

# Private Prisons: Growth and Consequences for the US Incarceration System

by

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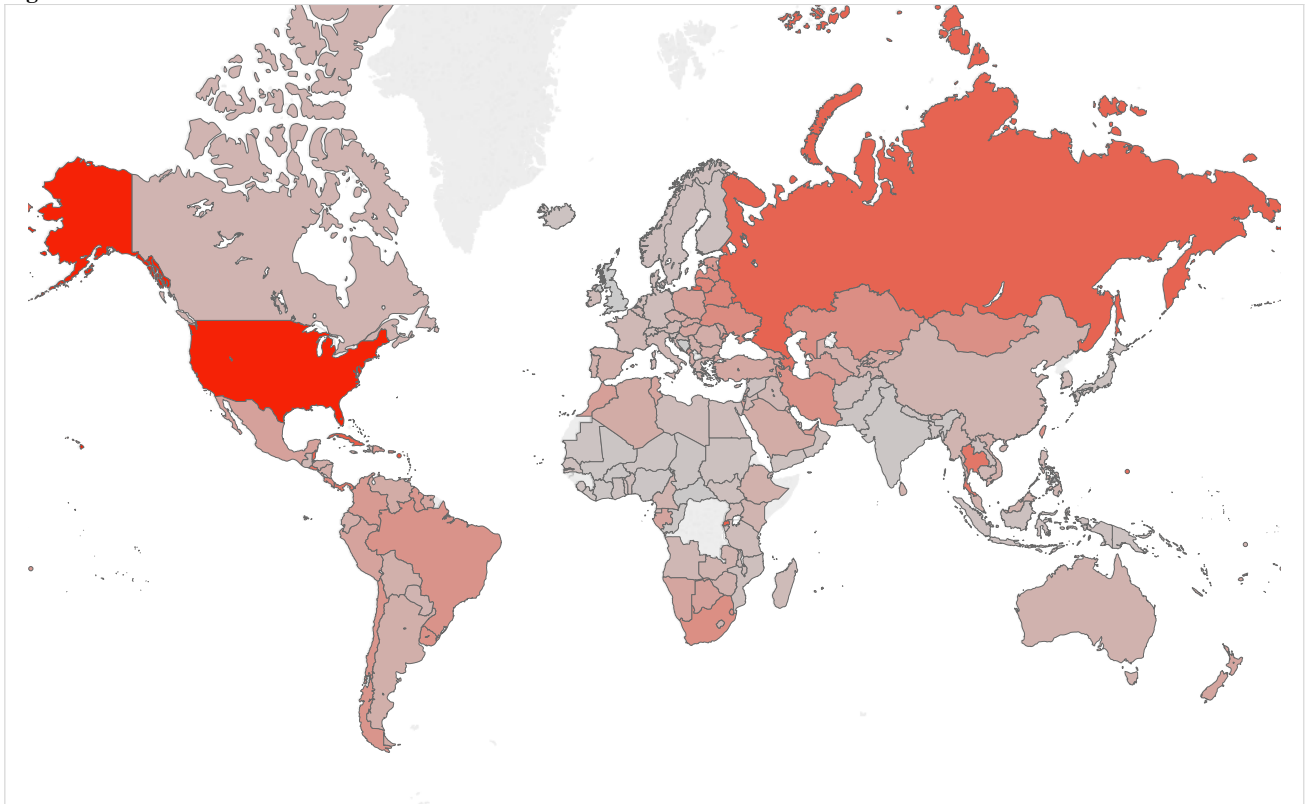
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## I. Incarceration Rates

### A. Overview of US Incarceration

The US has both the largest prison population and the highest prison population per capita in the world, accounting for 5% of the global population but 25% of the world's prisoners.<sup>1</sup> (Figure 1) There are 1.6 million people in the America's prisons, but this dynamic of mass incarceration has not always been the case. From 1978 to 2013, there has been a 413% increase in the prison population.<sup>2</sup> Issues around incarceration are increasingly becoming top of mind amongst lawmakers, academic researchers, policy experts, and social activists. Within this context of rising incarceration, private prisons are an area of particularly intense debate and controversy. This paper discusses the context of rising incarceration, declining crime rates, and the forces driving private prisons.

**Figure 1: Global Incarceration Rates**



<sup>1</sup> Walmsley, Roy. World Prison Population List. International Centre for Prison Studies (2013).

<sup>2</sup> Bureau of Justice Statistics. Corrections Statistical Analysis Tool (CSAT) – Prisoners.

### B. Policy Decisions and Implications

The incarceration rate had remained relatively range-bound over the course of five decades up to the early 1970s. From this time period onwards, however, the incarceration rate has climbed upwards at a rapid pace, plateauing in the 2000s. (Figure 2) As a result of this secular rise in incarceration rates, the US currently has the world's highest incarceration rate. The causes for this dramatic increase are manifold. From the mid-1970s to the mid-1980s, policymakers pushed through reforms intended to make sentencing more equitable and results more consistent. From the mid-1980s through the late 1990s, sentencing policy shifted to lengthening sentences for drug and violent crimes, both by making sentences longer and their enforcement more certain. The primary forces driving these changes were mandatory minimum sentences, three strikes laws, truth-in-sentencing laws, and laws applicable to certain offenses requiring life without the possibility of parole. Mandatory minimum sentence laws require minimum prison terms for those

convicted of certain crimes, three strikes laws usually require 25-year sentences for those convicted of a third felony, and truth-in-sentencing laws typically require those convicted to serve at least 85% of their original sentence. Since the mid-1990s, very few states have enacted

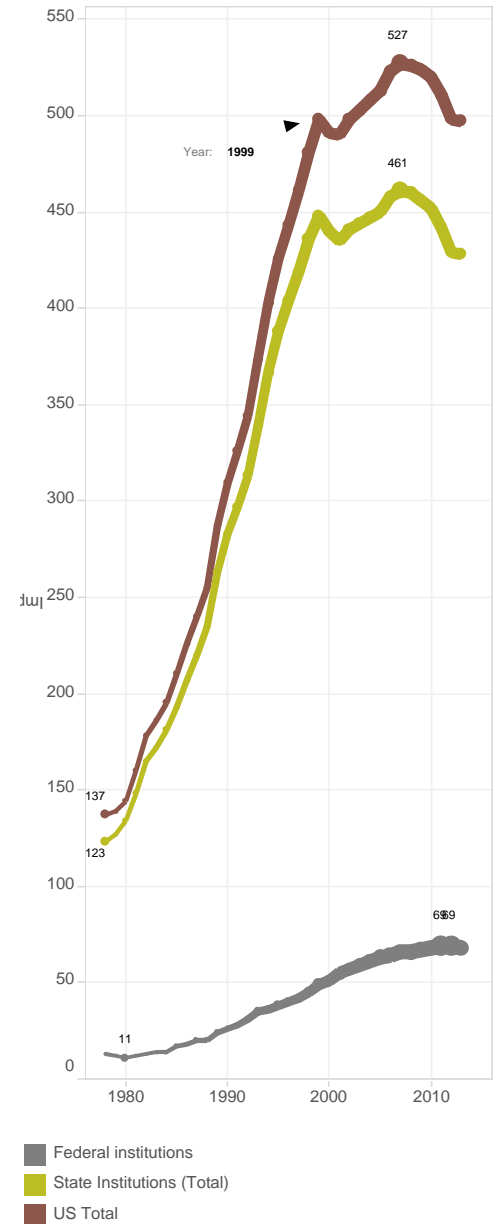


Figure 2: US Incarceration Rates (1978-2013)

new laws relating to any of these categories. The new mandatory minimum sentencing laws that have been enacted target narrowly-defined crimes such as carjacking and child pornography.<sup>3</sup>

Policies in relation to “get tough on crime” and the “war on drugs” have led to more arrests and harsher penalties for non-violent offenses. Mandatory minimum sentencing, especially as it relates to crack versus cocaine possession, has increased incarceration and has kept prisoners incarcerated for longer periods of time. Under these legal regimes, the punishment for minor offenses has risen along with law enforcement’s focus on them. Nonviolent crimes, even at young ages, can lead to elevated penalties when these policies are in place. Mandatory minimum sentencing in the US was traditionally used for a limited range of serious offenses, such as murder and treason. Beginning in the mid-1900s, Congress enacted more mandatory minimum penalties, applied them to a broader range of offenses, and lengthened the minimum penalties. As a result, the majority of convictions carrying mandatory minimum penalties are now for controlled substances, firearms, identity theft, and child sex offenses. More specifically, drug trafficking offenses comprised 77.4% of federal convictions for offenses carrying a mandatory minimum penalty.<sup>4</sup> The rising scope of correctional supervision also creates opportunities for incarceration. The parole and probation rate has outpaced the increase in the overall incarceration rate. If members of the parole and probation population violate the terms of their supervision, they put themselves at risk of admission.<sup>5</sup> In short, three strikes, zero tolerance, and truth-in-sentencing policies have increased the likelihood and severity of incarceration.

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<sup>3</sup> National Research Council. (2014). The Growth of Incarceration in the United States: Exploring Causes and Consequences. Committee on Causes and Consequences of High Rates of Incarceration.

<sup>4</sup> Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System. United States Sentencing Commission.

