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

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Abstract

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By Anna Gunderson

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

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Chapter 1

Introduction: Politics and Private Prisons

In the early 1980s, the incarceration rate had been steadily increasing for about a decade, straining state and federal resources as the governments scrambled to find solutions to their overcrowding problems. By 1984, one of the largest private prison operators in the contemporary United States, CoreCivic, won its first contract to house detainees for the Immigration and Naturalization Service (INS) in Houston, Texas. When INS told the two cofounders, Terrell Don Hutto and Tom Beasley, it needed the space three months earlier than expected, the men hastily looked for a replacement and found one: Houston's Olympic Motel. The motel was refurbished to be a secure facility and Hutto ventured to Walmart to buy toiletries for the 86 men who arrived on Super Bowl Sunday in 1994[1]. Eventually, the permanent facility, the Houston Processing Center, opened and detainees were then transferred to the

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[1] See http://www.cca.com/about/cca-history/.

permanent location, which is still in operation today. What is now a multi-billion dollar company began its operations in a Houston hotel, highlighting the humble beginnings of an industry that is now a key, albeit controversial, figure in American criminal justice.

1.1 The Growth of the Carceral State and Carceral Governance

Private prisons are just one significant development in the criminal justice system in the last few decades. As correctional privatization grew, so too did more general punitive policies aimed at incarcerating more individuals than ever before. Over the last three decades, the United States experienced an unprecedented rise in the number of people directly affected by the criminal justice system: in 1968, there were approximately 780,000 Americans under correctional control, in prisons or jails or under community supervision, and in 2015 that figure was over 6.7 million (Kaeble and Glaze 2016, Weaver and Lerman 2010). The phenomenon of mass incarceration, as scholars call it, necessitated the construction of institutions to support surging populations in prisons and jails. These institutions make up the carceral state, the system of massive criminal justice institutions like prisons and individuals' contact with that system via actors like the police (Weaver and Lerman 2010), the governance of which has been a growing topic of scholarly discussion.

The carceral state began to institutionalize as politicians used incendiary rhetoric

regarding crime to justify more punitive policies, most notably the construction of prisons (Simon 2007). This rhetoric was ubiquitous after the Civil Rights movement according to Vesla Weaver's concept of "frontlash," as the successes of that movement galvanized a powerful opposition to articulate a new problem of crime, such that the racial problem was redefined as a crime problem (Weaver 2007). Though this rhetoric was typically associated with members of the Republican party (Beckett 1999), recent studies of the development of crime policy, at least at the national level, suggests Democratic politicians were complicit in this rhetoric as well (Hinton 2016, Murakawa 2014). This support grew beyond rhetoric, however: stalwarts of the Democratic party, including Bill Clinton, Joe Biden, and Ted Kennedy, were among the most strident supporters of national measures to impose mandatory minimum sentencing, increase the number of offenses to qualify for the death penalty, and lengthen prison stays (Murakawa 2014). Democratic complicity in the growth of the carceral state extends even further back, as former President Lyndon B. Johnson's Great Society initiative spurred the passing of the Safe Streets Act of 1968, an act that greatly increased the funding and resource capability of local police departments and thus the number of people arrested and convicted (Hinton 2016). Therefore, the shift in rhetoric that occurred to "govern through crime" facilitated the construction of the institutions of the carceral state, rhetoric that was supported by both parties.

Democrats weren't the only strange bedfellows in the expansion of the carceral state. One notable exception the integral role of feminist organizations and their partnership with conservative politicians as unlikely allies to promote mass incarceration (Gottschalk 2006). These organizations, in addition to those who represented

battered women and victims of sexual assault, were broadly part of the victims' rights movement in the 1970s (Gottschalk 2006). In addition, these groups were loyal partners in the expansion of criminal sanctions for those convicted of rape or sexual or domestic violence. Even correctional officers' unions also faced immense pressure to support punitive measures to ensure future employment (Page 2011). Thus, the factors contributing to the growth in the government's ability to punish and incarcerate are not easily attributable to any single actor, political or otherwise.

Not only did the rhetoric surrounding the carceral state become more punitive beginning in the 1960s and 1970s, but so too did the state's literal capacity to punish. States experienced a building frenzy of prisons in the 1980s and beyond, a necessary step to house the thousands entering prisons each year. This carceral capacity, as Schoenfeld (2018) calls it, then spurred the creation of new interest groups invested in the continuation of carceral expansion, as well as enhanced incentives for politicians to satisfy those interest groups with the growth of more punitive crime measures. This argument is similar in flavor to general theories of policy entrenchment, or how reforms to existing policy survive even as others fail. The expansion of the carceral state was further entrenched as those involved made specific and extensive investments in the those punitive reforms and thus developed consistent policy preferences in favor of higher incarceration rates and more punishment (Patashnik 2014).

Though the carceral state expansion encouraged the development of a myriad of interest groups, perhaps the one that has garnered the most public attention has been the private prison industry. Enterprising businessmen saw an opportunity to monopolize a previously undiscovered market as governments at all levels - state,

local, and federal - scrambled to find solutions to their overflowing prisons and jails (Selman and Leighton 2010). Private prisons were thus a solution to a complex policy problem, a solution which was eventually adopted by Democratic and Republican states alike. Private prisons have the potential to encourage the development of an "iron triangle," a complex relationship between bureaucracy, legislatures, and lobbyists and also the physical governance of these institutions (DiIulio 1988, Lilly and Knepper 1993). Beyond that, despite significant public attention to this policy, we know very little about consistent patterns of private prisons and the precise details of how they operate. This dissertation seeks to demystify the private prison industry via the introduction of a new dataset of private prisons and the development of a new theory that favors the role of inmate litigation in conditioning states' responses to poor prison conditions. The implications of this study are many, for the policymaking process surrounding the carceral state, as well as carceral governance more broadly.

1.2 Private Prisons

In 2016, nearly 18% of federal prisoners and approximately 9% of state prisoners were housed in private facilities (Carson 2018). This proportion is even more stunning considering one of the preeminent private corrections companies, CoreCivic, was only founded in 1983 (Dolovich 2005). Though modern privatization of corrections facilities at all levels, local, state, and national, began in the 1980s, carceral privatization has a long and torrid history in the United States.

Private companies had previously been involved with the operation of the cor-

rections system beginning in the nineteenth century with the use of convict leasing (Dolovich 2005). This system, in which state governments leased inmates to private companies to work on plantations, roads, or other projects, was the most common way private companies interacted with the corrections system prior to the 1980s (Dolovich 2005). This was especially common in the South, as Southern states effectively enslaved convicts to labor in coal mines, brickyards, and other projects to generate profit for the state (Gottschalk 2006, Perkinson 2010). This brutal tradition was eventually replaced first by chain gangs, which forced inmates to labor on road projects, then by more modern correctional facilities in which the state took the control of prisons back[2] from private companies.

Private enterprise was largely absent from the criminal justice system for decades, but the intense pressure of overcrowded prisons and jails encouraged the development of the modern private prison industry. In the words of one of the founders of Core-Civic, "we could sell [prison] privatization as a solution, you sell it just like you were selling cars, or real estate, or hamburgers" (quoted in Selman and Leighton (2010)).

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. A few states adopted private prisons and later eliminated them[3], but the majority of states privatized part of their corrections systems and did not later cease contracts with private prison companies entirely. Thirty-three states had a private prison facility, regardless of jurisdiction, operating

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[2]Though, note that public prisons still utilize prisoners for a variety of industries, so private prison companies are not alone in monetizing the labor of inmates.

[3]States like Wisconsin, Arkansas, and Nevada - see Chapter 2 for further details.

within its borders at some point between 1986 and 2016, whereas thirty-five states contracted with a private facility to house a portion of their inmates in the same time period. Considerable diversity remains at the state level regarding the use of prison privatization, however. For example, 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. The average state between 1986 and 2016 housed just over 4% of their inmates in private facilities. Though the share of inmates in these private facilities still remains relatively low - 18% of federal prisoners and 7% of state prisoners as of 2016 (Carson and Anderson 2016) - the significant growth of this industry in only the last three decades warrants further study.

The growth of the private prison industry over the past thirty years has been exceptional. What is now a $5 billion industry dominated by two companies, CoreCivic and the GEO Group, began in the 1980s with dozens of companies vying for contracts with government partners. While there was once more than a dozen firms operating private correctional facilities in the United States (McDonald et al. 1998), that number has dropped dramatically. As of 2014, GEO and CoreCivic alone comprised approximately 85% of the market share (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). In fact, while twelve firms operated private prisons and jails in 1999, eight of those were eventually bought out by competing companies like GEO and CoreCivic, who have each acquired smaller,

for-profit prison companies steadily over the last few decades (Eisen 2018). The consolidation of the market has meant that the vast majority of government partners effectively have two, perhaps three choices when privatizing a correctional facility: CoreCivic, the GEO Group, and, on occasion, MTC.

Regardless of the private company a government chooses to contract with, the process typically follows a common trajectory. Theoretically, a state's privatization process begins when politicians decide to privatize a particular government function. Then, the actual contracting process begins when firms submit bids for the maintenance or operation of prisons in response to a state's request[4] for proposal to in theory shop around for the best proposal (Butler 1991). Additionally, contracting out encourages competition among firms, which is broadly theorized to result in more innovative and cheaper proposals (Butler 1991). Gains in efficiency and quality are thus expected from services that are contracted out. More generally, contracts consist of a specification of the work to be done, a competitive climate resulting from a pool of potential producers, monitoring of the contractor's performance by the government, and enforcement of appropriate terms (Savas 2000).

1.2.1 Continuing Controversies

The advent of private prisons in the 1980s, and the growing number of private facilities in the decades following, has done little to quell the controversy surrounding their use. Private prisons and the role of the market in government service provision

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[4]In the 1990s in particular, some private companies built facilities "on spec" without securing a government partner for them, a gamble that was a profitable one (McDonald and Patten 2003).

has attracted considerable controversy in the scholarly, legal, and public community (Austin and Coventry 2001, Bauer 2018). Though there is a surprising dearth of information regarding the public's opinion on privatization, the little evidence that does exist indicates that while citizens support market intervention into benign service areas such as garbage collection and janitorial services, they balk at private companies operating prisons of any kind (Thompson and Elling 2002). Additionally, the modal category of Americans asserts the government should never privatize prisons (Enns and Ramirez 2018). The public at large is still therefore grappling with the consequences of adopting this policy.

It is not only citizens who are concerned about the normative implications of private prisons. The House of Representatives Subcommittee on Courts, Civil Liberties, and the Administration of Justice held a hearing in 1985 specifically regarding the privatization of corrections and the feasibility of implementing that policy at the federal level. Robert Kastenmeier, the chairman of the subcommittee, posed several questions at the beginning of the session inquiring about cost savings and inmate rights, but ended his questions with this normative concern: "And the ultimate question: Can and should governments delegate this power to deprive persons of liberty?" (United States House of Representatives Subcommittee on Courts and the Administration of Justice 1986). Similarly, as the Tennessee government was considering a proposal from CoreCivic to take over the entire state's prison system, the state attorney general W.J. Michael Cody strenuously objected to delegating a responsibility like corrections to a private company. He argued "[t]he idea of a transfer or delegation thereof, [is] in direct opposition to the design and ends of their creation" (quoted

in Cody and Bennett (1987)). Thus, these concerns are not only relevant to public opinion, but policymakers at the national and state level actively considered these questions of accountability and the role of the government explicitly when deciding whether to privatize prisons.

Questions surrounding whether the government is able to delegate such broad authority to a private company or how this delegation squares with the constitution remain at the forefront of debates on prison privatization (Austin and Coventry 2001). These concerns are largely normative, as the federal government has dismissed these challenges as legally inconsequential. A presidential commission released a report on privatization in 1988 and did not consider these accountability concerns to be impediments to prison privatization - the report cites the federal statues that permit prison privatization and notes no state had yet passed legislation[5] expressly prohibiting privatization of prisons (Linowes 1988). Since then, most states enacted legislation that expressly authorizes the full-scale privatization of prisons[6], while others simply asserted existing statutes are broad enough to provide legal authority for contracts to be awarded to private prison companies (Quinlan, Thomas and Gautreaux 2004). Despite the statutory approvals of this practice, however, questions of accountability and appropriateness remain.

An outstanding question centers around the accountability of for-profit correc-

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[5]While no states had passed prohibitory legislation regarding private prisons in 1988, two states (Illinois in 1991 and New York in 1997) have since adopted statues expressly prohibiting the privatization of correctional facilities (Quinlan, Thomas and Gautreaux 2004).

[6]Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming (Quinlan, Thomas and Gautreaux 2004)

tions companies. Namely, while public managers of prisons are responsible to citizens through the legislative and executive branches, private managers are primarily responsible to their shareholders (Inman 2012). A public manager is an employee of the state and can be removed from his post easily. A private manager, however, is beholden to both the government who contracted with him to provide the service, and the shareholders of the company of which he is employed. As Laffont and Tirole (1991) point out, employees of private companies suffer from a conflict of interest between the government and their shareholders. Private companies then have competing incentives to perform the job for which they contracted with the government or to make money for their shareholders, which could result in those companies cutting corners to save money.

Proponents of prison privatization argue these concerns can be incorporated into the construction of robust contracts to prevent companies from abusing their informational advantages. Despite this strategy, it is practically impossible to write a contract comprehensive enough to govern every component of the service provided (Hart, Shleifer and Vishny 1997, Laffont and Tirole 1991). Thus, the contract is incomplete by its nature since the government cannot fully specify the full spectrum of what must be done in every situation. Additionally, prison contracts can be ineffective at reining in irresponsible behavior on behalf of the companies themselves. Under such conditions, we might expect incentives for the private company to engage in cost cutting at the expense of quality, whereas a manager of an equivalent public facility cooperates with the government to increase both quality and cost savings (Hart, Shleifer and Vishny 1997). This dilemma could be solved by a bureaucracy

that effectively constrains private companies from taking advantage of incomplete contracts by appointing an onsite government monitor to ensure compliance with state standards, though the monitors face constraints as well (Lopez-de Silanes and Vishny 1997, Selman and Leighton 2010). Both incomplete contracts and varying incentives can prompt a private company to renege on their contracts and start cutting corners, presenting both principal-agent and moral hazard problems.

Private companies are also advantaged by information asymmetries in their relationship with the government. Private prison corporations receive private information about the facility that is not shared with the government, and the company's actions are not easily verifiable, an example of a moral hazard problem (Macho-Stadler and Perez-Castrillo 1997). The company has this private information because it operates the prison on a day-to-day basis and can thus purposefully hide certain information if necessary. Though some contracts specifically require the presence of a facility monitor to prevent this from occurring, the inspections are spotty and scheduled, making it easy for prison managers to anticipate concerns of government monitors. There is also some theoretical reason to believe contract monitors who live in the same communities as the prisons they inspect may have a difficult time critiquing the operations there (Eisen 2018, Selman and Leighton 2010). Those private companies have a natural incentive to take advantage of their informational advantage, complying with the government's requests at minimum but occasionally cutting corners to save money. It is worth noting this principal-agent problem is not specific to prison privatization, but is indeed a potential issue with each government service that is contracted out with incomplete monitoring.

It could also be the case that even the most robust, detailed contracts are controversial precisely because of the details found in them already. One study found 65% of private prison contracts included occupancy guarantees - a requirement to keep the private prison or jail between 80 and 100 percent full at all times - or required payments for empty cells in these facilities (In the Public Interest 2013). This ensures that the government pays for the private prison beds *regardless of whether or not they are being used*, which may provide an incentive for governments to incarcerate more people if they are footing the bill for the contract anyway (Eisen 2018).

Not only are these concerns of accountability and transparency important to the government that contracts with these for-profit companies, but they are enduring problems that cannot easily be solved through methods like contract writing or appointment of contract monitors. In fact, I argue these concerns of accountability and transparency are at the heart of the state's decision to privatize, and that states are incentivized to privatize to shift accountability for poor prison conditions onto private companies.

1.3 Inmate Litigation and the Growth of Carceral Privatization

The central theoretical claim at the heart of my dissertation argues it is not the common explanations of privatization that explain correctional privatization, but rather it is states' responses to inmate litigation that conditions the likelihood of privatizing.

As the number of people incarcerated grew, so too did the volume of inmate lawsuits facing state governments. Inmates were filing lawsuits at ever increasing rates, because of growing legal and political rates, and states were facing this mountain of prison litigation that they had never had to handle before. It is in this environment that the modern private prison industry is born.

Two facets of litigation are studied specifically here. Primarily, I argue a higher number of inmate lawsuits, regardless of outcome, will make a state more likely to privatize its prisons. The state has an incentive to privatize to limit its legal and political accountability for these lawsuits. Legal uncertainty about who is responsible for the violations that occur within prisons allow states to effectively (at least partially, if not completely) shift legal liability for these lawsuits onto private companies. Additionally, the layer of bureaucracy added when a state privatizes ensures it is difficult, if not impossible, to know *who* to hold responsible for poor prison conditions. Taken together, privatization helps states limit their legal and political accountability for lawsuits and prison conditions more broadly.

Second, I examine successful lawsuits specifically and argue these court orders make it *less* likely for a state to privatize its prisons. Successful lawsuits are incredibly uncommon, 12% by generous estimates and 1.6% by other estimates (Ostrom, Hanson and Cheesman 2003, Schlanger 2015), but I argue they prompt states to reevaluate their substandard prison rules and procedures and force corrections' bureaucracies to professionalize. These court orders thus remove the incentive to privatize, to avoid accountability, and make it less likely that a state will turn to a for-profit company to manage and operate their prisons.

These two expectations suggest accountability and transparency are indeed at the root of states' decisions to privatize their correctional facilities. Indeed, the opaque nature of private prisons is a boon for states to avoid accountability or, if they are beholden to judicial decrees, removes the incentive to privatize at all.

1.4 Overview of Dissertation

This dissertation aims to shine a light on state adoption of private prisons. To fully explore this phenomenon, I engage with common explanations of privatization, before presenting a new theory on why states choose to privatize their prisons that is centered around inmate lawsuits. Then, I test this prediction empirically. Finally, I consider how the firms themselves respond to lawsuits to analyze whether the firms' economic outlook depends on the political environment.

Chapter 2 considers a number of common explanations for the adoption of private prisons: politics, economics, unionization, and campaign contributions. I introduce the original dataset at the heart of this dissertation that is longitudinally and geographically diverse and contains information on the location of private prisons in the United States from 1986 to 2016, the most comprehensive dataset of these institutions thus far developed. I then use this dataset to test these common explanations and find that none of these explain this policy choice, despite the many scholarly and public anecdotes surrounding private prisons. If these factors do not explain prison privatization, what does?

Chapter 3 introduces the central theoretical framework of my dissertation and

argues it is the advent of the prisoners' rights movement and inmates' use of litigation that prompted the rise of private carceral institutions. I review the historical development of prisoners' rights and the massive increase in inmate litigation before developing a set of hypotheses about how lawsuits influence the adoption of private prisons. I argue a higher number of successful inmates' lawsuits make a state more likely to privatize their carceral facilities to avoid legal and political accountability for poor prison conditions. Alternatively, the second hypothesis argues that an increase in the number of court orders against a state will make a state less likely to privatize. Because the judicial decrees are effectively forcing states to develop coherent rules and standards, it removes the incentive to privatize to limit accountability.

Chapter 4 then empirically tests these hypotheses using an instrumental variables design and the original dataset of private prisons. I use this dataset and the expectations laid out in Chapter 3 and test my hypotheses and find support for both empirically. States that experience a higher number of inmates' lawsuits are more likely to privatize, whereas those states that face more court orders are less likely to privatize their correctional facilities.

Chapter 5 considers the activity of private prison firms from their perspective and analyzes how the stock performance of these companies varies as the settlements of successful lawsuits are announced. To what degree do stockholders pay attention to these lawsuits? I find no effect in the aggregate, that all lawsuits matter to predict changes in stock prices. However, I do find a significant and negative effect on the announcement of a lawsuit in states that have increasing numbers of private prisons. This suggests investors are savvy and are particularly concerned about the legal

climate in the states that privatize the most.

The final chapter concludes with some broad implications of this study, which extend far beyond private prisons specifically. If the rights revolution gave legal rights to inmates, which states then responded to and privatized, which may have led to adverse consequences for inmates, how does that change our evaluation of this movement? Of course, I am not arguing it was misguided to give inmates more legal rights, as it is normatively the appropriate choice, but it pushes us to think carefully about the unintended consequences of decisions in the criminal justice system. Additionally, this dissertation speaks to the literature on the utility of using courts for social change, and suggests the rights revolution has potentially adverse consequences for those who stand to benefit from it. This project suggests even further need to understand the dynamics at the heart of prison privatization, a policy that is only gaining in controversy and attention as states and the federal government continue to rely on it.

Chapter 2

The Failure of Simple Stories to Explain Prison Privatization

One of the most peculiar developments in the American carceral state[1] in the last thirty years has been the introduction of private prisons. Companies, at the behest of government entities, run the day-to-day operations of prisons. This dissertation studies this unique phenomenon as it has developed over the last three decades, though this project has implications far beyond one policy area. To truly understand this phenomenon, this chapter evaluates the four most commonly argued assertions about the adoption of this policy, before introducing an original theoretical argument in Chapter 3.

The empirical studies that examine the factors influencing the allocation of prisoners to private facilities largely rely on privatization theory generally (Nicholson-Crotty

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[1] The carceral state encompasses the police, courts, jails/prisons, as well as associated institutions like legal financial obligations, probation and parole, and electronic monitoring (Schoenfeld 2016).

2004, Price and Riccucci 2005). That is, scholars hypothesize a few common independent variables that contributed to the rise in prison privatization, variables thought to influence privatization of government services broadly. First, states with Republican governments are more likely to privatize their prisons because conservative ideology favors management of government services in the hands of private companies as opposed to the government (Daley 1996, Quinlan, Thomas and Gautreaux 2004). Second, privatization is often lauded as a cheaper and more efficient way to deliver essential government services. Thus, a state will be more likely to turn to prison privatization in times of fiscal stress in anticipation of financial savings (Lopez-de Silanes and Vishny 1997). Finally, correctional officers unions' can be influential players regarding prison privatization policy. These unions definitively reject privatization, and aggressively lobby against it, for fear of job losses or decreased benefits to their members (Brudney et al. 2005, Naff 1991, Page 2011).

The theoretical predictors described above are integral in the decision-making process prompting privatization, though states make a compound decision when privatizing their prisons. First, state officials decide to privatize at all, then determine the level of privatization. This distinction follows the one proposed by Nicholson-Crotty (2004) to consider the potentially distinct considerations in the decision to either adopt private prisons for the first time, or to enhance or scale back the existing level of privatization.

This chapter introduces an original dataset on the spread of private prisons in the states over the last three decades and takes seriously the three most common explanations for privatization - politics, economics, and unionization. None of these

three explain both the growth or initial adoption of the policy and only economics appears to explain the initial adoption of private prisons. These results call into question a monolithic theory of privatization that considers privatization of multiple policies like trash collection and prisons to be equivalent and affirms the intuition that different stages of privatization have distinct theoretical considerations. Rather, it encourages the development of a new theory, a theory described in Chapter 3.

2.1 Privatization and Government Service Provision

Classic liberalism, theorized by scholars like John Locke and Adam Smith, has remained preeminent in American political development, as politicians such as Ronald Reagan continued to espouse the benefits of the market and emphasized the efficiency gains from transferring power from the government to the private sector. In the 1980s, Reagan's declaration that "government is the problem" spurred a number of industries as diverse as freight services, air-traffic control, the postal service, schools, and even corrections to privatize all or part of their operations (Henig 1989). Private companies, at the behest of the government, perform government functions more efficiently than the government can, according to this perspective. Proponents of privatization emphasize this point, asserting that competition amongst private firms encourages innovation and efficiency, whereas government-run programs do not compete or innovate, thus resulting in a bloated, inefficient bureaucracy (Starr 1988).

Moreover, the ideal government from a classic liberal perspective can be achieved via privatization: the government is minimally involved in each individual's life and the market, by way of private operation of government services, efficiently provides public goods.

Savas (2000) characterizes privatization as encompassing ten categories that describe varying levels of government involvement, the two extremes of which are government service and constituency self service[2]. In addition to the practical differences between the two poles of this continuum, there are also differences in the extent to which privatization policies move ownership, finance, and accountability out of the public sector (Starr 1988). That is, the implications of privatization for governmental policies may be distinct even within the same broad category, such as contracts.

Most commonly, privatization occurs as the government and a private company both retain partial ownership and operation of a particular service. These arrangements, often called public-private partnerships, occur when the government delegates the day-to-day operation of a service to a private company but retains ultimate responsibility for that service (Savas 2000). These partnerships aim to deliver essential services to citizens while adapting businesslike traits of efficiency and innovation (Brinkerhoff and Brinkerhoff 2011). Though the normative implications of implementing businesslike concerns into government service provision are unclear, it remains the theoretical aim of these partnerships to have the best of both worlds, quality service provision alongside efficiency and innovation (Brinkerhoff and Brinkerhoff 2011).

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[2]In full, his categories are government service, government vending, intergovernmental agreements, contracts, franchises, grants, vouchers, free market, voluntary service, and self service (Savas 2000).

These partnerships aim to achieve this goal via the development of robust contracts (Butler 1991), though some argue these contracts favor the financial concerns of private prison companies over the safety and well-being of inmates (In the Public Interest 2013).

Though the theories previously mentioned consider the role of government broadly, this project will focus on one particular essential function of government: law and the related duty of punishment. *Leviathan*, Hobbes' classic treatise on the role of government, emphasized the importance of a strong government to avoid the chaos of an anarchic state. This government consequently possesses rights over those he rules over. One of those rights refers to punishment: "the sovereign is committed the power of rewarding with riches or honour; and of punishing with corporal or pecuniary punishment, or with ignominy, every subject according to the law he hath formerly made" (Hobbes 1651). Thus, the strong state is responsible for doling out punishment as according to the law. Similarly, Max Weber's definition of a state relies on the state retaining the monopoly on the legitimate use of physical force. The state possesses the sole responsibility of utilizing violence against its citizens to keep the collective safe. In both of these philosopher's conceptions, therefore, the state is solely responsible for using force and meting out punishment when citizens break the laws of the state. A similar argument is made by Jean Jacques Rousseau in his classic theory of the social contract. If a citizen breaks the laws of the state, he is violating the metaphorical social contract he or she made with the government. Rousseau explains that criminals are no longer members of the state - rather, they make war on it. The government then has the right to punish those who threaten the

government, or the social norms a government has set up.

The government thus possesses the right to punish those who break the social contract or the laws the sovereign has set up. Law, then, is an essential function of government. This dissertation will frame the topic of prison privatization through the lens of the appropriate role of government and the market in service provision and, more specifically, this role as it pertains to law and punishment. Though this is a broad topic that has implications for other subjects in political science[3], this project focuses on one particular policy that speaks to theoretical issues regarding the appropriate role of government, laissez-faire economics and government service provision, and the integral roles law and punishment play in modern governance: private prisons.

2.2   The Decision to Privatize Prisons

Prison privatization ranges from no involvement on behalf of the private sector on one extreme to private ownership and operation of a facility on the other. Between these two poles, privatization is at an intermediate level in which private companies can provide select services like food, healthcare, or laundry for a public facility (Selman and Leighton 2010). Similarly, (Dolovich 2005) distinguishes between ordinal and nominal privatization. Nominal privatization occurs when private companies simply assist states with funding to construct prisons. Ordinal privatization, on the other

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[3]Broadly, this topic invokes a consideration of the political factors contributing to policy changes regarding the administration of law and punishment. Other topics imminently related to this one include the variation in punitive laws such as three-strikes policies across the states and the issues of federalism in the administration of law and punishment of criminal offenders.

hand, allows private companies to operate the day-to-day management of prisons. Private ownership of prisons typically requires the government to cede partial or full control of prison operations to a private company.

Theory points to a compound process by which prison privatization occurs. First, the government must choose whether to contract out a service at all, before assessing proposals from private companies in a bidding process and choosing with whom to contract (Ferris and Graddy 1986, Nicholson-Crotty 2004). The second step in this process, I propose, occurs when the state is determining the aggregate level of privatization. This second stage considers how state-level factors influence changing levels of prison privatization as it could be the case that once private prisons become institutionalized in a state, the factors that lead to the adoption of laws sympathetic to privatization may no longer be as relevant (Kim and Price 2014). Theoretically, this empirical result is consistent with the view that institutions are sticky in the long-term, that once a framework is set up to facilitate privatization, few actors have an incentive to deviate from that process (Knight 1992).

The theoretical process described above is common to the relationship between any state government and a private prison company. Despite these common theoretical origins, however, variation remains among states in their use of prison privatization. The two-stage theory is conditioned by other social, economic, and political variables suggested by the literature, which can help explain the diversity in state-level policies regarding prison privatization.

At its most extreme, privatization invokes an ideology that is anti-government and praises the benefits of market forces. These forces determine the allocation of gov-

ernmental services and, according to this perspective, improve those services relative to those that are wholly government run (Daley 1996). Citizen support for privatization is driven by a general distrust of power, and government power in particular (Quinlan, Thomas and Gautreaux 2004). This political philosophy is heavily associated with conservative ideology and 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, largely beginning in the 1980s (Daley 1996, Schneider 1999). 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 both privatization and the further development of infrastructure to detain criminal offenders (Kim and Price 2014).

This theoretical intuition has borne out in empirical studies, finding more Republican states are more likely to adopt and sign contracts with private prison companies (Nicholson-Crotty 2004) and states with more conservative political cultures are more likely to privatize (Price and Riccucci 2005). There is also reason to believe Democrats specifically will not support these policies. For instance, states with Democratic governors are less likely to allow Prison Industry Enhancement (PIE) projects, which are designed to encourage private production of goods within prisons (Gallagher and Edwards 1997).

Despite the empirical evidence that suggests Republicans are the primary ideological drivers of privatization, other scholars argue this relationship does not exist. Brudney et al. (2005) find no impact of partisanship or ideology on a state government agency's use of contracting out, supporting the hypothesis that privatization is a tool of governance that transcends ideological and party lines. Qualitative evidence suggests Democratic and Republican governors alike have supported prison privatization (Auger 1999). Similarly, the decision to privatize may be motivated by concerns of bureaucratic efficiency rather than partisanship (Ferris and Graddy 1986). Ideology's insignificance in predicting states' use of privatization is supported by another, distinct theoretical perspective, however. As Kim and Price (2014) suggest, partisanship may be important in the initial adoption of prison privatization statutes, but is deemed irrelevant once privatization becomes institutionalized.

Politics is therefore a prominent theory explaining prison privatization, a factor I will examine empirically in the following section. It is worth noting, however, the difference between initial adoption and growth or scaling back of prison privatization. I depart from Brudney et al. (2005) and Kim and Price (2014) in that I hypothesize politics is important at both of these stages, but that partisan concerns are more salient when states initially adopt private prisons. After adoption, institutional persistence and stability will render partisanship less important at predicting the level of privatization.

The second theory concerns an issue private prison companies proclaim to ameliorate, government financial stress. In the 1980s, governments were facing the dual pressures of the public's desire to incarcerate and their frugality in spending govern-

ment money (Enns 2016, Gilmore 2007). States attempted to pass bonds to construct new prisons, but citizens repeatedly voted down these bonds or set controls on spending[4]. 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. Additionally, though a dearth of revenues can prompt a state government to consider privatization as an appealing option to save money, institutional economic restraints on spending are also important in the decision to privatize. Government restrictions on spending, namely in the form of tax and expenditure limitations (TELs), can constrain governments from spending beyond their means (Lopez-de Silanes and Vishny 1997). In particular, states that have tax or expenditure limits may be more likely to turn to privatization in an effort to provide the same level of service for less money (Nicholson-Crotty 2004).

Harding (2001) describes how some state governments contracted out to private companies 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. This assertion is borne out in the literature, as states with higher levels of fiscal need or demand for expenditures contract out at a higher level (Brudney et al. 2005).

This theoretical intuition is bolstered by some scholarly evidence points to po-

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[4]For example, California's Proposition 13 in 1978 set expenditure controls and revenue restrictions on many local governments (McDonald et al. 1998).

tentially millions in cost savings after contracting out to private companies (Savas 1991). In fact, one study showed government-run programs[5] covering fields as diverse as waste management and corrections cost a third more to operate than contracting out would (Savas 1991, Stevens 1984). Private prison companies take advantage of this belief by promoting themselves as frugal alternatives to the public sector. The largest private prison company in the country, CoreCivic, pledges to build a 1,000-bed prison for under $75 million compared to a public cost of more than $150 million (Corrections Corporation of America 2013). This mechanism is also one identified by prison operators themselves: one 1998 report found fifty-seven percent of prison managers cited operational and construction cost savings as a reason why the facility or state turned to private prisons as a solution (McDonald et al. 1998). Despite these proclamations, however, private prisons are not consistently empirically cheaper for the government to operate as promises of cost savings typically go unfulfilled (Selman and Leighton 2010). This result could be because of the informational asymmetries in the relationship between the government and private companies, if private companies are able to effectively obscure their operations sufficiently to create the illusion of cost savings (Macho-Stadler and Perez-Castrillo 1997).

When a state government is initially deciding whether to adopt private prisons, economic constraints are vital, as they dictate to what degree the state government even needs to privatize. A state that is relatively unconstrained by economic considerations will likely not consider privatization because they do not have to. Conversely,

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[5]The study cited included analyses on waste management, street sweeping, street repaving, traffic signal maintenance, bus transportation, lawn maintenance, and corrections (Stevens 1984).

once a state has adopted some form of privatization, the resilient nature of institutions involving privatization ensures economics are not as important as they were before. States that have already privatized likely do not turn to privatization again as a solution to economic woes. Economic constraints, though I hypothesize they will remain important, will be less predictive of the level of prison privatization than of the decision to privatize at all.

Finally, I explore 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 effect that has been empirically confirmed 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, along with lower wages and benefits (Brudney et al. 2005). In case studies, these dynamics appear to be at play: 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% of those employed 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).

Despite this anecdotal evidence and the theoretical arguments behind it, however, the prediction that a state with more unionized corrections officers will be less likely to privatize its prisons is not consistently empirically verified. Price and Riccucci (2005) find that states with stronger labor laws are no less likely to have a lower percentage of private prisons, while Nicholson-Crotty (2004) finds that a state with a higher percentage of its work force in public unions is no less likely to adopt policies to privatize its corrections industry. Similarly, Brudney et al. (2005) find no association between public employee strength and an agency's use of contracts. The empirical conclusions about unionization are unclear, but it is important to note those studies only included one or two years of data. Moreover, all of these studies relied on general measures of union strength, such as the percent of the public workforce that is unionized. This does not account specifically for the strength of corrections officers' unions, which poses one primary problem. Analyses using a more general measure of unionization likely vastly understate the influence of corrections officers' unions, as the national rate of membership for unionized public sector workers in 2015 was more than 12% lower than the national average for correctional officers, bailiffs, and jailers. I seek to ameliorate these issues below, but for now, this perspective suggests unions may be the most successful at keeping private prisons out of the state at all, rather than having to constantly fight the state to keep the use of prison privatization low, especially in the face of a potentially powerful adversaries in the form of private prison companies.

2.3 Private Prisons: The Data

To examine how these factors and others influenced states' decision to either adopt or alter their level of prison privatization, I need a comprehensive dataset on this policy over the last few decades. However, this data has been nearly impossible to come by. Though private prisons have been of interest to scholars, policymakers, and the public alike for decades (e.g. Cody and Bennett 1987, Selman and Leighton 2010, Thompson and Elling 2002), information on these facilities is relatively scarce. There are a few reasons for this opacity. For one, private prison companies were not subjected to Freedom of Information Act (FOIA) requests at the state or national level for much of their history (Eisen 2018). It is only in 2013 or later that district court judges in states like Texas, Vermont, Tennessee, and Florida ruled that companies are subject to state public records laws about their facilities as these businesses effectively act as "government bod[ies]" (Eisen 2018, Thompson 2014). At the federal level though, the limited transparency forced upon these companies by the courts does not exist. Corrections companies are not subject to *any* FOIA requirements. Legislation to require FOIA compliance among nongovernmental entities that contract with the federal government to operate correctional facilities has been introduced in Congress every session since 2005, but that legislation, called the Private Prison Information Act, has always died in committee (Eisen 2018). Efforts by politicians to apply a universal FOIA requirement have so far been unsuccessful, but individual lawsuits against these companies at the federal level have gained more traction. Judges at the district and appellate level ruled in 2016 and 2017 that private prison companies were

mandated to share information about private facilities under FOIA (*Detention Watch Network v. United States Immigration and Customs Enforcement* 215 F.Supp.3d 256). Thus, at both the state and national level, companies are only mandated to share pertinent location information after the judiciary forces them to, which is by no means a universal application of FOIA law to private prison corporations. A researcher may be able to request contract information from these companies, but only for certain states or locations and likely only for those contracts operating currently or relatively recently.

The opacity of the companies is a major roadblock to those seeking to study private correctional facilities. It is also not only official sources of data that are unavailable, though - even attorneys who represent clients in private facilities were barred from the facilities after the lawyers reported that officials forced detainees to sign documents without appropriate legal counsel (Eisen 2017). Therefore, those researchers who would rely on interviews or other qualitative research into these facilities cannot even look to more anthropological approaches as the opacity of these facilities prevents them from doing so.

2.3.1   What is Missing?

Faced with these challenges, researchers have utilized other sources to study this phenomenon, but none satisfactorily display over-time and across-state variation in private prisons: how long a company has operated the facility for, whether the facility has undergone any capacity expansions, the customers of the facility, or the lengths

of the contracts companies sign with government entities, for example.

