

The Cost of Freedom:
The Private Prison Policy Debate

Alex Murray
Prof. Clayton Nall
TA: Sam Fontaine
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There has been a recent change in the policy equilibrium of the American prison system. Changes to the usage of private prisons made by President Barack Obama during his term have been reversed by President Donald Trump, leading to a debate amongst policy experts and economists over the economic benefits and ethical implications of the practice.¹ This fluctuation of policy helps to paint the picture of private prison legislation overall, defining key actors, values, and policies in the process. In this essay, it becomes evident that the private penal system has become an entrenched economic apparatus in the United States. From the outsized financial influence of private prison companies over politicians on the federal level to the financial necessity of operating these corrections facilities in state and local areas, the industry has supporters and opponents across the various levels of government. While the future of policy areas is often unpredictable, the 2020 Presidential Election and the murder of George Floyd are likely to have a massive influence on private prisons by re-energizing the criminal justice debate.

Changes in Private Prison Policy: Values from Obama to Trump

The transition in 2016 from the Obama administration to the Trump administration proved to be a pivotal moment for private corrections policy. Under Obama, criminal justice reform was an important policy area. In particular, former Deputy Attorney General Sally Yates issued a memorandum arguing for the end of federal involvement with these facilities, saying that private prisons “simply do not provide the same level of correctional services, programs, and resources.”² Also highlighting the importance of criminal justice reform, Obama published an

¹ King, Jordan, and Anthony Chen. 2018. "Private Prisons: An Evaluation Of Economic And Ethical Implications". *Wharton Public Policy Initiative*.

² Office of the Deputy Attorney General. 2016. "Memorandum For The Acting Director Federal Bureau Of Prisons - Reducing Our Use Of Private Prisons". Washington, D.C.: U.S. Department of Justice., p.1

editorial in 2017 entitled “The President’s Role in Advancing Criminal Justice Reform.”³ Most importantly in relation to this paper, the President describes the importance of values in the criminal justice policy area:

How we treat citizens who make mistakes (even serious mistakes), pay their debt to society, and deserve a second chance reflects who we are as a people and reveals a lot about our character and commitment to our founding principles. And how we police our communities and the kinds of problems we ask our criminal justice system to solve can have a profound impact on the extent of trust in law enforcement and significant implications for public safety.⁴

This application of values-based public policy is reminiscent of what political thinker Deborah Stone calls the *polis* concept of society, where a society *values the interests of the community as a whole over the interests of the individual*.⁵ Obama, by referencing a revealment of American values, illustrates how criminal justice reform is perceived as a barometer of political ethics and responsibility for political actors.

If it is possible to infer political values from how the Obama administration treated those that were imprisoned, then it is also possible to apply the same analytical process to the Trump administration. Since the election of President Trump, the majority of private prison policies enacted under Obama have since been reversed or eliminated. In 2017, former Attorney General Jeff Sessions announced that the Justice Department “rescind[ed]” the department’s previous order under Sally Yates to scale back the use of private correctional facilities, arguing that “the memorandum changed long-standing policy and practice, and impaired the bureau’s ability to

³ Obama, Barack. 2017. “The President’s Role In Advancing Criminal Justice Reform”. *Harvard Law Review* 130 (3): 812.

⁴ Ibid, p. 812

⁵ Stone, Deborah. 2012. *Policy Paradox*. New York: W.W. Norton & Co.

meet the future needs of the federal correctional system.”⁶ Furthermore, the Justice Department in January of 2020 filed a federal lawsuit against the State of California, CA Governor Gavin Newsom, and CA Attorney General Xavier Becerra challenging California state law A.B. 32, which “prohibits any individual or entity from operating private detention facilities in the state.”⁷ This act is the latest in a series of changes and challenges to private prison policy across the nation from the Trump administration.

Along with obstructing reform to the private penal system, President Trump has also been accused of both helping private prisons to profit during his term and to profit himself. A report from the Center For American Progress describes how both GEO Group and CoreCivic, two of the largest private-prison operators in the country, both donated \$250,000 to President Trump’s inaugural committee.⁸ Further evidence shows that GEO Group moved its annual conference in 2017 to a Trump-owned resort in Boca Raton, Florida, perhaps as an act of political influence. Given these potential connections to the Trump administration, it is not surprising to learn that the morning after the 2016 election, “stocks in CoreCivic increased by 34 percent, and those in the GEO Group rose by 18 percent.”⁹ Giving further credence to the possible relationship between the private prison industry and the Trump administration, both CoreCivic and Geo Group acknowledged in SEC reports that policies aimed at reducing the prison population in the

⁶ Ocasio, Bianca. 2017. "Justice Department Reverses Directive To Phase Out Private Prisons". *POLITICO*. <https://www.politico.com/blogs/under-the-radar/2017/02/justice-department-private-prisons-235324>.