<sup>5</sup> National Research Council. (2014). The Growth of Incarceration in the United States: Exploring Causes and Consequences. Committee on Causes and Consequences of High Rates of Incarceration.

### *C. Underlying Drivers of Incarceration*

The determinants of the prison population are the incidence of crime, probability of arrest given a committed crime, probability of incarceration given arrest, and the duration of the sentence. Beck and Blumstein have disaggregated incarceration rates along these factors. The ratio of arrests to crimes has not changed in the aggregate; this ratio is often used as a proxy for policing effectiveness. In other words, the data suggest increases in incarceration rates have not been driven by a police force more adept at arresting criminals.<sup>6</sup>

The probability of incarceration given arrest has trended upwards from the 1980s as measured by prison commitments per 100 adult arrests. For example, prison commitments for drug offenses rose from 2 to 9 per 100 arrests between 1980 and 2010. While the increase is not as stark for all offenses, the data indicate rising commitments to arrests have been a major factor in the increase in incarceration rates.<sup>7</sup>

The duration of incarceration requires estimation since the sentence length is unknown for those who have not yet been released. Looking at cohorts of released prisoners underrepresents prisoners with very long sentences, and those with life sentences will be excluded altogether. As a result, sentence lengths are best observed over a substantially long period of time. Average sentence lengths will understate true changes when the propensity for very long sentence periods is rising: this has largely been the case since the 1980s. The largest increase in average time served has been for murder, increasing from 5.0 years in 1981 to 16.9 years in 2000. In a seemingly counterintuitive result, the lowest rate of increase in time served was for drug offenses, which increased from 1.6 years in 1981 to 1.9 years in 2000 and has been

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<sup>6</sup> Blumstein, Alfred. Population Growth in U. S. Prisons, 1980-1996. *Crime and Justice* 26. Prisons (1999): 17-61.

<sup>7</sup> National Research Council. (2014). *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Committee on Causes and Consequences of High Rates of Incarceration.

steady since. This result is likely explained by short prison sentences replacing what previously would have been time served under probation or in a jail.<sup>8</sup>

The growth in federal incarceration has been even more pronounced than at the state level. From 1980 to 2013, there has been a 582% increase in the incarceration rate in the federal system.<sup>9</sup> Virtually all incarceration in federal prisons stems from convictions for robbery, fraud, and drug, weapon, and immigration offenses. Increased federal incarceration due to drug-related offenses mirrors that of the state level.

The data indicate that the rise in incarceration rates is driven by two factors: increased probability of imprisonment given arrest and longer sentences for those imprisoned. These two factors have been impacted by laws or guidelines promoting lengthy prison sentences for drug and violent crimes as well as repeat offenses. Furthermore, more than half the states and the federal system have adopted three strikes and truth-in-sentencing laws that ultimately increase incarceration rates.<sup>10</sup>

#### *D. Dispersion across States*

The time series data on incarceration rates can be divided into two time periods: from 1978 to 2000 and 2000 to the present. The increase in incarceration rates can be accounted for predominantly by the former time period, and incarceration rates have plateaued in the latter period. Different states witnessed very different growth rates in incarceration from 1978 to 2000, with Southern states experiencing the largest increases and Northeastern states the smallest.

While incarceration rates rose drastically across the entire nation, the dispersion of incarceration rates across states has also increased since the 1980s. (Figures 3 and Figure 4) States with certain

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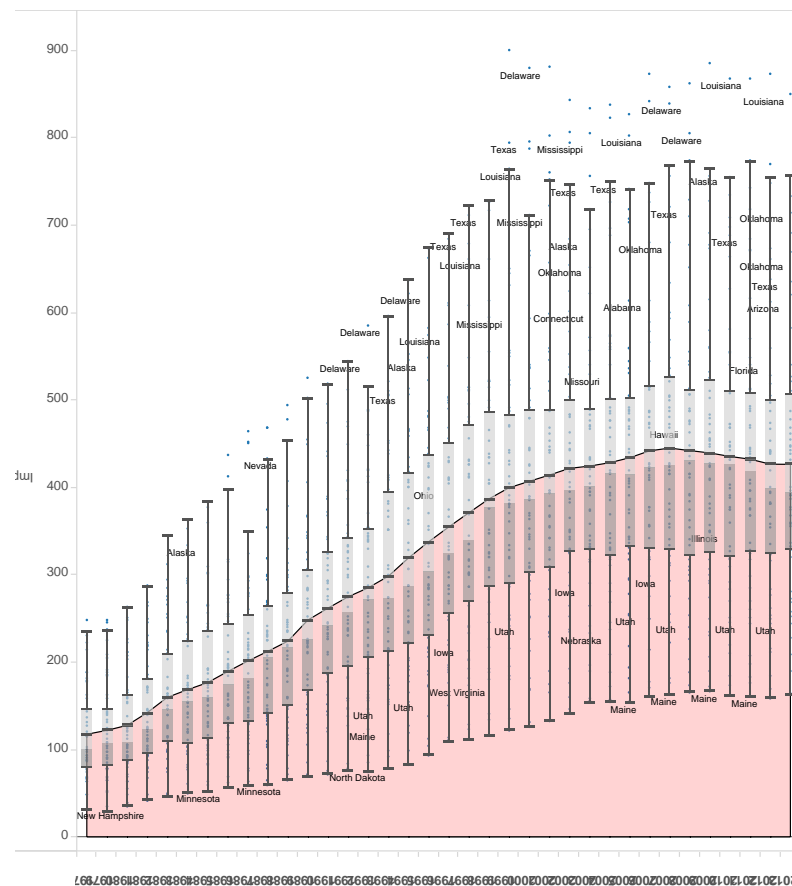
<sup>8</sup> National Research Council. (2014). The Growth of Incarceration in the United States: Exploring Causes and Consequences. Committee on Causes and Consequences of High Rates of Incarceration.

<sup>9</sup> Bureau of Justice Statistics. Corrections Statistical Analysis Tool (CSAT) – Prisoners.

<sup>10</sup> National Research Council. (2014). The Growth of Incarceration in the United States: Exploring Causes and Consequences. Committee on Causes and Consequences of High Rates of Incarceration.

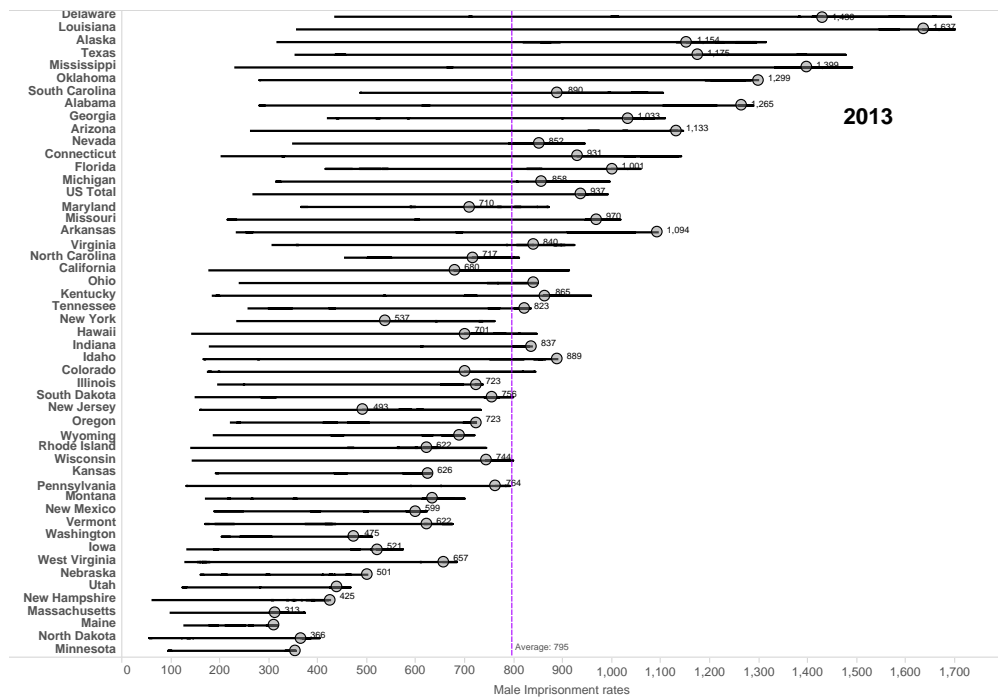
characteristics are much more likely to experience high incarceration rates. Characterizing states into top and bottom quintiles based off most recent data allows us to visualize the difference in degree. Features of high incarceration states include conservative political orientation, large black population percentage (Figure 5), low income, high poverty rates, high religiosity, and high percentage of population without a high school degree. This analysis uses the most recent demographic figures and is only descriptive in nature; it does not control for each factor and many high incarceration states share these features.