The most common source is the Bureau of Justice Statistics' (BJS) Prisoners series, which lists the number of private prison inmates a state has under its jurisdiction, housed both in- and out-of-state (e.g. Kim and Price 2014). There is one significant flaw with this data, however. For one, it does not provide any data on the facilities themselves, only on the prisoners housed in private institutions. Second, BJS only began collecting this data in 1999, over a decade after the first private prison opened in the United States. A similar source also comes from BJS, the Census of State and Federal Adult Correctional Facilities (e.g. Price and Riccucci 2005), which identifies characteristics of individual private facilities like capacity, security level, and the like. There are two similar issues with this data, however. The series only began collecting facility-level data in 1990, so it also does not provide any information on private prisons in the 1980s. Additionally, this data is only recorded every five years, so an analysis of change in facilities and capacity over time would be difficult without some interpolation, which would require additional assumptions about the growth of private prisons to be valid.

A second source of data is information gathered from Professor Charles Thomas of the University of Florida (e.g. Nicholson-Crotty 2004). Though this data is facility-level and longitudinal, problems remain. First, the information is not collected consistently nor is it readily available for each year. Second, Thomas was a member of the Corrections Corporation of America (CCA)'s real estate board and was partially funded to collect this information by the company (Nicholson-Crotty 2004). While it is difficult to say whether and how much that fact could influence the collection or

reporting of data, it is not ideal even if for the appearance of bias.

The quantitative studies of prison privatization have utilized two main sources of data that do give purchase on some aspects of prison privatization, but neither are not comprehensive and would not be wholly appropriate for this project. Instead, I develop an innovative dataset on private prison facilities, using information found in the pages of shareholder reports of private prison companies from the 1980s to the present.

2.3.2   An Original Dataset

To construct my dataset, I relied on the Securities and Exchange Commission (SEC)'s 10-K reports, annual reports publicly-traded companies are required to file with the SEC. 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. My sample includes the facilities operated by four companies: CoreCivic, the GEO Group, Correctional Services Corporation (CSC), and Cornell Companies[6]. 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. In fact, the industry has become smaller over

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[6]There were a few name changes for these companies over the last few decades: 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.

time: in 1999, there were 12 private prison firms and by 2016, eight of the original twelve were absorbed by other companies and only two new firms opened (Mumford, Schanzenbach and Nunn 2016).

Though the reports are fairly consistent over time, I filled in any missing data that occurred using past reports and other sources as a guide[7]. Additionally, this data encompasses only correctional facilities, like prisons and jails, and not community corrections facilities[8]. I chose to restrict the sample to only prison and jail facilities to measure the practice of private corrections, not private community corrections, which is a commonplace practice across all states. The 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 in each state-year from 1986 to present.

This comprehensive dataset improves on the existing data in several ways. First, this dataset provides information on capacity, customer, and contract length for private prisons for the last three decades. No other dataset contains consistent data on these facilities for that long of a time span. Second, not only does this data contain information on the location of these facilities, but it also lists contract data, information that was previously unavailable to researchers unless they chose to file FOIA requests with the state or federal government. Though this data source, like all others, is not perfect[9], it substantially improves the data currently available to

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[7]More details on the data collection in the Appendix.

[8]This choice deviates from the Bureau of Justice Statistics' variable because BJS' figure also includes inmates in privately-operated halfway houses, treatment facilities, or hospitals. My data only reflects those privately incarcerated, in prisons or jails.

[9]For example, this data only includes companies publicly traded on the stock market. This is likely not a significant concern. The businesses that are included represent the vast majority of the private prison market in the United States. In 1998, for example, these four companies together comprised more than 85% of the private prison market (Austin and Coventry 2001). In 2014, after

researchers and helps us examine these facilities in more fine-grained detail than ever before.

2.3.3   What Does the Data Look Like?

Before subjecting the traditional explanations of privatization to empirical testing, it is important to first place the results in context. What exactly do private prisons look like across the United States and to what degree is there variation both over time and across states in the usage of this policy?

Table 2.1 reflects the temporal variation in private prison, listing the first year each state adopts various kinds of private correctional facilities. The second column lists the year states placed any number of their inmates in private facilities. Often, this is the same year as the one listed in the third column, as states privatize a state prison and consequently house their inmates there. However, there are some states like Alaska or Hawaii that utilize private prisons but do not physically have any within their borders, so those kinds of states will have an entry in the second column but not the third. Finally, the fourth and fifth columns list the first year a local or federal private facility opened within each state. From the table, the variation of prison privatization across states becomes obvious. Even if states do not explicitly allow state-run private prisons, they can still play host to either local or federal private facilities within their borders. At the very least, it is useful to see the vast geographic and longitudinal variation in this policy, particularly when it is broken down into the

the GEO Group acquired the two smaller companies in my dataset, GEO and CoreCivic comprised approximately 85% of the market share by themselves (Mumford, Schanzenbach and Nunn 2016).

Table 2.1: State Adoption of Private Prisons

State	First Private Inmates	First State Private Facility	First Local Private Facility	First Federal Private Facility
Alabama	2003			
Alaska	1994			
Arizona	1997	1997		1994
Arkansas	1995	1995		
California	1989	1989	1992	1997
Colorado	1996	1996	2016	1999
Connecticut				
Delaware				
Florida	1995	1995	1986	1996
Georgia	1998	1998	1998	2002
Hawaii	1998			
Idaho	1996	2000		
Illinois			2004	2004
Indiana	1998	2005	1997	
Iowa				
Kansas	1995	1995		1992
Kentucky	1998	1998	1998	
Louisiana	1990	1990		2010
Maine				
Maryland				
Massachusetts				
Michigan	1997	1997		
Minnesota	1996			1997
Mississippi	1995	1995	1997	2008
Missouri				
Montana	1997	1999		
Nebraska				
Nevada	1998	1998		2010
New Hampshire				
New Jersey				1996
New Mexico	1989	1989	1986	1990
New York				1989
North Carolina	1994	1996		2000
North Dakota	1997			
Ohio	2011	2011	1998	2004
Oklahoma	1995	1995	2000	2014
Oregon	1989			
Pennsylvania			1995	1999
Rhode Island				1996
South Carolina	1996			
South Dakota				
Tennessee	1991	1991	1986	1990
Texas	1989	1989	1994	1986
Utah	1999	1999		
Vermont	2004			
Virginia	1996	1996		
Washington	2005			1997
West Virginia				
Wisconsin	1998			
Wyoming	1996	2015		

Second column refers to the year states first held some of their inmates in private facilities. Third column refers to the first private state facility in that state, whereas the fourth column refers to the first private local facility in that state, and the fifth column refers to the first private federal facility.

various kinds of prison privatization that can exist.

In addition to the temporal trends, the geographic distribution of the use of private prisons is fairly diverse. Figure 2.1 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, since 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.
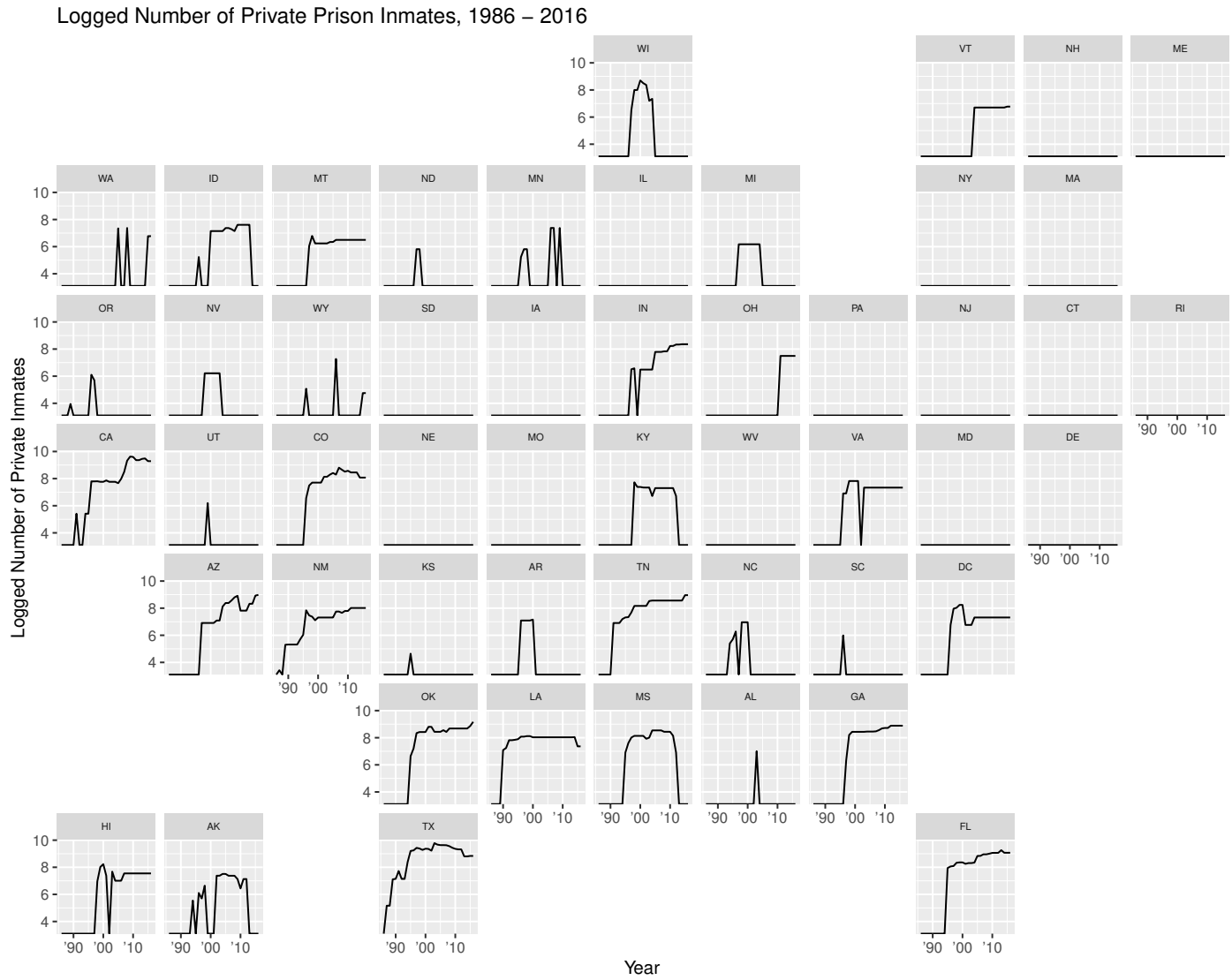
Figure 2.1: Logged number of inmates held in private facilities, 1986 to 2016.
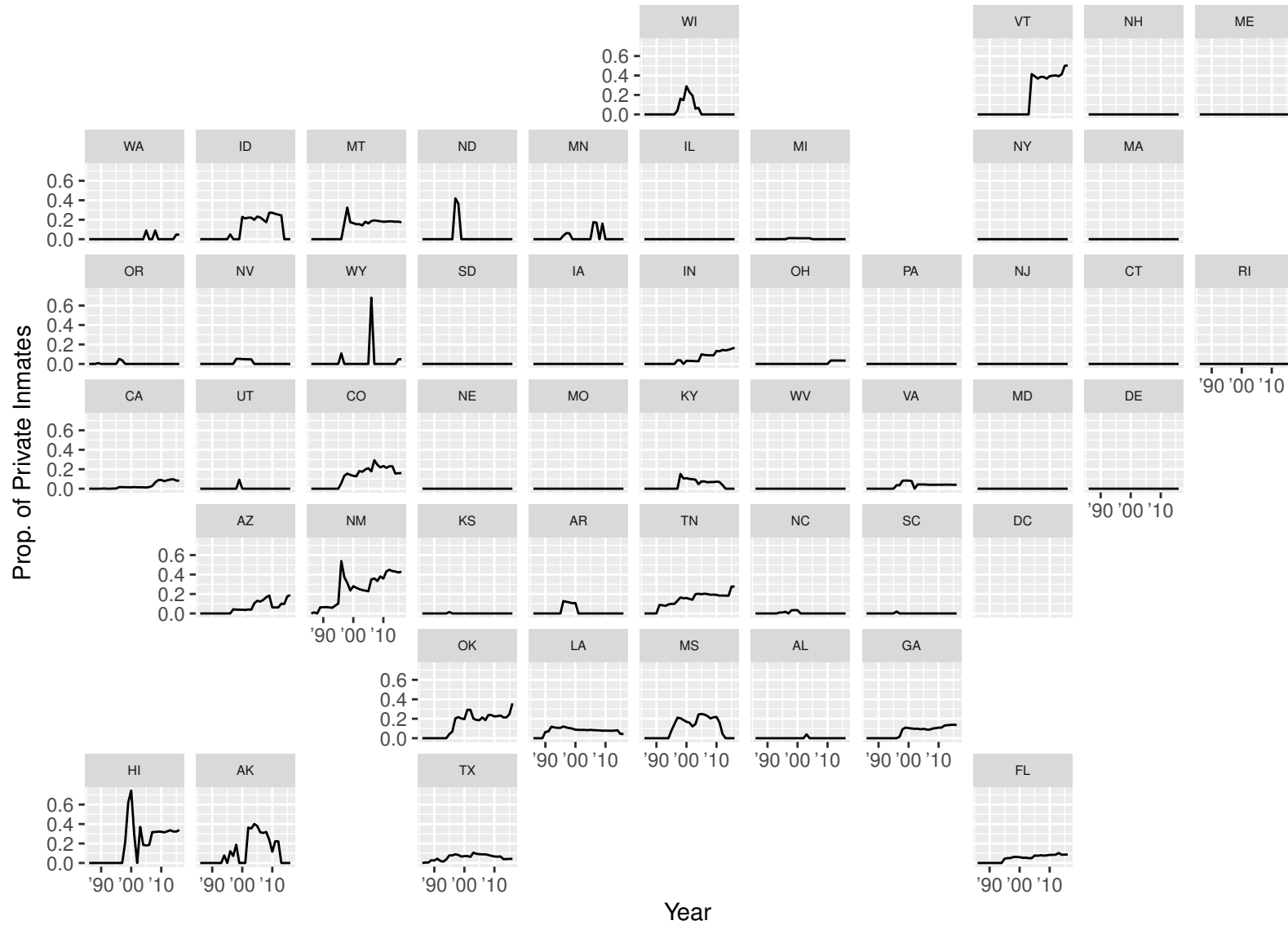
Figure 2.2: Proportion of inmates held in private facilities, 1986 to 2016.

A similar pattern emerges when evaluating the proportion of private inmates held in private facilities, as seen in Figure 2.2. This provides a more nuanced measure of each states' usage of this policy. For some states that are among the states that place the most inmates in private facilities, like Texas and California, that choice is paired with an expansion of the incarceration rate overall. That is, the proportion of inmates held in private jails or prisons is fairly low even though the state relies on private prisons to incarcerate, as Figure 2.2 points out. Moreover, some states that have a lower overall number of private inmates still maintain higher proportions in these facilities, nearing 50% or more. These states, like New Mexico, Hawaii, Alaska, among others, rely more heavily on private companies for incarceration than their capacity numbers would suggest.

One particular aspect of this map is worth considering. This graph represents only private inmates under state jurisdiction. Therefore, private facilities within the state that hold either inmates under jurisdiction of local authorities (like the city or county) and inmates under federal jurisdiction (of agencies like Immigration and Customs Enforcement or the U.S. Marshals Service) are not included. In these circumstances, the state is not overtly involved in the administration of the private facilities because the inmates incarcerated are not under state jurisdiction. Despite this, local and federal jurisdictions can still operate private facilities within a state even if the state, like both Illinois and New York[10] statutorily prohibit prison privatization (Quinlan, Thomas and Gautreaux 2004). So, to fully understand the scope of privatization at

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[10]Formally, Illinois Statutes Chapter 730, Act 140 and New York Correction Law Statute 72 expressly prohibit privatization (Quinlan, Thomas and Gautreaux 2004).

all levels of government, it is important to see the geographic pattern of not only private inmates, but private facilities as well.

Figure 2.3 displays the logged number of private facilities in each state, from 1986 to 2016. This includes both local and federal facilities. For the most part, the pattern mirrors that in Figure 2.1: states like California, Arizona, Georgia, and Texas, that had some of the highest number of private prison inmates, also have some of the highest logged numbers of private institutions. Second, there are some states, like Alaska, Hawaii, and Minnesota, among others, that place some of their inmates in private facilities, but not in their own states. Rather, states, particularly Alaska and Hawaii, house their prisoners as far as Arizona and Mississippi, respectively. Moreover, even the states that statutorily outlawed prison privatization, like New York and Illinois, contain private facilities within their borders. Though the customer base for those prisons is the federal government, even a prohibition against privatization cannot necessarily prevent other jurisdictions from placing private institutions in states that otherwise would not want them.
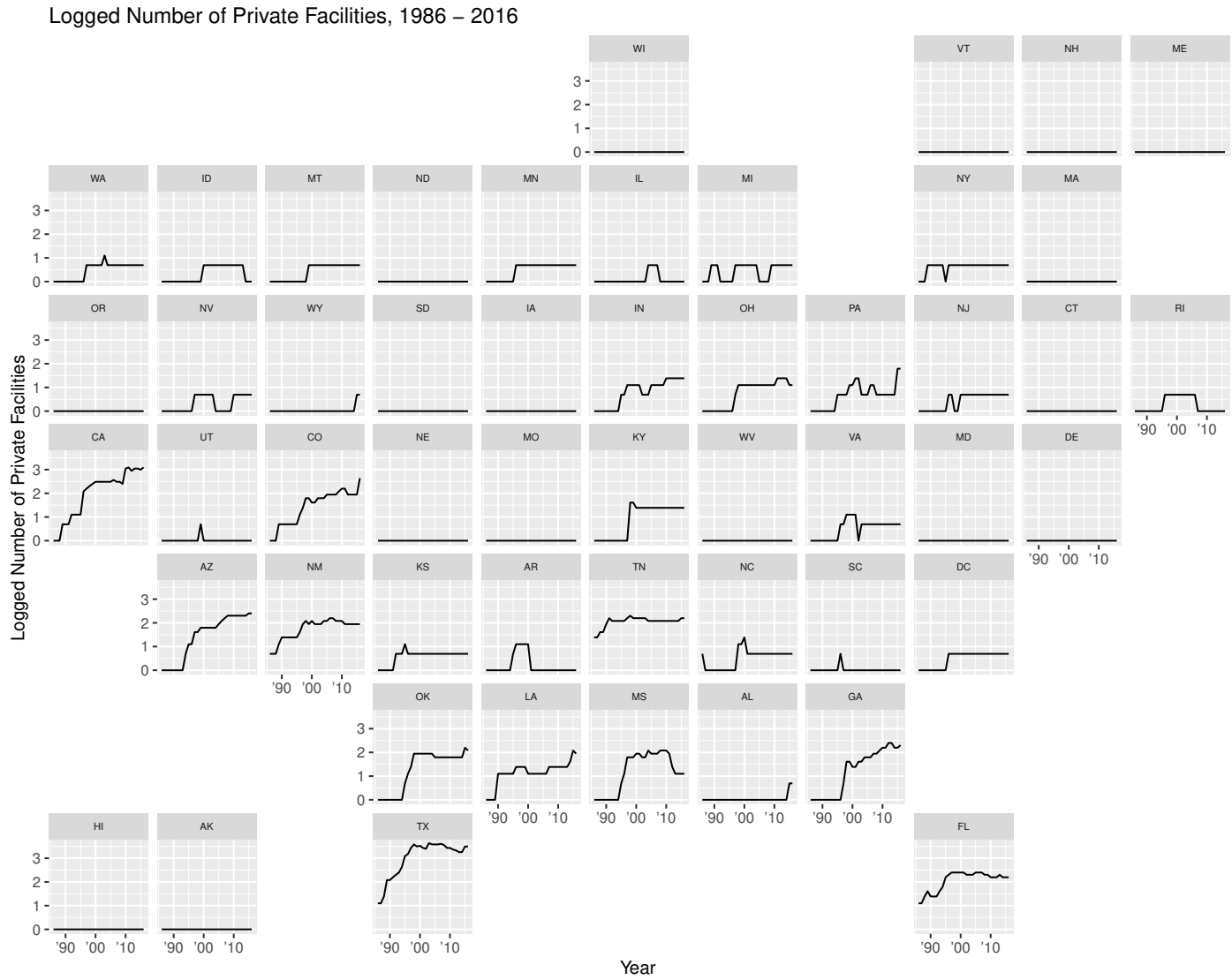
Figure 2.3: Logged number of private facilities in each state (including federal and local facilities), 1986 to 2016.

Similarly, Figures 2.4 and 2.5 represent the physical locations of these facilities in four different years across the dataset - 1986, 1996, 2006, 2016. In the figures, the hexagon represents 3000 square miles and darker hexagons indicate a higher density of private facilities in that hexagon. Whereas the facilities were largely clustered in the south in 1986, for example, within ten years states in more northern and western states had physical private prison facilities. By 2006 and 2016, locations such as Arizona, California, and Colorado had dense areas with at least five private facilities, though the geographic spread of private prisons remains extensive.

It is evident from the table and graphs that both the use of privatization and placement of private facilities is geographically widespread and varies over time. These additional insights are only possible from the data collection effort described here and help to shatter a few myths about privatization: that it is exclusive to the South and states that adopt privatization do not later change their mind.

In addition to the number of facilities by state, another useful piece of information found in my dataset considers the mix of intergovernmental agreements to share correctional facilities. In the data, less than ten percent of the prisons or jails have more than one customer (see Figure 2.6).

When the facilities have more than one customer, though, the customer type is nearly always different. These prisons or jails often house federal prisoners alongside state or local ones or can house customers from multiple of the same type of customer: federal inmates from both the U.S. Marshal's Service (USMS) and Immigration and Customs Enforcement (ICE). Either way, it seems that these companies utilize the most of these facilities as they can to ensure capacity is reached and the company
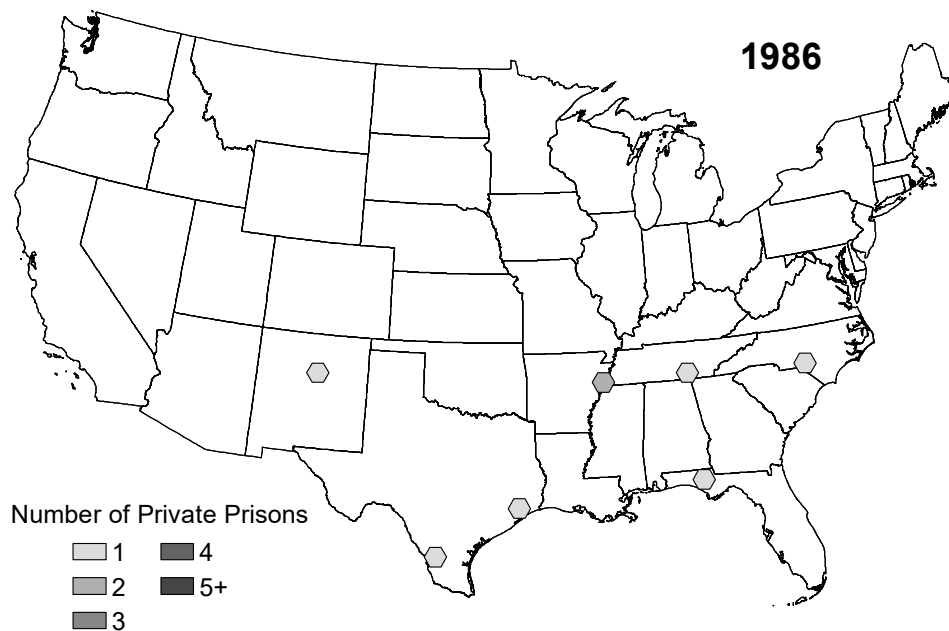
(a) Private Facilities in 1986
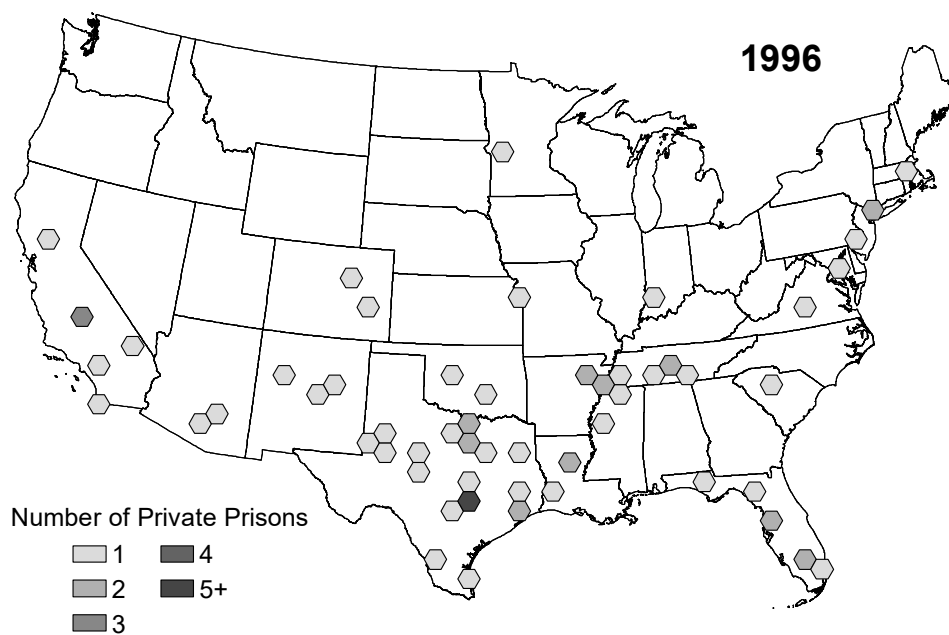
(b) Private Facilities in 1996

Figure 2.4: Location of private facilities in 1986, (a), and 1996, (b). Each hexagon represents 3000 square miles and darker hexagons indicate more private facilities. This map includes all private facilities that held local, state, or federal inmates.
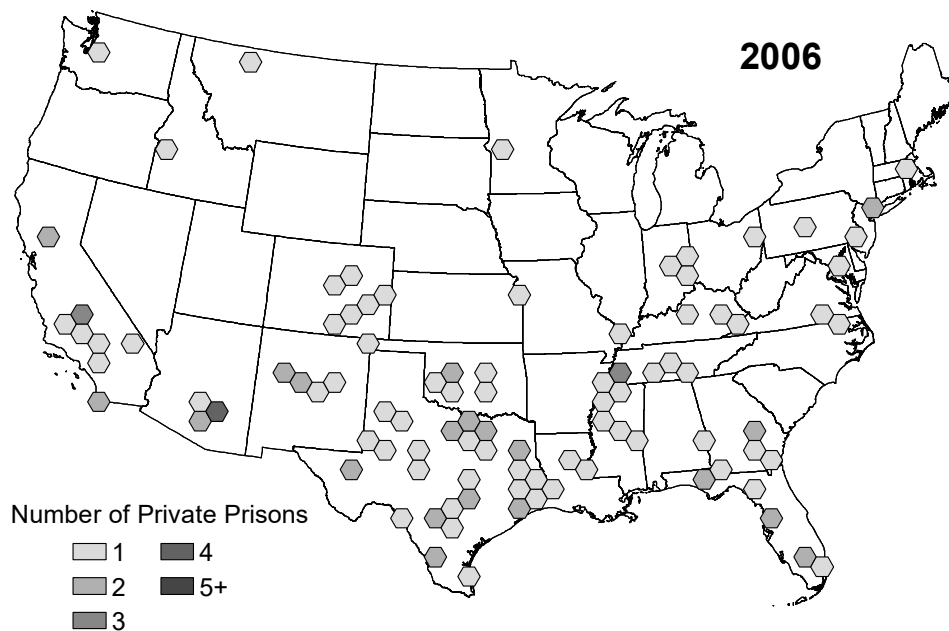
(a) Private Facilities in 2006
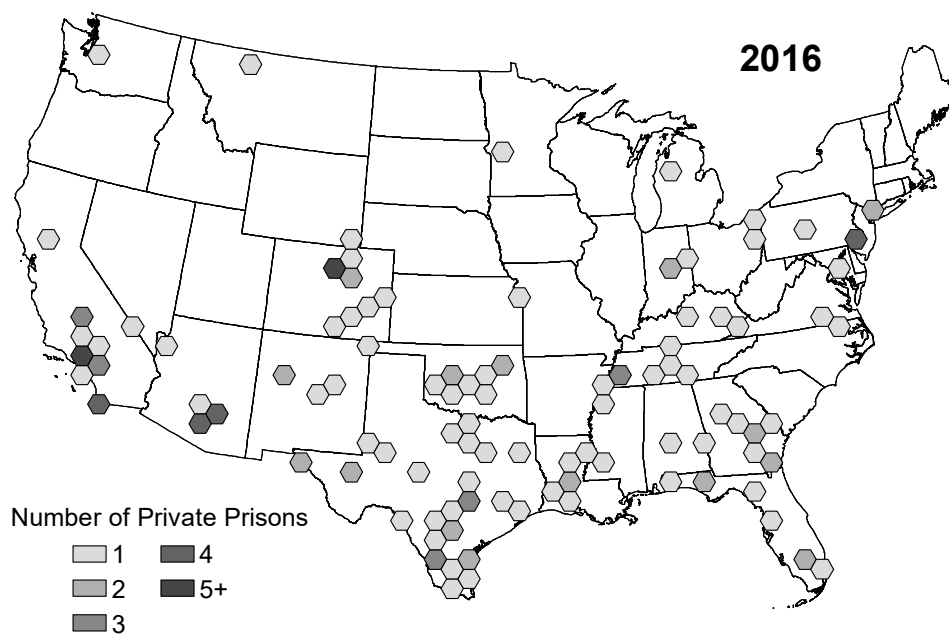
(b) Private Facilities in 2016

Figure 2.5: Location of private facilities in 2006, (a), and 2016, (b). Each hexagon represents 3000 square miles and darker hexagons indicate more private facilities. This map includes all private facilities that held local, state, or federal inmates.

makes the most money as possible.
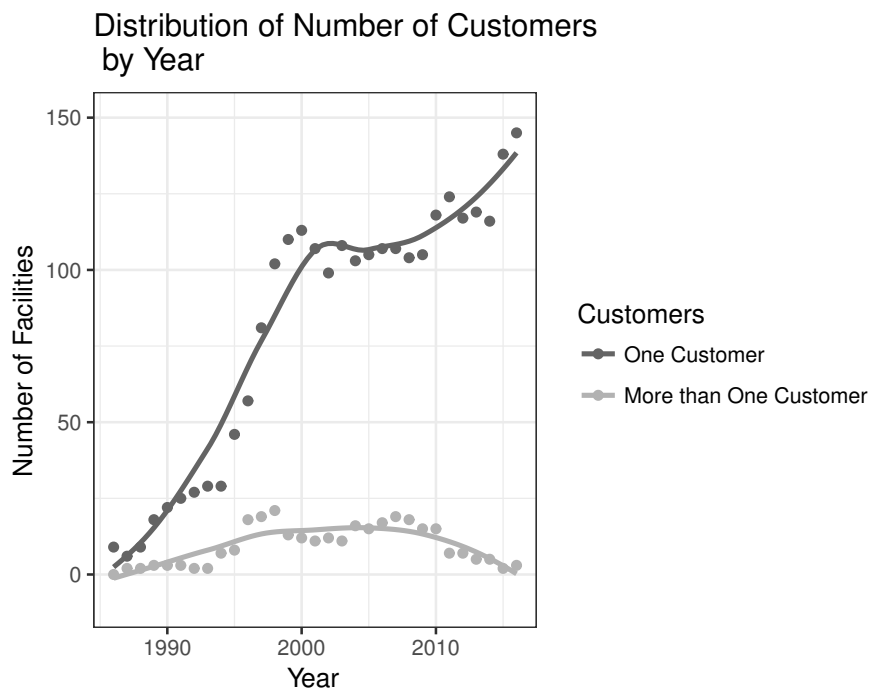
Figure 2.6: Sum of all facilities that have either one or more than one customer, 1986 to 2016.

Finally, it is worth considering how the dataset developed here corresponds to existing measures. By far the most comprehensive, and the one that provides the highest amount of longitudinal and spacial detail is the annual BJS data on the number of private prisoners per state. That data is only available consistently after 1999, so this section will only consider the correspondence between the BJS data and the original dataset from 1999 to 2015. Figure 2.7 offers visual evidence of the high correlation between these measures.

The two lines of the figure are nearly identical - and the correlation between them is extremely high at 0.879. Moreover, the divergence in the lines is easily explained by the variation in coding schemes that the BJS uses versus what I used. While

Correlation Between BJS Data and Original Dataset
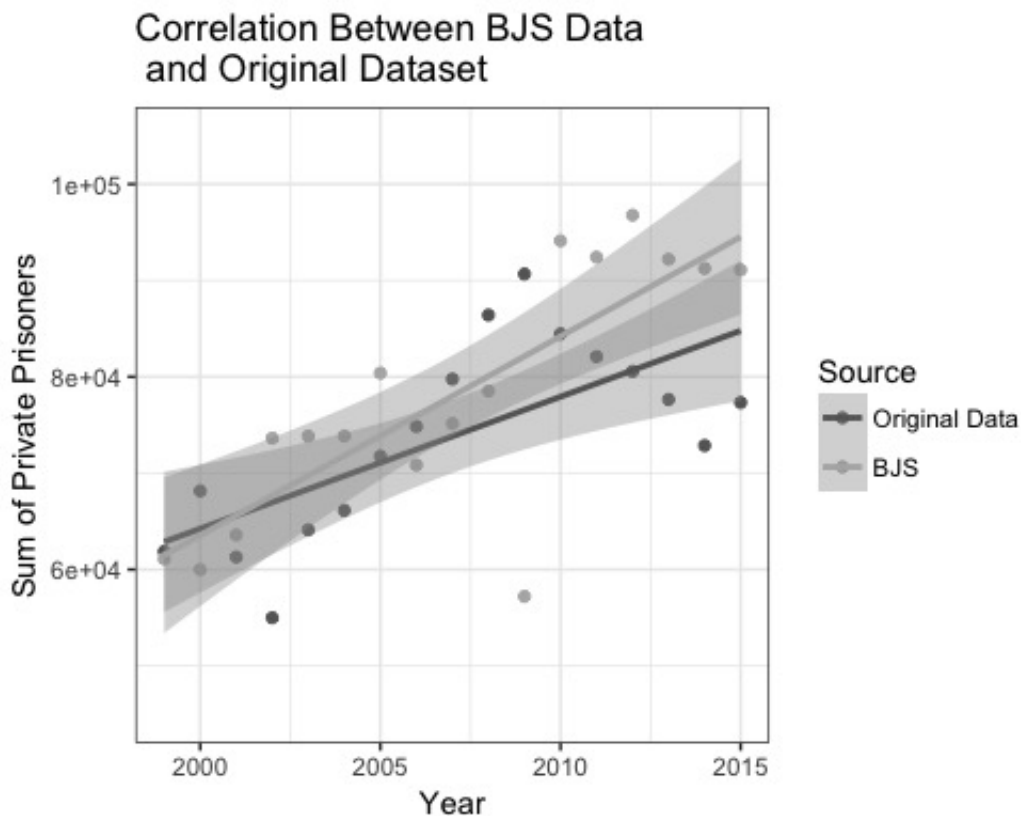
Figure 2.7: Comparison of BJS and the original dataset data on prisoners in private facilities, 1999 to 2015. This represents the sum of all state prisoners in each year that are housed privately.

my original dataset only considers those privately incarcerated in prisons or jails, the

BJS data also includes those in privately operated halfway houses, treatment centers,

and hospitals. It is likely, then, that some (or most) of the divergence found in this

graph is because of that slight difference in coding. As states experiment more with

privately operated halfway houses in lieu of incarceration, the gap between the BJS

data and mine should get larger (and it does, in the 2010s) since I do not include

those kinds of facilities in my counts. Additionally, my dataset only considers the four

companies that were traded publicly on the stock market. The BJS data makes no

such distinction, so part of the divergence is additionally explained by the inclusion

of smaller companies that are not in my dataset. Finally, though the lines themselves diverge somewhat over the time period, the confidence intervals are nearly identical, which helps assure that the small discrepancies between the two datasets are not massively significant. Overall, though, the extremely high correlation is encouraging evidence that my data collection is mostly accurate in its representation of private prisons in the United States.

2.4 What Determines States' Use of Private Prisons?

2.4.1 Private Prison Adoption

This original data allows me to examine the use of private prison over the last few decades, in a manner not possible to scholars studying this phenomenon before (e.g. Kim and Price 2014, Nicholson-Crotty 2004, Price and Riccucci 2005). Armed with that dataset, I first estimate models evaluating whether and to what degree the four theories above contribute to a state adopting private prisons for the first time.

I estimate a Cox proportional hazards (CPH) model, a type of survival analysis. In the data, a state's decision to privatize is considered a failure, while the remaining states that did not privatize by 2012 are censored. I collect the information on when the state privatized from my original dataset: if the state had an active contract to house some inmates under their jurisdiction in a private facility, that state "fails" and drops out of the dataset for the remaining years. If a state never privatizes,

that state contains observations for each year from 1983 to 2012 and is censored in the final year. I recorded the year when a state initially decided to privatize[11] and dropped the state from subsequent years once it "failed," or privatized its prisons. This methodology will estimate each state's probability of privatizing, conditional on that state not having privatized already and will model the theoretical first stage of deciding to privatize I describe above (Nicholson-Crotty 2004).

The CPH model, which will measure the determinants of states' initial adoption of privatization, tests for the influence of politics, economics, and union membership on the probability of privatizing. I estimate a model using *Republican Governor*, *Republican Control*, *Republican Governor * Republican Control*, *Budget Gap Per Capita*, and *Unionized Corrections Officers* as the main independent variables. I also control for *Violent Crime Rate* and *Incarceration Rate*.