⁷ "Justice Department Sues State Of California, California Governor, And California Attorney General For Prohibiting The Operation Of Private Detention Facilities In The State". 2020. *Justice.Gov*. <https://www.justice.gov/opa/pr/justice-department-sues-state-california-california-governor-and-california-attorney-general>.

⁸ Center for American Progress. 2019. "How Private Prisons Are Profiting Under The Trump Administration". Washington, D.c.: Center for American Progress., p. 5

<https://cdn.americanprogress.org/content/uploads/2019/08/29100331/DrivingPrivatePrisons-Brief.pdf>.

⁹ *Ibid*, p. 3

US would represent a risk to their industry.¹⁰

In totality, the body of legislative work and policy enactment produced under the Trump administration in this issue sphere would most closely match Stone's *market* model of society. In this model, public policy is produced to *maximize the personal gain of the individual over maximizing the communal gain of the public*.¹¹ Trump, through this analytical framework, is incentivized to keep private prisons operating because it is financially and politically beneficial to do so, despite claims of economic and ethical malpractice at these facilities. By doing so, Trump's policy values would seem to indicate that the economic benefit of private prisons is ingrained into the political framework of the United States and, as such, the future of private prisons looks bright for their operators as long as President Trump remains in the White House.

Problem Definition and Policy Enactment: Economics and Ethical Concerns

To understand what the future of the private penal debate might bring us, it is important to first define the social, political, and economic problems that prisons address and how these policies are enacted in reality. First, the main problem areas that the private corrections debate is based in are concerns of economic and ethical considerations. Traditionally, the argument pro-privatization advocates use is to frame public prisons as being more expensive to the taxpayer than private prisons are. In a monograph released by the Bureau of Justice Assistance

¹⁰ "Annual SEC Report For The GEO Group, Inc. (2019)". 2019. Washington, D.C. United States Securities and Exchange Commission, p.38

https://www.sec.gov/Archives/edgar/data/923796/000119312519050054/d663410d10k.htm#tx663410_2; "Annual SEC Report For CORECIVIC, INC. (2019)". 2019. Washington, D.C. United States Securities and Exchange Commission, p.34

<http://ir.corecivic.com/static-files/f289bea9-086c-4540-82b2-114dbfb95e4e>,

¹¹ *Paradox*, p. 35

and the National Council on Crime and Delinquency in 2001, Austin and Coventry describe the “crisis” that led to the proposition of private prisons:

In the 1980s, the public’s frustration over a perceived failure of the penal system to rehabilitate offenders and a reluctance to provide more funding for correctional institutions, coupled with the increasing demand for more jail space, precipitated a crisis. One proposed solution that emerged was the privatization of prisons and jails by contracting out, in part or in whole, their operations. In 1987, the number of inmates incarcerated in privately operated correctional facilities worldwide was 3,100; by 1998 the number had risen to 132,000.¹²

Clearly, the private prison system was born out of a number of important problems, including the perceived inability of public prisons to rehabilitate prisoners, increasing costs of keeping public prisons running, and the increase in overcrowding in prisons due to the “War on Drugs.” Decades on from the 1980s, much of the problems that public prisons face today are still the same ones from yesteryear; perhaps the biggest change since then is that the private prison model has become more widely adopted across the country. To summarize these problems, the main question facing prisons (both private and public) is *how to ethically rehabilitate those that have broken the law while still maintaining economic feasibility to do so.*

Given this main question of ethical and economic concerns, how have policymakers, on both sides of the debate, responded to this question through legislation? As a preface, it is important to recognize that the federal, state, and local governments have responded in dramatically different ways in their usage or non-usage of private prisons. For example, The

¹² U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance. 2001. "Emerging Issues On Privatized Prisons". Washington, D.C.: Bureau of Justice Assistance., p. iii
<https://www.ncjrs.gov/pdffiles1/bja/181249.pdf>.

Sentencing Project reported that New Mexico had “53% of its prison population...housed in private facilities, while 22 states [did] not employ any for-profit prisons” in 2017.¹³ On the other hand, the Federal Bureau of Prisons, between 2000 and 2017, increased its usage of private prisons by 77%, resulting in 27,569 inmates being incarcerated in the final year of the selected period.¹⁴ However, as highlighted by Peter Wagner from the Prison Policy Initiative, the private prison system is less of a driver of the policy agenda of prisons and is “more like a parasite on the public prison system,” due to the fact that less than 9% of those incarcerated are put into private prisons.¹⁵ The disproportionate attention that the private prison system receives is actually beneficial to the sector as “the more the public stays focused on the owners of private prisons, the less the public is questioning what would happen if the government nationalized the private prisons and ran every facility itself.”¹⁶