**Figure 3: Incarceration Rate Dispersion (1978-2013)**

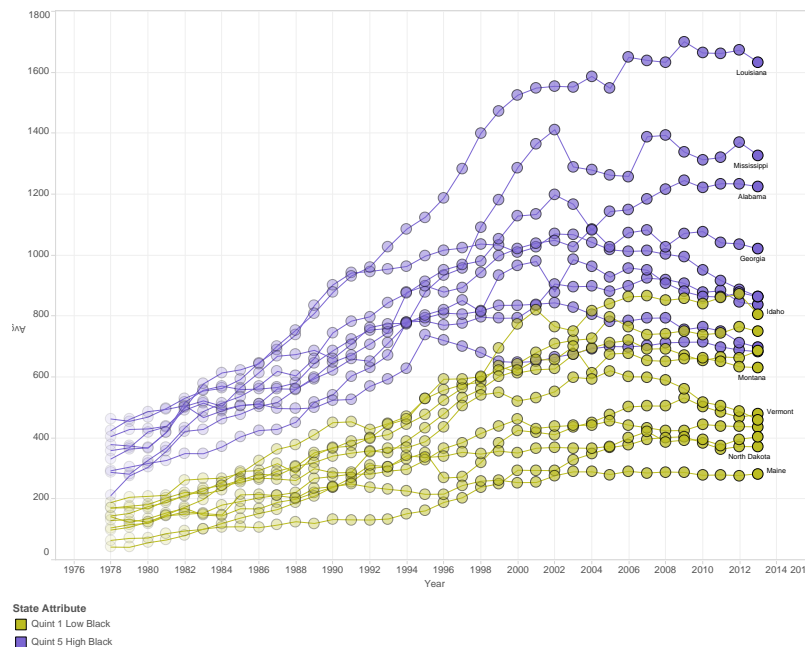




**Figure 4: Incarceration Rates by State (1978-2013)**



**Figure 5: Incarceration Rate - Black Population Quintiles**



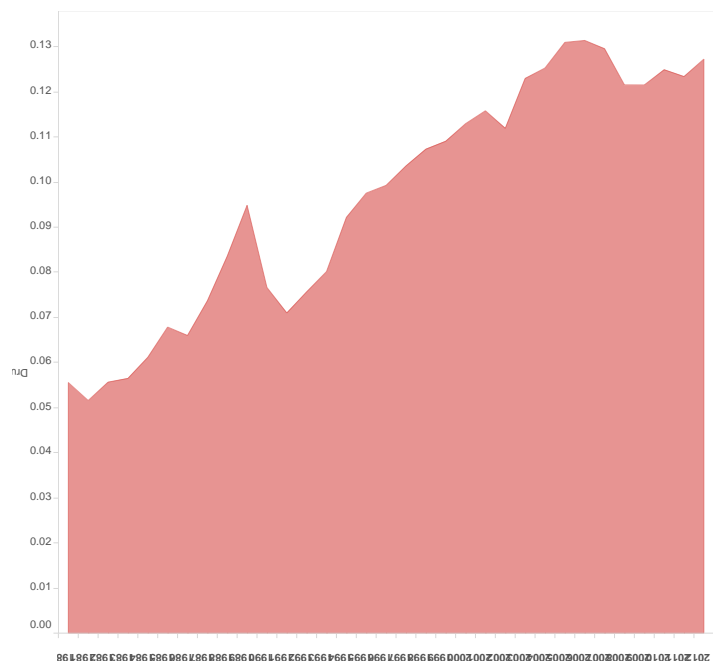
Mandatory minimum policies are not applied to all offenses subject to these policies; exceptions can be made because of substantial assistance (e.g. assisting law enforcement) or the safety valve provision (e.g. nonviolent drug offenders). However, Black offenders were subject

to a mandatory minimum penalty at sentencing for 65.1% of applicable cases, followed by White (53.5%), Hispanic (44.3%), and Other Race (41.1%). Furthermore, relief from mandatory minimum sentences had a large impact on the length of the sentence imposed: offenders who were subject to the mandatory minimum received an average sentence of 139 months, as opposed to 63 months for offenders who received relief.<sup>11</sup>

The drug arrest rate has increased dramatically, with 80% more arrests for drug possession or use in 2010 than in 1990.<sup>12</sup> (Figure 6) Drug arrest rates are also higher for African Americans than for whites. A possible cause for these elevated arrest rates is that African Americans are more likely to engage in drug-related activity, but the limited evidence on the subject suggests this is not the case. The

Monitoring the Future survey of high school seniors includes self-reported drug use, with data collection beginning in the 1970s. Both this survey and the National Survey of Drug Abuse validate that self-reported drug use is actually lower among blacks than whites. The National Longitudinal Survey of Youth, 1979 and 1997, also shows higher sales of drugs amongst poor whites than poor blacks.<sup>13</sup>

**Figure 6: Drugs Arrests as a % of Total Arrests (1980-2012)**



<sup>11</sup> Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System. United States Sentencing Commission.

<sup>12</sup> Bureau of Justice Statistics. Arrests in the United States, 1990-2010.

<sup>13</sup> National Research Council. (2014). The Growth of Incarceration in the United States: Exploring Causes and Consequences. Committee on Causes and Consequences of High Rates of Incarceration.

The application of mandatory minimum sentences and drug arrests are only two examples out of many suggesting racial bias within the criminal justice system. These biases potentially lead to higher incarceration rates in states with large Black populations.

Texas presents a case study for rising incarceration to understand the state-specific factors that can drive dispersion. The state's incarceration rate nearly doubled between 1992 and 1995, well exceeding national trends. The state legislature created a new class of felonies in 1993, primarily for low-level drug and property offenses. New sentencing guidelines required violent offenders to serve half their sentence before becoming eligible for parole, up from the previous 25% requirement. Stricter parole standards led to lower releases through parole: 18 out of every 100 prisoners being considered by a parole board were released in 1995, as compared to 75 out of 100 in 1990.<sup>14</sup>

#### *E. Consequences and Key Considerations*

The explosion of incarceration is worthy of further scrutiny. The primary purposes of incarceration are incapacitation, deterrence, retribution, and rehabilitation. The US justice system has a greater focus on punishment than rehabilitation than other countries.<sup>15</sup> Furthermore, as the incarceration rate rises, the US experiences diminishing benefits from deterrence effects, as will be discussed later in this paper. The costs of incarceration include the actual cost of housing an inmate, but the more hidden costs are the effects on inmates and communities. Formerly incarcerated individuals' employment prospects are bleak, and there is a substantial loss in skill-set and education due to the time spent in prison. The family structure can be harmed if a parent is incarcerated, and unemployment can contribute to recidivism.<sup>16</sup> The American context of

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<sup>14</sup> Texas leads nation in incarceration. <http://lubbockonline.com/news/120596/texas.htm>

<sup>15</sup> Deady, Carolyn W. Incarceration and Recidivism: Lessons from Abroad. Pell Center for International Relations and Public Policy (2014).

<sup>16</sup> Western, Bruce. Incarceration, Marriage, and Family Life. 2004.

rising incarceration also draws into question issues of social justice, particularly excess punishment and biases in the criminal justice.

## II. Crime Rates

### A. *Levitt's Argument on Abortion and Crime*

Crime rates have declined steeply from their highs, starting in the 1990s. The causes of this dramatic decline are debated, and a number of factors likely contributed. John Donohue and Steven Levitt's "The Impact of Legalized Abortion on Crime" has caused a stir in the academic community and beyond, with the key finding being popularized through Levitt's *Freakonomics*. The authors argue that unwanted children are more likely to commit crimes since they are born into families that are unwilling or unable to offer a nurturing environment. Five states had legalized abortion prior to the nationwide legalization through *Roe v. Wade*. These five states, the authors argue, witnessed an earlier decrease in crime rates than the rest of the country. States with higher abortion rates also experienced lower crime rates 20 years later. (20 years is approximately the age associated with the greatest propensity to commit a crime.) The authors conclude with an estimate that crime was 15-25% lower in 1997 than what it would have been without legalized abortion.<sup>17</sup>

Critics of Donohue and Levitt have run the same analysis, correcting for missing controls due to a programming error. Foote and Goetz also change total arrests to arrests per 100,000 people to better represent the incidence of crime. Based off these changes, Foote and Goetz argue that the impact of abortion on crime rates is no longer evident.<sup>18</sup> Levitt's explanation also does not explain why crime rates have continued falling even after the full benefits of legalized

