

DO INDIGENT DEFENSE EXPENDITURES AFFECT INCARCERATION RATES? AN EXPLORATION WITH AN EMPHASIS ON PRIVATE PRISONS

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ABSTRACT

Incarceration in the United States remains a significant issue with which to be dealt by politicians and policymakers at every level of government. Indeed, the United States exhibits the highest incarceration rate of any developed nation in the world.¹ A growing body of literature suggests that the high incarceration rates that have been recorded over the past four decades are associated with “the punitive turn” in American criminal justice and penal policy as coined by Garland (2001): both the magnitude of criminal penalties and the probability of imprisonment following arrest have increased.² Moreover, it is undeniable that individuals of color are disproportionately incarcerated.³

As a result of the rulings handed down by the U.S. Supreme Court in seminal cases like *Powell v. Alabama* (1932), *Gideon v. Wainwright* (1963), and *Argersinger v. Hamlin* (1972), state and local governments are legally obligated to provide counsel to all indigent defendants who face the possibility of incarceration.⁴ In this paper, I explore whether devoting more resources to indigent defense at the state level decreases the rate at which the criminally accused are incarcerated. I hypothesize that states devoting a higher level of funding to indigent defense exhibit lower incarceration rates on average than states associated with lower indigent defense expenditure levels. I build on existing literature by attempting to merge scholarly conversations about indigent defense and incarceration – emphasizing private prisons in particular – into a singular discussion utilizing data made available within the last five years.

My analysis yields no evidence that indigent defense expenditures affect state incarceration rates. Conversely, political, economic, and demographic variables including the rate at which state prisoners are incarcerated in private prisons, the political ideology of a state government, the proportion of a state’s population holding at least a high-school diploma, a state’s median income, and the proportion of black and Latino individuals within a state are robust within my multivariate regression model.

It is acknowledged by scholars that state indigent defense programs are grossly underfunded.⁵ It is possible that no state at the time of writing appropriates an amount of funding for indigent defense that is large enough to affect its incarceration rate. Additionally, the influence of private prison corporations appears to affect state incarceration rates considerably. This is arguably the most notable finding within my analysis, and a discussion of prison privatization is duly emphasized in this paper. Data about indigent defense programs nationwide is sparse and still evolving at the time of writing; this fact explain partially the insignificance of my indigent defense expenditures variable within my analysis. Future research might take advantage of newly-available data that may materialize and perform similar or more comprehensive analyses with such data.⁶

DEPENDENT VARIABLE INCARCERATION: A UNIQUELY AMERICAN CREATION

The incarceration rate in the United States between 1923 to 1972 was relatively stable; approximately 110 per 100,000 individuals were incarcerated during that period.⁷ That rate increased to 161 between 1972 to 1973; in 2007, the rate was 767.⁸ The total incarcerated population in the United States in 2012 – 2.23 million individuals – was seven times the rate of incarceration in 1972.⁹ Individual states experienced a

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considerable rate of growth in incarceration rates between 1972 to 2000, with the largest increases seen in Louisiana, Mississippi, Oklahoma, and Texas.¹⁰ Between 2000 to 2010, state incarceration rates continued to grow, but at a slower rate; incarceration rates in Delaware, Georgia, Texas, New Jersey, and New York declined.¹¹ The rate of incarceration in the United States exceeds those of western European democracies, the Russian Federation, former Soviet states, and most other developed nations worldwide.¹²

The national incarceration apparatus consists of federal prisons, state prisons, local jails, immigration detention facilities, police lockups, military prisons, and state mental facilities in which inmates are civilly-committed.¹³ I focus in this paper exclusively on prisoners under the jurisdiction of states. State prisons are typically operated by state departments of corrections, although increasingly prevalent are prisons, under the jurisdiction of states, that are operated by private corporations.¹⁴ Inmates in state prisons generally serve time for felony offenses and are incarcerated for less than one year.¹⁵

STATE PRISONERS

In 2012, 57-percent of adults incarcerated in the United States resided in state prisons.¹⁶ Of the 1.36 million state prisoners incarcerated in 2009, 716,000 – approximately 53-percent – had committed violent crimes (e.g. rape; murder).¹⁷ Other offenses for which state prisoners are incarcerated include theft; larceny; burglary; and perhaps most significantly, the manufacturing, possession, and sale of drugs.¹⁸ The greatest magnitude of change since the 1970s in the aggregate state prison population is a result of the increase in inmates incarcerated for drug offenses.¹⁹ At the beginning of that decade, a miniscule proportion of state prisoners were imprisoned for drug offenses.²⁰ By 1996, 23-percent of state prisoners were incarcerated for drug offenses; that figure decreased slightly to 17.4-percent in 2010.²¹