First, I include two dummy variables, the first of which is *Republican Governor*, which takes on the value 1 if the state had a Republican governor and 0 otherwise. The second dummy variable is *Republican Control*, which takes on the value 1 if Republicans controlled both chambers of the state legislature and 0 otherwise. Finally, I interact these two variables to analyze how unified Republican government affects prison privatization[12]. Including indicators for the partisanship of both the executive and legislative branch is useful, as state legislatures can pass legislation allowing

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[11]Sources of the year each state began privatizing are from the original dataset, but I supplemented this information with original research on the year a state first privatized, from information on state's corrections websites, Lexis-Nexis searches, or direct contact with government officials. More information in appendix.

[12]This strategy essentially considers split legislatures and those controlled by the Democrats to be methodologically equivalent. Though there are important qualitative differences between those two institutional arrangements, the literature suggests Republican legislatures should allocate more of their state's inmates to private prisons than both of these arrangements.

privatization, which the governor then has to sign (Quinlan, Thomas and Gautreaux 2004). The partisanship data comes from both the National Conference on State Legislatures (NCSL) and the Book of the States.

The second independent variable of interest is *Budget Gap Per Capita* in each state and year. To calculate this variable, I used the State Government Finances data series made available by the U.S. Census Bureau and subtracted the revenues each state received in each year from the expenditures in the same year. I then divided by the state's population to limit the amount of skewness in the data.

The final independent variable, *Unionized Corrections Officers*, is a rough proxy for the number of unionized corrections workers in each state and year. Unfortunately, there is no nationwide data that records the number of corrections officers who are unionized in each state as the union membership sample size is too small at the state level to calculate unionization rates of different occupations. I calculated a proxy, though the next steps in the project are to find a more precise measure of the political strength of unions. First, I used Page (2011)'s classification of which states had a corrections officers' union, either affiliated with the AFL-CIO or independently run. As of 2011, thirty-six states had some kind of corrections officers' union. Second, I used Hirsch and Macpherson (2003)'s data on the nationwide percentage of corrections officers who are union members. I then multiplied the national percentage of corrections officers who are unionized by the number of corrections employees in each state and year[13] before finally multiplying that number by the dummy variable

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[13]This data comes from the Bureau of Justice Statistics and reflects all employed corrections officers, both full- and part-time.

of whether the state had a union in 2011 or not. Essentially, this measure provides an approximate value of the number of unionized corrections officers in each state and year. While this is a rough proxy, it provides a coarse estimate of the number of employees in each state[14] who prefer lower levels of privatization to ensure job security.

The model also contains a matrix of control variables, which includes violent crime rate and incarceration rate. I include this set of control variables to ensure the models are not misspecified. Violent crime rate influences crime policy and could affect which party is in power if citizens consider violent crime when voting. Second, it also influences the amount of revenue, since states may need to spend more to decrease crime. Violent crime rate also affects the level of campaign contributions in each state, as companies may choose to donate to states that are more likely to spend more on corrections because of crime. Finally, this control affects unionization as corrections workers may choose to join unions in response to rising crime rates. The violent crime rate statistics are from the Federal Bureau of Investigation's Uniform Crime Reports and are measured as the number of violent crimes per 100,000 people.

Second, I control for each state's incarceration rate. This influences the need to outsource prisoners to private facilities. Additionally, this rate could change the need for private prisons and prompt voters to re-elect politicians who favor more punitive policies. A higher incarceration rate may lead to a lower revenue per capita, as states spend more in response to increased demand. Third, private prison companies may

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[14]In the empirical analysis, I rescale this variable by dividing by 1,000 such that the effect reported in the table is how the proportion of inmates in private facilities would change if the number of unionized corrections officers increases by 1,000.

deliberately donate to candidates in states in which the prisons are overcrowded and in need of privatization. Finally, higher incarceration rates could prompt unionization rates to spike, as workers look to unions to ensure officers aren't overworked. The incarceration rate is from BJS and is measured as the number of prisoners in each state per 100,000 people.

The results from the Cox proportional hazards model are in Table 2.2.

Table 2.2: Cox Proportional Hazards Model of Prison Privatization Adoption

	Dependent variable:	
	Coefficient	Hazard Ratio
	(1)	(2)
Republican Legislature	0.118	1.126
	(0.655)	(−0.159, 2.410)
Republican Governor	0.073	1.076
	(0.412)	(0.269, 1.883)
Unified Rep. Gov't	−0.002	0.998
	(0.855)	(−0.679, 2.674)
Budget Gap Per Capita	0.671***	1.956
	(0.322)	(1.325, 2.588)
# Unionized Corrections Officers (Thousands)	−0.006	0.994
	(0.047)	(0.901, 1.087)
Violent Crime Rate	−0.00002	1.000
	(0.001)	(0.998, 1.002)
Incarceration Rate	0.003	1.003
	(0.002)	(0.999, 1.007)
Observations	822	822
R^2	0.009	0.009
Max. Possible R^2	0.252	0.252
Log Likelihood	−115.769	−115.769
Wald Test (df = 7)	20.700***	20.700***
LR Test (df = 7)	7.487	7.487
Score (Logrank) Test (df = 7)	9.249	9.249

Note: SE's clustered by state. *p<0.1; **p<0.05; ***p<0.01
95% confidence intervals for hazard ratios reported.

The only significant predictor of the adoption of private prisons is budget gap per

capita: as that amount increases, so too does the likelihood a state will privatize. In fact, increasing the budget gap makes a state nearly twice as likely to begin privatizing for the first time. The other predictors, however, do not explain this policy: neither partisanship nor unionization appear to significantly affect a states' decision to privatize. Even the control variables, incarceration rate and violent crime rate, are not related to a state's adoption of private prisons.

2.4.2 Private Prison Levels

None of the variables hypothesized by the literature contribute to the likelihood a state adopts private prisons for the first time, except for fiscal stress. The next step[15] is to evaluate how these same factors contribute to the overall level of prison privatization in a state.

I estimate an OLS model, in Equation 2.1, with time and state fixed effects[16] to control for any individual heterogeneity longitudinally and among the states that do not change over time, analyzes how the four variables suggested by the literature - partisanship, economics, campaign contributions, and unionization - affect changes in the number of their inmates in private facilities.

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[15]Another option is to estimate a hurdle model, also known as a two-part model, which requires the dependent variable to be a count and relaxes the assumption that the zeros and positive counts in the data come from the same data-generating process (Cameron and Trivedi 2008). In spirit, this definitively reflects the two-step process described above, but the model is generally not parsimonious as the number of parameters to be estimated is typically doubled (Cameron and Trivedi 2008). Finally, a hurdle model restricts the dependent variable to be a strict count. This model would not allow me to explore the trade-off of allocating more inmates to private versus public facilities.

[16]I also cluster the standard errors by state.

$$y_{i,t} = \alpha_i + \delta_t + +\beta_1 (Republican\ Governor)_{i,t} + \beta_2 (Republican\ Control)_{i,t}+$$

$$\beta_3 (Republican\ Governor\ *\ Republican\ Control)_{i,t} + \beta_4 (Budget\ Gap\ Per\ Capita)_{i,t}+$$

$$\beta_5 (Unionized\ Corrections\ Officers)_{i,t} + \gamma X_{i,t} + \epsilon_{i,t}$$

$$(2.1)$$

In this equation, $y_{i,t}$ refers to the number of inmates under a state's jurisdiction housed in private facilities[17] in each state and year, from my original dataset. The independent variables - *Republican Governor*, *Republican Control*, *Budget Gap Per Capita*, and *Unionized Corrections Officers* - are identical to the variables described above, as well as the matrix of control variables, incarceration rate and violent crime rate.

Table 2.3 reports the results from Equation 2.1.

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

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[17]See appendix for alternative dependent variables: the proportion of inmates held in private facilities and the number of private facilities.

Table 2.3: OLS Model of Level of Prison Privatization

	Private Design Capacity
Republican Legislature	97.679
	(304.528)
Republican Governor	158.902
	(138.418)
Unified Rep. Gov't	126.681
	(356.603)
Budget Gap Per Capita	5.570
	(64.902)
# Unionized Corrections Officers (Thousands)	309.352*
	(178.869)
Incarceration Rate	8.057***
	(2.940)
Violent Crime Rate	−4.007**
	(1.854)
N	1,417
R^2	0.730
Adjusted R^2	0.713
State Fixed Effects	✓
Year Fixed Effects	✓
Residual Std. Error	1,222.687 (df = 1333)

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

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).

2.4.3 Different Dependent Variables

There could be a few qualms about the results reported here. In this and the following sections, I explore some of those potential problems and highlight how the insignificance of the literature expectations remain even after considering these problems.

First, one may be concerned about the choice of dependent variables for the OLS estimation in Table 2.3, the sum of all inmates under a state's jurisdiction in private facilities. In the appendix materials, I use my original dataset to construct two alternative dependent variables: the proportion of the state's inmates in private facilities (as compared to public prisons) and the sum of private state facilities. The results for the sum private facilities dependent variable are nearly identical - a slightly significant and positive relationship between the number of unionized corrections officers and the number of private state facilities. The proportion of inmates in private facilities dependent variable is slightly different, however: budget gap per capita is *negatively* related to the proportion of inmates in private facilities, whereas the coefficient on *Republican Governor* is positive. This means states with higher budget gaps per capita house a lower percentage of their inmates in private facilities and states with Republican governors and either split or Democratic legislatures house a higher proportion of their inmates in private facilities. Not only do the alternative dependent variables bolster the claims here, that the common explanations are not working as the theories suggest, but cast doubt on the conventional stories of these variables. Economically suffering states rely on private facilities at a lower percentage and states with either split or Democratic legislatures use privatization at a higher

rate than unified Republican governments.

2.4.4   Campaign Contributions

One significant variable not considered explicitly here is campaign contributions and lobbying activities of private prison companies. More generally, this phenomenon can be thought of as interest group politics. As Browne (1990) points out, interest groups concentrate on a specific, niche interest in order to stake a claim in a pluralist environment. In this case, businesses that focus on the particular issue of prison privatization do so in order to cultivate that specific identity. It is logical, then, for these companies to lobby politicians to ensure political survival.

Anecdotally, private prison companies engage in "lobbying blitzes" to defeat legislation antithetical to their business interests, as these companies have much to lose from legislation that restricts the growth of incarceration (Schneider 1999, White 2001). Additionally, CoreCivic's board is comprised of former governmental officials[18], which could reflect a strategy to make state governments more receptive to private prisons (Selman and Leighton 2010). Lobbying is a powerful tool of these companies and the two largest private prison companies in the country, CoreCivic and GEO Group, both operate political action committees and regularly donate hundreds of thousands of dollars to candidates at the local, state, and national level[19]. It follows

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[18]For example, CoreCivic's board in 2010 contained a former legislative director for a Tennessee senator, the commissioner of finance for Tennessee, a deputy assistant security of defense for the Defense Department, an Arizona senator, and director of legislative affairs and deputy counsel to former Vice President Al Gore (Selman and Leighton 2010).

[19]The National Institute on Money in State Politics reports for-profit correctional facilities construction and management contributed over $2,000,000 to candidates running for state office in 2014. According to Open Secrets, the CoreCivic Political Action Committee spent $264,697 on all candidates in the 2014 election cycle, while the GEO Group spent $518,390.

that we may expect those contributions to influence the policymaking decisions of those receiving the donations.

Though the largest private prison companies indeed contribute to politicians' campaigns at the state, local, and national level, it is difficult to find direct, convincing evidence to suggest private companies deliberately contributed to politicians to toughen criminal sanctions and grow their businesses (Dolovich 2005). Rather, the growth of privatization was accompanied by other factors, like rising crime rates and public fears of criminals and violent crime, that most likely contributed to the expansion of incarceration. It is difficult to attribute the growth of incarceration to one variable, though private prison companies hire professional lobbyists and directly contribute funding to political candidates (Jones and Newburn 2005). Empirical examinations of the relationship of those contributions to state private prison levels has not been undertaken, partially because of data limitations, but it remains important to explore how lobbying influences states' decisions to privatize. This theory suggests a positive relationship between campaign contributions and private prisons, as state officials receiving money from these companies may be more likely to adopt policy favorable to those companies.

To test this approach, I include a measure of the amount of campaign contributions given to state candidates by private prison companies in each election year, collected from the National Institute on Money in State Politics[20]. This data records all campaign contributions given to candidates, incumbents and challengers, in state-

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[20]These companies fall into the category "Correctional facilities construction & management/for-profit."

level elections in each year. I aggregated up to the state level so that each observation is total dollars given to state candidates by these companies in each year[21]. Because this variable could present an endogeneity problem - since campaign contributions could lead to more private prisoners *or* more private prisoners could prompt more contributions - I lagged this variable by one year, so any observation of the dependent variable for 2008, for example, is matched with expenditure data from 2007. The variable measures contributions from companies only, not individuals, and takes on the value of zero if no companies donated to state candidates in a particular year. I hypothesize as campaign contributions increase[22], the percent of inmates held in private facilities will increase.

From 2000 to 2016, private prison companies donated to over 2,500 state candidates in 49 states (with the exception of Nebraska), resulting in 280 state-year donations to candidates. Of the state-years that these companies donated, the average donation summed to approximately $20,000, with the minimum and maximum donation of $50 and over $260,000, respectively.

The reason I did not include this variable in the other specifications is data availability: the campaign contribution information is not reliable prior to 2000, which cuts my sample size nearly in half. However, even if we include this variable (in the appendix), it is not significant, and none of the other independent variables - partisanship, fiscal stress, or unionization - become significant.

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[21]For example, Florida state candidates received $813,944 from private prison companies in the 2010 cycle for incumbent and challenger candidates running for offices as diverse as governor, Senate seats, House seats, and attorneys general.

[22]I rescale this variable by dividing by $1,000 such that the effect reported in the table is how the proportion of inmates in private facilities would change if the contributions levied to state candidates from for-profit corrections companies increased by $1,000.

2.4.5 Alternative Operationalizations of Ideology and Union Membership

Second, one may be concerned about the robustness of the results in light of the coarseness of the partisanship variable. A more nuanced measure could change the relationship between politics and private prisons, so I checked the robustness of the results using an alternative operationalization of ideology. I used Shor and McCarty (2011)'s measure of state legislative partisanship[23], in which they use state roll call voting data to estimate state legislator ideology. Unfortunately, the data for the first stage loses over half of its observations, as the Shor and McCarty (2011) data only begins in 1993. When I use this measure in place of *Republican Control* from Table 2.3, the results remain insignificant. Unfortunately, I cannot include this measure in place of the same measure in Table 2.2 because the data only begins in 1993, and many states had already dropped out of the event history dataset because they had already privatized. Nevertheless, it appears that using this more fine-grained measure does not substantively change the results.

Finally, one may be concerned about the proxy I calculated to approximate the number of corrections officers that are unionized in each state year. I instead used the percent of the public work force that is unionized, from Hirsch and Macpherson (2003), in place of this variable and replicated Tables 2.2 and 2.3 in the appendix. The OLS results remain insignificant, as well as the variable for public union membership, but in the Cox proportional hazards analysis, *Republican Governor* is now slightly

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[23]I averaged the state House and Senate chamber measures of ideology.

significant, indicating that states are more likely to privatize when they have Republican governors. Additionally, as the percent of public union members increases, the likelihood of privatizing for the first time decreases. There are two potential interpretations of this result. First, perhaps the percent of public union members is a better proxy for the number of unionized corrections officers as the two variables are not highly correlated. Moreover, it could be the case that a stronger union presence overall is helpful at preventing states from privatizing, and not necessarily the presence of unionized corrections officers only. Either way, overall union strength may be effective at preventing the adoption of private prisons initially, but is not effective at slowing the growth once it has begun.

2.5   Implications

The implications of this chapter cast doubt on the conventional theory of privatization and prompt a rethinking of the mechanisms that motivate both the adoption and growth of prison privatization in particular. None of the factors previously hypothesized by the literature appear to behave as expected in predicting the number of private inmates, private facilities, the proportion of a state's inmates held in private facilities, or when a state privatizes for the first time. These results prompt a reevaluation of the current theories and affirm the need for a novel explanation for states' usage of private prisons. In the next two chapters, I propose a theory to account for the growth and presence of private prisons in a state: the tandem rise of prisoners' lawsuits and mass incarceration.

Chapter 3

The Rights Revolution and Prison

Privatization

The previous chapters outlined the new dataset on state private prisons as developed as part of this project growth and how the common explanations for privatization fall short in explaining the rise of this phenomenon. This chapter introduces my central theoretical argument, that mounting pressure placed on the bureaucracy and state government from prisoners' lawsuits convinced states of the promises of prison privatization. Briefly, I argue the effect of lawsuits on prison privatization is dependent upon which facet of the litigation process is examined. First, I hypothesize 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 judicial decrees. The state no longer has a need for new, updated facilities as the bureaucracy reforms to accommodate the growing problem of overcrowding. Additionally, often judicial decrees mandate the state decrease prison

populations, which has a direct and negative effect on private prison business. This fact is recognized by companies themselves, as they write of the negative effect of successful lawsuits on their business in annual shareholder reports (CoreCivic 2012). The second hypothesis posits 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. Privatization helps states evade legal and political accountability for prisoner lawsuits: through the murky and complex legal environment surrounding prisoner lawsuits within private prisons, states are less likely to be held responsible for actions that occur in these facilities. Similarly, the opaque chain of responsibility for private prisons encourages states to privatize and shift blame for poor prison conditions away from themselves, to private companies.

To fully flesh out this contention, I first review the historical background of the prisoners' rights movement in the judiciary and other institutions, before discussing the rise of mass incarceration and the shifting nature of the criminal justice system in the last four decades. I then describe how these changing dynamics affected prisoner lawsuits, and states' decisionmaking around prisons. Finally, I discuss the incentives to privatize when states are facing a successful lawsuit or simply more lawsuits over-all. 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 prison privatization?

3.1 The Judiciary's "Hands-Off" Attitude and Slaves of the State

> 'A convicted felon [is one] whom the law in its humanity punishes by confinement in the penitentiary instead of with death . . . . For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State.'
> *Ruffin v. Commonwealth (1871)*

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. 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 to apply it to those confined in prisons and jails. Slavery was legally outlawed in the United States in 1865, but for prisoners, state-sponsored

confinement continued long after.

After the Civil War, states subjected prisoners to horrific conditions not much distinct from the conditions of slavery. Particularly in the South, the development of the convict-leasing system allowed private companies to effectively enslave convicts to labor in coal mines, brickyards, and on other projects (Gottschalk 2006, Perkinson 2010). Eventually, this brutal tradition was outlawed by most Southern states by the mid-1920s and was replaced by chain gangs that developed the South's infrastructure by forcing convicts to work mainly on road projects (Gottschalk 2006). The most brutal conditions, like those in chain gangs, slowly disappeared from states' criminal justice systems and in its place, states developed a variety of prison management styles. Some states, like California, embraced the rehabilitative aspect of incarceration and provided more educational and reentry services while others, like Texas, instead preferred inmates to learn discipline, primarily via labor in the fields (Perkinson 2010). Though the administration of corrections varied across states, many state corrections bureaucracies took a laissez-faire, hands-off attitude to their prisons, allowing prisoners themselves to run vital operations within facilities rather than trained corrections officials (DiIulio 1987, Feeley and Rubin 2000). This practice, called the trustee system, was at the heart of many prisoners' rights cases as inmates argued the state's practice of utilizing trustees, a hierarchical system in which chosen prisoners administrated punishment at the behest of corrections officers, resulted in incredibly violent environments for prisoners (DiIulio 1987). It is in this environment, in which states variously sought to control and rehabilitate offenders often through punishment administered by prisoners themselves that the prisoners' rights movement

and the increase in prison litigation began (DiIulio 1987).

All the while, the courts largely deferred to state governments in the administration of correctional facilities in an approach termed the "hands-off" doctrine[1]. Officially, this doctrine stemmed from the court's perceived lack of jurisdiction in supervising prisons or interfering with the daily activities within correctional institutions (*Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts* 1963). The judiciary largely followed this doctrine for some or all of the following five rationales: first, a concern about separation of powers; second, the lack of expertise in penology; third, fear that judicial action would be counterproductive in maintaining prison discipline; fourth, the view that federalism prohibited federal courts from intervening in state prisons; and fifth, a concern that allowing these petitions would subsequently trigger a domino effect, overwhelming the federal judiciary in prisoner petitions (Goldfarb and Singer 1970, Haas 1977). 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.

Though the hands-off doctrine constrained judges in their ability to grant prisoners

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[1]Though this was the primary approach in the early twentieth century, the term "hands-off" doctrine was only coined in 1961. The term is first used in a document prepared for the Federal Bureau of Prisons and was adopted shortly thereafter into the academic lexicon about these lawsuits (*Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts* 1963).

relief for constitutional violations occurring within prisons, inmates did not stop filing lawsuits altogether. Hundreds of cases were filed in the first half of the twentieth century as prisoners sued for perceived grievances against the state (Feeley and Rubin 2000). The early lawsuits were by and large unsuccessful and very uncommon, but they paved the way for the watershed prisoners' rights cases, which were adjudicated beginning with *Cooper v. Pate* in 1964.

Cooper v. Pate, a 1964 Supreme Court decision, finally gave state prisoners the protections guaranteed around the Civil Rights Act of 1871[2] (Goldfarb and Singer 1970). This case, brought by a Black Muslim prisoner housed in Illinois, centered around the plaintiff's claim of discrimination as prison officials would not provide him with a Koran (Losier 2013). The Supreme Court decision permitted Muslim prisoners to sue prison officials for religious discrimination under Section 1983 of the Civil Rights Act of 1871 (Chase 2015). Thomas X. Cooper, the plaintiff in this case, filed the lawsuit pro se, without the aid of an attorney, after consulting with the leader of the Nation of Islam (NOI), Elijah Muhammad, and other inmates (Losier 2013). Though Cooper filed this lawsuit by himself, he connected his experience while incarcerated to the plight of other Muslim inmates and his case illustrated a typical strategy of the NOI to utilize networks both within and across prisons nationwide to expose inhumanities within correctional facilities to the broader public. Thus, while this particular case is often heralded as the first modern prisoners' rights case, it was

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[2]This act, enacted after the ratification of the Thirteenth and Fourteenth Amendments, primarily sought to tamper the violence committed by the Ku Klux Klan and sought to eliminate remaining abusive practices after the adoption of the Thirteenth and Fourteenth Amendments, specifically by eliminating civil rights violations "under color of state law" in Section 1983 of the Act (Dowd 1984). Though this act later provides the constitutional basis of the multitude of prisoners' rights litigation, that provision remained dormant in inmate litigation for nearly a century until this decision.

fairly emblematic of the beginning of a larger mobilization effort on behalf of prisoners all around the country and in particular, the mobilization efforts begun by minority advocates to highlight racial discrimination running rampant in prisons and jails.

Racial disparities in incarceration and punishment that exist in contemporary America[3] did not always exist as starkly. In the 1920s, Blacks comprised approximately a third of the prison population (Gottschalk 2006). By 1960, nonwhites were nearly 40 percent of the incarcerated, and by 1974, that percentage had risen to over half (Gottschalk 2006). The timing of this shift, shortly after the Civil Rights Movement, is no coincidence. In fact, some scholars argue incarcerating minorities in ever-heightening proportions was a "frontlash" to the Civil Rights Movement (Weaver 2007). This theory asserts the losers of the Civil Rights Movement, segregationists and other actors who wanted to maintain White supremacy in social and political life, turned to criminal justice policy in the aftermath of the successful movement and to champion tough-on-crime policies that effectively controlled the minority population by sending higher and higher numbers of them to prisons (Weaver 2007). This discrimination did not stop at the prison walls, though. Prisons all across the country continued to be heavily segregated, both informally in terms of which groups inmates aligned with, but also formally, as prison officials gave the higher-paying, more prestigious prison jobs to White inmates and, in the South, enlisted the majority-black prison population to pick cotton and other crops at the behest of White overseers (Thompson 2016). It is likely no surprise, then, that the increasing number of mi-

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[3]As of 2014, African-Americans were incarcerated at a rate more than five times that of Whites, while Hispanics were incarcerated at 1.4 times the White incarceration rate (Nellis 2016). That same year, at least 1 in 20 adult Black men were incarcerated in eleven states.

nority inmates flooding into prisons who encountered additional discrimination at the hands of prison officials felt this discrimination stemmed directly from their race. Many African-American and Hispanics inmates merged their individual experiences within prisons to the struggle of minorities more broadly.

Black inmates who organized both in and out of prisons to protest the conditions within these facilities largely organized under the umbrella of two groups: first, the NOI and second, the Black Panthers. Incarcerated members of the NOI were at the forefront of the prisoners' rights movement, as *Cooper v. Pate* illustrates, largely to win religious accommodations denied to them (Berger 2014). This was the first group to bring complaints as part of an organized strategy to improve prison conditions (Feeley and Rubin 2000). Additionally, this effort was coordinated and intentional, a strategy pursued by the NOI which served as a catalyst for non-Muslim prisoners to file cases (Gottschalk 2006). The movement begun by the NOI, followed by the efforts of the Black Panthers, sought to illuminate the growing racial disparities in prison and the idea that African-Americans were incarcerated to maintain the system of White supremacy, which was in decline after the Civil Rights Movement (Berger 2014). Both movements attracted media attention to the plights of incarcerated minorities, through media movements and the publicization of high-profile lawsuits against the criminal justice system.

It wasn't solely litigation prisoners turned to in their efforts to reform the system, however. Some prisoners turned to bloody and brutal riots in an effort to attract media attention to the horrors within correctional facilities and, in particular, to the vast racial discrepancies in prison treatment (Gottschalk 2006). Though these

events are much different than prisoners filing lawsuits in federal court, the aim was the same: to attract public attention to the inmates' cause. These riots generally began in an effort to secure better living and working conditions within prisons, an outcome similar to the one sought by prisoners filing lawsuits (Thompson 2016). Moreover, the number of riots was burgeoned by the writings of convict revolutionaries like Etheridge Cleaver, Angela Davis, and George Jackson (Berger 2014). Jackson's death in disputed circumstances in August 1971 was a major contributing factor to the notorious September 1971 riot at Attica prison in New York, a four-day standoff that left over forty people dead, prisoners and prison workers alike (Gottschalk 2006, Thompson 2016). This riot was certainly exemplary in its massive media coverage and high death toll, but it was a part of a larger movement among prisoners to riot to attract public attention to horrific prison conditions: in 1967, there were only five prison riots. In 1971, the year the Attica riot occurred, there were thirty-seven. By 1972, that number had risen to forty-eight, the highest number of prison riots in America's history (Gottschalk 2006). Prisoners rioted to achieve changes within the criminal justice system, but also to garner political and social support for their cause through the media reports of horrific conditions at their facilities (Rosenberg 2008). In this way, lawsuits and riots were inextricably linked, as both strategies sought to attract attention to the brutalities within prisons and gain sympathy for the prisoners' cause.

The external mobilization of these advocacy groups to attract attention to the inequalities within correctional institutions was matched by internal mobilization of the prisoners themselves. Prisoners who wanted to file lawsuits but were inexperienced

with the criminal justice system often sought help from jailhouse lawyers, inmates who took a special interest in litigation and aided other inmates in the filing of lawsuits and other legal actions (Berger 2014, Jacobs 1980, Thomas 1988). Though prisons were initially hostile to jailhouse lawyers, often painting them as agitators and punishing them for aiding fellow inmates in filing petitions, a 1969 Supreme Court case *Johnson v. Avery* held that state correctional officials could not punish jailhouse lawyers for providing legal assistance when the facility itself was not providing those services (Jacobs 1980). As a result, jailhouse lawyers proliferated, helping prisoners file lawsuits when they would otherwise not.

Jailhouse lawyers were only so effective at aiding inmates' legal claims, however. Greater attention to the plight of the incarcerated was also 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 and often as part of a greater litigation campaign by the NOI. However, as the federal courts stepped away from the hands-off doctrine and began issuing decisions maligning state corrections systems, the fate of prisoners was linked to a broader struggle for rights in the United States. This larger mobilization effort occurred as other disadvantaged groups were similarly utilizing the judiciary to acquire rights previously denied to them. This movement is known as the rights revolution, which expanded civil rights and liberties in the context of the judiciary, by levying attention to these rights, and supporting and implementing them (Epp 1998). Though this term is often used in reference to previously underrepresented groups gaining additional liberties, as in the case of prisoners or women, at its simplest, it refers to the increased judicial attention to the protec-

tion and establishment of individual rights. For prisoners, activists were crucial to the success of this litigation campaign as they linked the prisoners' cause to that of other powerless groups, 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's) National Prison Project, though there were smaller regional and local organizations that aided prisoners in filing lawsuits as well (Jacobs 1980, Schlanger 2006). These organizations, and the lawyers within these groups, were previously part of the struggle for civil rights, highlighting how they viewed prison conditions as a question of fundamental rights (Jacobs 1980). This framing reached far outside the lawyers and activists deeply involved in litigation, as it also caught the attention of law schools and the law profession itself. The University of Tennessee was the first law school to open a prison legal services program in 1947, but those programs soon proliferated across the country in the 1960s and 1970s (Cardarelli and Finkelstein 1974). Further, the American Bar Association created the Commission on Correctional Facilities and Services in 1970s to pursue correctional reform (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.

The involvement of a network of national advocacy organizations altered the makeup of prisoner litigation claims more broadly. Lawyers were able to collate individual claims into large lawsuits, pushed for class action status on behalf of prisoners, and largely sought to generate outcomes that placed entire prison systems

under court order (Justice 1990, Schlanger 2006, Schoenfeld 2010). In some cases, judges themselves indicated to lawyers they were open to charges against state prisons and even contacted sympathetic attorneys to represent prisoners in their cases against the state (Feeley and Rubin 2000, Schoenfeld 2010). As a result, lawyers were intimately involved in the strategy of the prisoners' rights movement and could serve as a signal to judges of the quality and legitimacy of prisoners' complaints. Because there were far more prisoner complaints than advocacy organizations designed to help them, involvement of any group of this type can serve to signal the most egregious prisoners' cases to judges themselves.

Following *Cooper v. Pate*, 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 pro se and often dismissed quickly, the federal judiciary still faced a mountain of litigation that they previously did not.

The 1960s and 1970s are considered the heyday of the prisoners' rights movement, as both public and legal attention was devoted to the inhumane conditions within correctional facilities. Even after public attention to the cause waned, however, the impacts of the movement were largely positive. Generally, prisoners had greater access to educational programs, medical treatment, and accommodations for religious practices (Jacobs 1980). Additionally, the most obvious physical brutality and torture

faded. What soon replaced the draconian, chaotic prison system was a comprehensive bureaucracy that governed prison life. These highly detailed standards covered the management of residence facilities, sanitation, food, clothing, medical care, discipline, staff hiring, libraries, work, education, among other facets of prison life (Feeley and Rubin 2000). More recent research on the longitudinal effects of federal court intervention suggest an improvement in prison conditions after the judiciary becomes involved, increasing operating and capital expenditures within prisons, and decreasing the number of inmate deaths in each year (Boylan and Mocan 2014). Thus it seems the aggregate effect of the rise in prisoners' legal claims is positive as state bureaucracies devoted more resources to ensure prisoners' constitutional rights while incarcerated.

The involvement of prisoners, lawyers, judges, and the state government prior to the 1970s soon rapidly changed. Prisoners had the same incentive to file lawsuits to protest inequities within prisons and were even more interested in doing so after both the likelihood of success increased and their access to the federal judiciary, via jailhouse lawyers and other legal groups, expanded. Lawyers from the civil rights movement became involved in the advocacy of prisoners, helping collate individual claims and pursuing wide-ranging decisions against entire prison or jail systems. Judges shifted from virtually acknowledgement of prisoner complaints against the state to more wide-ranging jurisdiction on these issues. Finally, state governments that once operated their correctional institutions often with little oversight and control that lead to widespread physical abuse were now forced to professionalize and develop bureaucratic standards for prison governance. It is in this evolving interaction between

these four actors that an additional challenge came to bear on all of them: mass incarceration.

3.2   Incarceration, Lawsuits, and State Responses

'For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State.'
Preiser v. Rodriguez (1973)

3.2.1   The Rise of Mass Incarceration

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, therapeutic communities, and other residential programs to prepare an inmate for release (Seiter and Kadela 2003). Sociologist Robert Martinson's infamous declaration that "nothing works" in the field of criminal rehabilitation in 1974 galvanized the critics of indeterminate sentencing and rehabilitative reentry policies into action. In the next ten years, indeterminate sentencing was abolished at the federal

level[4] and replaced it 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 that would previously be diverted or released early.

Incarceration rates were largely stable in the first half of the twentieth century, increased slightly in the 1960s and 1970s, before exploding in the 1980s (see Figure 3.1). The incarceration rate rose precipitously as punitive laws passed legislatures at the state, national, and local level to criminalize drug possession and dealing and to increase 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 partially attributable to the wide support for the expansion of the criminal justice system across political and social lines: Republicans, Democrats, Whites, Blacks, and others 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 states were facing similar difficulties as the 1980s began.

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[4]Senator Ted Kennedy was the main driver behind the Sentencing Reform Act of 1984, which established the United States Sentencing Commission, instituted mandatory minimums for dozens of offenses, and abolished federal parole (Stith and Koh 1993).
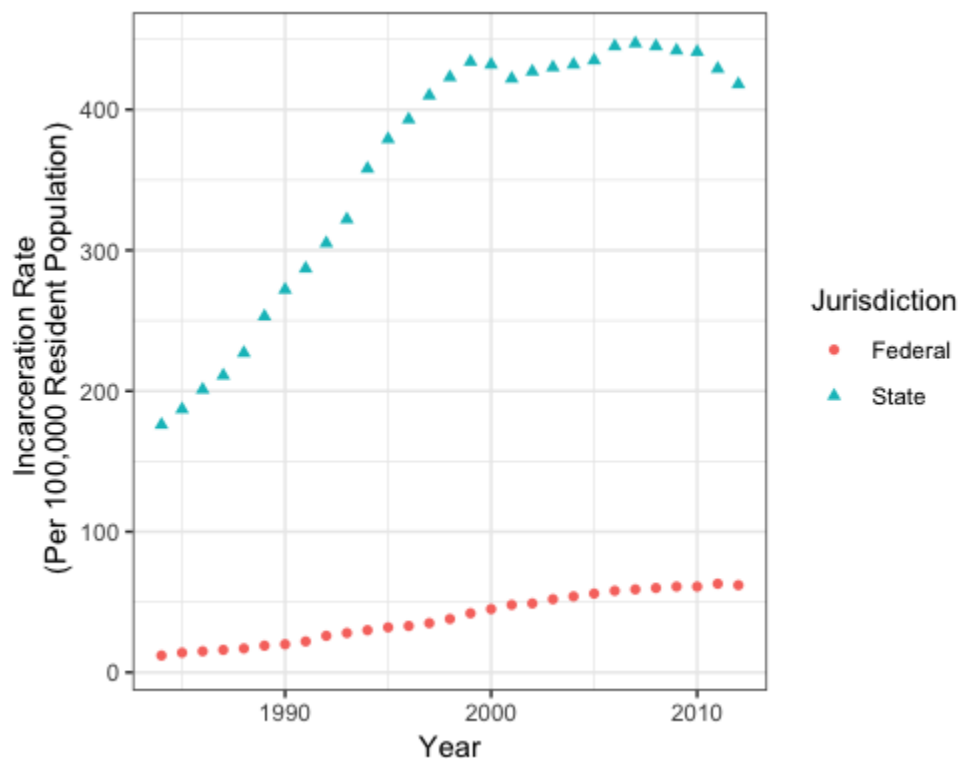
Figure 3.1: Incarceration rate of prisoners under jurisdiction of state and federal correctional authorities, 1970 to 2016. Data from the Bureau of Justice Statistics.

3.2.2 Prisoners, Lawyers, and Judges in an Era of Mass Incarceration

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 other

liberties such as healthcare and food grew even higher in number as prisons exceeded

their capacities. Figure 3.2 shows the growth of these lawsuits beginning in the early

1980s, emblematic of a vast increase in the number of prisoners filing lawsuits.
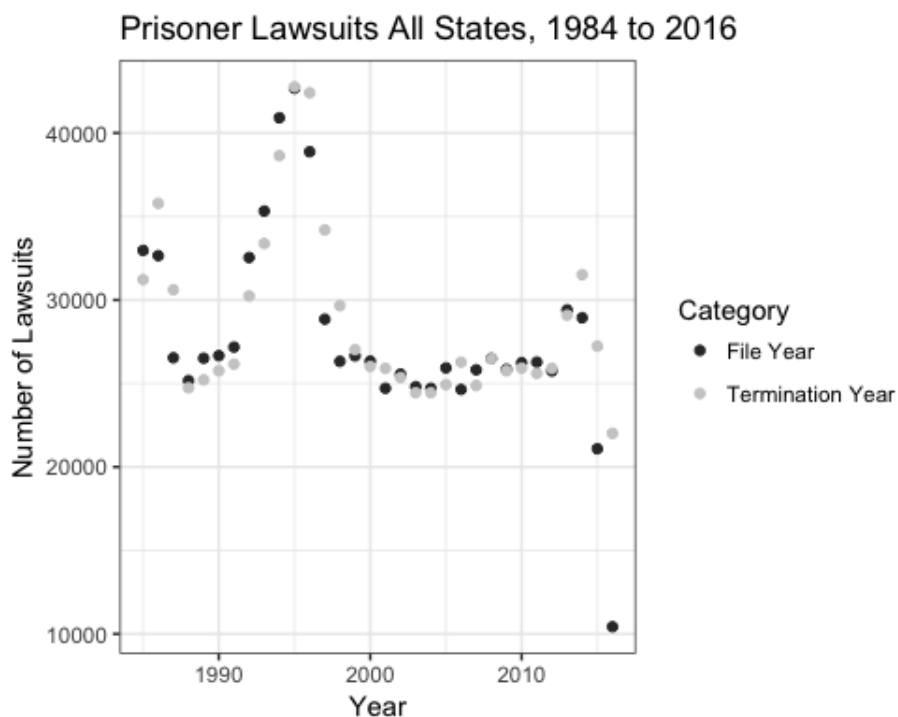
Figure 3.2: Prisoners' lawsuits, filed and terminated, in each year from 1984 to 2016. Data from the Federal Judicial Center.