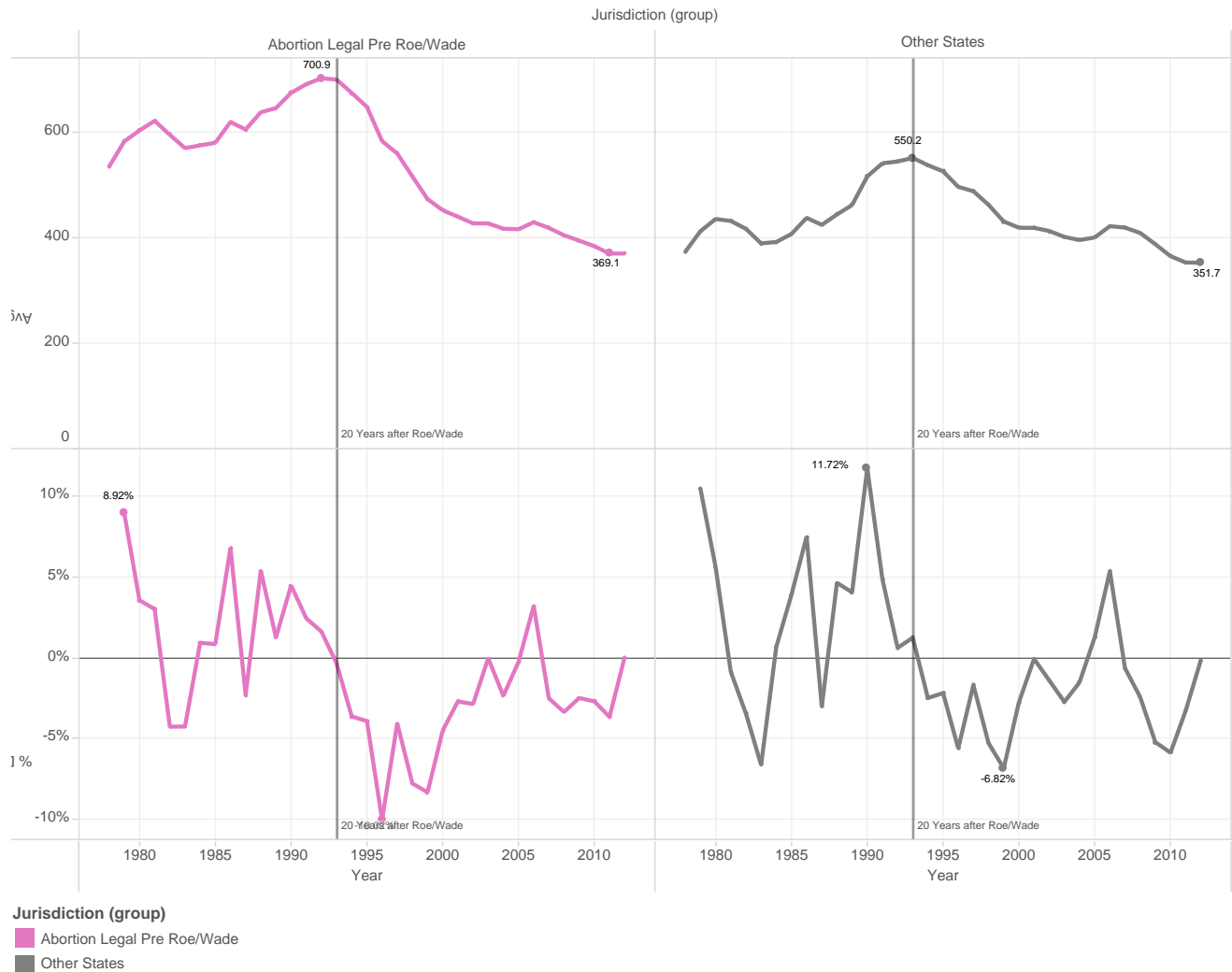
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<sup>17</sup> Donohue, J. J., and S. D. Levitt. The Impact of Legalized Abortion on Crime. *The Quarterly Journal of Economics* 116.2 (2001): 379-420.

<sup>18</sup> Oops-onomics. *The Economist*. The Economist Newspaper, 03 Dec. 2005.

abortion should have been realized. (Figure 7) Crime rates in Britain also started falling after the US, even though Britain had legalized abortion earlier.

**Figure 7: Crime in States with Legalized Abortion prior to Roe versus All Other States**



### *B. More Explanations for the Decline in Crime*

Alternative explanations to falling crime rates abound. Reyes (2007) argues that the unleading of gasoline contributed significantly to crime rates. The US removed lead from gasoline through the Clean Air Act in the late 1970s. Childhood lead exposure increases the propensity for characteristics like impulsivity, aggression, attention deficit and hyperactivity

disorder, and low IQ. Reyes concludes that changes in childhood lead exposure could account for a 56% decrease in violent crime in the 1990s.<sup>19</sup>

While Levitt's abortion hypothesis is particularly well-publicized, he has argued that other primary causes include increases in policing resources, growing incarceration, and the waning crack epidemic. Demographics have contributed to the decline as well.<sup>20</sup> The increase in births post-World War 2 laid the seeds for a surge in the population of 16-24 year olds. This age cohort has an increased likelihood of committing crime. As this cohort ages and the overall population ages, crime rates could see further declines. Demographics alone do not explain the dramatic decrease in crime; for example, cities like New York, Los Angeles, and London have experienced declining crime rates without the previously discussed demographic tailwinds.<sup>21</sup>

Better policing serves as an alternate means of deterrence and could help to explain declining crime. The work of police commissioners like Bill Bratton in New York and Los Angeles increased police effectiveness and coincided with steep declines. Practices such as identifying crime hotspots and leveraging data-driven tools like CompStat had their intended result, with crime falling steeply in particular locales that were the target of greater police interventions. The implementation of technology, such as DNA testing, mobile phone location services, and surveillance cameras increase the risks of committing a crime and lower the likelihood of getting away.<sup>22</sup>

In addition elevated risk, the rewards of committing a crime have also fallen. An increasing share of homes has burglar alarms, window locks, and safes. Retailers have invested

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<sup>19</sup> Reyes, Jessica Wolpaw. Environmental Policy as Social Policy? The Impact of Childhood Lead Exposure on Crime. *The B.E. Journal of Economic Analysis & Policy* 7.1 (2007).

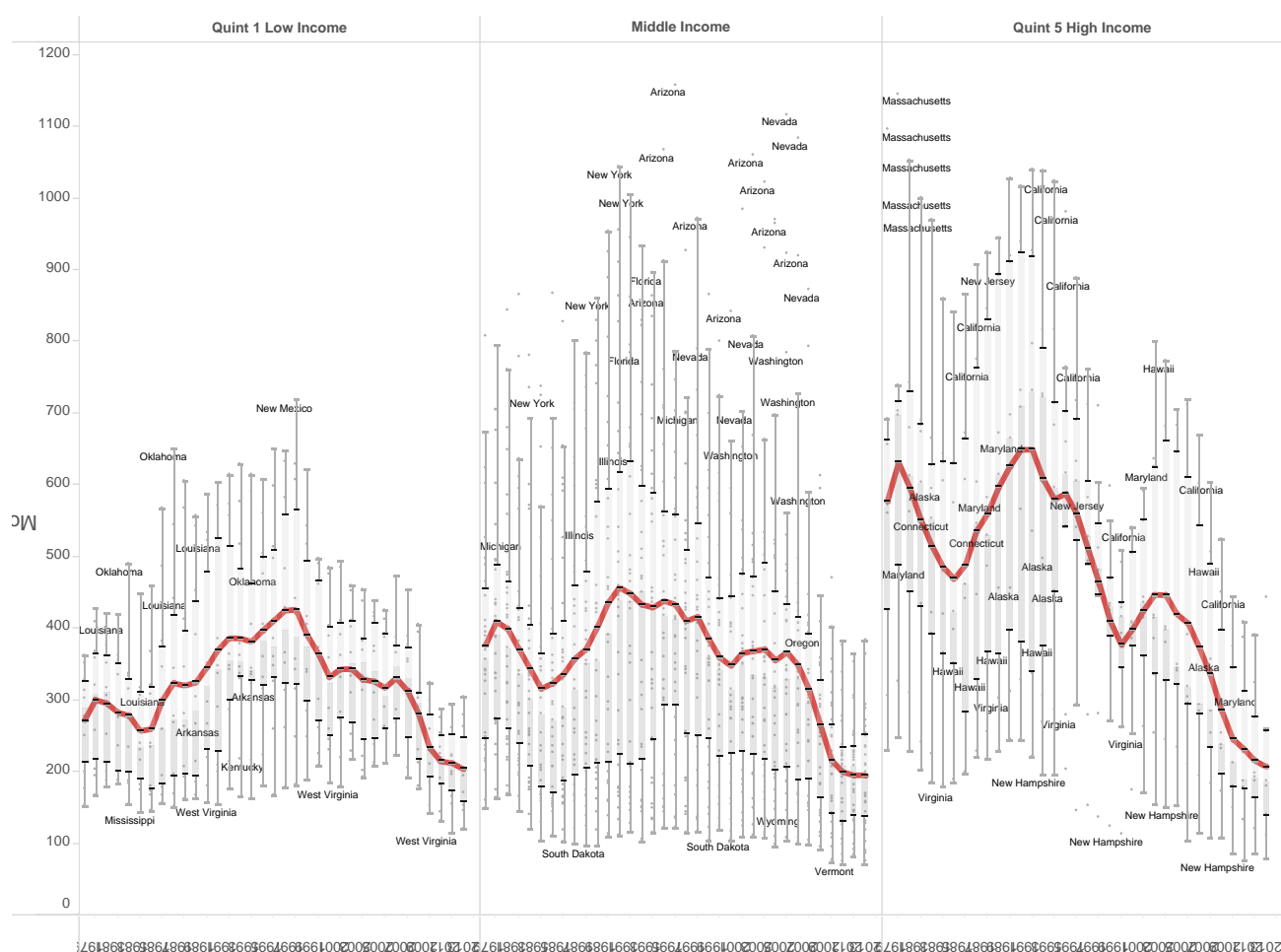
<sup>20</sup> Levitt, Steven D. Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not. *Journal of Economic Perspectives* 18.1 (2004): 163-90.

<sup>21</sup> Where Have All the Burglars Gone? *The Economist*. The Economist Newspaper, 20 July 2013.