If the attention received by the private prison industry is disproportionate to the number of prisoners actually in their facilities, then the legislation and policy surrounding private correctional facilities also receives an inordinate amount of attention. On the federal level, both President Trump and presumptive Democratic presidential nominee Joe Biden have either put private prison legislation into action or have plans for future legislation. President Trump, as highlighted in the section above, has acted to ensure that states, such as California, cannot ban the usage of private prisons. This is perhaps due to Trump’s 2017 executive order titled

¹³ The Sentencing Project. 2019. "Private Prisons In The United States". Washington, D.C.: The Sentencing Project. <https://www.sentencingproject.org/publications/private-prisons-united-states/>.

¹⁴ Ibid

¹⁵ Wagner, Peter. 2015. "Are Private Prisons Driving Mass Incarceration?". Blog. *Prison Policy Initiative*. https://www.prisonpolicy.org/blog/2015/10/07/private_prisons_parasite/;
Prison Policy Initiative. 2020. "Mass Incarceration: The Whole Pie". <https://www.prisonpolicy.org/reports/pie2020.html#dataheader>.

¹⁶ Wagner, “Driving Mass”

“Enhancing Public Safety in the Interior of the United States,” which has been credited with increasing the number of immigrants detained in prisons. As shown by the Center for American Progress, “for every 100 immigrant detainees, 32 are in Geo Group facilities, and 21 are in CoreCivic facilities,” further alluding to the connection between the Trump administration and the vested economic interests of private corrections.¹⁷

Presumptive Democratic nominee Biden has stated that his administration would continue on with the Obama-era mandate to end private prison usage while also seeking to “make eliminating prison and other methods of profiteering off of incarceration...a requirement for [Biden’s] new state and local prevention grant program.”¹⁸ This attempt to stop corporations from profiteering off of the imprisonment of others also extends to supporting S.2520, the “Inmate Calling Technical Corrections Act of 2018.” This bill, proposed by Senator Tammy Duckworth (D-IL), would put a stop to “the practice of private companies charging incarcerated individuals and their families outrageously high fees to make [telephone] calls.”

While both Presidential candidates have their own private prison agendas, Senators and Representatives also have waded into the policy debate. Bonnie Watson Coleman, the Democratic Representative for New Jersey’s 12th congressional district, introduced HR 4970: the “End For-Profit Prisons Act of 2019.” The proposed legislation sought to “restrict the authority of the Attorney General into contracts for Federal correctional facilities and community confinement facilities,” essentially ending the private prison industry on the federal level.¹⁹ Senator Benjamin Cardin (D-MD) proposed S.2773: the “Private Prison Information Act of 2019,” which would “require non-Federal prison, correctional, and detention facilities holding

¹⁷ “Profiting Under Trump,” p. 3

¹⁸ “Joe Biden’s Criminal Justice Policy”. 2020. *Joe Biden For President*. <https://joebiden.com/justice/>.

¹⁹ *End For-Profit Prisons Act Of 2019*. 2019. Washington, D.C.: The House of Representatives.

Federal prisoners or detainees under a contract with the Federal Government to make the same information available to the public that Federal prisons and correctional facilities are required to make available.”²⁰ At this point in time, both of these bills are still in the committees that they were referred to.

On the state and local levels, legislation has also been introduced that would reform the private prison industry. Some state and local politicians have sought to end all usage of private prisons in their states. Tennessee General Assembly members Rep. Jeremy Faison (R-Crosby) and Sen. Mike Bell (R-Riceville) introduced SB.1585/HB.2237, a bill that “prohibits contracts for the operation of prison facilities from containing occupancy level guarantees” in Tennessee, essentially ending the private prison practice.²¹ On the other hand, critics of a plan in Colorado to switch from private to public prisons was met with opposition. Critics cited that any reduction in private prisons would harm both the economy and schools in parts of the Centennial State. For example, according to *The Colorado Sun*, “the private prison in Bent County accounts for 25% of the local property tax base, and one in nearby Crowley County accounts for 54% of its total [tax base].”²² As shown above, the private correctional facilities debate is not split down party lines. Instead, it is a bipartisan policy issue that has divided legislators based primarily on financial incentives and influence.

²⁰ *Private Prison Information Act Of 2019*. 2019. Washington, D.C.: The Senate of the United States; <https://www.govinfo.gov/content/pkg/BILLS-116s2773is/pdf/BILLS-116s2773is.pdf>

²¹ “SB 1585/HB 2237”. 2018. *Wapp.Capitol.Tn.Gov*. <http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=SB1585&GA=110>.