Prisoners did not substantively change their strategy in this expansion of mass in-

carceration. Still armed with an abundance of time, low or nonexistent filing fees, and

the aid of either jailhouse lawyers or lawyers representing advocacy groups, inmates

took advantage of their ability to sue and did so in greater and greater numbers.

Though the quality and nature of these suits differed slightly from the lawsuits filed

by the pioneers of the movement (more on this below), more access to the courts

resulted in more petitions filed overall.

Lawyers involved in prisoners' cases also changed as well. Whereas the begin-

ning 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) - these national organizations soon 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). Though these nationally-minded lawyers gradually limited their involvement in prisoners' cases, however, reform-minded attorneys began to form regionally-focused organizations like the Southern Center for Human Rights in Georgia and the Southern Poverty Law Center in Alabama to continue fighting for prisoners' legal rights (Schlanger 2006). The commitment to prison reform did not change as the literal composition of the lawyers representing prisoners shifted, but it placed increasing importance on case selection: attorneys from these groups increasingly chose cases that have broad implications for the law more generally, rather than taking on individual complaints of inmates (Sturm 1994).

Lawyers similarly altered their legal strategy. Because the most horrific conditions were the first to be litigated, 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). Cases left to be litigated after the larger cases were more difficult and represented individual complaints rather than cases with wide-ranging policy implications. Prisoners' rights cases have also become more rigorous over time, as standards for evidence of proof of deliberate neglect within these facilities has increased (Schlanger

2006). As a result, lawyers shifted their strategy from challenging entire court systems like in the large cases in the 1960s and 1970s to more specific claims about particular correctional institutions and discrete actions taken by officials within those facilities (Schlanger 2006). Despite this change in lawyers' litigation strategy, their motivations remained the same: litigate the most egregious of offenses to provide the most relief for the highest number of inmates as possible (Sturm 1994).

Though lawyers involved in the struggle for prisoners' rights sought to litigate quality cases that would yield the most relief for the highest number of inmates, they certainly were not involved in all litigation occurring in this shifting time. This period saw the rise of frivolous lawsuits as well. Prisoners alleged cruel and unusual punishment because they received melted ice cream, believed the facility planted mind control devices in them, or gave them the incorrect ratio of chunky to smooth peanut butter jars from the canteen (Schlanger 2003). These kinds of lawsuits are often cited by proponents of limiting inmate access to the courts[5], but they are not the only kind of prisoner petitions that will not get much traction in the legal system. Prisoners representing themselves or those that are assigned attorneys with little experience and incentive to fight for their rights within prisons and jails are likely falling through the cracks of the judicial system if they have a simple, individual complaint against a facility (Sturm 1994). Often, the frivolous and potentially legitimate individual claims alike are dismissed quickly as judges face a mounting number of cases they must process quickly.

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[5]Indeed, proponents of the Prison Litigation Reform Act (PLRA) of 1996, which severely curbed inmates' ability to sue prisons or prison officials, often cited specific examples of frivolous lawsuits (Schlanger 2006).

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 this growing number of petitions. Some judges believed the block-buster prisoners' rights cases betrayed the hands-off doctrine and legal rights levied to prisoners to sue states while incarcerated went too far[6] (Feeley and Rubin 2000). There are some judges who never saw a problem with the hands-off doctrine, instead preferring to defer to the authority of corrections officials. Others saw the benefit of correcting the most egregious of issues, but as the 1980s continued and the worst practices faded away, judges questioned the utility of further litigation as prisoners won such significant victories already (Feeley and Rubin 2000). Judges' reticence to prisoner claims was further supported by the increasing number of frivolous lawsuits filed by inmates that some judges viewed as a waste of time and judicial resources. Finally, judges' natural skepticism toward prisoner petitions has always been the most pronounced among conservative justices. Critics of providing further rights to prisoners grew as President Ronald Reagan's judicial appointees joined the bench in the early 1980s, at the same time as the number of prisoner petitions swelled (Schlanger 2006). Through the increased skepticism of all judges to prisoners' claims of abuses and the influence of conservative judges, courts began scaling back prisoner victories in free speech, due process, legal access, and free exercise of religion in the 1980s and

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[6]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).

1990s (Feeley and Rubin 2000).

Though judges were perhaps more skeptical than ever before of prisoner claims of constitutional violations, there was one possible signal of quality they could rely on: the involvement of an advocacy network or experienced lawyer. Because the organizations seeking to promote reform within correctional institutions rigorously evaluated potential plaintiffs and only chose the most worthy among them (Sturm 1994), it is safe for a judge to assume an unrepresented prisoner is not likely to bring a legitimate claim against state governments. Moreover, the most consequential lawsuits for prisoners' rights were often class action lawsuits or a collation of multiple complaints into one, comprehensive one. A judge hearing dozens of identical claims of abuse against the state government may be more convinced of systematic constitutional violations than one prisoner alleging that same sort of violation. Thus, the interaction between judges and lawyers, and the signals each actor sends to the other, is highly consequential for the outcome of these complaints.

3.2.3 States' Responses to Changing Nature of Prisoner Legal Strategies

States' first, initial responses to the growing number of prisoner lawsuits involved simply making do with their outdated and small facilities. Once inmates began filing more petitions protesting this and other practices within prisons, however, governments were forced to proactively address these concerns before being sued by prisoners. Officials possessed one clear option to ameliorate their overcrowding concerns

without expanding or constructing new prison facilities - the release of existing prisoners onto parole or probation to make room for the new entrants. In fact, some court cases mandated precisely this action, requiring states to provide early release mechanisms and inmate population limits to prevent dangerous overcrowding (Taggart 1989). Though this was an occasional tactic utilized by judges in their orders against states, it became less common as the decade wore on, as public opinion of both the general public, media, and politicians at that time heavily favored keeping inmates *inside* prisons, rather than letting them out to potentially endanger citizens (Enns 2016). So, while state governments could certainly release offenders to mitigate overcrowding in their correctional facilities, it was not a politically popular choice to do so.

Most states, while they could choose to release prisoners to alleviate overcrowding concerns, were not likely to do so because of the political risks. However, corrections departments could not merely ignore the issue via temporary solutions like double- or triple-celling because of the intense pressure the judiciary was placing on the bureaucracy. In some states, entire corrections systems were placed under court order to reform their prisons. A federal judge placed the entire Arkansas prison system under a court order for violating the Eighth Amendment rights of prisoners in 1970, the first comprehensive court order of its kind (Feeley and Rubin 2000). Following the landmark Arkansas decision, entire prison systems across the country were declared unconstitutional[7], reaching 9 states in 1983, 13 in 1990, and 15 by 1995 (Schlanger

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[7]In the five years after the Arkansas decision, entire corrections systems were declared unconstitutional in whole or in part in five states: Mississippi, Oklahoma, Florida, Louisiana, and Alabama (Feeley and Rubin 2000).

2006). The effect of the court orders was not always so dramatic, though. In other states, individual facilities were the only ones judicially mandated to mitigate overcrowding and other inhumane conditions. Forty-four states had a court order against at least 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, highlighting the broad scope of this litigation and its widespread geographic impacts (Feeley and Rubin 2000).

Thus, states released prisoners less frequently for two main reasons: it was politically unpopular to do so and was unlikely to solve the significant overcrowding problem within state prison systems. The most logical response after releasing prisoners is to instead 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). However, 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 Corporation of America 2013). Even if it is hard to pin down a specific estimate for the cost of building a new facility, states' budgets reflect the immense cost of new construction. States spent nearly 10% of their total corrections budgets on capital outlay, the construction of new prisons and purchasing of land, in the 1980s and early 1990s, approximately $2

billion collectively each year (Kyckelhahn 2014). Thus, 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.

Often, states funded the construction of new prisons through the issuance of bonds, ballot initiatives sent to the voters requiring them to approve the likely multi-million dollar cost of building a new facility[8]. Unfortunately for states, voters were reluctant to approve these bonds as public opinion shifted beginning in the 1970s, known as the taxpayer revolt. States passed statutes, occasionally through voter initiative[9], to restrict government expenditures after endemic public dissatisfaction with the growth in the government and in rampant spending (Joyce and Mullins 1991). Simultaneously, these measures also restricted taxes, thus depriving state and local governments of a vital source of revenue (Gilmore 2007). California's school districts, for example, saw their revenues from property taxes drop by more than half in one decade, from the late 1970s to the late 1980s (Gilmore 2007). State and local governments alike saw their revenues dropping as a result of these laws, either through limits on expenditures or on tax rates. Some states found creative ways of funding prison construction that didn't require citizen approval, however. California, as one example, transitioned from general obligation bonds (GOBs) that required voter ratification to lease revenue bonds (LRF), which do not require voter approval (Gilmore 2007). Through these complicated accounting procedures, some states may have been able to avoid

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[8]For example, Maine's ballot had a bond measure in 1991 for $5.5 million to construct, purchase, and renovate correctional facilities that only received 35.4% of the vote.

[9]For example, California's Proposition 13, which decreased real estate taxes and placed restrictions on future legislative action on taxes and revenues, was passed by voter initiative in 1978 (Buchanan 1979).

the public pressure to spend and tax less, and perhaps stave off prison privatization.

Not only was citizen opinion largely against spending of any kind, bond initiatives aimed at funding prisons specifically were repeatedly voted down even as citizen concern about crime grew (Selman and Leighton 2010). Indeed, retributive measures like the Three Strikes laws were passed via initiative in states like California, even as the state government was suffering economically[10] (Barker 2009). Thus, politicians were running out of options to fund needed expansions to the prison system.

Citizen restrictions on expenditures were only magnified by the significant decrease in federal block grants to the states beginning in the 1980s. The amount of federal grants to state and local governments in fiscal year 1987, for example, was 14 percent lower than the comparable number in 1981 (Haughwout and Richardson 1987). Additionally, the percent of state revenue from federal block grants decreased by five percent in only 10 years, from 1980 to the early 1990s (Poterba 1994). This effect was magnified even further by the dismantling of the Law Enforcement Assistance Administration (LEAA), an agency within the Justice Department, in 1982. LEAA was created in 1968 and its passage resulted in massive transfers of federal monies to state and local law enforcement agencies with little regulation on what the governments could do with the funds (Gottschalk 2006). Thus, state governments faced massive strains on their criminal justice systems without federal assistance they had previously.

These difficulties compounded, making it difficult for states to manage growing prison populations and limits on the construction of new correctional facilities. Begin-

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[10]Indeed, California adopted its first private prison in 1988 (Thomas 1994).

ning in the 1980s, however, there were two main avenues to new construction: either the state built or renovated new facilities themselves, or the state could instead rely on an alluring new prospect to take on the physical and financial burden of construction, private prison companies. I argue states responded to these difficulties in two distinct ways, either pursuing or avoiding privatization, depending on the outcome of prisoner litigation.

3.3 Prison Privatization and Inmate Lawsuits

I argue it is the pressure of inmate litigation that conditions whether or not a state privatizes. Specifically, there are two distinct types of litigation that contribute to the likelihood of a state privatizing prisons: more lawsuits filed, regardless of outcome and successful lawsuits. Briefly, I argue this is a process driven by accountability. More prisoner lawsuits, regardless of outcome, makes it more likely a state will turn to private prison operators. These states face the ever-increasing numbers of inmates entering prisons and jails each year, but do not have the ability to negotiate with the legislature or the public at large to provide the funds for new prison construction. States are incentivized to privatize to transfer political and legal accountability for these lawsuits from themselves to private companies. On the other hand, successful lawsuits force the state to be accountable to the judiciary, via monitoring of the prison system, that ensure states make substantive changes to prison rules and standards. States no longer have the incentive to transfer legal and political liability to private companies as they are already held accountable by the judiciary for poor prison

conditions. To highlight these two differences, I review these two facets of prisoner litigation and introduce two key hypotheses: more inmate lawsuits, regardless of outcome, will make a state *more* likely to privatize their prisons and second, successful court orders will make a state *less* likely to privatize.

3.3.1 More Inmate Lawsuits

Though successful prisoners' rights lawsuits changed the composition of states' correctional systems in many cases, states faced a larger issue than just the implementation of court orders. As Figure 3.2 showed, the number of lawsuits prisoners filed reached the tens of thousands in the 1980s, as inmates took advantage of the more favorable legal climate to litigate their grievances. Briefly, I argue that the pressure of mounting lawsuits, regardless of the outcome of these cases, made it more likely for states to turn to private companies to alleviate the temporary stress on the criminal justice system. Saddled with increasing lawsuits that revealed the inadequate state of the corrections systems, states needed to renovate or construct new facilities even without the pressure of a court order. Because the majority of lawsuits were unsuccessful, most states then needed to find a solution to overcrowding but without attorneys and judges closely watching their every move. This flexibility then allowed states to explore the most desirable options to alleviate overcrowding. Private companies entered the fray and promised governments a solution to their problems that would be quick and cheap. States, unburdened by the influence of judges and lawyers, were allured by the promise of a hands-off approach to their correctional woes. Not only

that, they were incentivized to do so to limit their legal and political accountability for these legal claims. Thus, states are more likely to privatize when facing mounting lawsuits.

It is useful to begin by revisiting the characteristics of lawsuits. While some are successful, most others did not have that same effect. A higher number of lawsuits in a given state-year is some mix of failures and successes, but the percent of victorious cases is much lower than the percent of failures - 88% by one estimate (Schlanger 2015) and even higher failure rates like 98.4% in others (Ostrom, Hanson and Cheesman 2003). The rate fluctuates slightly over the years, but is always biased against prisoners: inmates are vastly more likely to fail in their litigation attempts than to succeed. There are a few reasons for this. First, "cheap victories are now nonexistent" (Schlanger 2006), suggesting the most egregious of violations were addressed in large lawsuits and only individual complaints remain. 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, 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). Thus, though the effect of the law is only evident after 1996, it imposed even additional restrictions on a population already facing incredibly high burdens to litigate.

It is thus not a surprise that inmates have a relatively low likelihood of success. These lawsuits are having some effect on state response to overcrowding, however. Even if the state is not under some sort of court order, how does the presence of these petitions alter states' behavior?

States unburdened by judicial and legal surveillance of their activities chose privatization as the most logical response to their overcrowding problems. This dynamic is driven by all lawsuits, not just lawsuits filed to protest overcrowding, because any lawsuit filed has the potential of revealing the poor state of the prison system. Whether it be overcrowding concerns, or inadequacies in medical care, or other complaints, these lawsuits highlight the inadequacy of the existing prison system to accommodate the current prison population. This argument is similar in flavor to others who argued successful court orders promoted prison expansion and increases in spending on prison capacity (Boylan and Mocan 2014, Guetzkow and Schoon 2015, Schoenfeld 2010), but this study emphasizes the role of *all* lawsuits in this process, and not just successful ones. Without the bargaining chip of a successful lawsuit to prompt public prison expansion, states needed an alternative source of revenue for this expansion: partnerships with private prison companies.

From a theoretical perspective, prison privatization allows the state to shift accountability away from the government to the private sector (Kay 1987, White 2001). No longer is it the fault of the public sector that prisons are failing, but rather it is now the responsibility of the private sector, allowing states to shift the blame for poor conditions onto private prison companies. This mechanism is similar to the debate at the core of the use of private military contractors abroad (Leander 2009). And similar to the legal murkiness described in more detail below in regard to private prisons, the legal uncertainty around the use of private military firms has also been a source of much controversy (Minow 2004).

Within the broad concept of accountability, there are several ways in which privatizing helps state government. First, there is the question of political accountability. In this vein, a growing number of inmate lawsuits brings public scorn and attention to poor conditions within prisons (Jacobs 1980). Privatizing the prisons, then, allows states to shift political accountability to these private companies and the negative media attention that comes with suffering prison conditions. Similarly, privatization is often accompanied with the appointment of a contract monitor or other government official, whose responsibility it is to oversee private operation of the prison. The appointment of this person, who in theory is supposed to ensure the government keeps a close eye on any problems happening within the facilities (Selman and Leighton 2010), in fact helps lessen governmental accountability (Raher 2010). Adding a layer of bureaucracy diffuses the blame for poor conditions within prisons - with the addition of the monitor, who is to blame for problems within prisons? It is thus more difficult, if not impossible, for voters to hold governmental representatives politically

accountable for poor conditions in prisons, as there are multiple layers of bureaucracy to contend with, and no clear attribution of responsibility for institutional failures. Not to mention, governmental officials may be reticent to question the contractor's operations, if the state is heavily reliant on them to manage their prisons (Raher 2010). Thus, privatizing prisons allows state governments to shift accountability away from themselves and add a complex layer of bureaucracy to make it even more difficult to hold the state responsible for poor conditions in these facilities.

Second, there is question of legal accountability, a complex question in the context of private prisons. In public prisons, inmates can bring claims against corrections officers, wardens, or the state itself for unconstitutional conditions of confinement. When a state holds some of its inmates in private facilities, the question of who the inmate can sue is a broader question - a private corrections officer[11], the private company, a government monitor, or the government itself (Tartaglia 2014). However, court decisions since the advent of private prisons have declared that private prisoners cannot sue the private guards or the private companies when there are sufficient state tort remedies, if the prisoner were to sue under section 1983 of federal law, the most common legal avenue for inmates (Tartaglia 2014). Similarly, inmates can only hold government monitors legally accountable if that monitor is actively and personally involved in depriving a prisoner of some right, an extremely high burden to prove. All that said, the law surrounding who is exactly responsible for events within private prisons (and in other realms of government privatization more generally) is far from

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

settled, making an already opaque litigation system even more inaccessible to the inmates seeking to sue (Gilmour and Jensen 1998, Raher 2010). By privatizing, states receive two potential significant benefits: it is perhaps even more difficult to hold them responsible legally for actions that happen within private prisons, and makes the litigation process even more difficult for inmates to access, thus stemming the flow of litigation overall.

Limiting state liability for privatization is evident in the construction of private prison contracts that require private companies to indemnify states of problems that occur within private prisons. As one example, a 2009 contract, collected by In the Public Interest, between CoreCivic and Nashville-Davidson County reads "The Contractor shall *protect, defend, indemnify, save and hold harmless Metro, all Metro Departments, agencies, boards and commissions, its officers, agents, servants and employees, including volunteers, from and against any and all claims, demands, expenses and liability* arising out of acts or omissions of the Contractor, its agents, servants, subcontractors and employees and any and all costs, expenses and attorney's fees incurred as a result of any such claim, demand or cause of action" (emphasis added; In the Public Interest 2013). These clauses are commonplace in both the contracts and any enabling legislation of privatization, specifically codifying that states are indemnified from legal action and only the private companies are responsible instead.

The limited liability also has financial benefits: states are incentivized to avoid further prisoner litigation to save money[12] and personnel time (Burkhardt and Jones

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

2016). Though there is no concrete source on the precise costs of inmate litigation, the estimates reported in journalistic accounts are significant: California, for example, spent over \$200 million over fifteen years on legal fees and costs of providing inmates with attorneys to sue the government (Associated Press 2013). Florida spent over \$1.5 million on these lawsuits annually in the 1990s (State Journal Register 1996). One inmate in Wisconsin alone filed 117 lawsuits in the 1990s, costing the state \$1.7 million dollars (Wisconsin State Journal 1998). And, of course, while this is not a significant proportion of state budgets, it nevertheless represents a cost seen as simply unnecessary for the states to absorb.

States that were not forced to reform their prisons under the watchful eye of attorneys and judges thus did not find this public option much 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 are "... particularly adept and experienced in assisting and advising government agencies and community representatives on methods of financing new facility construction, such as tax exempt municipal bonds or cer-

tificates 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, but are also highlighting existing issues within public correctional systems.

CCA argues in their 1986 annual report in response to concerns of overcrowding that "government response to this growth has been hampered by the administrative and budgetary problems traditionally plaguing public sector facilities" (Corrections Corporation of America 1986). Similarly, "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 to meet constitutional standards" (Corrections Corporation of America 1986). CCA's and GEO Group's promises of fast-track construction techniques and flexible financing is incredibly alluring to state officials struggling with how to find the funds to build new prisons. Their lobbying efforts, described by CCA, specifically state the company was targeting politicians in states that have considered legislation to allow privatization or in those states that are sympathetic to privatization for some reason (Corrections Corporation of America 1986).

States ran out of options to finance their prisons and private companies realized the benefit of targeting their marketing to highlight their flexible financing options and cheap upfront costs. 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).

Taken together, these dynamics suggest prison privatization is beneficial for states facing more litigation, as it helps limit their legal and political accountability in doing so. The complex legal rules surrounding prison privatization, and the complex chain of blame attribution that occurs when a state privatizes, contributes to this incentive and forms the basis for my primary hypothesis.

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

3.3.2   Successful Lawsuits

The widespread geographic impact of successful prisoners' rights cases prompted state action in response (Feeley and Rubin 2000). Briefly, I argue that unlike the sum of all lawsuits, which are primarily successes for state governments, successful lawsuits make it less likely for a state to privatize its prison system. The state is being held accountable for poor prison conditions within the corrections system, and thus no longer has the incentive to privatize to avoid legal and political accountability concerns of these lawsuits.

To illustrate the common dynamics at play in these successful lawsuits it is useful to revisit three blockbuster lawsuits that were typical cases in the beginning of the prisoners' rights movement: *Holt v. Sarver I and II* in Arkansas in 1969 and 1970, *Pugh v. Locke* in Alabama in 1976, and *Ruiz v. Estelle* in Texas in 1980.

The first comprehensive prisoner rights case occurred in Arkansas, *Holt v. Sarver* in 1969. Judge J. Smith Henley appointed local attorneys to represent the group of

inmates suing the state government and consequently relied heavily on the expert testimony presented in the case to issue the resulting court order, which acknowledged the horrific conditions within state prisons at the time and provided a general set of recommendations to improve existing problems (Feeley and Rubin 2000, Feeley and Swearingen 2004). The recommendations from the judge covered not only overcrowding within the states' prisons, but also ordered the elimination of the trustee guard system and the establishment of higher standards for inmate safety, health, and sanitation (Harriman and Straussman 1983). Henley handed down his order in 1969, but his involvement did not stop there. He ordered the state to report back on its progress toward sufficient health and safety standards for inmates, but lack of action by state officials prompted Henley to declare the entire system unconstitutional in *Holt v. Sarver II* in 1970. For nearly a decade afterward, the judge heard a barrage of additional cases after appointing two new lawyers to the case including Philip Kaplan, an attorney experienced with the civil rights movement (Feeley and Rubin 2000, Feeley and Swearingen 2004). These additional lawsuits accused the state corrections system of violating prisoners' constitutional rights even after the disposition of the original case, which culminated in Henley then ordered reports and updates[13] on the state's progress in meeting the judge's recommendations. In the years following this blockbuster decision, Henley issued several supplemental decrees, kept close tabs on corrections officials, and even toured the prisons himself (Feeley and Rubin 2000). The close surveillance of the corrections bureaucracy continued for over a decade as

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[13]Interestingly, the new state corrections commissioner at the time was Terrell Don Hutto, one of the co-founders of the largest private prison company in the United States, CoreCivic (Feeley and Rubin 2000, Selman and Leighton 2010).

the judge and lawyers alike continued to ensure compliance with the court's order.

Second, another early successful prisoners' rights case is *Pugh v. Locke*, an Alabama decision handed down in 1976. Frank Johnson, a district judge in the state, received several complaints from inmates in state prison systems and responded by bringing in private counsel, the ACLU National Prison Project, the U.S. Attorney's Office, and the Department of Justice's Civil Rights Division to investigate these claims (Schlanger 2006). The subsequent trial was short, as the state essentially admitted it had not provided adequate conditions for their prisoners (Robbins and Buser 1977, Yackle 1989). Johnson issued a highly detailed order, demanding the establishment of a classification system and a minimum size of state prison cells (Yackle 1989). Johnson's extensive involvement was instrumental in ensuring the wide scope of the order and his willingness to include experienced counsel for the plaintiffs signalled his commitment to improving prison conditions. *Pugh* lasted for years, as the state negotiated[14] with prisoners' lawyers and Judge Johnson. After Johnson was replaced by Robert Varner when Johnson moved to the U.S. Circuit Court of Appeals, the case culminated in judicial mandates to release prisoners and improve conditions within the existing facilities (Yackle 1989). These actors entered a protracted battle to ensure state compliance with the court order, but the sweeping order against the prison system came to an end in 1984 as the state made enough progress to limit judicial supervision of the carceral system (Yackle 1989).

Finally, the paradigmatic prisoners' rights case is arguably *Ruiz v. Estelle*, a Texas

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[14]In a more colorful comment, Alabama Governor George Wallace remarked "thugs and federal judges" had "just about taken over society" (Yackle 1989).

case decided in 1980. This case originated when Judge William Wayne Justice sought out complaints from prisoners in state facilities and asked his law clerks to find representative plaintiffs to sue the state government for deficiencies in safety and health within prisons (Justice 1990). Then, Justice asked William Bennett Turner[15], a seasoned civil rights lawyer from the NAACP Legal Fund, to represent the plaintiffs, who were now organized into a large class action suit against the state of Texas (Feeley and Rubin 2000, Justice 1990). This lawsuit detailed the horrific and violent conditions within Texas prisons, most notably the building tenders system that imbued some prisoners with power over others, resulting in mass physical and sexual abuse of those inmates not in a position of power (DiIulio 1987). Justice's order against the state furiously detailed the abuses prisoners underwent while incarcerated and ordered the state to fix these problems (Feeley and Rubin 2000). Afterward, the judge also appointed a special monitor to ensure compliance with his court order shortly after his decision. Over the next decade, the Texas Department of Corrections experienced a period of instability as multiple directors of the department resigned under pressure to conform to the court order, an order which the department resisted at every turn (Ekland-Olson and Martin 1988, Feeley and Rubin 2000). Eventually the state adapted to the new requirements, but it took more than a decade: Justice didn't relinquish his court order until 1992, and even then, he was unsure of the effects of *Ruiz v. Estelle* considering the vast increase in incarceration that had happened in the previous decade (Feeley and Rubin 2000).

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[15]Judge Justice also sought out the advice of Judge Johnson, who presided over the expansive order in *Pugh v. Locke* in Alabama in the 1970s (Justice 1990).

These three cases - *Holt v. Sarver I and II*, *Pugh v. Locke*, and *Ruiz v. Estelle* - are paradigmatic of the earliest successful lawsuits against state prison systems. The similarities among the lawsuits, as well as states' responses to these victories, are essential for understanding why a state with more successful lawsuits will be less likely to privatize their corrections systems. Most notably, lawyers, judges, prisoners, and the state bureaucracy are in constant communication to ensure state compliance with any and all judicial requests regarding the prison system. There are three common- alities between these cases that ensure the state is held accountable for poor prison conditions: the judge is intimately involved in prison reform; continued monitoring of state actions within prisons; and the establishment of bureaucratic standards in response to the court order.

First, judges were instrumental in bringing in successful lawyers, experienced with litigating cases regarding civil rights, signaling both their willingness and commitment to ensuring prisoners are substantively represented. Moreover, once the judge handed down the court order, he worked with the attorneys to ensure state compliance with judicial recommendations. Judges heard appeals from prisoners in the systems, even touring the facilities themselves and keeping abreast of the contemporary challenges inmates faced (Feeley and Rubin 2000, Justice 1990, Yackle 1989). The continued involvement of the judge meant the state could not shirk from its responsibilities to improve the corrections system and the judge's continued involvement held the state truly accountable for actions that occurred in these prison systems, at least while the court order was in place.

Second, judicial involvement ensured continued monitoring of state action in the

corrections system, but others more broadly were involved in confirming compliance with court orders. In a variety of cases, most notably *Ruiz v. Estelle*, the court appointed a special master to report to the judge on the department of corrections' progress in adhering to the court order (Justice 1990). These monitors provide an additional layer of accountability in which judges are able to check compliance without monitoring the bureaucracy itself. Not only were monitors instrumental in ensuring compliance, but the lawyers in the cases also had a keen interest 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 more experienced lawyers stepped in to represent prisoners (Schlanger 1998-1999). Lawyers were in touch with their clients and able to alert the judge quickly if the state did not following through on their promises. Continued attention to public prisons shone a spotlight on an otherwise opaque system and provides an opportunity for judges and lawyers alike to keep tabs on the bureaucracy.

Finally, these court orders ensured state was accountable for these poor prison conditions via the actual translation of the court order to policy. Prolonged attention paid to the corrections systems makes compliance with court orders, whether they mandate new construction of prisons[16] or more vague requirements to alleviate over-crowding 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

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[16]Though, it is worth noting court orders may force states to spend more on corrections, but specifically on capital outlays, or the construction of new facilities and the like (Taggart 1989).

a whole and genuinely incorporate the requests of judges into corrections systems (Feeley and Rubin 2000). To respond to the orders placed on the corrections systems, bureaucrats must fundamentally alter their operations in response. 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 their previous counterparts (Feeley and Swearingen 2004). Additionally, the court orders were not only tolerated and adapted by prison officials, but were welcomed by these administrators. The orders effectively gave bureaucrats within corrections departments leverage in the budget process, to procure additional resources for the facilities (Rosenberg 2008). It additionally 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). Judicial action now, though occasionally undesirable in its scope and magnitude, can help prevent even bigger problems from occurring later and prevent the additional involvement of the judiciary in the prison system.

These three factors - judicial involvement, continued monitoring of court order compliance by other actors like special masters and lawyers, and the development of

clear bureaucratic standards - ensure the state is held accountable for poor prison conditions. Whereas privatization is attractive to limit political and legal accountability, if the state is already held accountable for improving prison conditions, it no longer has the incentive to privatize to avoid this responsibility. States are forced to accommodate reforms via the expansion of existing prisons or construction of new facilities, a process conducted under close attention of the judge and attorneys. It is thus unnecessary to export the operations of prisons to private companies: the state is slowly, sometimes painfully, implementing court orders and building or renovating public facilities themselves. The promises of private companies, to save money and build new facilities easily and cheaply, thus 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 antiquated workforce is replaced by professional workers who are reluctant to hand over operations of correctional institutions to private companies.

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 and were held accountable to court orders. This reformation occurs in-house, as states remove antiquated traditions of prison life and replace those traditions with a streamlined prison bureaucracy that accommodates the wishes of the judiciary. Privatization of these facilities is unnecessary and successful court orders ensure that the most attractive benefit of privatization, the limitation of legal and political accountability,

no longer exists. States thus have no more incentive to privatize their prisons.

This dynamic is also one recognized by private companies themselves: in response to a 2011 court case, *Brown v. Plata*, reports to shareholders from private prison companies indicate their unease about this successful lawsuit. 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; CoreCivic 2012). 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; GEO Group 2012).

This intuition leads me to my second hypothesis.

Hypothesis 2: *States in which prisoners won a higher proportion of lawsuits against prison officials are less likely to privatize their corrections systems.*

3.4   Discussion and Conclusion

' A state is not at liberty to afford its citizens only those constitutional rights which fit comfortably within its budget.'
Frank v. Wallace (1976)

The above sections detail the two main expectations of this project and expect varying outcomes of lawsuits depending on the characteristic of those petitions examined. My primary hypothesis argues states will be more likely to privatize their prisons in the face of mounting lawsuits to limit their legal and political accountability. The legal murkiness around lawsuits in private prisons, and the opaque nature of these contracts mean it is difficult, if not impossible, to know who to hold responsible for problems that occur within private prisons. These for-profit companies then present themselves as panaceas to the problems of public-run prisons and concentrate their marketing efforts to those states. The second hypothesis considers what happens when states are legitimately held accountable for poor prison conditions, when a court order is handed down. I hypothesize more successful prisoners' rights lawsuits is associated with less prison privatization. Successful lawsuits involve the judge, outside monitors, and attorneys in the monitoring of state corrections systems to ensure compliance with the terms of the court orders. States respond by professionalizing their corrections bureaucracy and complying with the court order via new construction or expansion of facilities in line with judicial recommendations. Because the state is held accountable for poor prison conditions, it no longer has the incentive to privatize.

This chapter developed the theoretical expectations for the relationship between

prisoners' rights lawsuits and prison privatization. The next chapter takes up these expectations empirically, by utilizing an original dataset of private prisons and prisoners' lawsuits to investigate this relationship. To what degree is the nature of a state's correctional institution conditioned by its response to prisoner litigation and were there unintended consequences of the increasing legal representation of inmates?

Chapter 4

Do Lawsuits Affect Prison Privatization? An Empirical Analysis

None of the common explanations for the rise in prison privatization explain the scope or adoption of this policy, so what does? The last chapter laid the theoretical groundwork for this project, analyzing how the prisoners' rights movement and the litigation it spurred influenced a state's decision to privatize its prisons, a story largely about accountability. I proposed two hypotheses: primarily, a state that faces more prisoner lawsuits, regardless of outcome, will be more likely to privatize their prisons. Privatizing helps states avoid legal and political accountability for the claims raised in these lawsuits. The legal murkiness around lawsuit filing in private prisons, along with the complex question of who is responsible for poor conditions within prisons, make it

more likely for a state to privatize. Conversely, the second hypothesis argues a state with more successful lawsuits will be *less* likely to privatize. Judges, outside monitors, and the establishment of clear rules and procedures for prison life ensure that the state is already held accountable for poor prison conditions. States experiencing successful lawsuits therefore have no incentive to privatize to avoid accountability, as they are already held accountable for deficiencies in conditions of confinement. Taken together, the main theoretical argument presented here posits prisoner lawsuits are instrumental in the choice to privatize.

This section aims to evaluate these hypotheses empirically. First, I describe the data utilized in this project on both inmate lawsuits and private prisons, and present some descriptive data on these phenomenon. I then develop an original state-year dataset that uses information on both of these categories in tandem. Next, I consider what the best methodological choice is to estimate the relationship between both the sum of all prisoner lawsuits and successful inmate litigation, and the presence of private prisons. Because these relationships are likely endogenous, as the causal arrow between inmate lawsuits and private prisons likely goes both ways, I use a set of instrumental variables analyses alongside a set of ordinary least squares models to estimate this relationship. I find broad support for both the hypotheses in the previous chapter, that an increased amount of litigation increases the likelihood a state will privatize and more successful court orders decreases the likelihood a state will privatize. I present some additional tests of the theory and robustness checks, along with some contextual examples of my hypotheses to further emphasize these dynamics. Finally, I evaluate my theoretical claims in the face of the quantitative

evidence I marshal and offer implications for the results presented here. If efforts to enshrine populations with rights previously denied to them contributes to unintended and perhaps unwanted consequences, what effect, if any, does that have on our evaluation of the rights revolution writ large? How does our evaluation of the success of the prisoners' rights movement change if that revolution shifted penal policy in an unexpected, and perhaps negative, way?

4.1 Data: Private Prisons and Inmate Litigation

This chapter uses the original data introduced in Chapter 2 to evaluate the effect of either successful lawsuits or more lawsuits overall on prison privatization. I read dozens of Securities and Exchange Commission (SEC) reports to develop a comprehensive dataset on private prison adoption over the last four decades. These data comprise only those for-profit correctional institutions operated by publicly traded companies, representing the vast majority of this market, approximately 85% of all private prisons in the country (Mumford, Schanzenbach and Nunn 2016). In the analyses below, I use three separate dependent variables to reflect variation in private prison adoption: the sum of all inmates under a state's jurisdiction held in private facilities, the proportion of all prisoners under a state's jurisdiction in these private facilities, and finally the number of private prisons in the state that holds a state's inmates. Figures 4.1, 4.2, and 4.3 highlight these variables[1] from 1986 to 2016 for all states.

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[1]Note the number of private inmates and the number of private state facilities are logged for ease of interpretation, but see Appendix for the absolute value of these variables.
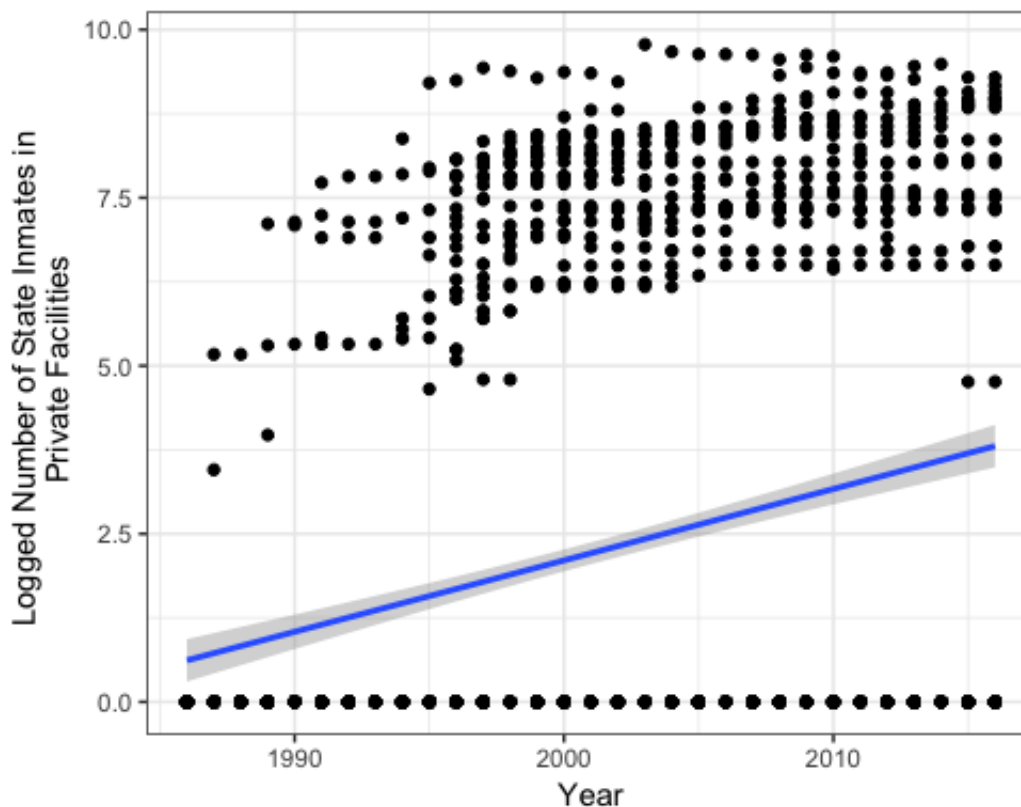
Figure 4.1: Logged number of inmates under a state's jurisdiction in private facilities, 1986 to 2016.