<sup>22</sup> Ibid.

in shrink reduction through the form of security gates and RF or RFID tags. The private security industry has grown, and fewer businesses handle cash on premises, leading to fewer viable targets for robberies. Central locking, alarms, and hotwiring-proof circuitry make it much more difficult to steal a car, leading to dramatically lower car theft rates. (Figure 8) Lower car theft has cascading effects on crime, since stolen vehicles are often used as getaway cars in other crimes and car theft is a “gateway” crime of sorts. In short, potential targets of crime have innovated at a faster pace than criminals, leading to a worsening risk/reward profile of crime.

**Figure 8: Motor Theft Crime Rate - Income Quintiles**



Broader social changes have likely reduced criminality amongst the youth. For example, the receding crack-cocaine epidemic reduced crime in the 1990s. The millennial generation is

more likely to be educated and less likely to use drugs. Repopulation of inner cities could be a boon for areas previously struggling due to suburban migration. Gentrification in areas like Harlem, while controversial in its own right, would lower crime according to the broken windows theory, which stipulates that preventing low-level crime helps to ensure lawfulness.<sup>23</sup>

Crime rates are elevated for states in which a higher percentage of the population has not received a high school degree. (Figure 9) The relationship between education and crime is another potential source for dispersion in crime rates within states. Education raises the economic returns of legitimate work and heightens the opportunity cost of incarceration. Additionally, the stigma of a criminal conviction is greater for white collar than blue collar workers. Schooling also potentially increases the psychic cost of committing crime and may change individual rates of time preference or risk aversion. Lastly, criminal behavior is state dependent and the probability of committing a crime is higher for those that have done so in the past. As a result, an increased propensity to commit a crime, due to a lack of education in this example, has a self-amplifying characteristic to it.<sup>24</sup>

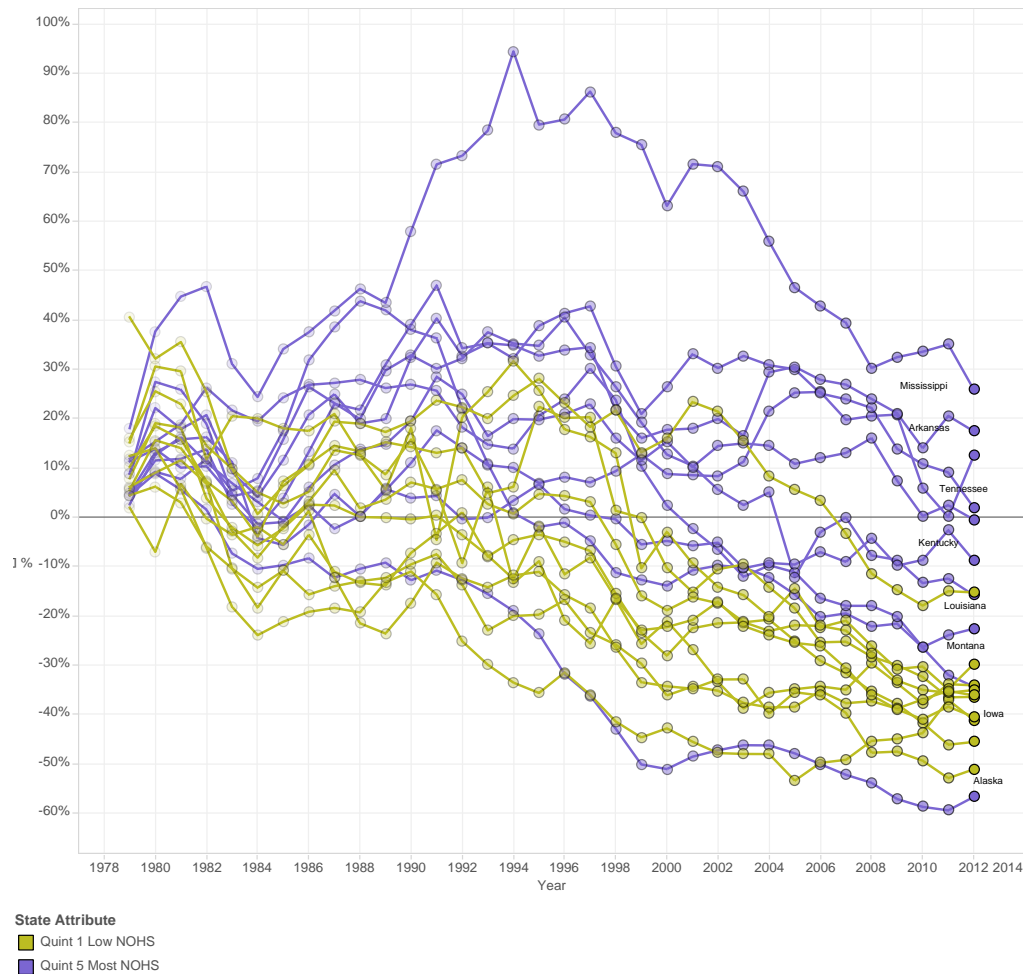
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<sup>23</sup> Ibid.

<sup>24</sup> Lochner, Lance and Moretti, Enrico. The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports. American Economic Association 94.1 (2004).



**Figure 9: % Change in Incarceration –High School Degree Quintiles**



### *C. The Relationship between Crime and Incarceration*

The relationship between incarceration rates and crime rates is also under contention. Crime rates would ostensibly decrease as incarceration rates increase due to both incapacitation of existing criminals and deterrence of future ones. However, the data suggest a limited impact of incarceration on crime rates. An increase incarceration does not seem to have translated well to deterrence and lower crime. For example, the US experienced increases in crime rates in the late 1970s and 1980s, which coincided with a rising incarceration rate. (Figure 10) The problem with this kind of broad statement is the preponderance of confounding factors. Research that attempts to control for these factors finds that rising incarceration has only a small effect on

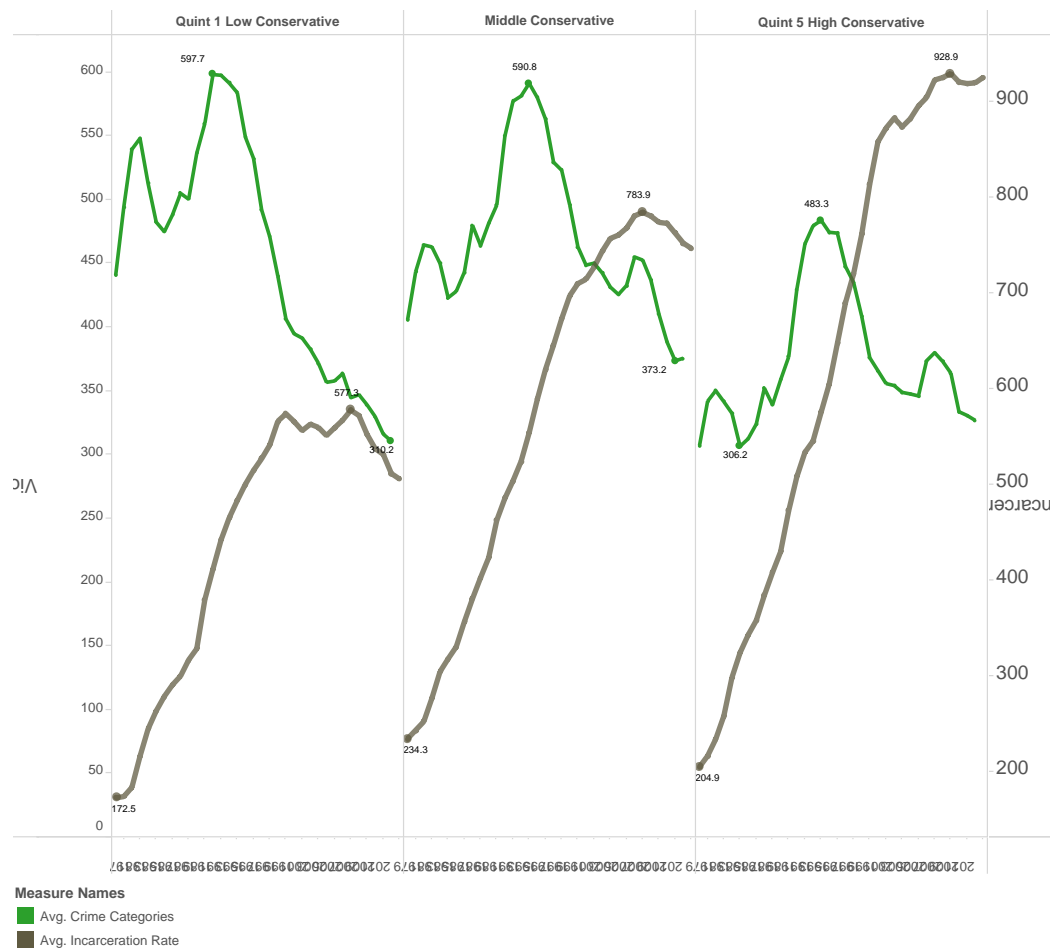
lowering crime rates.<sup>25</sup> Furthermore, Canada, the Netherlands, and Estonia have all decreased their prison populations without experiencing higher crime rates. Closer to home, New York has experienced falling crime rates in conjunction with falling incarceration rates.