²² Frank, John. 2020. “As Democrats Try To End Private Prisons In Colorado, Critics Warn Of Economic Ruin For Rural Areas”. *The Colorado Sun*, , 2020. <https://coloradosun.com/2020/02/05/colorado-lawmakers-private-prisons/>.

Supporters and Opponents of Private Prisons: Follow the Money

Given the past, present, and future legislation surrounding this political issue, how have policymakers supported or opposed these policies? One way to potentially figure out the political sides to this policy area is to find out which politicians have received donations from corporations, lobbying groups, and wealthy individuals, all policy actors who have a vested interest in maintaining the private prison system as is. As noted before, it is much too simplistic to say that the private prison debate is split down party lines. Indeed, the characterization of Republicans as benefiting the most from the private corrections industry may be true. According to OpenSecrets.org, a website that tracks financial contributions to campaigns and politicians, 18 of the top 20 recipients during the 2020 federal election cycle were Republican politicians or candidates.²³ Furthermore, of the total \$1,642,627 in contributions donated to election campaigns, 9% went to Democrats while 91% went to Republicans.²⁴

What do these contributions mean in terms of supporters and opponents of private prisons? While we cannot say for certain that these donations did have a significant effect on the voting outcomes of major private prison reform, this information does tell us that *at least* these politicians are doing something to win the approval of the private correctional facilities industry, whether it be on the election podium or in a private meeting. Of course, it is unwarranted to label all of those politicians and groups that have received financial donations from private prison corporations as unethical. As noted by the National Consumer Law Center in their 2019

²³ "For-Profit Prisons: Top Recipients | Opensecrets". 2020. *Opensecrets.Org*. <https://www.opensecrets.org/industries/recips.php?cycle=2020&ind=G7000>.

²⁴ "For-Profit Prisons: Long-Term Contribution Trends | Opensecrets". 2020. *Opensecrets.Org*. <https://www.opensecrets.org/industries/totals.php?cycle=2020&ind=G7000>.

publication, “Commercialized (In)Justice,” many state and local governments have had no other option except to accept the influence of the private prison industry in their areas:

Due to the policy decisions that have driven mass incarceration, state and local governments have experienced sharp growth in costs associated with administering the criminal legal system in recent decades. At the same time, many local governments have seen an erosion of state financial support for municipal services and new limitations on their ability to finance their justice systems through taxes. It is in this context that states and local governments have acted so aggressively both to offload core functions of their legal systems to private companies and to find ways outside of tax revenues to pay for the costs of the system.²⁵

As shown, much of the financial support that comes from these private companies is necessary for states and local governments to function properly. This illustrates the important nuances of the policy issue; *many of the “supporters” of this industry have no choice in the matter and, thus, should not be painted as “evil” or “unethical” as the issue is not black-and-white but shades of grey.*

Conclusion: The Future of Private Prison

As mentioned above, the analogy of the private prison policy area as “shades of grey” is also appropriate for the future of the debate. With the 2020 Presidential Election due in November of this year, the direction in which private prison reform is going to take is impossible to predict. If President Trump remains in office, it is probable that the private prison practice would remain entrenched in the correctional system of this country. If Democratic nominee

²⁵ National Consumer Law Center. 2019. "COMMERCIALIZED (IN)JUSTICE CONSUMER ABUSES IN THE BAIL AND CORRECTIONS INDUSTRY". Boston, MA: National Consumer Law Center.
<https://www.nclc.org/images/pdf/criminal-justice/report-commercialized-injustice.pdf>.

Biden wins the Presidency, it can be expected that the private corrections industry would see a decrease in power and influence in this nation. Furthermore, state and local governments are likely to also have a major say in the future of the practice. As highlighted above, states such as California, Colorado, New Mexico, and Tennessee have all attempted to or succeeded in passing legislation that both supports and opposes private prisons. Through state and local jurisdiction, these governments may end up having a greater influence on the debate than the Federal government.

Regardless, the recent murder of Minneapolis resident George Floyd has brought back criminal justice reform into the mainstream consciousness of the United States. While not directly related to the private prison debate, any reform in the criminal justice system is going to have serious implications for the private corrections industry in the future. As recently as June 2nd, the Federal Bureau of Prisons issued its strictest lockdown measures in twenty-five years in response to potential riots over the Floyd murder, indicating that the event has already effected the functioning of prisons across the country.²⁶ Clearly, the debate over the usage of private prisons in this country is unlikely to end anytime soon.

²⁶ Klar, Rebecca. 2020. "Protests Trigger Strictest Federal Prison Lockdown In 25 Years". *The Hill*, , 2020. <https://thehill.com/homenews/news/500697-protests-trigger-strictest-federal-prison-lockdown-in-25-years>.

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