Over the last four decades, all three variables are increasing. There are quite a few states that consistently have zero values for all three of these variables, but there is great variation in how much the states use private prisons in the aggregate, and as a proportion of their total prison system. While California and Texas, for example, hold the highest number of inmates in private facilities, it is the smaller states like New Mexico and Hawaii that use private prisons at the highest percentage of their total prison system. Either way, these graphs highlight the vast variation over time and across states in private prisons.

The second step in estimating this relationship is the collection of data on inmate litigation. To test both hypotheses from Chapter 3, we need two separate sources of
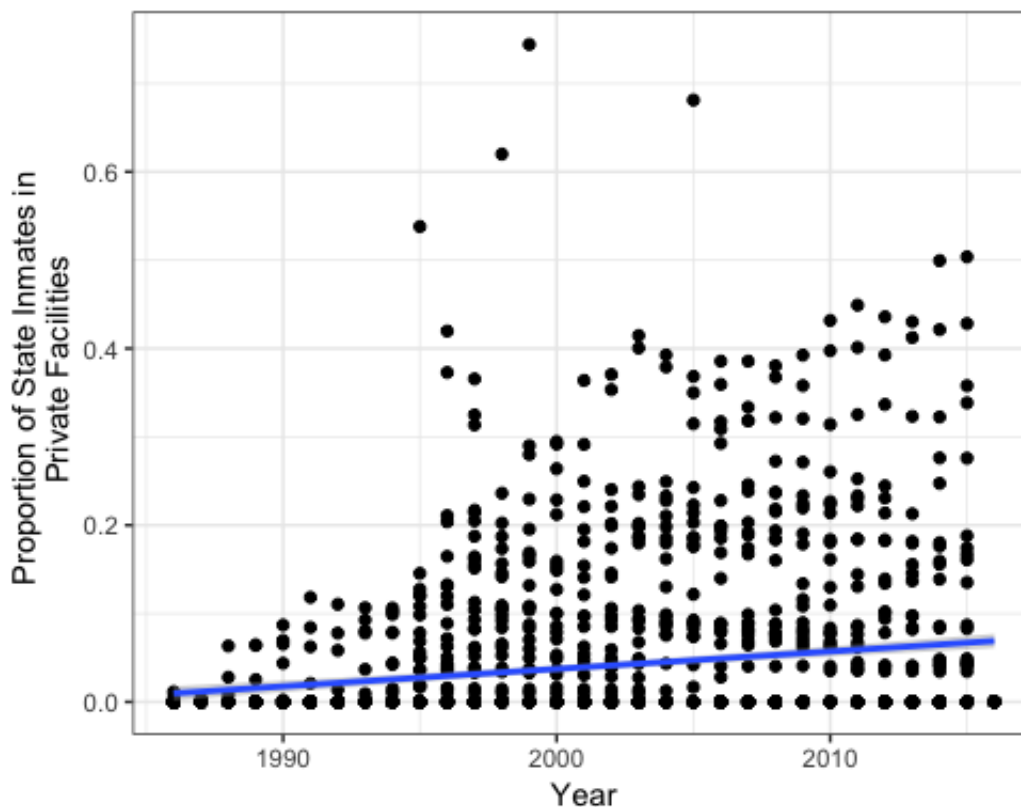
Figure 4.2: Proportion of inmates under a state's jurisdiction in private facilities, 1986 to 2016.

information on inmate litigation: the sum of all these lawsuits filed by prisoners and the number of successful lawsuits.

First, to test the effect of a higher amount of inmate litigation on private prison adoption, I constructed a large dataset of all the "Prisoner Petition" cases[2] filed in the federal district courts from 1986 (the first year of available SEC data for private prisons) to 2016. I utilized two separate sources, the Federal Judicial Center's Integrated Database (FJC) and Bloomberg Law, to create a comprehensive dataset

[2]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). It does not include those cases filed under Nature of Suit code 440 (Civil Rights: Other Civil Rights) which may also include important prisoner litigation (Schlanger 2003). Because not all of those cases involve prisoners, and because identifying those applying to inmates would require individual research into each case, I only focused on those cases that were explicitly included in the "Prisoner Petition" category as identified by the United States Courts.
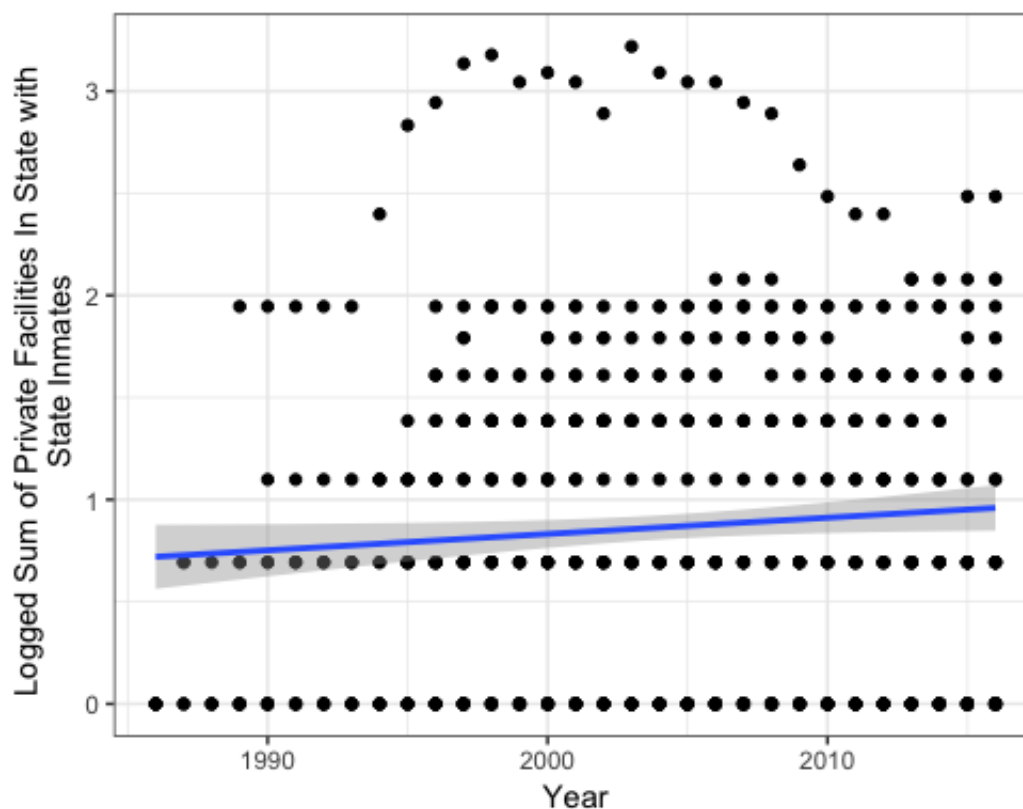
Figure 4.3: Logged number of private facilities in a state that hold state inmates, 1986 to 2016.

of each court case filed and terminated in each state-year. I merged these two sources together to create a dataset of 849,310 court cases filed by prisoners in all states[3] from 1986 through 2016. Each court case contains information about a battery of case outcomes: who won the case (plaintiff, the prisoner, or the defendant, the state or local correctional institution), the damages awarded to the plaintiff (if applicable), among other characteristics. The outcome is a state-year dataset with information on the sum of the number of inmate lawsuits terminated in each year from 1986 to 2016.

Figure 4.4 represents the number of prisoners' lawsuits filed and terminated in the

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[3]This does not include cases filed in the District of Columbia, Puerto Rico, Guam, Northern Mariana Islands, Virgin Islands, or the Canal Zone.

district courts each year, from 1985 to 2016. Similarly, Figure 4.5 highlights the rate

of filing, how many inmates filed lawsuits in each year per 100,000 prison population.
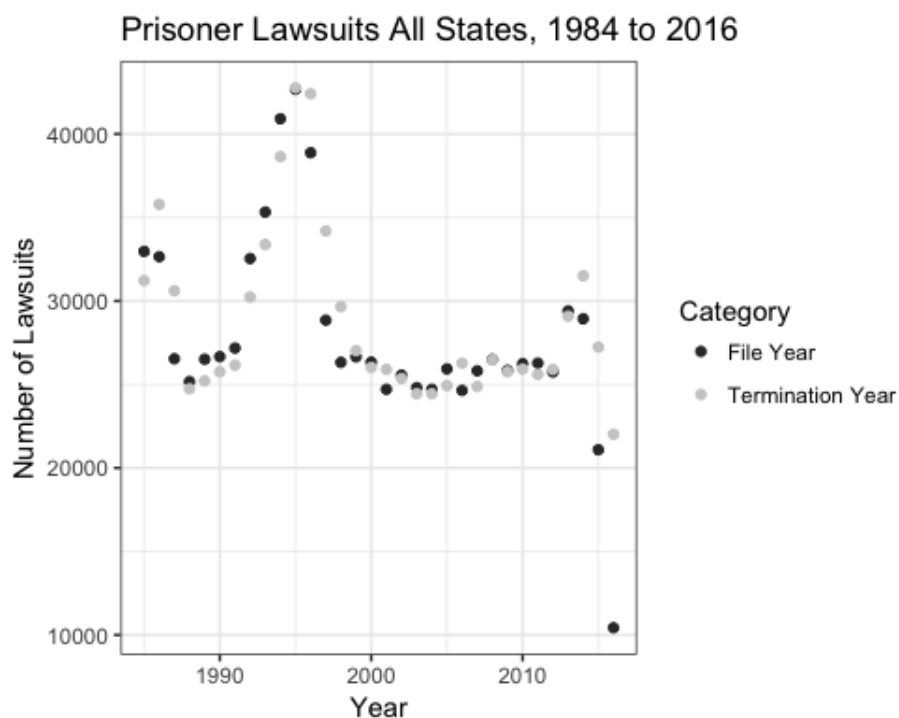
Figure 4.4: Prisoners' lawsuits, filed and terminated 1985 to 2016. Data from the Federal Judicial Center.

In any given year, inmates nationwide file tens of thousands of lawsuits to protest

conditions of their incarceration. There is a large uptick in the beginning of the time

period, the 1980s to the mid-1990s, until the Prison Litigation Reform Act (PLRA)

is passed in 1996. Recall from the last chapter that the PLRA severely curtailed

inmates' ability to file lawsuits in federal courts, which gives substantial leverage to

state governments in these litigation proceedings[4], all the while limiting any power

inmates have in the system (Schlanger 2015). That sharp break is followed by a

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[4]Moreover, the PLRA stipulates that defendants (in my case, state governments) unhappy with court orders that are more than two years old can seek immediate termination of those orders. Additionally, defendants have a period of thirty to ninety days after the immediate termination proceedings have initiated during which the court order is not in effect, thus giving a time advantage to those governments (Schlanger 2006).
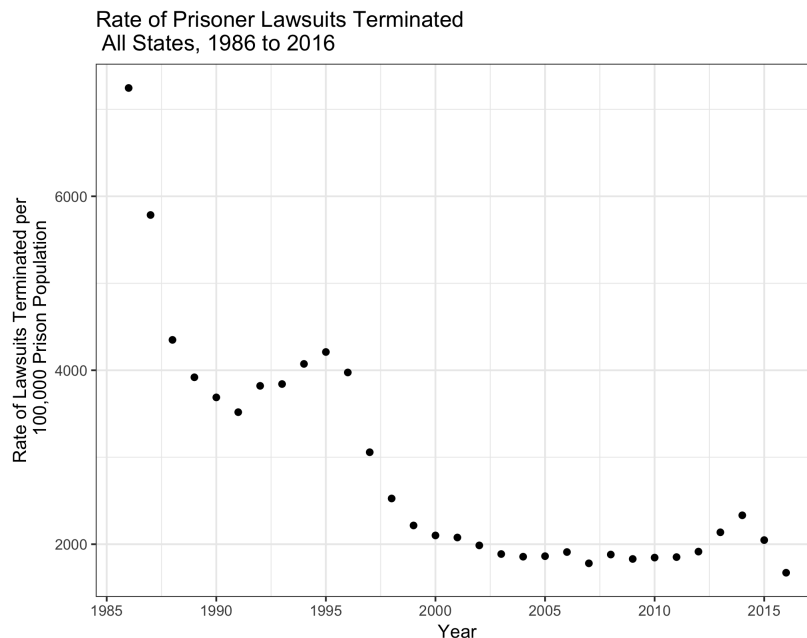
Figure 4.5: Rate of prisoners' lawsuits terminated per 100,000 inmate population, 1986 to 2016. Data from the Federal Judicial Center and the Bureau of Justice Statistics.

fairly consistent amount of inmate litigation through the 2000s, with another sharp dip beginning in the 2015-2016. It is unclear why this sharp decrease occurred, but overall district court filings decreased by over 2% in 2016 so perhaps the decline reflects a general downturn in the district court filings. Moreover, the FJC's data on district court filings by inmates also shows a sharp decrease for that year, so for some reason prisoners were less litigious in 2016 than in previous years. Either way, there is variation over the time period of this study, as prisoners used litigation more heavily in the earlier period, PLRA limited their legal options, then the level of inmate lawsuits reached a lower, rough equilibrium afterwards.

For the secondary hypothesis, that analyzes the effect of successful lawsuits on prison privatization, I need data on the court orders issued against the state for poor prison conditions in the last few decades. Scholars seeking to understand the compre-

hensive effect of successful court cases on corrections administrations within the states typically take a qualitative approach through the use of case studies (e.g. Schoenfeld 2010, Yackle 1989). This method is particularly useful for tracing the complicated and multi-pronged effect one court case could exert on a variety of institutions, as court orders are often complex in their scope and implementation. The drawback of this approach lies in its limited external validity as it is unclear to what extent the lessons gleaned from court cases in Alabama or Florida, for example, travel to other states.

Other large-N examinations of the effects of successful court cases identify a small number of individual court cases that were significant in their scope and analyze how outcomes shift when a state is under a comprehensive court order than when it is not (e.g. Boylan and Mocan 2014, Fliter 1996, Levitt 1996). Often, these analyses only cite those cases in which entire states' corrections systems were placed under court order, which does not allow scholars to identify the effects of not only the most comprehensive court orders, but also the effects of smaller cases that still award some improvement in conditions or treatment within corrections facilities.

These two approaches are useful, but they are less amenable to large-N studies of a host of court cases, prisoner litigation that includes not only blockbuster cases, but also those that achieve smaller goals for inmates. For information on success-ful lawsuits, 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 other law areas. 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. The CRC data contains a battery of information on these cases, on case characteristics of the attorneys representing the plaintiffs, whether the lawsuit was certified as a class action lawsuit, among others. Therefore, the universe of cases included in this dataset are the most consequential cases filed in each of these different case types, as determined by a number of law experts. This fits nicely with the expectations laid out in Hypothesis 2 as these experts selected only those cases that yielded policy change, and thus were the most likely alter the behavior of corrections departments.

For the purposes of this paper, I focus on the CRC's coding of important cases in either the "Jail Conditions"[5] or "Prison Conditions" category. This particular category mostly includes those cases prisoners won or settled for a decree of some kind to improve prison conditions[6]. 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 main independent variable of analysis is therefore *Sum Court Orders*, a sum of the number of lawsuits that led to the adoption of a court order in each state-year

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[5]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.

[6]Cases in which the plaintiffs were not successful or did not result in an injunction are mostly also not included. The only exception is the inclusion of jail and prison strip search class actions (see the CRC website for more information).
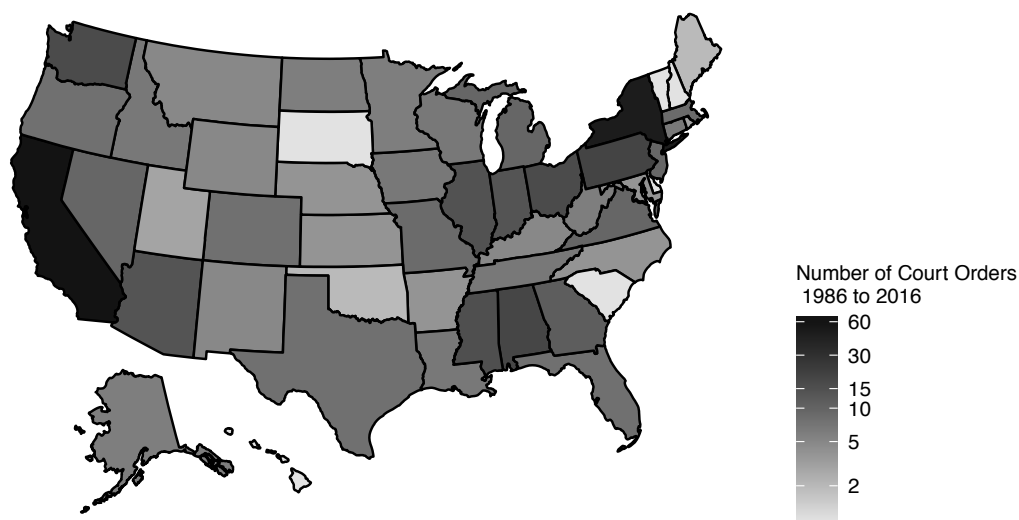
Figure 4.6: Sum of court orders issued, 1986 to 2016. Data from the Civil Rights Clearinghouse.

over the period 1986 to 2016. See Figure 4.6 for a map of the sum of these court orders over the last three decades. These 368 total 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 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[7] as a prisoner's primary legal pathway to relief.

For the most part, these successful lawsuits are filed under Section 1983 of the Civil Rights Act of 1871, which gives prisoners the right to sue the government for constitutional violations while incarcerated. The topics of these lawsuits are diverse and range from religious accommodations, to deprivation of healthcare, to segregation, among other concerns. 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 health and comfort of the inmates. These decrees mandated actions such as more diversity in the religious services offered to inmates, more recreation time for inmates in solitary confinement, and availability and quality of health and dental care[8]. 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 sheriff legal ability to release prisoners if and when the facility reached a certain population, or mandated the construction of a new jail[9]. Therefore,

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[7]The difficulty is exacerbated further because there is no consistent database on specific filings in state courts, so this data collection effort would likely involve scouring individual states' electronic or physical legal records.

[8]*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.

[9]*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.*

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. All the cases included in my sample resulted in some kind of court order, either imposed on the state by a judge or via a consent decree, which is negotiated and agreed upon by both the government and the inmates' lawyers. Moreover, the scope of these orders differ. Some place strict caps on the prison population, others mandate the construction of new facilities, whereas others task the corrections departments with developing a comprehensive set of guidelines to accommodate inmates' grievances. Though these successful lawsuits differ with the precise details of the complaint, because they all result in some kind of court order on the system, the government is prompted to develop professional, clear guidelines on the facet of prison life the inmate is litigating.

4.2 Estimating the Effect of Inmate Litigation on Private Prisons

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 relation-

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County of Fresno, filed in 1993 in the Eastern District of California; *Woodson v. Sully*, filed in 1985 in the District of Kansas, respectively.

ship, to show up empirically, the argument presented in Chapter 3 suggests that the opposite relationship is likely true, that privatization stems prisoner lawsuits. 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). Despite that belief, there is mixed evidence as to whether private facilities have a lower likelihood of being subjected to a court order (e.g. Burkhardt and Jones 2016, Makarios and Maahs 2012), but nevertheless the possibility remains prisoners are litigating complaints in a different way when incarcerated in private facilities. Legally this is correct, as inmates in private facilities have the power to sue individual officers for civil rights violations[10] and the companies that operate those facilities, but those same inmates are unable to sue the federal government directly for negligence and are only permitted to sue the company itself (Volokh 2013). Therefore, it is likely the relationship between prisoners' lawsuits and prison privatization is an endogenous one, complicating any methodological strategy for estimating this relationship. In particular, this potential issue can result in the independent variable, the sum of total 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

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[10]Indeed, the Supreme Court ruled in *Richardson v. McKnight* (1997) that private prison guards do not possess qualified immunity and can thus be sued individually for civil rights abuses. Correctional officers in public facilities have qualified immunity, so "private prison inmates even (at least in this respect) get more favorable treatment by the federal courts" (Volokh 2013).

Green 2011). A valid instrument additionally is independent of other preexisting determinants of the dependent variable, prison privatization. A valid instrument in this case must fit several characteristics, the most important of which is the instrument must serve as a source of exogenous variation that is currently missing from the analysis. To fit this characteristic, I look to the exogenous imposition of caseloads across the district courts.

Scholars often assume district court judges are randomly given cases ("from the wheel"[11]). Though this practice is often taken as a given by scholars studying the effects of district judges' characteristics on outcomes like sentencing disparities (e.g. Payne 1997, Schanzenbach 2005), it may be of practical importance that cases are not truly assigned randomly. Some studies have found non-random practices in assignment procedures in individual district courts (Ashenfelter, Eisenberg and Schwab 1995, Macfarlane 2014), so the assumption of random assignment is not always supported by the evidence. Indeed, scholars studying similar phenomenon at the Court of Appeals have cautioned against using random assignment as a cure-all for causal inference identification problems in studying the effect of judges' characteristics on various outcomes (Boyd, Epstein and Martin 2010, Hall 2010). Despite these legitimate concerns of nonrandom assignment, there are a few reasons to believe this is not a significant problem for the analysis presented here.

First, the analyses that cast doubt on the true random assignment of judges to cases often cite the Court of Appeals as the venue (Chilton and Levy 2015, Hall

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[11]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).

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, Hall 2010). Each judge in the district likely 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 of Lawsuits Terminated*. To do this, I consider the caseload facing district court judges. Because judges are assigned randomly to these cases, it is unlikely that they are actively manipulating their caseload. I therefore use *Weighted Cases Per Judge Serving* as my instrumental variable, which represents the weighted number of cases both active and senior judges hear in each state-year[12] (Habel and Scott 2014). This is a plausible instrument because one may expect judges that hear more cases each year to terminate more cases and vice versa, an overburdened judge has an incentive to terminate cases quickly to clear her docket. Finally, it is important the exclusion restriction is satisfied, which means the instrumental variable must not have any independent effect on prison privatization other than through the independent variable, the sum of all prisoners'

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[12]The FJC defines case weights to account for the varying lengths of time different categories of cases take to adjudicate (Habel and Scott 2014). See the appendix for more details and alternative operationalizations of this variable.

lawsuits (Sovey and Green 2011). This exclusion restriction is likely satisfied, as

Weighted Cases Per Judges Serving only influences prison privatization through *Sum*

of Lawsuits Terminated. It is unlikely varying numbers of cases heard prompts judges

to alter a state's corrections policy, as judges do not possess this policymaking power

and judges cannot easily modify the number of cases they hear. Additionally, it is

highly unlikely states will modify the character of their prison systems due to the

number of cases judges terminate in each year.

I estimate the following instrumental variables[13] analysis, two-stage least squares

(TSLS) equations on the data, details of which are found below. Equation 4.1 refers

to the first stage and Equation 4.2 refers to the second stage, in which I use the fitted

values from the first equation in place of *Sum Lawsuits.*

$$SumLawsuits_{i,t-1} = \alpha_i + \delta_t + WeightedCasesPerJudgesServing_{i_{t-1},t_{t-1}} + \epsilon_{i,t} \quad (4.1)$$

$$\boldsymbol{\gamma}_{i,t} = \alpha_i + \delta_t + Sum\hat{L}awsuits_{i_{t-1},t_{t-1}} + \epsilon_{i,t} \quad (4.2)$$

In this equation, $\boldsymbol{\gamma}_{i,t}$ is a set of dependent variables concerning private prisons:

Private Design Capacity, Proportion Inmates in Private Facilities, and *Number of*

Private Facilities - State Only, all of which are calculated using the original dataset

collected as part of this project. *Private Design Capacity* reflects the sum of inmates

under a state's jurisdiction that are confined in a private prison operated by a publicly

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[13]See the appendix for an OLS estimation similar to Chapter 2, in which I add the Sum of Prisoner Lawsuits Terminated along with the common explanations for privatization to the equation.

traded company. For those facilities with multiple customers, I averaged the total bed capacity across the jurisdictions. For example, North Lake Correctional Facility (operated by the GEO Group) lists both Vermont and Washington as its primary customers in 2016 but it is unclear how many of the prison's inmates are under either state's jurisdiction. This variable averages the total capacity, 1748, across the two jurisdictions. Thus, both Vermont and Washington are assigned 874 inmates (though I revisit this calculation in the supplementary materials). Second, I also calculate *Proportion Inmates in Private Facilities*, to define what percentage of the total prison system has been privatized. Third, I use *Number of Private Facilities - State Only*, a sum of state private facilities in each state-year, regardless of which company operates them. This dependent variable only considers those private facilities in a state that house that state's inmates, though I consider the sum of all private prisons, whether they be under local, state, or federal control, in the appendix.

The main explanatory variable of interest is *Sum Lawsuits Terminated*, the sum of all prisoner lawsuits terminated in each year. The instrumental variable, described in more detail above, is *Weighted Cases Per Judge Serving*, the weighted number of cases district court judges hear in each year. α_c refers to a vector of circuit intercepts, δ_t is a vector of year intercepts, and $\epsilon_{c,t}$ is a matrix of error terms. Finally, I cluster by circuit to reflect the systematic differences between various circuits. I use circuit fixed effects and clustered standard errors[14] rather than state, as in the earlier analysis, as nearly one-third of the states have *no* variation in the dependent variable. No control

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[14]Note, though, the results remain significant even when clustering by state.

variables are exogenous[15] and can be included in the TSLS estimation. A smaller number of circuits do not vary over time and while that is not ideal, it at least allows me to control for some geographic heterogeneity.

All explanatory variables, including the instrumental variable and the endogenous variable, are lagged by one year. So, *Sum Lawsuits*, 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 results from both the IV and OLS for the first dependent variable, the lagged number of inmates in private facilities, are in Table 4.1 below.

Table 4.1: Hypothesis 1: Lagged Private Design Capacity

	Dependent variable:		
	Lagged Private DC *OLS*	Sum Lawsuits *First Stage IV*	Lagged Private DC *IV*
	(1)	(2)	(3)
Sum Lawsuits	1.581***		2.105***
	(0.475)		(0.691)
Weight per Judge Serving		1.165**	
		(0.539)	
Constant	−1,277.341***	−308.691*	−1,005.074***
	(408.839)	(170.463)	(274.734)
N	1,581	1,200	1,200
Residual Std. Error	1,665.849 (df = 1539)	533.380 (df = 1165)	1,684.342 (df = 1165)
Circuit/Year FE	✓	✓	✓
F-Statistic		19.0337	

*p < .1; **p < .05; ***p < .01
All models have se's clustered by circuit.

The results corroborate the intuition behind Hypothesis 1 - as the sum of all pris-

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[15]See appendix for inclusion of population as a control.

oners' 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). These results suggest states are utilizing privatization more in the aggregate as the stress on the criminal justice system more broadly increases.

An identical analysis estimated using the lagged proportion of inmates in private facilities is in Table 4.2.

Table 4.2: Hypothesis 1: Lagged Proportion in Private Facilities

	Dependent variable:		
	Lagged Prop. in Private - *OLS*	Sum Lawsuits *First Stage IV*	Lagged Prop. in Private - *IV*
	(1)	(2)	(3)
Sum Lawsuits	−0.00001*		−0.00002
	(0.00001)		(0.0001)
Weight per Judge Serving		1.165**	
		(0.539)	
Constant	−0.038***	−308.691*	−0.044***
	(0.012)	(170.463)	(0.014)
N	1,581	1,200	1,200
R^2	0.233	0.366	0.236
Adjusted R^2	0.212	0.348	0.213
Residual Std. Error	0.080 (df = 1539)	533.380 (df = 1165)	0.085 (df = 1165)
Circuit/Year FE	✓	✓	✓
F-Statistic		19.0337	

*p < .1; **p < .05; ***p < .01
All models have se's clustered by circuit.

These results are not robust, but are suggestive of an opposite relationship to the results presented in Table 4.1: as the sum of prisoners' lawsuits increases, the proportion held in private facilities decreases. Table 4.2 suggests states that use private prisons to alleviate overcrowding also expand their public capacity at an even higher rate. However, because the OLS results are barely significant and the IV results do not rise to traditional significance levels, it is difficult to make a definitive conclusion about the effect of more prisoner litigation terminated on the proportion of a state's inmates held in private facilities.

Finally, the third dependent variable I examine is the sum of state private facilities. These results are in Table 4.3.

Table 4.3: Hypothesis 1: Lagged Sum Private Facilities - State Only

	Dependent variable:		
	Lagged Sum Facilities *OLS*	First Stage IV *First Stage IV*	Lagged Sum Facilities *IV*
	(1)	(2)	(3)
Sum Lawsuits	0.002**		0.003***
	(0.001)		(0.001)
Weight per Judge Serving		1.165**	
		(0.539)	
Constant	−1.290**	−308.691*	−0.896***
	(0.528)	(170.463)	(0.275)
N	1,581	1,200	1,200
R^2	0.525	0.366	0.536
Adjusted R^2	0.512	0.348	0.522
Residual Std. Error	1.714 (df = 1539)	533.380 (df = 1165)	1.859 (df = 1165)
Circuit/Year FE	✓	✓	✓
F-Statistic		19.0337	

*p < .1; **p < .05; ***p < .01
All models have se's clustered by circuit.

Similar to Table 4.1, there is a significant and positive relationship between the

number of state private prisons and inmate litigation. States house more private facilities within their boundaries when the sum of lawsuits filed by prisoners increases. This suggests another aggregate shift in the priorities of prison systems, to construct private facilities overall to mitigate the pressures of overcrowding.

I find support for Hypothesis 1 in the analyses presented in Tables 4.1, 4.2, and 4.3. The results from the OLS and IV estimations are substantively identical, providing encouraging evidence that the relationship posited in Hypothesis 2 persists even after accounting for endogeneity. However, the contradictory results in Tables 4.1 and 4.2 again suggest states are utilizing both private and public facilities to mitigate concerns of overcrowding in correctional institutions. While states are building more private facilities and housing more of their inmates in those kinds of institutions in the aggregate, the population in public-run facilities is still increasing at a higher rate than the private rate. This is in line with states' priorities as the incarceration rate rose precipitously - to house more inmates, public or not. Even states with the highest aggregate levels of privatization over this time period, like Texas or New Mexico, also vastly expanded their public system. The effect of more lawsuits on prison privatization is at least partially dependent on whether we are examining aggregate or proportional levels of privatization.

Finally, to ground these empirical results in context, we can return to the states described in more detail in the last chapter. New Mexico is one typical example of a state with few successful lawsuits, as only five suits prisoners brought in this state were successful from 1986 to 2016. Despite this, the state has one of the highest proportions of inmates in private facilities. How do we explain this divergence? I

argue, via Hypothesis 1, that states facing more litigation overall will turn to the private sector in an effort to deal with overcrowding crises brought to public attention through lawsuits. Privatization helps the state avoid the costly expense of opening new prisons and also helps them pass the buck of poorly operated prisons. As one editorial in the Santa Fe New Mexican put it in 1987, "the real force behind the attempt to push corrections operations into private industry might be to save politicians from the embarrassment and blame when incidents occur ... with a private prison, it would be convenient to blame all the problems on the contractor" (Santa Fe New Mexican 1987). This particular example concerns the operation of private prisons within a state's jurisdiction, but concerns about sending inmates to out-of-state facilities also follow a similar logic. Alaska, which has housed anywhere between 20 and 40% of its inmates in private prisons in other states, contemplated opening a facility of their own in the late 1990s to accommodate concerns of overcrowding (Daily Sitka Sentinel 1997). However, that expansion never occurred as costs of opening a public prison were just too high (in both start-up and maintenance) that the state continued to use private prisons out-of-state to provide an interim solution to the overcrowding problem. Both of these states illustrate the potential motivations behind privatizing: to shift blame away from the state for problems occurring within prisons and to provide an interim solution that does not require professionalization or the development of new prisons or guidelines.

It is also useful to consider one states' experience with privatization. Idaho began contracting with CoreCivic to operate Idaho Correctional Center in 2000. For the next decade, the state knew the facility was violating the contract and misrepresenting staff

hours, but it was not until extensive litigation occurred that the state took action and took back state ownership of the facility (Tartaglia 2014). This is an example of the political accountability mechanism working in reverse: the state privatized initially to avoid the problems associated with prisoner litigation, but soon that litigation got so severe that the state was facing media and public scorn about it. The state then took control of the facility back, as privatization no longer helped the state avoid accountability for these lawsuits. This examples help to provide context for the results in the tables, but they cannot tease out which mechanism is at play, whether states are avoiding legal or political accountability. Future study of these mechanisms and case study analysis in particular may help to illuminate these considerations.

4.3   Estimating the Effect of Successful Litigation on Private Prisons

Similar to the approach above, I use an instrumental variables regression[16] to limit the effect of endogeneity on my estimations. Because judges are in theory assigned randomly to 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

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[16]Similar to Hypothesis 1, see the appendix for OLS regressions as in Chapter 2, adding the Sum of Court Orders as an explanatory variable alongside the other typical explanations of privatization like ideology, economics, and unionization.

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 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 analysis requires the exclusion restriction to be satisfied, which mandates 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[17], 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 4.3 refers to the first stage and Equation 4.4 refers to the second stage, in which I use the fitted values from the first equation in place of *Sum Court Orders.*

$$SumCourtOrders_{i,t-1} = \alpha_c + \delta_t + \beta_1(PropPriorProsecutor_{i_{t-1},t_{t-1}}) + \epsilon_{c_1,t_1} \quad (4.3)$$

$$\gamma_{i,t} = \alpha_c + \delta_t + \beta_2(Sum\hat{Court}Orders_{i_{t-1},t_{t-1}}) + \epsilon_{c_2,t_2} \quad (4.4)$$

As above, $\gamma_{i,t}$ is a set of dependent variables concerning private prisons: *Private*

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

Design Capacity, Proportion Inmates in Private Facilities, and *Number of Private Facilities - State Only.* The variables are similarly lagged, as well as the inclusion of common fixed effects: α_i, circuit intercepts, δ_t, year intercepts (i.e. two-way fixed effects), and $\epsilon_{i,t}$, a vector of error terms.

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[18]. *Sum Court Orders* is from the CRC and represents the sum of court orders issued in the important prisoners' rights cases in each state-year.

This 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 4.4.

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

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[18]Part of this problem is the availability of electronic data on the identification of judges on individual cases in the 1980s.

Table 4.4: Hypothesis 2: 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/Year FE	✓	✓	✓
F-Statistic		11.424	
*p < .1; **p < .05; ***p < .01			

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

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* to serve as an instrumental variable. Though the specification isn't significant, it's p-value only barely misses statistical significance, meaning that the relationship between the proportion of judges who were prior prosecutors and the sum of prisoners' court orders is consistent. Additionally, the results from Column 3 support the contention of Hypothesis 2, that a higher number of court orders issued in a state-year makes it less likely for states to privatize. 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 reported there may be biased. Overall, it seems there is 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.

The identical analysis run using the dependent variable of *Lagged Proportion in Private Facilities* is in Table 4.5. Encouragingly, Table 4.5 highlights a similarity among the OLS and IV results in their magnitude - a higher number of court orders issued in the district courts results in a lower percentage of a state's prisoners in private facilities. However, the OLS results are significant, whereas the instrumental variables regression is not. One reason for caution against making firm conclusions from this analysis is the results from the Wu-Hausman test (not shown here), which labels IV again as the preferred choice over OLS given the endogeneity of *Sum Court Orders.* Therefore, even though the OLS results are significant and in the expected direction, we must take caution about generalizing from these results since the estimates are likely biased from the endogeneity concerns. Either way, there is some evidence for Hypothesis 2 utilizing this variable - states seem to be decreasing not only the number of inmates in private facilities (as in Table 4.4), but may also be decreasing the overall percentage of their inmates in private facilities.

Finally, the analysis run using the third dependent variable, *Lagged Number of Private Facilities - State Only* is reported in Table 4.6. Similar to Table 4.4, a higher number of court orders in a given-state year is associated with a lower number of private facilities, in the instrumental variables analysis. The Wu-Hausman test is significant at the 0.05 level, suggesting the IV estimation is more consistent than

Table 4.5: Hypothesis 2: Lagged Proportion in Private Facilities

	Lagged Prop. in Private - *OLS*	Sum Court Orders *First Stage IV*	Lagged Prop. in Private - *IV*
	(1)	(2)	(3)
Sum Court Orders	−0.009*		−0.122
	(0.005)		(0.161)
Prop. Prior Prosecutor		0.692	
		(0.424)	
Constant	−0.041***	0.183***	−0.023
	(0.012)	(0.070)	(0.032)
N	1,550	1,550	1,550
Residual Std. Error (df = 1508)	0.081	0.676	0.112
Circuit/Year FE	✓	✓	✓
F-Statistic		11.424	
*p < .1; **p < .05; ***p < .01			

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

OLS because of the endogeneity of *Court Orders.* This is more encouraging evidence of Hypothesis 2 that states utilize private facilities less often as the court gets more active in the administration of prisons.