Crime and incarceration are related, but the link between the two is indirect and not immediate. As a framework for analysis, there are two factors at work in relating crime to incarceration: the incidence of crime and the policy response to the crime, as determined by the criminal justice system. The incidence of crime reflects the number of people who have committed a crime, while the policy response determines the likelihood and severity of a sentence. The data suggest that the rise in incarceration rates has been fueled by the policy response to crime, not the incidence of crime.

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<sup>25</sup> Roeder, Oliver. What Caused the Crime Decline? Brennan Center for Social Justice (2015).

**Figure 10: Relationship between Crime Rates and Incarceration Rates – Conservative Quintiles**



### III. Private Prisons

#### A. Overview of Private Prisons

Given the dramatic rise in incarceration rates in the past thirty years, the private prison industry has witnessed similarly explosive growth. Social activist Angela Davis coined the term “prison industrial complex” in describing the combination of public and private forces driving the social concerns around US incarceration. Within this complex, private prison operators have been the subjects of particularly intense scrutiny. Growth in the private prison population has far exceeded growth in overall incarceration: the number of private federal facility inmates has

increased 120% since 2000.<sup>26</sup> Two publicly traded corporations, Corrections Corporation of America and GEO Group operate the majority of private prisons in the US.

### *B. Historical Context of Private Prisons*

The US has a complicated history with private prisons. The modern conception of the prison emerged in the US during the 18<sup>th</sup> century, along with the coinciding popularity of private facilities. These private prisons often benefited from prisoner labor in situations that would be considered exploitative today. The convict labor system became increasingly mired in bribery and corruption due to a lack of independent regulation. Furthermore, organized labor, manufacturers, and farmers were vocal in their opposition to what they considered as unfair competition.<sup>27</sup>

President Theodore Roosevelt signed an executive order in 1905 banning convict labor on federal projects. Congress passed the Hawes-Cooper Act in 1929 to prohibit inmate-produced imports from other states. Additionally, Congress and state legislatures passed laws to further limit the interaction of prisoners with the private sphere. By the 1920s, the trend was to keep more and more of the corrections system within the government. While governments increasingly controlled prisons, corrections agencies did outsource discrete functions starting in the 1900s. For example, governments would contract out prisoner services such as food preparation, health care, and inmate transportation to both for-profit and not-for-profit counterparties.<sup>28</sup>

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<sup>26</sup> Bureau of Justice Statistics. Corrections Statistical Analysis Tool (CSAT) – Prisoners.

<sup>27</sup> Austin, James and Coventry, Garry. Emerging Issues on Privatized Prisons. National Council on Crime and Delinquency (2001).

<sup>28</sup> Ibid.

### *C. Factors Driving Private Prison Adoption*

By the mid-1970s, federal and local governments were comfortable enough to expand the role of private players from a contractual relationship to an increasingly operational one. This trend began with juvenile correctional operations: Pennsylvania's Weaversville Intensive Treatment Unit, opened in 1976, is considered the first high-security institution to be privately owned and operated. This historical fact has persisted, with a much larger proportion of juvenile offenders being held in private facilities than the overall prisoner population. Although private facilities hold 31% of the juvenile offender population, for-profit corporations operate only 7% of facilities.<sup>29</sup> Most of the literature and media attention over private prisons is directed to adult facilities. Juvenile facilities have received much less scrutiny even though their presence is well established, with the privately operated Society for the Reformation of Juvenile Delinquents establishing its first house of refuge in New York City in 1825.<sup>30</sup> Given that private operators are mostly non-profit within the juvenile space, this feature hints at the possibility that the key contention is operators' profit motive, as opposed to private ownership. Another possible reason for why juvenile centers have not received the same attention is because private juvenile facilities tend to be different in nature from their public counterparts. Private facilities are often smaller community-based homes or halfway houses, while public facilities are more likely to serve as training schools or detention centers.

The Bureau of Prisons began contracting with private operators in the late 1960s for community treatment centers, serving as halfway houses for federal prisoners prior to release or parole. Like outsourced services, these centers too received little attention, likely because they operated outside the mainstream secure prison environment. By 1984, the US Immigration and

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<sup>29</sup> Juvenile Offenders and Victims: National Report Series. Office of Juvenile Justice and Delinquency Prevention (2015).

<sup>30</sup> McDonald, Douglas. Private Prisons in the United States. Abt Associates (1998).

Naturalization Services (INS) had contracts with two private prison operators for the purpose of detaining illegal immigrants. The INS was one of the first governmental agencies to contract with private operators, and it ramped up the number of contracted beds rapidly in subsequent years. In 1985, Corrections Corporation of America received the first state-level private prison contract award from Kentucky. Rising incarceration rates and correctional costs made privatization a more viable policy option. At first, private prisons failed to garner much attention or controversy, likely due to the nascent state of the market and the consequently small share of total inmates.<sup>31</sup>

Within this context of rising incarceration rates, state governments in the 1980s saw private prisons as a way to address the need for prison beds. Taxpayers at the time were hesitant to pay for a rising prison population, and more and more policymakers saw private prisons as a way to address cost concerns. Most scholars consider faster and cheaper bed capacity as the key driver of private prison growth, particularly in light of rapidly increasing incarceration rates in the 1980s. Clark (1998) estimated that rebuilding prisons for Washington D.C.'s Department of Corrections would take three to four years for private operators, as opposed to five to six years for the government.<sup>32</sup> While private operators may have an advantage in construction, they could also benefit from building without public approval. If a state is financing a public facility through a construction bond, it has to achieve voter approval on the bond. On the other hand, private contracts can be grouped together with the rest of the state's operating budget.<sup>33</sup>

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<sup>31</sup> Austin, James and Coventry, Garry. *Emerging Issues on Privatized Prisons*. National Council on Crime and Delinquency (2001).

<sup>32</sup> Report to the Attorney General Inspection and Review of the Northeast Ohio Correctional Center. Office of the Attorney General (1998).

<sup>33</sup> Austin, James and Coventry, Garry. *Emerging Issues on Privatized Prisons*. National Council on Crime and Delinquency (2001).

Being tough on crime increasingly served as a political tool, exemplified by Richard Nixon's 1968 presidential campaign. This politicization of justice coincided with changes in the perception of incarceration, moving from rehabilitation to incapacitation. In other words, keeping criminals unable to further harm the public became a more prominent mandate for prisons. Due to the policies discussed previously, incarceration rates grew tremendously and governments were ill equipped to handle the increase in prisoner counts.<sup>34</sup> By 1986, 43 states were operating their prisons at greater than 95% capacity, and 38 states were at either full or over capacity.<sup>35</sup> Courts began ordered correctional institutions to reduce overcrowding, with 33 states receiving such orders in 1985. These court orders further bolstered the substantial increase in prison bed demand.<sup>36</sup>

The political landscape of the 1980s favored the development of the private prison industry through its support for privatization more generally. For example, President Reagan created a Commission on Privatization to explore different government functions and make recommendations on their privatization. With respect to private prisons, the Commission deemed contracting as an "effective and appropriate" option. However, the Commission also commented: "Because experience has been limited, there is little foundation for comparing the quality and costs of government-managed facilities with contractually managed ones."<sup>37</sup>

#### *D. Initial Debate around Privatization*

In 1986, a small private facility opened in Cowansville, Pennsylvania, agreeing to house 55 inmates from Washington D.C. due to overcrowding in D.C. A number of local residents

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<sup>34</sup> Kyle, Peter H. Contracting for Performance: Restructuring the Private Prison Market, 54 Wm. & Mary L. Rev. 2087 (2013)

<sup>35</sup> Camp, Scott D. and Gaes, Gerald G. Private Prisons in the United States, 1999: An Assessment of Growth, Performance, Custody Standards, and Training Requirements. Federal Bureau of Prisons (2000).

<sup>36</sup> Bowditch, Christine. Private Prisons: Problems within the Solution. Justice Quarterly 4.3 (1987).

<sup>37</sup> Privatization toward More Effective Government. Report to the President's Commission on Privatization (1988). [http://pdf.usaid.gov/pdf\\_docs/PNABB472.pdf](http://pdf.usaid.gov/pdf_docs/PNABB472.pdf)

reacted negatively to the arrival of these inmates; some patrolled the streets in the fear of escaped prisoners. A Philadelphia-based prisoner reform group capitalized on this incident and successfully petitioned the state legislature to declare a moratorium on private prisons. The expansion of private facilities and incidents like the aforementioned sparked a nationwide debate about private prisons. Congress held hearings in 1986, and many criminal justice associations declared their positions on the issue. For example, the American Bar Association saw privately operated prisons created “grave constitutional and policy problems.” Debate around private prisons, however, did little to adversely affect the growth and development of the industry.<sup>38</sup>

#### *E. New Facility Construction*

Private prisons also have an advantage on the financing front: governments with debt restrictions can use alternate financing schemes with private prisons, such as lease-payment bond financing. Under this financing scheme, private companies issue bonds to fund facility construction. The private company then leases those bonds to the state, and the state pays for the bonds through its operating budget. Federal aid to state and local governments had been declining since 1980, and the general revenue sharing program ended by 1986. A number of state governments found themselves reaching their debt ceilings and were financially constrained in issuing bonds to fund prison construction.<sup>39</sup> These financing mechanisms attract less public scrutiny by shifting corrections expenditures from capital improvements budgets to operating budgets.<sup>40</sup> For example, the INS needed more beds to meet the rising number of illegal immigrants and saw private operators as a viable solution. The INS could more rapidly deploy

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<sup>38</sup> McDonald, Douglas. *Private Prisons in the United States*. Abt Associates (1998).