THE ROLE OF ‘COMMUNITY CORRECTIONS’

An increasingly large proportion of inmates across the board are incarcerated as a result of the supervision and administration of parole, probation, and bail apparatuses, which are referred to collectively as “community corrections.”²² Logically, higher incarceration rates beginning in the 1970s have resulted in a concurrent increase in the number of inmates under parole or bail supervision, which in turn has yielded an increase of the proportion of inmates serving time for *violations* of parole, probation, or the posting of bail.²³ For example, 20-percent of state prisoners in 1980 were incarcerated following parole violations; that figure increased to 30-percent in 1991 and ranged from 30-percent to 40-percent in 2010.²⁴

PRIVATE PRISONS: THE SCHOLARLY CONSENSUS AND THE POLITICAL LANDSCAPE

Prison privatization is a relatively new phenomenon. Several late-twentieth-century developments catalyzed the proliferation of prison privatization in the United States. The stagflation – high unemployment and inflation coupled with stagnant economic demand – that was characteristic of the 1970s diminished the willingness on the part of the public to increase government spending and raise taxes for the corrections industry and other government functions.²⁵ Additionally, one consequence of the explosion of the incarcerated population in the late-twentieth century was the issuance of court orders to 39 states mandating the reduction of state prison populations in 1988.²⁶

Contracting with private prison companies (hereinafter PPCs) in order to move inmates out of overcrowded prisons offered a solution to this problem.²⁷ President Ronald Reagan’s punitive, tough-on-crime approach to criminal justice policy coupled with his portrayal of the federal government as invasive and wasteful and the private sector as cost-effective and efficient solidified the acceptance on the part of the general public of relying on the private sector to solve the problem of overcrowding and deliver the service of incarceration.²⁸

In 1989, Texas contracted with Wackenhut Corrections Corporation, which is now GEO Group, to build and operate four state prisons; this development is recognized as the first instance of state prison privatization in the United States.²⁹ 5.7-percent of state prisoners were incarcerated in private prisons in 2003.³⁰ In 2005, 151 private prisons operated in 30 states.³¹ ³² GEO Group and CoreCivic (formerly known as Corrections Corporation of America [CCA]), the two largest PPCs in the United States, collectively occupied a 75-percent market-share of the private prison industry in 2010.³³ GEO Group and CoreCivic

contract with the Federal Bureau of Prisons, Immigration and Customs Enforcement (ICE), the U.S. Marshals Service (USMS), and eleven states: Alaska, Arkansas, California, Florida, Georgia, Indiana, Louisiana, Oklahoma, New Mexico, Texas, and Virginia.³⁴ In 2016, contracts between CoreCivic and state governments made up 52-percent of its revenue – \$953.9 million.³⁵

Private prisons are controversial and politically contentious. PPCs tout lower costs and higher efficiency-levels as compared to those offered by prisons operated exclusively by governments, but these assertions are questionable. Opponents of private prisons criticize the execution of incarceration by private corporations as immoral and unethical and call into question the secretive behavior of those corporations.

COSTS AND EFFICIENCY

PPCs argue that the service they provide, incarceration, is more cost-effective and efficient than that which is provided by state governments and federal agencies directly.³⁶ A wealth of scholarly research has been conducted in an attempt to empirically verify this assertion. No compelling evidence exists to date that private prisons are definitively and substantially more cost-effective and efficient than public prisons.³⁷

The General Accounting Office, for example, made precisely this conclusion in both 1996 and 2007.³⁸ A Department of Justice made the same conclusion in 2001.³⁹ At the time of writing, the individual who directed that study stands by its findings and remains unconvinced that enough data has been gathered to alter them in any meaningful sense.⁴⁰ Studies that *have* attempted to make definitive conclusions reveal underwhelming if tepid support for the efficacy of prison privatization. A 1999 University of Cincinnati meta-analysis conducted by two doctoral students found that private prisons are neither more nor less costly than public prisons.⁴¹

Comparing the costs of private and public prisons is “a black box.”⁴² Many of the available studies that attempt to do this employ invalid measures, flawed research designs, imperfect information, datasets that make illogical comparisons, and narrow foci that make generalizations difficult or impossible.⁴³ Locating a control group in the context of prisons in which the square-footage, architectural design, security level, staff-to-inmate ratio, median inmate age, extent of overcrowding, and inmate health range, may differ dramatically is often untenable.⁴⁴

The tabulations of costs for private and public prisons are by no means identical. State and federal prison privatization contracts include all relevant costs, while public corrections budgets may include line-items relating to, for example, staff pensions, information technology, and human resources that are paid for with multiple funding-sources.⁴⁵ Moreover, studies attempting to aggregate PPCs’ expenditures do not include such additional expenditures as contract compliance monitoring and legal fees in the wake of litigation.⁴⁶