Table 4.6: Hypothesis 1: Lagged Sum Private Facilities - State Only

	Lagged Sum Facilities -*OLS*	Sum Court Orders *First Stage IV*	Lagged Sum Facilities - *IV*
	(1)	(2)	(3)
Sum Court Orders	0.198		−4.435**
	(0.213)		(2.198)
Prop. Prior Prosecutor		0.692	
		(0.424)	
Constant	−0.934***	0.183***	−0.212
	(0.338)	(0.070)	(0.664)
N	1,550	1,550	1,550
Residual Std. Error (df = 1508)	2.021	0.676	3.737
Circuit/Year FE	✓	✓	✓
F-Statistic		11.424	
*p < .1; **p < .05; ***p < .01			

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

Collectively, the results from Tables 4.4, 4.5, and 4.6 support Hypothesis 2, that states with successful prisoners' rights litigation privatize at a lower rate. The narrative laid out in the previous chapter therefore finds some support in these analyses. Most importantly, it identifies the effect of the most important prisoners' rights cases, as determined by subject matter legal experts, and shows that states are indeed responsive to the orders of the judicial system. Not only does this provide encouraging evidence for the existence of checks and balances and cross-institutional enforcement of orders, but it also suggests that problems identified within the system are recognized by the state and institutionalized as reforms. The state is being held accountable for poor prison conditions and thus has no incentive to privatize its prisons.

It is useful to ground these empirical results with substantive examples, however. Much like the Arkansas case described in the previous chapter, *Holt v. Sarver I* and *Holt v. Sarver II*, states are professionalizing after a court order is handed down. The continued attention of the judge and attorneys involved in the litigation ensures compliance with the court order, that the state is truly reforming its prison facilities. It is likely because of this extended third-party enforcement of the court order that states, rather than waste their time and resources outsourcing carceral activities to the private sector, choose instead to reform in-house and privatize at a lower rate.

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, and follows the reasoning laid out in the previous chapter, for a few reasons. First, attorneys within larger community organizations represented these prisoners, as lawyers from The National Prison Project at the American Civil Liberties Union (ACLU) along with lawyers from the Neighborhood Legal Services Association represented the inmates. This burgeons the narrative that the most successful lawsuits are successful because of the involvement of larger organizations that help collate 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." All together, this prototypical case 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 at least some part of its operation to stay in compliance with the court order. Indeed, Pennsylvania never adopts private prisons at the state level and only contains one private facility, Moshannon Valley Correctional Center, that holds BOP prisoners and opened in 2006 after years of local opposition to the project. It seems that the state is following the narrative sketched out in the previous chapter by professionalizing only in response to a successful lawsuit and not privatizing as a result.

Substantively, this phenomenon is evident from the companies' perspectives as well, illustrated by one significant California case. In 2011, the Supreme Court handed down a historical decision regarding the extent of overcrowding in California's prison system. Writing for the majority, Justice Anthony Kennedy asserted,

> Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.

This blockbuster case, *Brown v. Plata*, was the product of two decades of litigation surrounding the unconstitutionality of mental health care and general medical services in California's prisons (Simon 2014). After the state dragged its heels in imposing real, procedural change in response to earlier court cases, a three-judge District Court panel met to decide whether to limit the state's prison population. The panel ordered California to reduce its prison overcrowding to 137.5% of the correctional facilities' design capacity, when those facilities were regularly operating at 200-300% of design capacity (Simon 2014). The Supreme Court affirmation of this order, that the judiciary has the right and responsibility to impose such an order, reinvigorated the calls for reform within California's criminal justice system. Not only was the case momentous for its scope and effect on the second largest state prison system in the United States, but it highlights the profound effect inmate litigation has on both the operation and character of correctional systems.

This case was resolved in 2011 when the Supreme Court affirmed the 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). After this decision was handed down, the two largest private prison companies in the country, CoreCivic and GEO Group, indicated to their shareholders that this occupancy would be a concern for the future of their business.

It is the central contention of this dissertation that this negative attitude of private prison companies to *Brown v. Plata* is not unique, but is instead indicative of a broader unease about the effect of successful lawsuits on finances. As states professionalize and adapt to the demands of the court order, not only do they have less demand for the beds offered by private companies, but it is also unnecessary for states to rely on private companies to pick up the slack when a successful order mandates clear action on behalf of the state corrections systems. Finally, both dynamics of Hypotheses 1 and 2 are illustrated fairly well by Hawaii's experience with both privatization and inmate lawsuits. 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).

4.4   Robustness Checks

To ensure these results are not products of any arbitrary modeling decisions, I utilize a few other estimation strategies to bolster the conclusions found thus far. First, the third dependent variable used in the TSLS estimation is *Number of Private Facilities - State Only.* It may be the case that all private facilities within a state's borders, whether they be state or federal or local, are similarly affected by prisoner lawsuits. I reran the analysis using the sum of private facilities within each state, including state, local, and federal prisons and jails, and the results were substantively identical to those found in Tables 4.3 and 4.6.

Second, though all of these models include fixed effects, they do not include any exogenous controls. 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. Though population is likely correlated with both incarceration rate

and budgetary resources of a state, it is not endogenous to the relationship. When I include this exogenous control variable, the direction of the variables largely do not change, but some coefficients lose their statistical power. 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 Tables 4.1, 4.2, and 4.3, remain the same. As the number of either logged or absolute lawsuits filed by prisoners increases, so too does the number of inmates in private facilities and the number of private facilities overall.

Finally, one may be concerned about the way I constructed the design capacity variable. Regarding facilities with multiple customers, 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, the facility I referenced earlier, 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[19] 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* and *Proportion in Private Facilities* as according to this measure. The substantive results from Tables 4.1, 4.2, 4.4, and 4.5 do not change as a result of this alternative operationalization of the dependent variable.

4.5 Discussion and Conclusion

Empirical testing of Hypotheses 1 and 2 resulted in fairly strong support of both intuitions: privatization is more likely in states facing a higher number of lawsuits and less likely in states facing a higher number of successful court orders. In the aggregate, a higher number of prisoner lawsuits results in higher numbers of private inmates and facilities. When examining the overall level of prison privatization, however, the relationship was negative. This indicates states are increasing their use of correctional privatization, but the expansion of publicly-run prisons were growing at a faster rate. Collectively, these results suggest a two-pronged approach to prison overcrowding, that states rely partially on privatization but more so on public-run facilities. They do this to limit accountability, as more lawsuits overall make a state more likely to

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[19]Therefore, I estimated the following equation: $\gamma_{ja,t,c} = \frac{PrisonPop_{ja,t}}{PrisonPop_{ja,t} + PrisonPop_{jb,t}} * DesignCapacity_{t,c}$, where $\gamma_{ja,t,c}$ represents the design capacity of facility c for jurisdiction ja in time t, $PrisonPop_{ja,t}$ represents the prison population of jurisdiction a in time t, and $PrisonPop_{jb,t}$ represents the prison population of jurisdiction b in time t.

seek out methods to reduce a state's legal and political accountability. On the other hand, successful lawsuits are holding states accountable for these conditions already, thus removing the state's incentive to do so.

These results are in line with other theoretical and quantitative work on the effects of prisoner litigation on various outcomes. States are responsive to litigation and change their corrections policy as a result (Levitt 1996, Schoenfeld 2018). 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. Successful lawsuits prompt institutional change within the states that experience them, as evidenced by the development of new rules and procedures, massive changes to a state's corrections bureaucracy, in the face of court orders (Justice 1990, Schoenfeld 2018, Yackle 1989).

Armed with the evidence of the unintended consequences of prisoner litigation more broadly, it becomes important to consider how private companies responded to lawsuits specifically and other political factors. Even if litigation is promoting favorable outcomes for private prison companies, that outcome is unimportant if these businesses do not consider political or institutional factors throughout their decision-making process. In particular, how do the fortunes of private prison companies change as the political environment shifts under them?

Chapter 5

Do Private Prison Firms Respond to Successful Prison Litigation?

The previous chapters analyzed the effect of prisoner litigation on corrections privatization and found support for the hypothesis that a higher number of lawsuits in aggregate makes it more likely for states to privatize their prisons. Those analyses considered the prison privatization process from the perspective of state actors, how institutional constraints from the judiciary prompted state representatives and bureaucrats to act in particular ways. This chapter instead focuses on how the actions of political actors inform the behavior of the other institution in this relationship, private prison companies.

To what degree do these companies react to political events like the announcement of prison consent decrees? It is of vital importance to ask this question to further illuminate the arguments presented in previous chapters. Even if state governments react in certain ways to particular events like prison overcrowding and inmate litigation,

that behavior means next to nothing unless private prison firms, and their investors, acknowledge the importance of those events. Specifically, the theory in Chapter 3 suggests a mutual relationship between politicians and firms, that governments are sometimes forced to privatize in response to carceral pressures but also that these companies actively seek out expansion opportunities, especially with sympathetic political representatives. This chapter considers the performance of private prison firms and seeks to discover the degree to which their finances are dependent on particular political events.

Unlike Chapter 3, the focus of this chapter is exclusively on the announcement of successful lawsuits, as those events are newsworthy and likely to catch the attention of investors. More lawsuits piling up in the judiciary is likely not interesting to these investors because they cannot readily observe it happening - they would need to be watching district court dockets to see if any prisoner litigation was filed each day. This onerous task is likely not one investors are engaged in. Therefore, I focus on the implications of Hypothesis 1 from Chapter 3. To do so, I consider the behavior and character of investors of private prison companies and develop some hypotheses about how those investors will respond to the announcement of successful lawsuits. I argue there will be no unconditional effect of successful lawsuits on stock performancein the aggregate, but there will be a significant and negative effect of the lawsuits in states with private facilities. These results are confirmed empirically, suggesting investors are the most savvy at responding to threats to business in states that have the most private prisons.

5.1 The Obama DOJ and Private Prisons

On August 11, 2016, the Office of the Inspector General (OIG) in the U.S. Department of Justice released a blockbuster report that maligned the private operation of several federal correctional facilities, revealing these prisons had comparatively more safety and security incidents than similar publicly-operated facilities. OIG noted the privately operated prisons - run by the three largest private prison operators in the country; CoreCivic, the GEO Group, and Management and Training Corporation (MTC) - had more assaults, uses of force, lockdowns, and contraband finds, among other safety and security incidents in these facilities (U.S. Department of Justice 2016). The damning report generated a wave of controversy about the role of private prisons in the federal prison system and reached an inflection point seven days later, on August 18, 2016, when Deputy Attorney General Sally Yates released a memorandum in response to the report's findings recommending the federal government either decline contract extensions or dramatically reduce their scope (Yates 2016).

There were quite a few reasons the report was not as dire for private prison business as the news implicated. For one, Yates' directive was only directed toward the Federal Bureau of Prisons (BOP), which accounted for only 9% of CoreCivic's revenue in 2016 and 14% of GEO Group's revenue in 2016[1]. Far more of the revenue from the federal government for each of these companies is concentrated in other branches not covered by this report, including the U.S. Marshal's Service (USMS)

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[1]Information gathered from those companies' Securities and Exchange Commission (SEC) reports. It is unclear how much of MTC's business was affected by this decision as the company does not publicly release revenue or customer information about their facilities, though only 2 of the 57 prisons they operated nationwide in 2016 appeared to be BOP facilities (Management and Training Corporation 2016).

and Immigration and Customs Enforcement (ICE), which both account for 43% of CoreCivic's revenue in 2016, 33.2% of GEO Group's revenue in the same year, and three of MTC's fifty-seven facilities in 2016.

Even though the comparative loss of BOP's business is not even close to the majority of the business these companies are engaged in with either the rest of the federal government or state governments, these companies' immediately suffered at the hands of their shareholders. Figure 5.1 below highlights how the returns of the two publicly traded companies[2] that had contracts with the federal government - CoreCivic and the GEO Group - dropped precipitously with the DOJ report release and the Yates announcement a week later.

Figure 5.1(a) is the two-year period that covers the DOJ announcement, whereas Figure 5.1(b) is the approximate six-month period around that announcement. The first dotted line in Figure 5.1 represents the Yates announcement of the rollback of the use of private prisons on August 18. The closing price of both companies' stocks dropped precipitously after the announcement, even though these companies still retained their most valuable federal customers, USMS and ICE. CoreCivic and GEO Group did not rebound quickly from this announcement until the second dotted line, three months later on November 8, 2016 - when Donald Trump was elected president. Shortly thereafter, Trump nominates Alabama Senator Jeff Sessions to be his attorney general on November 18 (the third dotted line), an announcement that continues the upward trajectory of the companies' closing stock prices. The

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[2]The rest of the analysis only considers the publicly traded companies - since MTC is not, I do not consider it here.
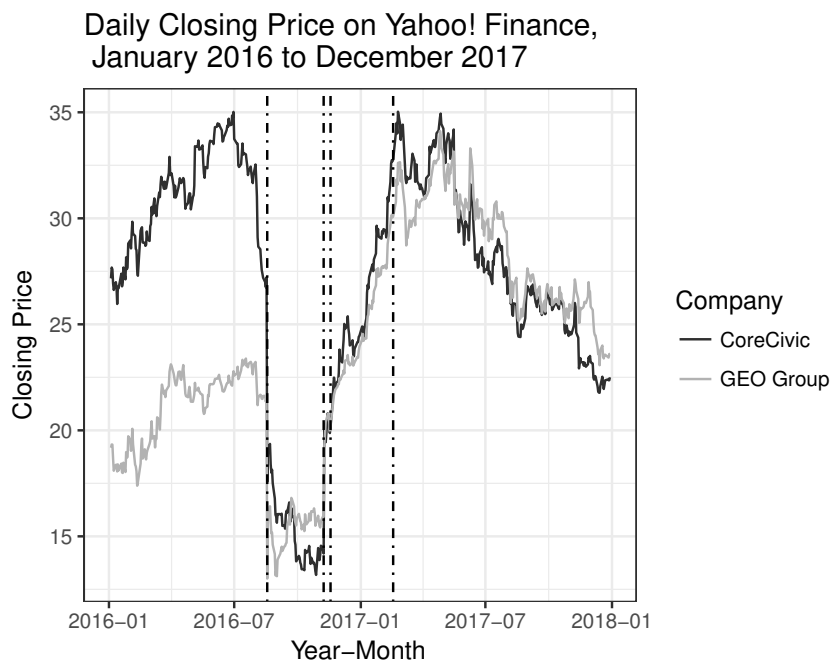
(a) January 2016 to December 2017
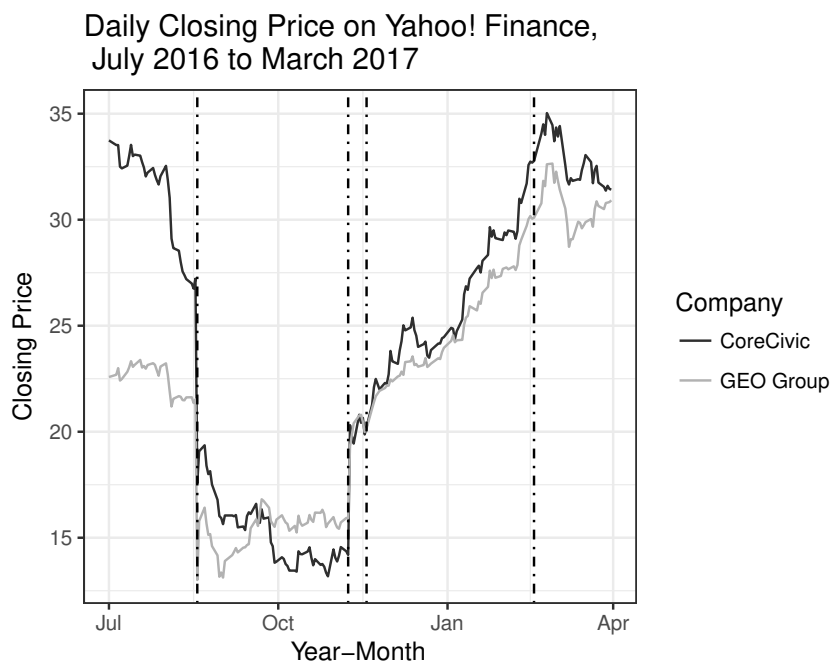
(b) July 2016 to March 2017

Figure 5.1: Closing prices of CoreCivic's and GEO Group's stock. In (a), across two years, and (b) across eight months. The four dotted lines are: Yates' announcement, Trump's election, Trump nomination of Jeff Sessions as attorney general, Sessions appointment.

ever increasing stock of these companies is indicative of the expectation of private prison firms that both Sessions and Trump would be supportive of federal carceral privatization. The final dotted line in Figure 5.1 is February 8, 2017, when Sessions is confirmed as the attorney general. Sessions soon rescinds the Yates memo and reasserts the federal government's support of private prisons, thus providing these companies and their shareholders reason to celebrate the election. The end of 2017 brings the closing prices of these firms to pre-Yates memo levels, indicating that shareholders are at least as confident in the future of their business as they were prior to that announcement.

Examining the stock performance of private prison firms is particularly illustrative of shareholder expectations about the companies' futures: are investors confident in the future of the business and in the viability of the government as a customer, at least for the foreseeable future? This short anecdote, though only one of many political events that can affect the financial performance of private prison firms, indicates a close relationship between politics and business in the realm of carceral privatization. And though this one example is particularly stark, it is only one event of many that provides prima facie evidence not only that private prison firms and their investors pay attention to politics, but that their business depends on it.

5.2 Investors, Stocks, and Company Performance

Companies that are publicly traded on the stock market - the private prison firms that are the subject of this project - often go public initially to get an infusion of

capital from selling shares. This capital can then be used to build the business, via the purchase of property, resources, or the like. After the initial public offering (IPO), however, stocks become less directly important to the fiscal health of the firm and instead act as important signals to investors of the company's health and well-being, particularly as compared to the competitors.

Stock prices are therefore a useful barometer for investors to assess a company's health and how confident investors appear to be in the future of the company. Though stock prices by themselves do not make firms money after the IPO phase (unless they release new shares for investors to purchase), there are a few reasons why these prices are so integral to the future of the business. First, investors that are unhappy with stock market performance can take drastic measures to alleviate that concern, through actions like a takeover of the board or forcing through changes to improve company performance. And because companies are required to file public documents with the Securities and Exchange Commission (SEC) once they go public, shareholders have access to a multitude of financial data they can use to their advantage to force changes within the company if need be. The second reason why stock prices are so important to company health is because so many board members also hold massive amounts of stock in their own company. Whether they are incentivized to do so via stock incentive programs or choose to invest in their own company by themselves, company employees who own stock are now financially invested in ensuring those stock prices remain high. Finally, lower stock prices could result in unintended financial consequences elsewhere: banks that are considering lending to a company will often take the firm's share price into account when making that decision. Therefore, the

new acquisition of loans or capital to build the business is at least partially dependent on stock prices.

Because the performance of stock prices is an overall indicator of economic health, with investors and company employees alike relying at least partially on rising stock prices to make money and build the business, fluctuations in these prices on the stock market are of particular import to study. The key question underlying analyses of stock prices then has to grapple with a tough puzzle: what explains changes in firm's stock prices over time?

The explanations for stock price fluctuations are many and diverse, from general macroeconomic changes in economic activity like inflation or interest rates to unobserved, private decisions made by shareholders[3], this chapter considers how changes in stock prices are altered by political events. Specifically, I engage the argument presented in Chapter 3 to hypothesize private prison firms' stocks suffer in response to the announcement of successful prisoners' rights lawsuits.

In particular, I argue shareholders will respond negatively to announcements of successful prisoners' rights lawsuits, but only in those states that have one or more private facilities within them. I expect a negative reaction to the issuance of a court order because of the reasoning described in more detail in Chapters 3 and 4. Successful prisoners' rights lawsuits prompt the state to professionalize and bureaucratize in response to the often very specific requests of the judiciary. The governments therefore have little incentive to outsource their carceral operations to the private sector, as

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[3]Indeed, about half of the variation in stock prices overall cannot be explained by macroeconomic shifts or major news events, meaning that decisions to purchase or sell stocks are explained at least half of the time by publicly unobservable choices or information held by investors (Cutler, Poterba and Summers 1989).

corrections departments adapt their behavior to the court orders and no longer need to look to the private sector for quick and easy solutions to prison overcrowding. That argument, detailed in Chapter 3, found empirical substantiation in Chapter 4 in which I found states with a higher number of successful court orders were less likely to privatize prisons. Because of these theoretical and empirical expectations, therefore, I hypothesize shareholders will respond negatively to the announcement of these court orders.

On the other hand, I do not expect all lawsuits, in the aggregate, will shift stock prices because not all these judicial orders will have any bearing whatsoever on the business of the private firms. That is, I have two separate expectations about the stock market behavior of these companies in response to the announcement of a judicial court order:

Hypothesis 1: *The stock market prices of private prison firms will not be affected, **on average**, when a successful prisoners' rights lawsuit is announced.*

Hypothesis 2: *The stock market prices of private prison firms will be negatively affected when the lawsuit occurs in a state with an existing private facility.*

These two hypotheses reflect the savviness of private prison investors, that only those legal orders that are the most important for the continuation of business will affect the stock price. The mechanism of investors responding quickly to the announcement of a court order is a general hypothesis put forth by the finance literature, but the specific aspects of the private prison industry illustrate how this intuition operates in practice.

5.3 Politics, Stocks, and Private Prison Firms

The private prison industry is a massively profitable one, but is largely dominated by two large firms - CoreCivic and the GEO Group. In 2016, these companies listed over $1.8 billion and $2.1 billion in revenues, respectively, from the operation and maintenance of dozens of private prisons and community corrections centers in the United States and abroad. These businesses are traded publicly and therefore are fixtures on the stock market, with CoreCivic and the GEO Group having over 118 million and 123 million shares outstanding as of 2018, respectively. Though this chapter is primarily tasked with analyzing the effects of Hypotheses 1 and 2 listed above, its goal is also to illuminate the stock performance and characteristics of these firms. With that in mind, what characterizes the stock performance of these companies?

Like other companies, private prison firms like CoreCivic and the GEO Group issue stock that is held by both individuals and institutions, like investment companies and large banks. Though individuals can and do hold stock in both firms, the vast majority of shareholders are institutions. As of 2017, over 80% of CoreCivic's stock was held by institutional investors, compared to more than 93% of the GEO Group's stock. Though the portfolio of institutional investors differed slightly across the two companies, the firms shared the top two institutional shareholders: Vanguard Group, an investment company, and Blackrock, Inc., a hedge fund. Among the hundreds of other investors include a multitude of investment banks like Northern Trust Corporation, multinational banks like Wells Fargo, and even public retirement funds from

at least a dozen states[4], including, ironically, one state that has statutorily outlawed private prisons: New York.

These institutions hold most of the stock in the two currently existing private prison firms and it is safe to say a fair amount of the individual investors in the firms are employees. While the largest investors in both CoreCivic and the GEO Group hold millions of shares, the board of directors and executive officers routinely hold thousands, sometimes hundreds of thousands, of stocks themselves. This provides employees an incentive to grow the business, thereby raising the stock price and resulting in more money for the workers.

Taken together, the institutional and individual investors of private prison firms determine each company's stock price. Though there is some evidence that these two groups behave differently in their investment behavior[5], this paper will largely focus on the attitude of large institutions, as these actors are the overwhelming shareholders in these firms.

Institutional investors have a fairly lengthy history with these companies, as the four companies included in this analysis have been publicly traded for multiple decades. CoreCivic has been publicly traded since October 1, 1986, GEO Group since July 27, 1994, Correctional Services Corporation (CSC) from February 1, 1994, to November 7, 2005, and Cornell Companies from October 3, 1996, to August 13,

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[4]Both CoreCivic and the GEO Group's investors include the public retirement funds for the states of California, New York, Alabama, Ohio, Texas, Arizona, Oregon, Michigan, New Mexico, Louisiana, Colorado, Kentucky, and Utah. The GEO Group also has investors from the state retirement systems in Florida and Pennsylvania.

[5]For example, individual investors are more likely to respond to attention-grabbing events and buy stocks of firms that have media announcements or abnormally positive stock performance (Barber and Odean 2008).

2010. 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. Figure 5.2 highlights the bid stock price of all four firms over the time period 1986 to 2016.
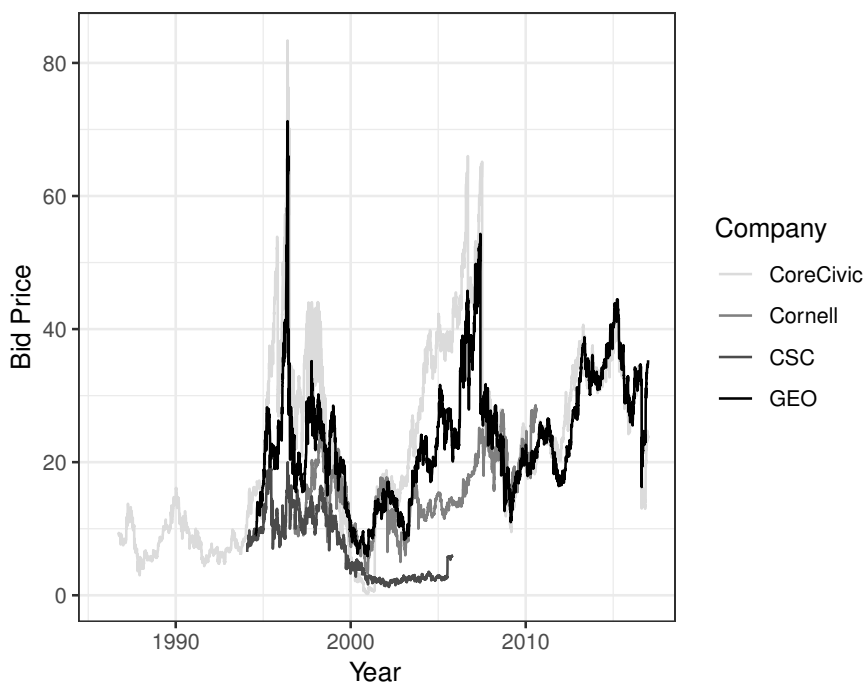
Figure 5.2: Bid price of private prison firms' stocks, 1986 to 2016.

The data source for this figure comes from the Center for Research in Security Prices (CRSP) and represents bid price, the daily maximum price an investor is willing to pay for a share in each private prison company. The CRSP data encompass a variety of stock market characteristics, including the volume of shares traded any given day, the price of the shares, value-weighted returns, among other variables. This data source will be used to construct the variable used in the analysis below, but this graph only reflects the bid price of each firms' stock over the time period of this study.

All four companies certainly have varying stock prices, but the broad patterns across the time period are consistent. A growing value of the firms' stocks as more private prisons are opened and the businesses grow, in the late 1990s and mid-2000s. After both CSC and Cornell are acquired by the GEO Group, the market for the private prison industry grows equally for both GEO and CoreCivic - their stock prices are nearly identical beginning in 2010 and that mirroring pattern remains even six years later. It appears that, at least in the aggregate, shifts in one company's stock are mirrored nearly exactly by shifts in the other's stock. This suggests broad market forces affect the stock performance of the entire industry more so than individual firms' changes in financial fortune.

5.3.1 Stock Market Volatility

Assessing the effect of events, the success of a prisoners' rights lawsuit in the context of this chapter, is a challenging estimation to conceptualize. The aim of the argument is to assess the effect of one event on the stock performance of these firms, but there can be multiple events not only per year, but per month, and the events are common to all firms (i.e. a successful lawsuit in California could feasibly affect the business of all private prison firms, not just those firms that operate in that state). To accommodate multiple events that affect multiple firms, I utilize an empirical approach typically chosen by scholars in marketing, finance, and economics: an event study analysis.

An event study is a useful tool for scholars seeking to understand the immediate effect of an event. It is difficult to measure how an event affects an outcome like

public policy regarding private prisons, for example, because there is no clear and unequivocal measure of what that policymaking would look like. It is therefore nearly impossible to isolate the precise effect of the event on policymaking without acknowledging the theoretically endless other factors that could determine changes in that policy. Furthermore, the time period of the effect is entirely unclear. The advantage of analyzing how an event, the announcement of a successful lawsuit in this study, affects an outcome like stock prices is I can isolate the immediate effect of the event on a rapidly changing outcome like stock prices (Campbell, Lo and MacKinlay 1996). Intuitively, this approach relies on the assumption that investors take into account events relevant to the businesses they are invested in and respond accordingly, via the buying or selling of stock (Fama et al. 1969).

An event study analyzes how an event, the announcement of a successful prisoner lawsuit, immediately affects stock prices. This approach is not novel, as scholars both within and outside political science have used this approach to examine the effects of a variety of events. Applications within economics and finance include how the following affects stock prices: the announcement of Timothy Geithner as Treasury Secretary on the stock prices of firms that he had a prior connection with (Acemoglu et al. 2016); the announcement of a celebrity endorser (Agrawal and Kamakura 1995); and the effects of protests on stock prices (King and Soule 2007). Studies utilizing this approach in political science are relatively more scarce, but include the following events and their corresponding effect on stock prices: terrorist attacks (Chen and Siems 2004); the nomination of a politically connected board member (Goldman, Rocholl and So 2009); the election of candidates the firm gave campaign contributions

to (Fowler, Garro and Spenkuch 2017); the news release of reports of ill health of H. Muhammad Suharto on firms connected to him (Fisman 2001); the effect of Senator James Jeffords switching from Republican to Independent and tipping the Senate to Democrats (Jayachandran 2006); how oil and gas companies' stocks respond to key procedural votes in Congress (Gilligan and Krehbiel 1988); the sudden death of Senator Henry Jackson on prices of firms affected by his committee leadership (Roberts 1990); and the effect of terrorism in Basque Country in Spain on businesses in that area (Abadie and Gardeazabal 2003). This approach is thus a useful and commonplace one a variety of literatures to identify the effects of one event on firms that are theoretically connected to the event of interest.

Though we seek to understand the effect of particular events on stock prices, scholars do not use the raw stock prices as the variable of interest. Stock prices fluctuate wildly across any time period, so utilizing the raw returns may reflect market-wide changes in investor behavior rather than the precise effect of the event. Therefore, like the studies mentioned above, I use the raw stock returns to calculate cumulative abnormal returns (CARs), an approach that adjusts firm stock prices around the event for both the past performance of that firm's stock prices and the behavior of the entire stock market.

I calculate CARs using the market model, which relates the performance of the private prison company's stock to the performance of the entire stock market (Fama et al. 1969). The advantage of this particular method of estimating CARs is it reduces variance in the estimates by accounting for common, market-wide shifts in financial performance (Campbell, Lo and MacKinlay 1996).

Intuitively, this approach provides a numerical estimation for how "abnormal" a stock price is on day t when an event occurs, taking into account past stock market behavior. With that intuition in mind, there are a few methodological steps for calculating this variable, the first of which is to calculate the daily abnormal returns (ARs) which will sum to calculate the CARs:

$$AR_{i,t} = R_{i,t} - [\hat{\alpha}_i + \hat{\beta}_i R_{m,t}] \tag{5.1}$$

This equation calculates the daily abnormal return for firm i, $AR_{i,t}$ by taking the actual return on that day, $R_{i,t}$ and subtracting $[\hat{\alpha}_i + \hat{\beta}_i R_{m,t}]$, where $R_{m,t}$ is the return on the market for the event day t[6]. This is calculated for each day over the event window, which is chosen by the analyst. For my purposes, I try a variety of windows: CAR[-1,1], CAR[-2,2], CAR[-5,5], CAR[-10,10], and CAR[-30,30] as I am agnostic at the outset about whether the effect of the event, the lawsuit, will take one, two, five, ten, or thirty days to materialize in the stocks of the firms. $\hat{\alpha}_i$ and $\hat{\beta}_i$ are calculated using the following equation:

$$R_{i,t} = \alpha_i + \beta_i R_{m,t} + \epsilon_{it} \tag{5.2}$$

As before, $R_{i,t}$ is the actual daily return for each company's stock and $R_{m,t}$ is the daily return of the stock market. The estimated values of both α_i and β_i from this equation are then plugged back into Equation 5.1 to calculate the daily annual return

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[6]For this analysis, I use the value-weighted returns (including dividends) on all stock markets - NASDAQ, New York Stock Exchange (NYSE), and the American Stock Exchange (AMEX).

for firm i.

This equation is estimated using market and firm-specific stock returns 250 to 30 trading days before the event, following the literature (Acemoglu et al. 2016, Fowler, Garro and Spenkuch 2017). This window allows me to estimate what the "normal" returns of these companies look like over the last 220 days. For a successful lawsuit decided in November, for example, the firm's normal return would be determined by the stock's prices from approximately March to October of that same year. Finally, these values are plugged into Equation 5.1 and subsequently summed to calculate the CAR.

$$CAR[t_1, t_2]_i = \sum_{t=t_1}^{t_2} AR_{i,t} \tag{5.3}$$

$CAR[t_1, t_2]$ represents the cumulative abnormal return for firm i from time t_1 to time t_2. In the analyses below, I utilize a variety of different specifications for this variable: CAR[-1,1], CAR[-2,2], CAR[-5,5], CAR[-10,10], and CAR[-30,30].

This thus forms the set of dependent variables included in the analysis, which effectively measures the normalized change in the returns for firm i after a particular event, a successful lawsuit.

5.3.2   Political Events

Thus far, the description of the procedure used to estimate the CARs has been relatively general about the "event" that occurs. This section details the data used to construct the events in my data, the announcement of successful lawsuits.

As in Chapter 4, I rely on the Civil Rights Clearinghouse (CRC) as a source of

information on successful prison and jail conditions cases that resulted in substantive policy or operational change within correctional facilities. As before, these cases are filed in the federal district courts, where the majority of prisoners' rights cases are heard, and include cases in every state save Minnesota and North Dakota. These successful cases were the ones in which a court order was issued to mandate the government operating the correctional facility to take some kind of action. Some of the orders are more specific, placing specific caps on inmate population, whereas others are more general and merely order the state or county operating the prison or jail to develop clear standards in response to a prisoner lawsuit. Either way, these orders mandate some action by the government responsible for the correctional facility and generally require them to develop clear guidelines about inmate care and behavior.

To find the precise dates of these orders, I combed through the CRC database and the legal records through Westlaw to find the exact date a judge handed down the court order in each case. Though there were often preliminary settlements prior to the final one, I chose the date of the final, court-approved order as the date of the event as this is the final action the judges undertake in the original case[7] and acts as the final settlement of the court case.

These dates represent important events for the local and state governments under court order, but why do we expect private prison companies to be similarly affected by these judicial decisions? The theory laid out in Chapter 3 suggests private companies

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[7]Often, these cases are immediately appealed by the government. I still use the date of the final settlement, not the appellate decision because the initial ruling provides the most clear signal of the court's attitude toward the quality of operation at that particular facility.

rely on lawsuits as a signal of the government's correctional vulnerability, lobbying states with more lawsuits to privatize their prisons. On the other hand, successful lawsuits, like the ones in the CRC database, should discourage private prison firms and their investors because it reflects the professionalization of the government under court order. That government bureaucratizes and adapts to the court order, effectively eliminating the need for private prison firms to step in. I argue investors are paying attention to these events as important signals of the strength of the industry and predict they will sell more stock after a successful lawsuit in any state.

I estimate CARs for each firm around each lawsuit. According to the dates each firm has been publicly traded then, that means that CoreCivic CARs are matched with lawsuit data from 1986 to present; GEO Group from 1994 to present; CSC from 1994 to 2005; and Cornell Companies from 1996 to 2010. I assume all court orders affect all companies, so each court order can be theoretically matched with stock data from all four companies, if those companies were all publicly traded at that point. The reason for this inclusion is successful prisoners' litigation can fundamentally alter the character of a state's corrections system, via the implementation of new rules and procedures. Any company, whether it be CoreCivic, GEO Group, CSC, or Cornell Companies, are then subject to those rules. Those decisions in turn can affect companies that are currently operating in those states or affect whether or not companies choose to expand their business to that state.

5.4   Methodology

Following the common practice of papers that use event study methodology (e.g. Abadie and Gardeazabal 2003, King and Soule 2007), the empirical strategy of this chapter is twofold. First, I estimate the average CAR across all firms in response to the successful lawsuit. Second, I estimate an ordinary least squares (OLS) model which incorporates various aspects of the successful lawsuits to estimate which facets of the court orders are the most consequential for the behavior of the firms' stock prices.

The first approach is largely descriptive and it estimates the average effect of the lawsuit on CARs in the aggregate, across all firms. This allows me to identify the overall average CAR after an event occurs, regardless of firm or other characteristics. I will also subset the data to find the average CARs across firms to see if one company is more affected by the lawsuit announcement than others. I estimate this relationship by regressing the CARs[8] on an intercept and cluster the standard errors by company.

However, there may be reason to think this approach is not wholly appropriate: notably, it assumes the effect of the court orders is uniform across multiple subsets of the data. To account for this, I take on the second approach using OLS.