<sup>39</sup> *Ibid.*

<sup>40</sup> Kyle, Peter H. *Contracting for Performance: Restructuring the Private Prison Market*, 54 Wm. & Mary L. Rev. 2087 (2013)



funds through private prisons since it could use funds allocated for detention operations, instead of going through a lengthier capital appropriation process.

Private prisons had different sources of value-add for different municipalities. For example, Florida had found the local jail in its Bay County to be non-compliant with its standards. The county commissioners were not satisfied with the sheriff's slow pace of making the appropriate changes and contracted with Corrections Corporation of America instead.<sup>41</sup>

The age and condition of prison facilities exacerbated capacity problems facing governments. Older prisons require more high cost maintenance or replacement, which drains resources from new facility construction. In 1983, the median year of construction for a prisoner in a federal facility and state facility was 1945 and 1946, respectively. In other words, more than half of prisoners were in facilities over 37 years old. Furthermore, 10.7% of prisoners in state institutions were in facilities over 100 years old.<sup>42</sup> Furthermore, only one-fifth of all state and federal prisons had achieved accreditation from the Commission on Accreditation for Corrections. These factors enabled lawsuits involving the conditions for confinement and its constitutionality. Several states were forced to go as far as releasing prisoners prior to the completion of their intended sentence in order to bring occupancy rates in line with mandated levels.<sup>43</sup>

#### *F. Comparing Private Prisons to Public Counterparts*

Private prisons generally charge the government a daily rate per inmate to cover the construction costs and ongoing operating costs of the facility. In the 1980s, private facility size shifted from initial 80-bed detention centers to 500-600 bed facilities and from low security to

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<sup>41</sup> McDonald, Douglas. Private Prisons in the United States. Abt Associates (1998).

<sup>42</sup> Bureau of Justice Statistics, Prisoners in State and Federal Institutions on December 31, 1983.

<sup>43</sup> McDonald, Douglas. Private Prisons in the United States. Abt Associates (1998).

increasing medium and maximum-security facilities.<sup>44</sup> . Privatization advocates argue that private prisons provide a low-cost, high-quality product offering, partly stemming from their ability to use non-union labor. Labor costs are roughly two-thirds of the operating costs of a prison, and any labor cost savings would consequently be impactful to the total cost profile of a private prison.<sup>45</sup> The proponents of privatization at the time argued that private firms would be more efficient than public provisioning, which faced bureaucratic issues and political constraints. Competition would further force private players to act efficiently, in contrast with public agencies that lack the necessary incentives. The argument follows the standard logic of the argument for privatization: private prison operators benefit from experience, specialization, and accountability that the public sector does not. States facing mounting budget deficits and continuously rising prison populations have found this argument more and more compelling.

Critics of this line of reasoning argue that prisons are a labor-intensive business with few areas for technological improvement. Furthermore, a profits motive in incarceration may lead to cost minimization to the detriment of quality. Privatization may not render the purported benefits if political capture allows private operators to garner favorable contractual terms. Privatization critics also point to the history of convict leasing arrangements that persisted in the South during the Civil War decades. Conditions in these facilities are generally considered terrible, and they experienced death rates higher than that of public prisons.<sup>46</sup>

Criteria and proxies for quality and safety include staff misconduct, staffing levels, employee training, staff turnover, drug use, inmate escapes, assaults, and homicides. Based on a 1999 survey by the Bureau of Prisons, private prison operators had similar staffing levels (i.e.

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<sup>44</sup> Lundahl, Brad. Prison Privatization: A Meta-Analysis of Cost Effectiveness and Quality of Confinement Indicators. Utah Criminal Justice Center (2007).

<sup>45</sup> Kyle, Peter H. Contracting for Performance: Restructuring the Private Prison Market, 54 Wm. & Mary L. Rev. 2087 (2013)

<sup>46</sup> McDonald, Douglas. Private Prisons in the United States. Abt Associates (1998).

officers per inmate) to public prisons. Homicide and escapes have very low base rates, making it difficult to compare private and public prisons. On the other hand, critics of private prisons point out elevated drug misconduct in private prisons. Assault rates are difficult to compare due to differing definitions (e.g. with or without a weapon), although private prisons fare worse on this benchmark. Private prisons' employees receive 58 hours fewer training than public employees, and private prisons face higher employee turnover rates than public facilities.<sup>47</sup>

A meta-analysis of 12 studies with head-to-head comparisons of private and public prisons suggests that privatization presents no clear advantage. Effect sizes were small for both cost and quality to the point of raising into question the benefits of privatization. However, public prisons were found to provide better skills training programs and generated fewer complaints or grievances. Here too the magnitude of the difference is small, with public prisons having a 4% advantage in the number of inmates receiving skills training. Analysis from Pratt and Maahs (1999) concurs that cost savings are likely minimal. Perrone and Pratt (2003) also found that the data on quality do not equivocally allow for conclusions that private operators are better than public ones or vice versa.<sup>48</sup>

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<sup>47</sup> Camp, Scott D. and Gaes, Gerald G. Growth and Quality of U.S. Private Prisons: Evidence from a National Survey. Federal Bureau of Prisons (2001).

<sup>48</sup> Lundahl, Brad. Prison Privatization: A Meta-Analysis of Cost Effectiveness and Quality of Confinement Indicators. Utah Criminal Justice Center (2007).

*G. Summary of arguments regarding prison privatization*

In Favor of Private Prisons	Against Private Prisons
<ul style="list-style-type: none"> <li>• <b>Cost effective:</b> innovation, lower labor costs with better management, negotiations to lower prices in procurement process, unencumbered by government bureaucracy, more efficient facility construction, government benefits from tax revenues paid</li> <li>• <b>Lowering costs across the system:</b> intensifies competition in both private and public realm</li> <li>• <b>Higher quality:</b> private operators provide higher quality in order to avoid legal costs associated with inmate grievances, efficient implementation of prison programs, focus on quality in order to win future contracts</li> <li>• <b>Overcrowding:</b> reduces costs and pressure on government due to overcrowding</li> <li>• <b>Privatization track record:</b> privatization has a history of working in other industries</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Conflicts of interest:</b> cost pressure could lead to worse quality (i.e. lower staff to inmate ratios, fewer rehabilitative services), possibility of abuse more concerning given civil liberties at stake</li> <li>• <b>Contractual violations:</b> risk of nondisclosure of problems or contractual noncompliance</li> <li>• <b>Regulatory capture or corruption:</b> influence through lobbying or more explicitly capturing political system through bribes or kickbacks</li> <li>• <b>Employees:</b> less unionization, lower employee salaries, and higher turnover rates negatively affects security</li> <li>• <b>Economies of scale:</b> government benefits from even more economies of scale than private operators</li> <li>• <b>Faulty comparisons:</b> comparing costs with private operators excludes hidden costs such as government monitoring of private companies</li> <li>• <b>Counterparty risk:</b> governments become liable for facilities if a private prison operator goes bankrupt or fails to meet its contractual obligations</li> <li>• <b>Loss of bargaining power:</b> private companies may have a bargaining advantage if a private contract is up for renewal and public prisons are overcrowded</li> </ul>

Often the primary motivation for privatization is the cost savings purported by private prison operators. Cost savings would stem from operational efficiency, nonunion labor, and controlling wages/fringe benefits. Arizona's Department of Corrections analyzed private prisons operating in the state and found most private prisons have a similar cost profile to public counterparts. The lack of cost savings in Arizona is particularly striking given that private prisons house relatively healthy inmates, with private operators' healthcare costs per inmate per day a third lower than public prisons.<sup>49</sup> A 1996 GAO report was inconclusive in determining whether privatization saved money<sup>50</sup>, and a 2001 Bureau of Justice Assistance survey found that the average savings from privatization were only 1%.<sup>51</sup>

Comparing cost savings across public and private prisons is a complicated process. Tangible costs like medical costs may be ignored in cost comparisons. Intangible costs like public monitoring are even more difficult to measure and include in a cost analysis.<sup>52</sup> The Taft studies exemplify the difficulties associated with performing a cost-benefit analysis of privatization to reach a definitive conclusion. Two cost and performance studies, one by Abt Associates and another funded by the Bureau of Prisons (BOP), looked at the same set of four prisons. Abt's per diem cost analysis reported that the average cost of a public facility was 14.8% higher than the privately-operated Taft facility, while the BOP analysis showed only a 2.2% difference. The two primary sources for discrepancy were differing treatments for inmate population sizes and overhead costs. Taft had more inmates than the public prisons and could therefore benefit from increased economies of scale. BOP made adjustments to account for the

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<sup>49</sup> Ryan, Charles L. Biennial Comparison of Private versus Public Provision of Services. Arizona Department of Corrections (2011).

<sup>50</sup> Private and Public Prisons: Studies Comparing Operational Costs and/or Quality of Service. Government Accountability Office (1996).

<sup>51</sup> Austin, James and Coventry, Garry. Emerging Issues on Privatized Prisons. National Council on Crime and Delinquency (2001).

<sup>52</sup> Kish, Richard J. Do Private Prisons Really Offer Savings Compared with their Public Counterparts? Economic Affairs (2013).

economies of scale, while ABT used the actual amount paid without adjusting. With respect to overhead, BOP assumed that the government would incur most overhead costs regardless of whether or not a private company operated the prison. Abt instead estimated the actual resources provided by the government to estimate differences in overhead.<sup>53</sup>

Recidivism rates serve as another benchmark for comparison between private and public prisons. Post-release prisoner performance is a matter of public interest given that rehabilitation is one of the driving motives underlying incarceration. Prison facilities can attempt to influence recidivism rates through the availability, participation, and completion of academic, vocational, and substance abuse programs.<sup>54</sup> Recidivism, like costs, is not defined in an equivocal manner. For example, relapse can be defined through arrests, convictions, or incarceration. Different time periods used for each of these events can also muddle the comparability of data.<sup>55</sup>

Research on prisons in Florida found no significant recidivism rate differences between private and public prison inmates for adult males, adult females, or youthful offender males. This study by Bales et al. improved upon the existing research by better controlling for covariates and more extensively identifying appropriate comparison groups between the two types of prisons.<sup>56</sup> Spivak and Spark (2008) conducted a similar analysis of recidivism with data from Oklahoma between 1997 and 2001. In every categorical model the authors used, they found that private prison inmate groups had a greater hazard of recidivism than public inmate groups. However, the authors included a caveat about the role of private prisons in Oklahoma. Case management staff was more inclined to send troublesome inmates to private prisons in order to remove it from their

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<sup>53</sup> Ibid.

<sup>54</sup> Spivak, Andrew L. and Sharp, Susan F. Inmate Recidivism as a Measure of Private Prison Performance. *Crime and Delinquency* 54.3 (2008).

<sup>55</sup> Spivak, Andrew L. and Sharp, Susan F. Inmate Recidivism as a Measure of Private Prison Performance. *Crime and Delinquency* 54.3 (2008).

<sup>56</sup> Bales, William D. Recidivism of Public and Private State Prison Inmates in Florida. *Criminology and Public Policy* 4.1 (2005).

caseload. While the study included control variables to account for prisoner differences, it is possible that the models did not fully capture the differences. As a result, the study concludes with the more conservative interpretation that a prisoner spending a greater proportion of his sentence in a private prison does not have better post-release performance.<sup>57</sup>

Duwe and Clark (2013) examined 3,532 offenders released in Minnesota between 2007 and 2009. Their analysis of performance also suggests that private prisons do not lead to lower recidivism rates. Private prisons increased the risk of re-arrest by 13% and re-conviction by 22%. Of the eight models used, private prisons increased recidivism in all eight and the increase was statistically significant in three models. The higher recidivism rates could be attributable in part to worse visitation policies and rehabilitative programming in private facilities.<sup>58</sup>

#### *H. Private Influence on Public Policy*

Privatization raises the concern that the prison industry could influence sentencing through the political process or by directly causing longer sentences. Capacity utilization is a key driver of prison profitability due to the predominantly fixed or semi-fixed cost structure of operating a prison. As a result, private prisons have an incentive to maintain demand in the form of incarceration by, for example, promoting stricter criminal justice policies or discouraging early release.<sup>59</sup>

Opponents of the prison-industrial complex argue that private prisons have effectively leveraged lobbying, relationship building, and campaign contributions to consolidate political power. For example, California, Florida, and Georgia have been particularly successful target

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<sup>57</sup> Kish, Richard J. Do Private Prisons Really Offer Savings Compared with their Public Counterparts? *Economic Affairs* (2013).

<sup>58</sup> Duwe, Grant and Clark, Valerie. The Effects of Private Prison Confinement in Minnesota on Offender Recidivism. *Criminal Justice Review* (2013).

<sup>59</sup> Kyle, Peter H. Contracting for Performance: Restructuring the Private Prison Market, 54 *Wm. & Mary L. Rev.* 2087 (2013)

states for private prison operators, with CCA giving two-thirds of its total state-level political spending in these three states. Incarceration of illegal aliens presents another illustrative example: private prison operators recognized a market opportunity here and now house a majority of imprisoned illegal immigrants.

While anecdotal in nature, there is evidence of connections between the government and private prisons. The management team of Corrections Corporation of America often includes state prison wardens, superintendents, and corrections commissioners. While a revolving door between the government and private industry is not particularly novel, it is worthy of further of scrutiny given the public interest inherent in corrections. Volokh argues that there is little evidence suggesting that private prisons are pushing forth a pro-incarceration agenda and that public actors, such as prison guard unions, contribute much more to campaigns and lobbying efforts. The public sector has a greater incentive to do so due to its larger absolute size than the private prison industry. Volokh argues advocacy is a public good: the private sector may actually decrease pro-incarceration advocacy due to a collective action problem.<sup>60</sup>

Volokh's theoretical framework is problematic in explaining the relationship between private prisons and government policy. Dramatic increases in incarceration mean that the private prison industry is not taking demand away from the public sector as much as reacting to excess demand from growth. Also, private operators benefit from taking greater market share on the margin and consequently have an incentive to expand the market further. Indeterminate sentencing is increasingly being considered as an alternative to the sentencing policies that helped fuel the explosion in incarceration. Lobbying by private operators will be particularly influential and relevant in times of possible paradigm shifts.

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<sup>60</sup> Volokh, Alexander. Privatization and the Law and Economics of Political Advocacy. *Stanford Law Review* 60.4 (2008).



Strictly based on the financial incentives at work, private prison operators also have an incentive to increase sentences for inmates and have the ability to do so. For example, assigning more infractions to inmates would lower the probability of a favorable parole decision. Shortchanging rehabilitative programs would increase the likelihood of recidivism and help to create future demand. This paper is certainly not suggesting that there is evidence of these practices; rather, the mere possibility is troubling given the incentive structure of private operators.<sup>61</sup>

Rising incarceration rates were propelled by legislation such as the Sentencing Reform Act of 1984, the Violent Crime Control & Law Enforcement Act of 1994, and the Illegal Immigration and Immigrant Responsibility Act of 1996. Similar criminal justice legislation promulgated through state-level governments. Some of this legislation was influenced by federal legislation like the 1994 Crime Act, which provided prison construction funds to states that adopted Truth-in-Sentencing laws. However, much of the state-level legislation was crafted by the American Legislative Exchange Council (ALEC), a conservative public policy think tank that counts over 40% of state legislators as members. One of the key goals of ALEC is to develop model legislation and introduce them through its membership base. ALEC is majority funded by corporations, and private prison operators are active in participating within the organization. For example, members of CCA's management team have chaired ALEC's Criminal Justice Task Force, and this task force has been particularly influential in its work. In its 1995 Model Legislation Scorecard, ALEC stated that the Criminal Justice Task Force

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<sup>61</sup> Kyle, Peter H. Contracting for Performance: Restructuring the Private Prison Market, 54 Wm. & Mary L. Rev. 2087 (2013)

introduced 199 bills, the most of any task force. In that year, 25 states adopted Truth in Sentencing Act legislation and 11 enacted Three Strikes policies.<sup>62</sup>

#### IV. Conclusion

This paper has discussed how shifts in criminal justice policy have contributed to a higher probability of incarceration given arrest and longer sentences. The explosion in incarceration has a number of troubling features and consequences; for example, these changes have had a disproportionately large effect on African American and Hispanic populations. In addition, the increase in incarceration has coexisted with declining crime rates, the potential causes of which this paper also explores. Private prisons are considered as an area of particularly intense controversy. Existing research suggests that private prisons have largely failed to prove advantages over public facilities. The share of prisoners held in private facilities has climbed upwards dramatically, and there is a need for further research before further resources are committed to privatization.

There is a substantial difference in data availability between the public and private prison systems. The Department of Justice's Bureau of Prisons manages much of the public data in this realm, in addition to the Department of Homeland Security's Immigration and Customs Enforcement. If not already available, federal-level data can be accessed through Freedom of Information Act (FOIA) requests, and state and local government records subject to open records laws. However, private prisons are subject to neither FOIA nor open records laws. All five bills between 2005 and 2012 making private prisons subject to the FOIA did not make it through Congress, although various state court rulings have challenged the preexisting status quo that open records laws do not apply to private prisons. Better data would allow for more rigorous

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<sup>62</sup> Sarabi, Brigitte and Bender, Edwin. *The Prison Payoff: The Role of Politics and Private Prisons in the Incarceration Boom*. Western Prison Project (2000).

testing of private prisons. One area for future research is the relationship between private prison share and incarceration rates, in order to better understand the effects of contract structure and political influence.

The modern conception of the private prison solved a specific policy problem for states facing rapidly increasing incarcerated populations: they offered themselves as faster and cheaper alternatives to public construction and operation. Private prisons remain largely the recipients of new bed provisions, as opposed to the takeover of existing public prisons, suggesting that states still see them as serving this original purpose. Given the stabilization of incarceration rates and continued declines in crime, the role of private prisons in the incarceration system merits reconsideration. As more and more data has accumulated on operating performance, private prisons have still not proven a cost or quality advantage over public counterparts. Scrutinizing the role of private prisons within US incarceration is as important now as it has ever been.

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