To find the effect of a lawsuit on a firm's CAR, I now estimate a series of OLS regressions that add an indicator for the sum of private facilities that exist in the state that experience a successful lawsuit. This data represents the original dataset

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[8]Diagnostic tests indicate a high degree of heteroskedasticity in the variances in the dependent variable across firms, so comparing the means with a test like Analysis of Variance (ANOVA) would not accurately account for the high degree of correlation between company and its associated standard errors.

collected as part of this project, described more fully in Chapter 2, and represents a facility-year database of private prisons over the last three decades. The dataset used for these analyses is therefore a company-lawsuit pair, with the stock prices of particular companies matched with the number of private facilities that company operates within the state the lawsuit was handed down in. Equivalently, I estimate the below equation, where i indicates the firm and t indicates the day the court order was announced.

$$CAR[t_1, t_2] = \alpha_i + \beta_1(SumFacilities) + \epsilon_{i,t} \tag{5.4}$$

In Equation 5.4, α_i is a set of company fixed effects. The effect of interest is the coefficient on β_1, which represents the effect of the sum of private facilities in the state and year the lawsuit took place in on the company's stock price. I calculate *Sum Facilities* by aggregating the private prison facility dataset to the state-year level, so this variable represents the number of private correctional institutions operated by each company that exist within a state (whether they be operated by local, state, or federal authorities). That means that states like New York that do not contract with private prison firms for state inmates but do have a federal private immigration facility has a positive value for this variable, whereas states like Alaska that contract with private prison companies but exclusively ship inmates to out-of-state private facilities are not. The reason for this differentiation lies in the nature of these lawsuits. Because these are prisoner lawsuits filed in federal court, the outcome of the case acts as a useful signal for state governments about district court judges' attitudes toward

inmate lawsuits. A positive outcome for an inmate in a local jail in Arizona, for example, may give pause to state prison officials as the precedent for favorable treatment of prisoners in the district has been set. So, regardless of the jurisdiction of the facility, I assume states take signals from successful lawsuits within the district courts in their state to roughly estimate how amenable those judges could hypothetically be to lawsuits brought by prisoners within the state's jurisdiction.

Approximately one-third of the successful lawsuits occur in states with at least one private facility, and about 20% of the states in the sample have more than one operating private correctional institution at the time of the court order announcement. The sum ranges from zero to twenty[9]. Finally, I cluster errors by company to account for variation across firms in stock performance.

5.5 Results

Armed with the two empirical strategies, we can speak to the effect of an announcement of a successful lawsuit on the stock performance of firms. First, what is the average affect of these court orders?

5.5.1 Average CARs and Lawsuits

This section takes a simple approach and merely calculates the average cumulative abnormal returns across all firms to analyze the effect of a lawsuit on stock prices. I also subset the sample to assess whether the effect of lawsuits differ across firms in

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[9]The GEO Group operated 20 facilities in Texas in 2007.

Columns 2 through 5 below.

Table 5.1: Average CAR[-1,1] Across and Within Firms After a Successful Lawsuit

	Dependent variable:				
		CAR[-1,1]			
	All Firms	CoreCivic	GEO Group	CSC	Cornell
	(1)	(2)	(3)	(4)	(5)
Constant	0.001	0.003	0.002	−0.007	−0.007
	(0.002)	(0.003)	(0.003)	(0.006)	(0.006)
Observations	1,123	438	305	180	180
R^2	0.000	0.000	0.000	0.000	0.000
Adjusted R^2	0.000	0.000	0.000	0.000	0.000
Residual Std. Error	0.059	0.062	0.048	0.077	0.077
Degrees of Freedom	1122	437	304	179	179

*p<0.1; **p<0.05; ***p<0.01
Note: SE's clustered by company in Column 1.

Table 5.1 shows the average CAR[-1,1][10] first for all firms pooled together (Column 1), then subsetted into the different companies (Columns 2 through 5). None of the specifications are significant, indicating that the announcement of a settlement for a successful lawsuit does not affect the overall performance of the private prison companies, either pooled together or subsetted separately. This null finding is in fact compatible with the expectations of Hypothesis 1: not all lawsuits are consequential to the business operations of these companies, either in the aggregate or separately. Rather, I expect investors of these firms to only be concerned with the successful lawsuits in the states the companies are already operating in. I next consider this possibility.

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[10]See the appendix for CAR[-2,2], CAR[-5,5], CAR[-10,10], and CAR[-30,30] as the alternative dependent variables.

5.5.2 CARs in States with Private Facilities and Lawsuits

Table 5.2 considers Hypothesis 2, how the effect of a lawsuit on stock prices is conditioned by the business presence of the companies already operating there.

Table 5.2: Average CAR After a Successful Lawsuit in States with Increasing Numbers of Private Prisons

	Dependent variable:				
	CAR[-1,1]	CAR[-2,2]	CAR[-5,5]	CAR[-10,10]	CAR[-30,30]
	(1)	(2)	(3)	(4)	(5)
Sum Private	−0.0004***	−0.0002	−0.001	−0.002***	−0.005**
Facilities	(0.0001)	(0.0002)	(0.001)	(0.001)	(0.002)
Observations	1,122	1,122	1,122	1,122	1,122
R^2	0.001	0.001	0.004	0.007	0.007
Adjusted R^2	−0.003	−0.003	0.0001	0.004	0.003
Residual Std. Error	0.057	0.078	0.115	0.147	0.253
Degrees of Freedom	1117	1117	1117	1117	1117

*p<0.1; **p<0.05; ***p<0.01
Note: All SE's clustered by company.

Columns 1 through 5 of this table represent the varying event windows for the CARs, but the result is broadly consistent around all of them - in states with growing numbers of private facilities, the announcement of a successful lawsuit decreases the stock performance of private prison firms, particularly for one-, ten-, and thirty-day windows around the event. These significant coefficients translate into a fairly massive financial outcome for these companies: for each increase in the number of private facilities in a state, the announcement of a successful lawsuit results in 0.04% lower abnormal returns for firms in a one-day window around the event. For the ten- and thirty-day windows, the effects get larger, with abnormal returns falling by 0.2% and 0.5%, respectively. Though it is difficult to pin down the exact monetary

influence of those values, these coefficients represent roughly two-thirds, five-fourths, and over one-hundred times the value of the mean for each of the variables, CAR[-1,1], CAR[-10,10], and CAR[-30,30], respectively. Therefore, there is a significant and negative effect of the announcement of an additional lawsuit, in the states that are contracting to more and more private facilities.

Finally, it is interesting to note the variation in the significance and magnitude of the dependent variables as the event window grows. This could be due to a lag in investors' understanding of the court order. The stock drops significantly initially simply in response to the order, then investors react ten to thirty days later after the consequences of the lawsuit are made clear, either by company reports to investors about the litigation, individual investor research into the event, or news media surrounding it.

Taken together, the results from Tables 5.1 and 5.2 support the hypotheses suggested earlier in the chapter. There is no unequivocal effect of a successful lawsuit on the stock returns of private prison firms, either in the aggregate or separated by firm. However, when I add an indicator for the sum of private facilities in the state, it becomes clear that investors are particularly concerned about lawsuits in states with existing private facilities, likely because those legal orders have the highest likelihood of affecting the business of private prison firms. Additionally, it seems that the negative returns to business increase as the event window grows. This implication suggests investors need time to assess how a particular court order will affect the business of the firm, and ultimately realize the court order bodes poorly for the future of private prison firms.

5.5.3 Robustness Checks

Though these results above conform to the expectations set out in Hypotheses 1 and 2, there are a few concerns to consider prior to making any firm conclusions about the effect of successful lawsuits on stock prices.

First and foremost, it is vital to consider other time periods than the CAR[-1,1] results reported in the main body of this chapter. I also calculated CAR[-2,2], CAR[-5,5], CAR[-10,10], and CAR[-30,30] as alternative dependent variables for Table 5.1, the results of which are in the appendix. Only one specification - the CAR[-10,10] for the GEO Group subset - is significant and negative, but all others remain insignificant. Therefore, it is not likely there is a pooled effect of a lawsuit announcement on CARs as the non-significant result is robust to a variety of different event windows.

Second, Hypothesis 2 argues prisoner lawsuits negatively affect stock prices only in those states that already have an existing private facility. In the main body of the paper, I conceptualize this as *Sum Private Facilities*, but to further tease out this mechanism, I simplify the measure even further to *Private Facility Exists*. This dummy variable is listed as a 1 when a state that has a successful lawsuit has any positive number of private facilities, and 0 when there are none. The results from the identical regression as the one shown in Table 5.2 are in the appendix and, surprisingly, none are significant. A state that has any private facilities and a successful lawsuit has no significant effect on the stock prices of private prison firms. This result suggests that the mechanism is driven primarily by increases in states' usage of private prisons, not the sheer presence of them affects stock prices. That is, investors are particularly

concerned about the states with the most business and not necessarily on the states that only have one private facility and do not provide much revenue to the firm.

Finally, there exists time trends in both prisoner litigation and stock prices. In a separate table in the appendix, I add year fixed effects to Table 5.2 to assess whether the inclusion of those fixed effects changes any of the results. Encouragingly, it does not - as a successful lawsuit is announced in a state with a growing number of private facilities, the stock prices of the companies fall.

Overall, these checks provide reassurance that the patterns found in the main analyses are not mere products of the estimation strategy chosen and help provide further nuance to the argument laid out in the chapter. Investors are not responsive to all prisoners' lawsuits in the aggregate, but rather are the most concerned with those in states that comprise a large section of their business.

5.6   Discussion and Conclusion

This chapter aimed to flesh out the dynamics described in Chapters 3 and 4 from the perspective of the private prison firms themselves. That is, how, if at all, are the financial outcomes of the businesses dependent on political factors? I focus here specifically on successful inmates' lawsuits as the event that will give investors pause about the future financial outlook for private carceral firms.

I leverage approaches commonly taken in economics and finance to ask, how do the stock prices of private prison firms change in response to the announcement of successful court orders? I find that on aggregate, investors are not particularly

concerned with these judicial decrees. Rather, as Table 5.2 and appendix materials suggest, investors are responding to the lawsuits particularly in those states that are the most consequential for private prison firms' business.

These results have a few important implications. For one, it provides encouraging evidence that the dynamics described theoretically in Chapter 3 and empirically in Chapter 4 exist from the perspective of private prison companies. Investors, and executives from these companies, are attune to the legal status of correctional facilities and the court orders handed down against them. It is not just state governments that are responding to successful lawsuits, as shown in Chapter 4, but the companies themselves are similarly vulnerable to shifts in judicial attention and favor.

Second, though the growth of private prisons over the last three decades has touched nearly all regions of the country (see the figures in Chapter 2), only those states that are increasing the business opportunities for these firms are consequential for the financial performance of them. It is not enough for states to have merely one or more private facilities, but those states must have swelling numbers of them to attract investor attention. This is intuitive from the institutional investors' perspective, as it limits their attention to the most important areas for the future of their business. These investors are likely much more concerned about their business prospects in Texas or California, states with up to twenty private facilities, than they are about those in Alabama or Idaho, states with only one facility at any point in the last three decades.

Finally, this study holds implications for the nature of the relationship between the private prison industry and politics. If, as this chapter suggests, investors are

responsive to shifts in the political (and particularly legal) environment, what are the consequences for the behavior of these firms in relation to politics? It is difficult to imagine a company that is so deeply financially affected by political outcomes does not try to influence politics to limit those negative shocks from affecting their business. What actions, if at all, are these companies taking to ensure their continued business with the government? How can we see those connections happening? These sorts of questions raise many normative concerns about the appropriate nature of privatization for prisons and jails, but are also dependent on the nature of the private prisons themselves. If the conditions are more deplorable than public correctional institutions, then these questions about accountability are even more prescient than ever.

Chapter 6

Revisiting Privatization and the Rights of Vulnerable Populations

In the late 1980s, Texas was one of the first states to contract with a private company to operate and manage correctional facilities. In the next decade, over 20 private prisons opened in the state, holding inmates under Texas, county, federal, or other states' jurisdictions. Despite Texas' growing experience with private prisons, peculiar loopholes remained. Two Oregon inmates held in a Texas private prison escaped in 1996, traveling nearly 200 miles before being apprehended (Associated Press 1996). Though this appears like a regular prison break, the state soon discovered standard practice in public prisons did not easily translate to private prisons, as the two men could not technically be charged with any crime because *escaping from a private prison was not yet illegal.* While governments have largely closed these seemingly inexplicable loopholes in the past few decades, this example highlights the ever changing legal and political climate surrounding the private operation of correctional facilities, a practice

that has become commonplace across the country.

These legal inconsistencies are evidence of a larger uncertainty surrounding private prisons: who is responsible for what happens within them? Have the laws caught up with correctional privatization? This project introduces accountability as a key mechanism either promoting or devaluing privatization as a new policy choice, a mechanism that become salient in the latter half of the twentieth century with the advent of the prisoners' rights movement.

For much of the twentieth century, the state virtually ignored inmates, and specifically prisoners' requests for improved treatment and resources while incarcerated. Beginning in the 1960s and 1970s, the federal judiciary began hearing cases inmates brought to federal courts about violations of their constitutional rights (Feeley and Rubin 2000). Soon, judges awarded massive sums to many prisoners adversely affected by poor prison management, prompting state action to reform their correctional systems (Justice 1990, Schoenfeld 2018, Yackle 1989). These victories expanded both prisoners' rights and the amount of power judges wielded over state corrections systems, but were only one change in the complete evolution of the criminal justice system from the 1980s to present day (Gottschalk 2006). Most notably, the number of Americans affected by the carceral state has expanded significantly, as 1 in 31 people are now under some form of correctional control, in prisons, jails, or on parole or probation (Pew Center on the States 2009). Perhaps one of the more peculiar developments, though, has been the adoption and expansion of state private prisons.

Though private prisons in 2016 held 18% of federal prisoners and 9% of state prisoners as of 2016 (Carson 2018), research on the development and effect of these

facilities is relatively rare and does not provide conclusive information on details of this policy. Why do governments choose to privatize the confinement of the convicted? How do these private prison companies concentrate their business and lobbying efforts to further develop their business? How are private prison companies themselves affected by politics? The answers to these questions, though addressed in other articles and books in political science and related fields like public administration (e.g. Kim and Price 2014, Nicholson-Crotty 2004, Price and Riccucci 2005, Schneider 1999, Selman and Leighton 2010), are not conclusive and do not provide a complete understanding of why states specifically would privatize their prisons.

6.1   Accountability and Private Prisons

This project seeks to fill this gap in two primary ways: first, by introducing an innovative new dataset of publicly traded private prison locations over the last four decades and second, by advancing an original theoretical argument about the rise of prison privatization as a phenomenon driven by states' desire to avoid legal and political accountability for prisoner lawsuits. To do this, I explored the theoretical motivations behind prison privatization and used the original dataset to quantitatively test and find evidence for my theoretical claims.

Chapter 2 sought to test the four dominant theories of prison privatization as presented by the broader literature: partisanship, fiscal stress, unionization, and campaign contributions (Kim and Price 2014, Nicholson-Crotty 2004, Price and Riccucci 2005). I take these explanations seriously and test them empirically. To do

so, I introduce the original dataset I collected to test these expectations, which is a significant contribution to this literature as scholars can now study private prisons across time and space, for all fifty states in the last three decades. I read thousands of pages of Securities and Exchange Commission (SEC) reports to painstakingly create a record of every private facility operated by a publicly traded company from 1986 to 2016. I then use this data to test these dominant theories and find none are sufficient to explain either the adoption or growth of prison privatization over the last four decades. If these explanations, the ones commonly cited by journalistic and scholastic accounts of this policy, do not explain the rise of prison privatization, what does?

Chapter 3 introduced a theoretical framework to explain the rise of state prison privatization and emphasized the growth of inmate lawsuits as the major contributing factor to the expansion of this policy. I argue the growth of inmate lawsuits prompts states to privatize: more prisoner lawsuits, regardless of outcome, makes it more likely a state will turn to private prison operators. These states face the ever-increasing numbers of inmates entering prisons and jails each year, but do not have the ability to negotiate with the legislature or the public at large to provide the funds for new prison construction. States are incentivized to privatize to transfer political and legal accountability for these lawsuits away from themselves to private companies. The other theoretical prediction from Chapter 3 considers successful lawsuits, and argues the effect of limited victorious lawsuits will be *negatively* associated with prison privatization. Successful lawsuits prompt substantive legal and procedural change within state prisons and thus makes privatization unappealing as a means to avoid

accountability. States have no incentive to privatize as successful legal orders already mandate substantive changes within prisons. These two dynamics place inmate lawsuits squarely at the heart of states' decisionmaking regarding prison privatization.

Chapter 4 then tested my main theoretical claims using the original dataset introduced in Chapter 2. However, this undertaking is a difficult methodological task. I argue inmate lawsuits and successful court orders affect prison privatization, but it is likely the opposite relationship exists as well: that is, prison privatization itself stems the flow of all kinds of inmate lawsuits because of legal uncertainty about who is liable for poor prison conditions within private correctional facilities. I estimate an instrumental variables analysis to counteract this methodological challenge. I find support for my claim, that successful lawsuits are associated with fewer prisoners in private facilities and more lawsuits overall are associated with more private prisoners. These results are largely robust to a variety of alternative specifications and dependent variables, highlighting the role of inmate litigation in the growth of private prisons in the last four decades. I situate these findings in real-world contexts by providing examples of both ways governments shirk when privatizing - building liability clauses into contracts and enabling legislation - and of successful lawsuits that promoted correctional reform and not prison privatization, to the chagrin of these for-profit companies.

Finally, Chapter 5 considered how private companies would respond to some of the mechanics theorized in Chapter 3. Specifically, how do for-profit correctional companies, and their investors, respond to the announcement of successful lawsuits? I use event study methodology and find private prison companies' stocks are lower after

the announcement of successful lawsuits in states with active private prison contracts, highlighting the negative effect of inmate legal victories on the likelihood of states privatizing. Investors are particularly savvy at recognizing threats to business from successful court orders and respond accordingly, by selling more private prison stock.

Taken all together, these results suggest inmate litigation is an important contributing factor to state prison privatization over the last few decades. Not only that, but private prison executives and investors recognize the importance of ongoing litigation to the future of their business. This perspective goes beyond the traditional understandings of prison privatization and broadens the scope of our studies of it, encouraging a reevaluation of the factors that contribute to correctional privatization.

6.2   Implications and Next Steps

Though the main focus of this dissertation is quantitative findings around the adoption of private prisons, further work needs to be done fleshing out the qualitative implications of this study. How do legislators, corrections bureaucrats, and private prison companies interact to produce variation in private prisons across states and time? I am currently conducting interviews with actors in all of these institutions to provide more context for these findings and highlight state decisionmaking surrounding private prisons.

These conclusions, as well as those to come from the qualitative interviews, are vitally important for understanding the mechanics behind prison privatization in the last few decades. Though the effect of privatization is low - in 2016, 18% of federal

inmates and 9% of state inmates were held in private facilities (Carson 2018) - privatization represents a significant shift in the administration of the carceral state. How does private enterprise and the government interact to provide an essential government function, punishment? Does government really have the monopoly on the use of force (e.g. Weber 1965) or is there room for public-private partnerships in punishment? This dissertation does not answer these questions per se, but instead encourages a reevaluation of the common explanations of this policy, and emphasizes the role of both the judiciary and prisoners themselves in prison privatization.

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

Additionally, this dissertation casts doubt on the utility of prisoners filing as many lawsuits as possible to prompt procedural change within prisons. It suggests that even if prisons on the whole improved from successful litigation due to bureaucratization

and fewer instances of physical brutality (Feeley and Rubin 2000, Jacobs 1980), there could still exist outcomes from litigation that are undesirable. It raises doubts about correctional systems being reformers by reducing the use of prisons and points to the importance of organizations like the ACLU in helping to bring successful lawsuits against the state government. It is ironic that though the ACLU is heavily opposed to prison privatization and brings suits against the government for violations occurring within private correctional facilities, their activity could have inspired inmates to file lawsuits, 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 also especially important. First, it is theorized, though difficult to prove, that private prison operators cut corners in their facilities to make more money and sacrifice inmate care for profit (Dolovich 2005). Theoretically, private managers cut costs at the expense of quality whereas public managers coordinate with the government to increase both quality and cost savings (Hart, Shleifer and Vishny 1997). Thus, prisons can suffer under private managers because of misplaced priorities between cost savings and quality. Second, the concept of private prisons is by no means accepted either legally or politically. A typical conceptualization of the state gives the government a monopoly on the use of force to keep citizens safe (Weber 1965). It is unclear, then, whether governments are legally or morally allowed to yield this sovereignty to a private company. This

is also a sentiment echoed by state governments - some passed statutes expressly forbidding privatization as according to state law, while others found justification for this policy within existing laws (Quinlan, Thomas and Gautreaux 2004). Either way, normative and legal questions did and continue to swirl around the operation of these facilities. Finally, some critics of private prisons are concerned with quality differences across facility types. The evidence on this is mixed, with some studies finding public correctional facilities are safer, more cost effective, and better managed, with others finding the opposite of private facilities performing better on these metrics (Burkhardt 2018, Perrone and Pratt 2003). These scholarly studies are inconsistent in their findings, but government-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 Epp (1998) and others as primary benefactors of this movement to enshrine vulnerable populations with individual rights. If it is the case, however, that efforts to bring about the rights revolution also brought forth policies that may be antithetical to that mission, how does that change the scholarly evaluation of that movement and its successes? When we analyze the outcomes of this revolution, should we consider downstream effects, like private prisons, that the founders not only did not intend, but did not want? It is worth noting, finally, that no honest reading of this paper could be taken as an argument against efforts to protect prisoners rights through

litigation, but rather as a commentary on how those normatively positive efforts may lead to a variety of undesirable and unanticipated outcomes.

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

Appendix A

Appendix

A.1 Appendix to Chapter 2

A.1.1 Data Collection Description

All variables gleaned directly from 10-K reports filed by private prison companies. All information is taken from there. This dataset includes private facilities operated by both the federal and state government, along with county jails. I do not include community corrections facilities (residential facilities) operated by these companies. I do include juvenile facilities if the purpose is listed as correctional (I.e. they are incarcerated), but do not include those juvenile facilities that are simply treatment centers. Importantly, this choice deviates from the Bureau of Justice Statistics' variable of the number of inmates in private facilities, as the BJS number includes inmates housed in privately-operated correctional facilities including any privately-operated halfway houses, treatment facilities, hospitals, or other special

facilities and excludes inmates housed in any publicly-operated facility, even if under contract. BJS data also does not include prisoners under federal jurisdiction. This dataset covers the private jail or prison facilities, at either the local, state, or federal level, in each state-year.

The following indicates the coverage of the data.

SEC 10-K's available:

- Corrections Corporation of America (now CoreCivic): 1986 - Present

- Cornell Companies: 1997 - 2010

  - Cornell acquired by GEO Group in 2010

- Correctional Services Corporation (also known as Esmor Correctional Corporation): 1998-2005

  - CSC acquired by GEO Group in 2005

- GEO Group (formerly Wackenhut Corrections): 1996-2016

  - 10-K's available for Wackenhut prior to 1996, but there is no capacity data, only location data available

Data availability:

- Corrections Corporation of America

- Facility names and capacity: 1986 - Present

- The SEC data contains the locations of the facilities. Though the early 10-K's do not list the names of those facilities, I used their later properties to label the facilities with their probable names.

- Primary customer explicitly listed: 1996 - Present

- Cornell Companies

  - Names of facilities, capacity, and primary customer: 1996-2009

  - Correctional Services Corporation (also known as Esmor Correctional Corporation)

  - Names of facilities, capacity, and primary customer: 1997-2004

- GEO Group (formerly Wackenhut Corrections)

  - Facility names: 1989 - Present

  - Like Corrections Corporation of America, the SEC data for Wackenhut only contained the locations of the facilities they operated. Using the names and locations of the properties they operate at later dates, I labeled the properties with their probable names.

  - Capacity: 1996 - Present

  - Primary customer explicitly listed: 1996 - Present

Missing data (as of February 2018)

- Corrections Corporation of America 10-K for fiscal year ending 1993

- CSC 10-K for fiscal years ending 1994-1997

While waiting for the missing data, I inputted the following information:

- CCA 1993 is inputted from the CCA 1992 variables

- Wackenhut 1991 is inputted from Wackenhut 1990

- Because so many years are missing from CSC, I simply omitted the years I was missing

Note: For Cornell Companies and the Correctional Services Corporation, I only listed the Adult Secure Services Facilities: Residential Facilities, not community corrections facilities.

Note: The data for Corrections Corporation of America in 1999 is spotty given its conversion to Prison Realty Trust, an attempt to change the company into a real estate investment trust (REIT). The data in that year lists capacity and other variables as normal, but does not list the primary customer of the facility. As such, I inputted the primary customer as according to previous and future years: if the facility had one operator in 1998 and 2000, I inputted that operator for 1999 as well. If the facility was opened in 1999, I listed the 2000 operator as the primary

customer for 1999. If the facility does not exist past 2000, I listed the 1998 customer for 1999. If there was disagreement in the customers in 1998 and 2000, I only listed the customers that were in both years. If there was complete disagreement in the customers in 1998 and 2000, I left the primary customer blank. If the facility listed no customer for 1998 but one for 2000, I listed the customer from 2000 for the 1999 value.

Finally, some facilities CCA owned and operated in both 1998 and 20001 are missing for some reason in the 1999 filing. Because it is highly unlikely the operation of the facility changed back and forth from some other private contractor or the state in a span of one year, I inputted the 1998 data for 1999, providing the design capacity number was the same.

A.1.2 Different Dependent Variables

In addition to the model presented in the paper, which analyzes how the politics, economics, and unionization variables affect the growth of prison privatization, I estimate an additional two dependent variables: Proportion in Private Facilities and Sum State Facilities. These two variables come from my original dataset and represent the proportion of all inmates under a states jurisdiction that is private and the number of private facilities within a states borders that holds state inmates, respectively. The results are in Tables A.1 and A.2.

Table A.1: OLS Model of Proportion of Corrections System that is Private

	Prop. in Private Facilities
Republican Legislature	−0.004
	(0.013)
Republican Governor	0.022**
	(0.011)
Unified Rep. Gov't	−0.011
	(0.017)
Budget Gap Per Capita	−0.010**
	(0.004)
Unionized Corrections Officers (Thousands)	−0.003
	(0.002)
Incarceration Rate	0.0002*
	(0.0001)
Violent Crime Rate	0.0001
	(0.0001)
N	1,417
R^2	0.553
Adjusted R^2	0.525
Residual Std. Error	0.063 (df = 1333)
State Fixed Effects	✓
Year Fixed Effects	✓

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

Table A.2: OLS Model of Sum State Private Facilities

	Sum of State Private Facilities
Republican Legislature	−0.271
	(0.198)
Republican Governor	0.051
	(0.117)
Unified Rep. Gov't	0.156
	(0.239)
Budget Gap Per Capita	0.036
	(0.061)
Unionized Corrections Officers (Thousands)	0.375*
	(0.198)
Incarceration Rate	0.009***
	(0.003)
Violent Crime Rate	−0.003**
	(0.001)
N	1,417
R^2	0.837
Adjusted R^2	0.827
Residual Std. Error	1.058 (df = 1333)
State Fixed Effects	✓
Year Fixed Effects	✓

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

A.1.3 Campaign Contributions

Table A.3 adds the sum of campaign contributions given to state candidates (in thousands) to the specification. Because of data availability, this regression is only run on state-year observations from 2000 on.

Table A.3: OLS Model of Level of Prison Privatization Including Campaign Contributions

	Private Design Capacity
Republican Legislature	142.980
	(220.726)
Republican Governor	258.195
	(170.619)
Unified Rep. Gov't	−314.030
	(291.199)
Budget Gap Per Capita	40.272
	(53.986)
Unionized Corrections Officers (Thousands)	371.538
	(294.614)
Campaign Contributions (Thousands)	9.914
	(8.175)
Incarceration Rate	4.588
	(5.624)
Violent Crime Rate	−6.478**
	(3.098)
N	779
R^2	0.854
Adjusted R^2	0.839
Residual Std. Error	1,108.268 (df = 707)
State Fixed Effects	✓
Year Fixed Effects	✓

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

A.1.4   Alternative Operationalizations of Ideology and Union Membership

I estimate the OLS model shown in the paper using Shor and McCarty (2011)'s measure of legislative ideology to reflect the more fine-grained reality of ideology within state legislatures. I averaged the House and Senate chambers ideology to calculate Legislative Ideology, a holistic measure of the legislatures ideology. The results of this estimation are in Table A.4.

Table A.4: OLS Model of Level of Prison Privatization Adding Shor and McCarty (2011) Legislative Ideology

	Private Design Capacity
Legislative Ideology (Shor and McCarty)	−118.648
	(331.190)
Republican Governor	232.850
	(159.457)
Rep. Gov * Leg. Ideology	18.676
	(250.879)
Budget Gap Per Capita	32.145
	(68.320)
Unionized Corrections Officers (Thousands)	199.570
	(236.391)
Incarceration Rate	4.793
	(4.076)
Violent Crime Rate	−5.894**
	(2.656)
N	938
R^2	0.817
Adjusted R^2	0.801
Residual Std. Error	1,180.122 (df = 860)
State Fixed Effects	✓
Year Fixed Effects	✓

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

Next, instead of using the proxy for the number of unionized corrections officers

in both the Cox proportional hazards and OLS estimations, I used the percent of

the public workforce that are union members, from Hirsch and Macpherson (2003).

These results are in Tables A.5 and A.6.

Table A.5: OLS Model of Level of Prison Privatization Adding State Public Union Membership

	Private Design Capacity
Republican Legislature	228.657
	(313.349)
Republican Governor	201.174
	(146.660)
Unified Rep. Gov't	21.062
	(339.903)
Budget Gap Per Capita	862.315
	(676.114)
% Public Workforce that are Union Members	35.136
	(26.275)
Incarceration Rate	8.830**
	(3.498)
Violent Crime Rate	-4.511**
	(1.972)
N	1,270
R^2	0.740
Adjusted R^2	0.722
Residual Std. Error	1,257.328 (df = 1189)
State Fixed Effects	✓
Year Fixed Effects	✓

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

Table A.6: Cox Proportional Hazards Model of Prison Privatization Adoption Adding State Public Union Membership

| | *Dependent variable:* | |
| | Coefficient | Hazard Ratio |
	(1)	(2)
Republican Legislature	0.146	1.158
	(0.698)	(−0.210, 2.526)
Republican Governor	0.785*	2.193
	(0.464)	(1.283, 3.103)
Unified Rep. Gov't	−0.131	0.877
	(0.922)	(−0.931, 2.684)
Budget Gap Per Capita	1.010***	2.745
	(0.358)	(2.044, 3.446)
% Public Workforce that are Union Members	−0.040***	0.961
	(0.014)	(0.934, 0.988)
Violent Crime Rate	−0.001	0.999
	(0.001)	(0.996, 1.001)
Incarceration Rate	0.005	1.005
	(0.003)	(0.999, 1.011)
Observations	732	732
R^2	0.029	0.029
Max. Possible R^2	0.238	0.238
Log Likelihood	−88.665	−88.665
Wald Test (df = 7)	34.430***	34.430***
LR Test (df = 7)	21.282***	21.282***
Score (Logrank) Test (df = 7)	20.807***	20.807***

Note: SE's clustered by state.   *p<0.1; **p<0.05; ***p<0.01
   95% confidence intervals for hazard ratios reported.

A.2 Appendix to Chapter 4

A.2.1 Graphs of Absolute Values of Private Prison Data

The below graphs use the absolute (i.e. not logged) values of first, the number of inmates under a state's jurisdiction that are held in private prisons and second, the number of private prisons in a state that hold state inmates.
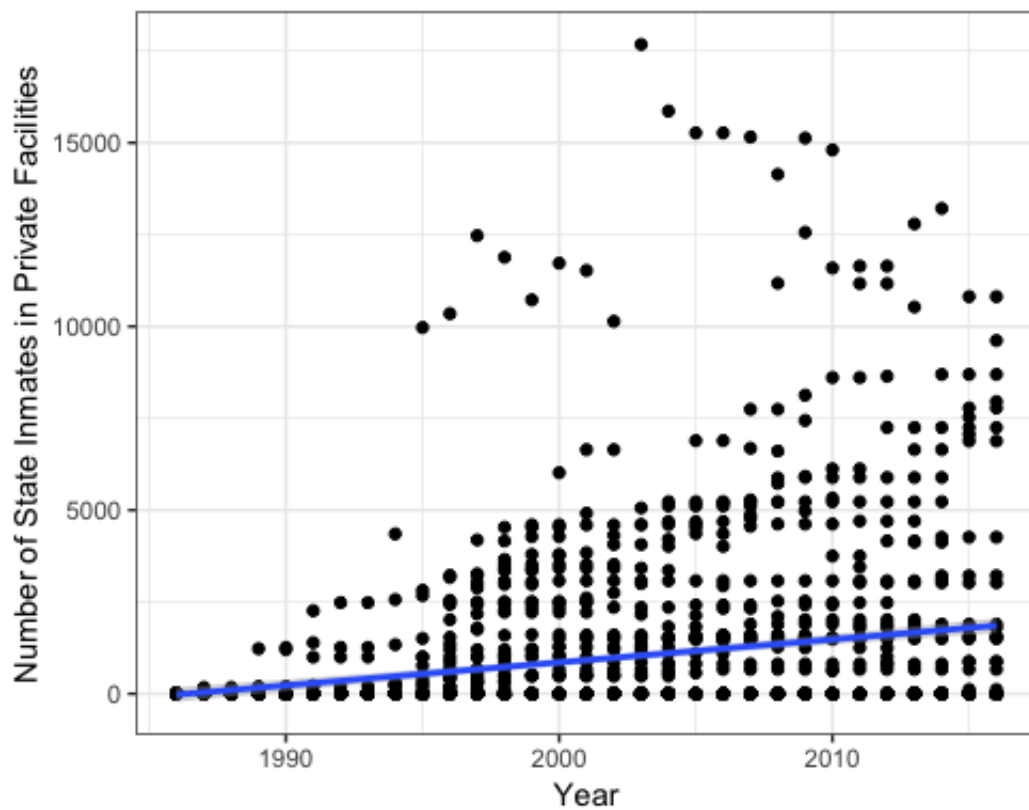
Figure A.1: Number of inmates under a state's jurisdiction in private facilities, 1986 to 2016.
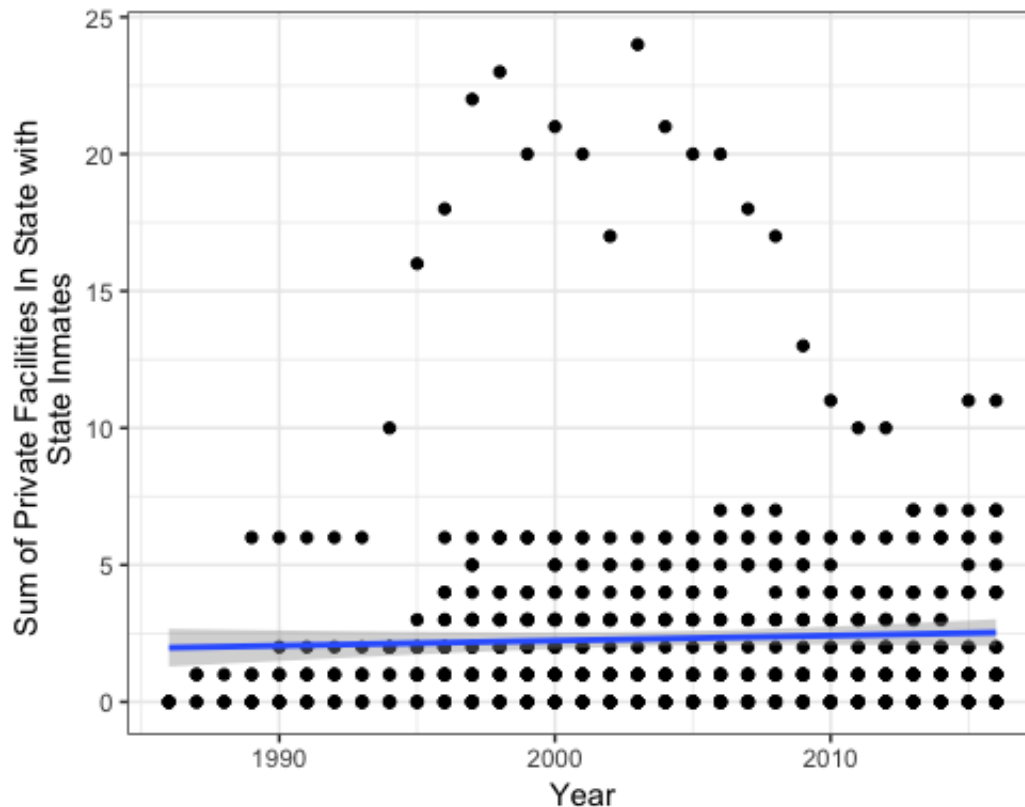
Figure A.2: Number of private facilities in a state that hold state inmates, 1986 to 2016.

A.2.2 Comparing Litigation Theory and Privatization Theories: Hypothesis 1

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

$$PrivateDesignCapacity_{i,t} = \alpha_i + \delta_t + \beta_1 SumLawsuits_{i_{t-1},t_{t-1}} +$$
$$\beta_x OtherTheories_{i_{t-1},t_{t-1}} + X_{i_{t-1},t_{t-1}} + \epsilon_{i,t}$$

(A.1)

The outcome in Equation A.1 is private design capacity[1], which measures the number of state private inmates in private prisons - it does not include those in privately operated local jails or federal facilities. Prior to the collection of this dataset, scholars studying prison privatization could not adequately estimate the effect of any variables on the growth of private carceral facilities - my data allows us to estimate this relationship, for all states across multiple decades, for the first time.

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

The other theory variables are a dummy variable for Republican governor, a dummy variable for the presence of a Republican-controlled legislature (i.e. both chambers), and a final dummy variable for the interaction of these two, unified Republican government. These values come from the National Conference on State Legislatures (NCSL) and the Book of the States. My second explanatory variable is budget gap per capita, from the Census Bureau, and represents the per capita difference between revenue and expenditures in any given state-year. My final independent variable of interest is a proxy for the number of unionized corrections officers. First, I use Page (2011)'s classification of which states had a corrections officers' union as of

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[1]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. This variable is design, not operational capacity. Companies only report the design capacity of their facilities and not the actual number of inmates located there in the source of the data. The appendix contains additional details on this calculation, particularly in regard to weighting this variable if a facility had multiple government customers.

2011, a total of thirty-six states. Second, I use Hirsch and Macpherson (2003)'s data on the nationwide percentage of unionized corrections officers. I then multiply the national percentage of corrections officers who are unionized by the total number of corrections employees in each state-year[2] before finally multiplying that number by the dummy variable of whether the state had a union in 2011 or not. I then divide the final measure by one thousand.

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

Table A.7 shows the results of Equation A.1. Column 1 estimates Equation A.1 without the sum of prisoner lawsuits, while Column 2 includes all variables in the specification.

The results highlight how broadly inconsequential the literature's theories are at explaining the number of inmates privately incarcerated. Neither partisanship nor the budget gap is significantly related to the number of private inmates, and unionization is either barely *positively* significant or not significant, a result contra to the one expected by the literature. Though it is difficult to say why this is so, perhaps the reason is the potential weakness of these unions. Comprehensive studies of corrections

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

Table A.7: OLS Model of Level of Prison Privatization

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

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

officers unions have not been undertaken to the author's knowledge, and while the prototypical example is the CCPOA, the strength of that union may be an outlier in the context of the other state-level organizations.

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

common explanations from the literature reach statistical significance. An increase in one additional inmate lawsuit in a state-year results in an increase of more than one additional inmate in a private facility, a magnitude that is consequential when considering the average state faces around 500 of these lawsuits annually, meaning it would house more than 500 additional inmates in private facilities. Though the size of the significance of the incarceration rate is larger, that comports with the overall positive association between private prisons and inmate population. Additionally, if we use the proportion of inmates in private facilities as the dependent variable, in the appendix, the sum of prisoner lawsuits remains significant and positive, whereas incarceration rate loses its significance - highlighting the importance of inmate litigation in predicting states' usage of this policy. That the sum of prisoner lawsuits remain significant once the incarceration rate is accounted for[3] helps to bolster the theoretical perspective put forth in this paper.

I also use additional dependent variables: the proportion of inmates held in private facilities and the sum of state private facilities.

I estimate an additional two dependent variables: *Proportion in Private Facilities* and *Sum State Facilities.* These two variables come from my original dataset and represent the proportion of all inmates under a state's jurisdiction that is private and the number of private facilities within a state's borders that holds state inmates, respectively. The results are in Tables A.8 and A.9.

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

Table A.8: OLS Model of Proportion of Corrections System that is Private

	Prop. in Private Facilities
Sum Lawsuits	0.00003***
	(0.00001)
Republican Legislature	−0.003
	(0.014)
Republican Governor	0.018*
	(0.011)
Unified Rep. Gov't	−0.006
	(0.016)
Budget Gap Per Capita	−0.038
	(0.027)
# Unionized Corrections Officers (Thousands)	−0.004**
	(0.002)
Incarceration Rate	0.0001
	(0.0001)
Violent Crime Rate	0.0001
	(0.0001)
N	1,417
State Fixed Effects	✓
Year Fixed Effects	✓
R^2	0.564
Adjusted R^2	0.537
Residual Std. Error	0.064 (df = 1332)

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

Table A.9: OLS Model of Sum State Private Facilities

	Sum of State Private Facilities
Sum Lawsuits	0.001***
	(0.0004)
Republican Legislature	−0.221
	(0.171)
Republican Governor	−0.034
	(0.106)
Unified Rep. Gov't	0.169
	(0.202)
Budget Gap Per Capita	0.137
	(0.408)
# Unionized Corrections Officers (Thousands)	0.251*
	(0.151)
Incarceration Rate	0.009***
	(0.002)
Violent Crime Rate	−0.002*
	(0.001)
N	1,417
State Fixed Effects	✓
Year Fixed Effects	✓
R^2	0.859
Adjusted R^2	0.850
Residual Std. Error	0.996 (df = 1332)

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

This result is robust to the Shor and McCarty (2011) measure of legislative ideology and a state public union membership value instead of the unionized proxy (see below). I estimate the OLS model shown in the paper using Shor and McCarty (2011)'s measure of legislative ideology to reflect the more fine-grained reality of ideology within state legislatures. I averaged the House and Senate chamber's ideology to calculate *Legislative Ideology*, a holistic measure of the legislature's ideology. The results of this estimation are in Table A.10.

Table A.10: OLS Model of Level of Prison Privatization Adding Shor and McCarty (2011) Legislative Ideology

	Private Design Capacity
Sum Lawsuits	1.210**
	(0.531)
Legislative Ideology (Shor and McCarty)	−15.067
	(264.768)
Republican Governor	298.487*
	(152.965)
Rep. Gov * Leg. Ideology	8.680
	(247.861)
Budget Gap Per Capita	968.868
	(609.969)
# Unionized Corrections Officers (Thousands)	102.181
	(180.859)
Incarceration Rate	3.983
	(3.498)
Violent Crime Rate	−5.085**
	(2.333)
N	938
State Fixed Effects	✓
Year Fixed Effects	✓
R^2	0.828
Adjusted R^2	0.813
Residual Std. Error	1,166.667 (df = 859)

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

Finally, I replace the proxy, *Number of Unionized Corrections Officers (Thousands)* with *Percent Public Workforce that are Union Members* in Table A.11. This variable, from Hirsch and Macpherson (2003), measures the percent of the entire state's public workforce that is unionized.

Table A.11: OLS Model of Level of Prison Privatization Adding State Public Union Membership

	Private Design Capacity
Sum Lawsuits	1.655***
	(0.491)
Republican Legislature	288.578
	(291.903)
Republican Governor	144.147
	(144.110)
Unified Rep. Gov't	89.345
	(335.363)
Budget Gap Per Capita	447.048
	(608.755)
% Public Workforce that are Union Members	19.514
	(21.277)
Incarceration Rate	9.235***
	(2.698)
Violent Crime Rate	−3.602**
	(1.648)
N	1,417
State Fixed Effects	✓
Year Fixed Effects	✓
R^2	0.744
Adjusted R^2	0.728
Residual Std. Error	1,221.843 (df = 1332)

$^*p < .1$; $^{**}p < .05$; $^{***}p < .01$
SE's clustered by state.

A.2.3 Comparing Litigation Theory and Privatization Theories: Hypothesis 2

I run the above analysis on the second hypothesis as well, beginning with the inclusion of the sum of successful court orders in the OLS estimation, the results of which are in Table A.12.

Table A.12: OLS Model of Level of Prison Privatization

	Private Design Capacity	
	(1)	(2)
Sum Court Orders		−72.456
		(88.801)
Republican Legislature	−721.489*	−718.500*
	(420.391)	(418.332)
Republican Governor	−28.100	−12.106
	(304.445)	(290.768)
Budget Gap Per Capita	169.646	191.026
	(167.454)	(168.830)
Unionized Corrections Officers (Thousands)	529.590***	528.763***
	(119.038)	(119.765)
Incarceration Rate	5.493	5.366
	(4.296)	(4.257)
Violent Crime Rate	−4.367	−4.396
	(2.752)	(2.706)
Unified Rep. Gov't	721.846	712.027
	(542.494)	(537.393)
N	304	304
R^2	0.770	0.770
Adjusted R^2	0.690	0.689
Residual Std. Error	1,571.723 (df = 225)	1,573.937 (df = 224)

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

I also test this equation using the two other dependent variables: the proportion of state inmates held in private facilities and the sum of private state facilities. These results are in Tables A.13 and A.14.

Table A.13: OLS Model of Proportion of Corrections System that is Private

	Prop. in Private Facilities
Sum Court Orders	−0.0004
	(0.002)
Republican Legislature	−0.024*
	(0.014)
Republican Governor	−0.003
	(0.007)
Budget Gap Per Capita	0.080**
	(0.034)
Unionized Corrections Officers (Thousands)	0.001
	(0.002)
Incarceration Rate	0.0001
	(0.0001)
Violent Crime Rate	0.0001
	(0.00004)
Unified Rep. Gov't	0.021
	(0.014)
N	304
R^2	0.793
Adjusted R^2	0.720
Residual Std. Error	0.038 (df = 224)

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

Table A.14: OLS Model of Sum State Private Facilities

	Sum of State Private Facilities
Sum Court Orders	−0.040
	(0.091)
Republican Legislature	−1.003**
	(0.418)
Republican Governor	−0.371
	(0.305)
Budget Gap Per Capita	1.169
	(1.224)
Unionized Corrections Officers (Thousands)	0.318**
	(0.153)
Incarceration Rate	0.010**
	(0.004)
Violent Crime Rate	−0.002*
	(0.001)
Unified Rep. Gov't	0.832*
	(0.442)
N	304
R^2	0.852
Adjusted R^2	0.800
Residual Std. Error	1.200 (df = 224)

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

Finally, I run the robustness checks as above: including the Shor and McCarty (2011) legislative ideology scores in place of the ideology dummy variables and the measure of public unionization in place of the proxy of the number of unionized corrections officers. The results of these regressions are in Tables A.15 and A.16.

Table A.15: OLS Model of Level of Prison Privatization Adding Shor and McCarty (2011) Legislative Ideology

	Private Design Capacity
Sum Lawsuits	149.959
	(97.689)
Legislative Ideology (Shor and McCarty)	249.731
	(689.613)
Republican Governor	249.473
	(296.699)
Budget Gap Per Capita	6,132.691*
	(3,127.901)
# Unionized Corrections Officers (Thousands)	587.758***
	(166.477)
Incarceration Rate	−5.737
	(7.322)
Violent Crime Rate	−6.593**
	(3.254)
Rep. Gov * Leg. Ideology	−781.785
	(616.552)
N	200
R^2	0.858
Adjusted R^2	0.778
Residual Std. Error	1,511.129 (df = 127)

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

Table A.16: OLS Model of Level of Prison Privatization Adding State Public Union Membership

	Private Design Capacity
Sum Lawsuits	−75.861
	(99.868)
Republican Legislature	−474.404
	(421.868)
Republican Governor	−109.706
	(334.965)
Budget Gap Per Capita	7,350.475*
	(4,166.764)
% Public Workforce that are Union Members	65.055
	(77.587)
Incarceration Rate	11.241**
	(5.036)
Violent Crime Rate	−5.726
	(3.801)
Unified Rep. Gov't	417.978
	(553.943)
N	304
R^2	0.720
Adjusted R^2	0.621
Residual Std. Error	1,737.536 (df = 224)

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

A.2.4 Alternative Dependent Variables for Hypothesis 1: Proportion Inmates that are Private, Sum State Private Facilities, Sum All Private Facilities (State, Local, and Federal)

Tables A.17, A.18, and A.19 below show the same analyses as those in the paper, using proportion of inmates in private facilities, the sum of state-only private facilities, and the sum of all private facilities (operated by local, federal, or state authorities) as alternative dependent variables for Hypothesis 1.

Table A.17: Hypothesis 1: Lagged Proportion in Private Facilities

	Dependent variable:		
	Lagged Prop. in Private - *OLS*	Sum Lawsuits *First Stage IV*	Lagged Prop. in Private - *IV*
	(1)	(2)	(3)
Sum Lawsuits	−0.00001*		−0.00002
	(0.00001)		(0.0001)
Weight per Judge Serving		1.070**	
		(0.430)	
Constant	−0.038***	−143.289	−0.038**
	(0.012)	(172.193)	(0.017)
N	1,581	1,400	1,400
Residual Std. Error	0.080 (df = 1539)	525.071 (df = 1361)	0.080 (df = 1361)
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓
F-Statistic		19.0337	

*p < .1; **p < .05; ***p < .01
All models have se's clustered by circuit.

Table A.18: Hypothesis 1: Lagged Sum Private Facilities - State Only

	Dependent variable:		
	Lagged Sum Facilities *OLS*	First Stage IV *First Stage IV*	Lagged Sum Facilities *IV*
	(1)	(2)	(3)
Sum Lawsuits	0.002**		0.003**
	(0.001)		(0.001)
Weight per Judge Serving		1.070**	
		(0.430)	
Constant	−1.290**	−143.289	−1.602**
	(0.528)	(172.193)	(0.654)
N	1,581	1,400	1,400
Residual Std. Error	1.714 (df = 1539)	525.071 (df = 1361)	1.885 (df = 1361)
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓
F-Statistic		19.0337	

*p < .1; **p < .05; ***p < .01
All models have se's clustered by circuit.

Table A.19: Hypothesis 1: Lagged Sum Private Facilities - All Included

	Lagged Sum Facilities *OLS*	First Stage IV *First Stage IV*	Lagged Sum Facilities *IV*
	(1)	(2)	(3)
Sum Lawsuits	0.004***		0.006***
	(0.001)		(0.002)
Weight per Judge Serving		1.070**	
		(0.430)	
Constant	−2.335***	−143.289	−2.814**
	(0.886)	(172.193)	(1.111)
N	1,550	1,400	1,400
Residual Std. Error	3.037 (df = 1508)	525.071 (df = 1361)	3.273 (df = 1361)
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓
*p < .1; **p < .05; ***p < .01			

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

A.2.5 Alternative Operationalizations and Description of Hypothesis 1 Instrumental Variable: Weighted Cases per Judge Serving

Habel and Scott (2014) provide a wealth of data on the number of judges serving, both active and senior status, and the number of case filings each district sees. In the paper, the main variable I use is *Weight per Judge Serving*, which divides weighted case filings by the number of active and senior judges in each district-year. Weighted case filings are calculated by the Federal Judicial Center and account for the varying lengths of time different categories of cases take to adjudicate. Additionally, Habel and Scott (2014) scour judge biographies and histories to gather a count of judges serving in each district-year, with active, regular judges counting as 1 (provided they served the whole year) and senior judges counting as 0.25 due to their decreased caseload. This calculation is particularly important as vacancies on districts are extremely common, whether due to a not-yet filled nomination, illness, or other, so the total number of judgeships a district has may not be close in reality to the number of judges who actually hear cases.

Then, I aggregate this variable to the state level, so for a state like Alabama with three district courts, I add up all the weighted case filings for those courts and divide by the total number of judges serving.

Now, I try out two alternative variables to *Weighted Cases per Judge Serving.* First, I divide weighted case filings by the number of authorized judgeships only. These results are in Tables A.20, A.21, and A.22.

Table A.20: Hypothesis 1: Lagged Private Design Capacity using Weighted Cases per Authorized Judge Serving

	Lagged Private DC OLS	Sum Court Orders First Stage IV	Lagged Private DC IV
	(1)	(2)	(3)
Sum Lawsuits	1.609***		2.011***
	(0.470)		(0.773)
Weight per Authorized Judge Serving		1.042**	
		(0.465)	
Constant	−1,285.487***	−110.994	−1,355.883***
	(416.376)	(171.072)	(484.067)
N	1,550	1,400	1,400
Residual Std. Error	1,667.933 (df = 1508)	526.397 (df = 1361)	1,648.248 (df = 1361)
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓

*p < .1; **p < .05; ***p < .01
Note: All models have se's clustered by circuit.

Table A.21: Hypothesis 1: Lagged Proportion in Private Facilities using Weighted Cases per Authorized Judge Serving

	Lagged Prop. in Private OLS	Sum Court Orders First Stage IV	Lagged Prop. in Private IV
	(1)	(2)	(3)
Sum Lawsuits	−0.00001*		0.00000
	(0.00001)		(0.0003)
Weight per Authorized Judge Serving		0.211	
		(0.146)	
Constant	−0.039***	8.651	−0.038
	(0.012)	(80.105)	(0.026)
N	1,550	1,400	1,400
Residual Std. Error	0.081 (df = 1508)	310.579 (df = 1360)	0.079 (df = 1360)
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓

*p < .1; **p < .05; ***p < .01
Note: All models have se's clustered by circuit.

Table A.22: Hypothesis 1: Lagged Sum Private Facilities - State Only using Weighted Cases per Authorized Judge Serving

	Lagged Sum Facilities OLS	Sum Court Orders First Stage IV	Lagged Sum Facilities IV
	(1)	(2)	(3)
Sum Lawsuits	0.002**		0.003**
	(0.001)		(0.001)
Weight per Authorized		1.042**	
Judge Serving		(0.465)	
Constant	−1.307**	−110.994	−1.579**
	(0.538)	(171.072)	(0.640)
N	1,550	1,400	1,400
Residual Std. Error	1.725 (df = 1508)	526.397 (df = 1361)	1.862 (df = 1361)
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓

*p < .1; **p < .05; ***p < .01
Note: All models have se's clustered by circuit.

Second, I divide weighted case filings by the number of judges serving but excluding senior status judges. These results are in Tables A.23, A.24, and A.25.

Table A.23: Hypothesis 1: Lagged Private Design Capacity using Weighted Cases per Judge Serving (Excluding Senior Status)

	Lagged Private DC OLS	Sum Court Orders First Stage IV	Lagged Private DC IV
	(1)	(2)	(3)
Sum Lawsuits	1.609***		1.917**
	(0.470)		(0.755)
Weight per Judge Serving (No SS)		0.779***	
		(0.273)	
Constant	−1,285.487***	−64.686	−1,336.529***
	(416.376)	(131.359)	(477.715)
N	1,550	1,400	1,400
Residual Std. Error	1,667.933 (df = 1508)	530.005 (df = 1361)	1,641.474 (df = 1361)
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓

*p < .1; **p < .05; ***p < .01
Note: All models have se's clustered by circuit.

Table A.24: Hypothesis 1: Lagged Proportion in Private Facilities using Weighted Cases per Judge Serving (Excluding Senior Status)

	Lagged Prop. in Private OLS	Sum Court Orders First Stage IV	Lagged Prop. in Private IV
	(1)	(2)	(3)
Sum Lawsuits	−0.00001*		−0.0001
	(0.00001)		(0.0003)
Weight per Judge Serving (No SS)		0.152*	
		(0.081)	
Constant	−0.039***	19.840	−0.033
	(0.012)	(71.387)	(0.027)
N	1,550	1,400	1,400
Residual Std. Error	0.081 (df = 1508)	310.885 (df = 1360)	0.083 (df = 1360)
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓

*p < .1; **p < .05; ***p < .01
Note: All models have se's clustered by circuit.

Table A.25: Hypothesis 1: Lagged Sum Private Facilities - State Only using Weighted Cases per Judge Serving (Excluding Senior Status)

	Lagged Sum Facilities OLS	Sum Court Orders First Stage IV	Lagged Sum Facilities IV
	(1)	(2)	(3)
Sum Lawsuits	0.002**		0.003**
	(0.001)		(0.001)
Weight per Judge Serving (No SS)		0.779***	
		(0.273)	
Constant	−1.307**	−64.686	−1.570**
	(0.538)	(131.359)	(0.631)
N	1,550	1,400	1,400
Residual Std. Error	1.725 (df = 1508)	530.005 (df = 1361)	1.854 (df = 1361)
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓

*p < .1; **p < .05; ***p < .01
Note: All models have se's clustered by circuit.

A.2.6 Alternative Independent Variable for Hypothesis 1:

Logged Sum of All Lawsuits

Tables A.26, A.27, and A.28 use the logged sum of all prisoners' lawsuits as the main

independent variable in place of the sum of all lawsuits.

Table A.26: Hypothesis 1: Lagged Private Design Capacity - Logged Sum Lawsuits

	Lagged Private DC *OLS*	Logged Sum Lawsuits *First Stage IV*	Lagged Private DC *IV*
	(1)	(2)	(3)
Log Sum Lawsuits	446.839**		734.948**
	(208.090)		(369.989)
Weight per Judge Serving		0.003**	
		(0.001)	
Constant	−2,851.901**	3.265***	−4,075.774**
	(1,135.925)	(0.419)	(1,855.379)
N	1,581	1,400	1,400
Residual Std. Error	1,813.377 (df = 1539)	1.000 (df = 1361)	1,810.564 (df = 1361)
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓
*p < .1; **p < .05; ***p < .01			

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

Table A.27: Hypothesis 1: Lagged Proportion in Private Facilities with Logged Sum Lawsuits

	Lagged Prop. in Private - *OLS*	Sum Court Orders *First Stage IV*	Lagged Prop. in Private - *IV*
	(1)	(2)	(3)
Log Sum Lawsuits	−0.014		−0.007
	(0.009)		(0.020)
Weight per Judge Serving		0.003**	
		(0.001)	
Constant	0.018	3.265***	−0.011
	(0.034)	(0.419)	(0.087)
N	1,581	1,400	1,400
Residual Std. Error	0.079 (df = 1539)	1.000 (df = 1361)	0.079 (df = 1361)
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓

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

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

Table A.28: Hypothesis 1: Lagged Sum Private Facilities - State Only - Logged Sum Lawsuits

	Lagged Sum Facilities -*OLS*	Sum Lawsuits *First Stage IV*	Lagged Sum Facilities - *IV*
	(1)	(2)	(3)
Log Sum Lawsuits	0.531**		1.153**
	(0.251)		(0.587)
Weight per Judge Serving		0.003**	
		(0.001)	
Constant	−3.155**	3.265***	−5.838**
	(1.359)	(0.419)	(2.818)
N	1,581	1,400	1,400
Residual Std. Error	1.922 (df = 1539)	1.000 (df = 1361)	2.069 (df = 1361)
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓

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

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

A.2.7   Distribution of Hypothesis 2 Instrumental Variable: Proportion Judges who were Prior Prosecutors

Figure A.3 is a boxplot of the distribution of *Proportion Prior Prosecutor* within states with more than one district court, 1986 to 2016. This figure is useful at understanding whether the assumption of randomization is correct: within states that have more than one district court, is it the case that the distribution of the instrumental variable, the proportion of judges that are prior prosecutors, is significantly different across the district courts? West Virginia appears to have the most significant difference between their two district courts - the results do not change if I exclude all observations from that state.

Figure A.3: Standard deviation of Proportion Prior Prosecutor in states with more than one district court, 1986 to 2016.

A.2.8 Alternative Dependent Variables for Hypothesis 2: Proportion Inmates that are Private, Sum State Private Facilities, Sum All Private Facilities (State, Local, and Federal)

Tables A.29, A.30, and A.31 below show the same analyses as those in the paper, using proportion of inmates in private facilities, the sum of state-only private facilities, and the sum of all private facilities (either operated by state, local, or federal authorities) as alternative dependent variables for Hypothesis 2.

Table A.29: Hypothesis 2: Lagged Proportion in Private Facilities

	Lagged Prop. in Private - *OLS*	Sum Court Orders *First Stage IV*	Lagged Prop. in Private - *IV*
	(1)	(2)	(3)
Sum Court Orders	−0.009*		−0.122
	(0.005)		(0.161)
Prop. Prior Prosecutor		0.692	
		(0.424)	
Constant	−0.041***	0.183***	−0.023
	(0.012)	(0.070)	(0.032)
N	1,550	1,550	1,550
Residual Std. Error (df = 1508)	0.081	0.676	0.112
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓
F-Statistic		11.424	

*p < .1; **p < .05; ***p < .01
Note: All models have se's clustered by circuit.

Table A.30: Hypothesis 2: Lagged Sum Private Facilities - State Only

	Lagged Sum Facilities -*OLS*	Sum Court Orders *First Stage IV*	Lagged Sum Facilities - *IV*
	(1)	(2)	(3)
Sum Court Orders	0.198		−4.435**
	(0.213)		(2.198)
Prop. Prior Prosecutor		0.692	
		(0.424)	
Constant	−0.934***	0.183***	−0.212
	(0.338)	(0.070)	(0.664)
N	1,550	1,550	1,550
Residual Std. Error (df = 1508)	2.021	0.676	3.737
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓
F-Statistic		11.424	

*p < .1; **p < .05; ***p < .01
Note: All models have se's clustered by circuit.

Table A.31: Hypothesis 2: Lagged Sum Private Facilities - All Included

	Lagged Sum Facilities -*OLS*	Sum Court Orders *First Stage IV*	Lagged Sum Facilities - *IV*
	(1)	(2)	(3)
Sum Court Orders	0.569		−8.982**
	(0.502)		(4.174)
Prop. Prior Prosecutor		0.692	
		(0.424)	
Constant	−1.614***	0.183***	−0.126
	(0.551)	(0.070)	(1.199)
N	1,550	1,550	1,550
Residual Std. Error (df = 1508)	3.688	0.676	7.455
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓

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

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

A.2.9 Robustness Checks: Adding Population as a Control to Hypotheses 1 and 2

Tables A.32, A.33, A.34, A.35, A.36, and A.37 below are the estimations used in the paper, along with the alternative dependent variables, with population added as a control variable.

Table A.32: Hypothesis 1: Lagged Private Design Capacity with Population

	Lagged Private DC *OLS*	Sum Lawsuits *First Stage IV*	Lagged Private DC *IV*
	(1)	(2)	(3)
Sum Lawsuits	1.118**		3.336
	(0.564)		(2.693)
Population	0.0001	0.0001***	−0.0001
	(0.00005)	(0.00000)	(0.0002)
Weight per Judge Serving		0.212*	
		(0.122)	
Constant	−1,278.331***	3.902	−1,424.533**
	(400.372)	(79.694)	(593.014)
N	1,550	1,400	1,400
Residual Std. Error	1,656.935 (df = 1507)	310.563 (df = 1360)	1,770.965 (df = 1360)
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓
*p < .1; **p < .05; ***p < .01			

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

Table A.33: Hypothesis 1: Lagged Proportion in Private Facilities with Population

	Lagged Prop. in Private - *OLS*	Sum Court Orders *First Stage IV*	Lagged Prop. in Private - *IV*
	(1)	(2)	(3)
Sum Lawsuits	0.00001		0.00003
	(0.00001)		(0.0003)
Population	−0.000***	0.0001***	−0.000
	(0.000)	(0.00000)	(0.00000)
Weight per Judge Serving		0.212*	
		(0.122)	
Constant	−0.039***	3.902	−0.040
	(0.012)	(79.694)	(0.025)
N	1,550	1,400	1,400
Residual Std. Error	0.080 (df = 1507)	310.563 (df = 1360)	0.079 (df = 1360)
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓

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

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

Table A.34: Hypothesis 1: Lagged Sum Private Facilities - State Only with Population

	Lagged Sum Facilities - *OLS*	Sum Lawsuits *First Stage IV*	Lagged Sum Facilities - *IV*
	(1)	(2)	(3)
Sum Lawsuits	0.002*		0.008
	(0.001)		(0.006)
Population	0.00000	0.0001***	−0.00000
	(0.00000)	(0.00000)	(0.00000)
Weight per Judge Serving		0.212*	
		(0.122)	
Constant	−1.302**	3.902	−1.808*
	(0.530)	(79.694)	(0.999)
N	1,550	1,400	1,400
Residual Std. Error	1.721 (df = 1507)	310.563 (df = 1360)	2.746 (df = 1360)
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓

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

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

Table A.35: Hypothesis 2: Lagged Private Design Capacity with Population

	Lagged Private DC OLS	Sum Court Orders First Stage IV	Lagged Private DC IV
	(1)	(2)	(3)
Sum Court Orders	−273.479**		−4,679.397
	(120.565)		(5,294.399)
Population	0.0002***	0.00000***	0.0004
	(0.00004)	(0.000)	(0.0002)
Prop. Prior Prosecutor		0.630	
		(0.546)	
Constant	−1,164.379***	0.108*	−799.459
	(350.908)	(0.065)	(831.043)
N	1,550	1,550	1,550
Residual Std. Error (df = 1507)	1,687.053	0.627	3,244.438
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓
*p < .1; **p < .05; ***p < .01			

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

Table A.36: Hypothesis 2: Lagged Proportion in Private Facilities with Population

	Lagged Prop. in Private - OLS	Sum Court Orders First Stage IV	Lagged Prop. in Private - IV
	(1)	(2)	(3)
Sum Court Orders	−0.002		−0.129
	(0.003)		(0.206)
Population	−0.000***	0.00000***	0.000
	(0.000)	(0.000)	(0.000)
Prop. Prior Prosecutor		0.630	
		(0.546)	
Constant	−0.038***	0.108*	−0.028
	(0.012)	(0.065)	(0.026)
N	1,550	1,550	1,550
Residual Std. Error (df = 1507)	0.080	0.627	0.113
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓
*p < .1; **p < .05; ***p < .01			

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

Table A.37: Hypothesis 2: Lagged Sum Private Facilities - State Only with Population

	Lagged Sum Facilities -*OLS*	Sum Court Orders *First Stage IV*	Lagged Sum Facilities - *IV*
	(1)	(2)	(3)
Sum Court Orders	−0.373		−5.236
	(0.230)		(5.072)
Population	0.00000**	0.00000***	0.00000*
	(0.00000)	(0.000)	(0.00000)
Prop. Prior Prosecutor		0.630	
		(0.546)	
Constant	−1.141***	0.108*	−0.738
	(0.427)	(0.065)	(0.908)
N	1,550	1,550	1,550
Residual Std. Error (df = 1507)	1.781	0.627	3.539
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓

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

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

A.2.10 Weighting the Dependent Variables for Hypotheses 1 and 2

Tables A.38, A.39, A.40, and A.41 use the weighted versions of the design capacity variables. I estimated the following equation to weight these variables: $\gamma_{ja,t,c} = \frac{PrisonPop_{ja,t}}{PrisonPop_{ja,t}+PrisonPop_{jb,t}} * DesignCapacity_{t,c}$, where $\gamma_{ja,t,c}$ represents the design capacity of facility c for jurisdiction ja in time t, $PrisonPop_{ja,t}$ represents the prison population of jurisdiction a in time t, and $PrisonPop_{jb,t}$ represents the prison population of jurisdiction b in time t.

Table A.38: Hypothesis 1: Lagged Private Design Capacity (Weighted)

	Lagged Private DC Weighted - *OLS*	Sum Lawsuits *First Stage IV*	Lagged Private DC Weighted - *IV*
	(1)	(2)	(3)
Sum Lawsuits	1.587***		1.984***
	(0.457)		(0.725)
Weight per Judge Serving		1.070**	
		(0.430)	
Constant	−1,237.382***	−143.289	−1,325.454***
	(401.231)	(172.193)	(474.401)
N	1,581	1,400	1,400
Residual Std. Error	1,644.218 (df = 1539)	525.071 (df = 1361)	1,629.778 (df = 1361)
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓
*p < .1; **p < .05; ***p < .01			

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

Table A.39: Hypothesis 1: Lagged Proportion in Private Facilities (Weighted)

	Dependent variable:		
	Lagged Prop. in Private (Weighted) - *OLS*	Sum Court Orders *First Stage IV*	Lagged Prop. in Private (Weighted) - *IV*
	(1)	(2)	(3)
Sum Lawsuits	−0.00001		−0.00003
	(0.00001)		(0.00004)
Weight per Judge Serving		1.070**	
		(0.430)	
Constant	−0.035***	−143.289	−0.032***
	(0.011)	(172.193)	(0.012)
N	1,581	1,400	1,400
Residual Std. Error	0.074 (df = 1539)	525.071 (df = 1361)	0.075 (df = 1361)
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓

*p < .1; **p < .05; ***p < .01
Note: All models have se's clustered by circuit.

Table A.40: Hypothesis 2: Lagged Private Design Capacity (Weighted)

	Lagged Private DC Weighted - *OLS*	Sum Court Orders *First Stage IV*	Lagged Private DC Weighted - *IV*
	(1)	(2)	(3)
Sum Court Orders	226.861		−3,908.937
	(224.204)		(2,426.100)
Prop. Prior Prosecutor		0.692	
		(0.424)	
Constant	−959.375***	0.183***	−314.991
	(294.454)	(0.070)	(667.022)
N	1,550	1,550	1,550
Residual Std. Error (df = 1508)	1,865.669	0.676	3,369.350
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓

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

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

Table A.41: Hypothesis 2: Lagged Proportion in Private Facilities (Weighted)

	Lagged Prop. in Private (Weighted) - *OLS*	Sum Court Orders *First Stage IV*	Lagged Prop. in Private (Weighted) - *IV*
	(1)	(2)	(3)
Sum Court Orders	−0.008**		−0.107
	(0.004)		(0.157)
Prop. Prior Prosecutor		0.692	
		(0.424)	
Constant	−0.037***	0.183***	−0.022
	(0.011)	(0.070)	(0.030)
N	1,550	1,550	1,550
Residual Std. Error (df = 1508)	0.075	0.676	0.101
Circuit FE	✓	✓	✓
Year FE	✓	✓	✓
*p < .1; **p < .05; ***p < .01			

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

A.3 Appendix to Chapter 5

A.3.1 Different CAR Windows in OLS Regression

Tables A.42, A.43, A.44, and A.45 below try different windows for the first regression in Chapter 5: CAR[-2,2], CAR[-5,5], CAR[-10,10], and CAR[-30,30].

Table A.42: Average CAR[-2,2] Across and Within Firms After a Successful Lawsuit

	Dependent variable:				
			CAR[-2,2]		
	All Firms	CoreCivic	GEO Group	CSC	Cornell
	(1)	(2)	(3)	(4)	(5)
Constant	0.002	0.005	0.002	−0.005	−0.005
	(0.002)	(0.004)	(0.004)	(0.008)	(0.008)
Observations	1,123	438	305	180	180
R^2	0.000	0.000	0.000	0.000	0.000
Adjusted R^2	0.000	0.000	0.000	0.000	0.000
Residual Std. Error	0.080	0.088	0.062	0.104	0.104
	(df = 1122)	(df = 437)	(df = 304)	(df = 179)	(df = 179)

*p<0.1; **p<0.05; ***p<0.01

Note: SE's clustered by company in Column 1.

Table A.43: Average CAR[-5,5] Across and Within Firms After a Successful Lawsuit

			Dependent variable:		
			CAR[-5,5]		
	All Firms	CoreCivic	GEO Group	CSC	Cornell
	(1)	(2)	(3)	(4)	(5)
Constant	0.002	0.004	−0.007	0.011	0.011
	(0.004)	(0.007)	(0.005)	(0.010)	(0.010)
Observations	1,123	438	305	180	180
R^2	0.000	0.000	0.000	−0.000	−0.000
Adjusted R^2	0.000	0.000	0.000	−0.000	−0.000
Residual Std. Error	0.117	0.138	0.086	0.135	0.135
	(df = 1122)	(df = 437)	(df = 304)	(df = 179)	(df = 179)

*p<0.1; **p<0.05; ***p<0.01
Note: SE's clustered by company in Column 1.

Table A.44: Average CAR[-10,10] Across and Within Firms After a Successful Lawsuit

			Dependent variable:		
			CAR[-10,10]		
	All Firms	CoreCivic	GEO Group	CSC	Cornell
	(1)	(2)	(3)	(4)	(5)
Constant	−0.002	−0.003	−0.013*	0.002	0.002
	(0.005)	(0.007)	(0.007)	(0.013)	(0.013)
Observations	1,123	438	305	180	180
R^2	0.000	−0.000	0.000	0.000	0.000
Adjusted R^2	0.000	−0.000	0.000	0.000	0.000
Residual Std. Error	0.151	0.157	0.129	0.171	0.171
	(df = 1122)	(df = 437)	(df = 304)	(df = 179)	(df = 179)

*p<0.1; **p<0.05; ***p<0.01
Note: SE's clustered by company in Column 1.

Table A.45: Average CAR[-30,30] Across and Within Firms After a Successful Lawsuit

			CAR[-30,30]		
	All Firms	CoreCivic	GEO Group	CSC	Cornell
	(1)	(2)	(3)	(4)	(5)
Constant	−0.00003	0.00001	−0.011	−0.014	−0.014
	(0.007)	(0.012)	(0.014)	(0.020)	(0.020)
Observations	1,123	438	305	180	180
R^2	0.000	0.000	0.000	−0.000	−0.000
Adjusted R^2	0.000	0.000	0.000	−0.000	−0.000
Residual Std. Error	0.257	0.259	0.241	0.262	0.262
	(df = 1122)	(df = 437)	(df = 304)	(df = 179)	(df = 179)

Dependent variable:

*p<0.1; **p<0.05; ***p<0.01

Note: SE's clustered by company in Column 1.

A.3.2 Reconceptualizing the Independent Variable: Any Private Prisons

Table A.46 below uses a dummy variable for the presence of any private prisons in a state in place of the sum of private facilities in Table 5.2.

Table A.46: Average CAR After a Successful Lawsuit in States with Any Private Prisons

	Dependent variable:				
	CAR[-1,1]	CAR[-2,2]	CAR[-5,5]	CAR[-10,10]	CAR[-30,30]
	(1)	(2)	(3)	(4)	(5)
Private Facility Exists	0.002	0.0003	−0.005	−0.011	−0.015
	(0.002)	(0.002)	(0.008)	(0.012)	(0.017)
Observations	1,122	1,122	1,122	1,122	1,122
R^2	0.001	0.001	0.004	0.007	0.005
Adjusted R^2	−0.003	−0.003	0.0003	0.003	0.001
Residual Std. Error	0.057	0.078	0.115	0.147	0.253
	(df = 1117)	(df = 1117)	(df = 1117)	(df = 1117)	(df = 1117)

*p<0.1; **p<0.05; ***p<0.01

Note: All SE's clustered by company.

A.3.3 Adding Year Fixed Effects

Table A.47 adds year fixed effects to the estimation of Table 5.2.

Table A.47: Average CAR After a Successful Lawsuit in States with Private Prisons Plus Year Fixed Effects

	Dependent variable:				
	CAR[-1,1]	CAR[-2,2]	CAR[-5,5]	CAR[-10,10]	CAR[-30,30]
	(1)	(2)	(3)	(4)	(5)
Private Facility Exists	−0.0002*	−0.0001	−0.0005*	−0.002***	−0.003
	(0.0001)	(0.0003)	(0.0003)	(0.0003)	(0.002)
Observations	1,122	1,122	1,122	1,122	1,122
R^2	0.025	0.025	0.029	0.065	0.145
Adjusted R^2	−0.005	−0.005	−0.0002	0.036	0.119
Residual Std. Error	0.057	0.078	0.115	0.145	0.237
	(df = 1088)	(df = 1088)	(df = 1088)	(df = 1088)	(df = 1088)

*p<0.1; **p<0.05; ***p<0.01

Note: All SE's clustered by company.

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