Perverse Incentives, Guaranteed Occupancy Clauses, and Broader Moral Implications

Scholars acknowledge that PPCs are incentivized to perpetuate the “unlimited market of inmates” that keeps prison beds filled.⁴⁷ Contracts between governments and PPCs regularly include provisions that ensure prison occupancy-rates of between 80- to 100-percent, and state governments pay to use beds whether they are filled or not.⁴⁸ Opponents of private prisons argue that such provisions are morally reprehensible, as is the very existence of private prisons.⁴⁹

Other developed nations have publicly expressed this argument. In 2009, the Supreme Court of Israel held that a private corporation that is inherently motivated by profit-maximization naturally commodifies incarceration and therefore violates individuals’ personal liberties.⁵⁰ Abolish Private Prisons, Inc., an Arizona-based non-profit organization, is of the position that a government may not delegate the execution of incarceration to a private entity and that such violates the non-delegation doctrine established in *Wayman v. Southard* (1825).⁵¹ That organization is also of the view that PPCs violate the 13th Amendment to the U.S. Constitution by treating prisoners as property (that is, commodifying their incarceration).⁵² Conversely, proponents of private prisons argue that the state *administers* incarceration on behalf of the people and the rule of law and is free to delegate the execution of that function to both public and private entities.⁵³

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GOVERNMENTAL RELATIONS AND LOBBYING

PPCs have made a concerted effort to influence governments and maintain connections therewith in order to maintain their profitability. PPCs employ governmental relations staff tasked with, for example, obtaining inmate population projections from sitting corrections officials in order to augment efforts to fill beds and maintain occupancy levels.⁵⁴ CoreCivic and GEO Group, for example, have made \$25 million in both lobbying and campaign donation expenditures since 1989.⁵⁵ Both companies belonged for years to the American Legislative Exchange Council (ALEC), a conservative advocacy group of which nearly 25-percent of state legislatures are members.⁵⁶ ALEC drafted model legislation that influenced the adoption of truth-in-sentencing laws, which mandated that sentenced prisoners were required to serve at least 85-percent of their sentence, in 25 states and three-strikes laws, which automatically sentenced convicted individuals to life in prison upon conviction of a third felony offense, in 11 states.⁵⁷

Transparency

PPCs have been criticized as being relatively opaque entities. PPCs are not required to report such metrics as the number of inmates placed in solitary confinement or company policies governing the circumstances behind which inmates are placed therein.⁵⁸ In the same vein, PPCs are not required to comply with Freedom of Information Act (FOIA) or other public records requests, making any information that is withheld by a PPC difficult or impossible to obtain.⁵⁹ CoreCivic and GEO Group have lobbied extensively against legislation that subject the private prison industry to FOIA requests.⁶⁰

ATTEMPTS AT REFORM

Seven pieces of legislation intending to improve the transparency and accountability of private prisons have been introduced since 2012; each of them died in committee.⁶¹ In Vermont, a bill that would have enacted a moratorium on contracting with PPCs was introduced; that bill also died in committee.⁶²

THE 'PUNITIVE TURN' IN AMERICAN CRIMINAL JUSTICE POLICY

Garland (2001) labels the protractive increase in the punitiveness of criminal justice and penal policy in the United States beginning in the 1970s as “the punitive turn”.⁶³ Drastic social and economic changes that occurred in the 1960s and 1970s overlapped with a concurrent increase in crime rates during the same time period.⁶⁴ Anxiety among the general public about crime pervaded, and to the extent that politicians calibrate their actions such that they align with the preferences of the voters who elect them, it makes sense that politicians increased the magnitude of the extent to which criminal justice policy was punitive.⁶⁵

Southern conservatives “recoded” the social and economic disarray of the 1960s – large swaths of individuals receiving governmental assistance; fractious race relations; poverty; economic downturn for the working-class – into a ‘tough-on-crime’ approach to criminal justice.⁶⁶ The 1970s saw economic stagflation and the beginnings of the gradual diminishment of white privilege and the concurrent gradual increase in the rights of individual of color.⁶⁷ Republicans fought during that decade for the so-called ‘silent majority’ by advocating for the protection of the working- and middle-class social and family structure.⁶⁸ This was achievable, they argued, through perpetuating a punitive approach to crime and drugs (and later, in the 1980s and 1990s, a corresponding intolerance of abortion and queer individuals).⁶⁹ Such was President Ronald Reagan’s approach to criminal justice in the 1980s.⁷⁰

The effect of “the punitive turn” was an increase in the severity and breadth of criminal law. Sentencing policies and procedures were standardized nationally beginning in 1975 and continuing through the mid-1980s.⁷¹ Beginning in the mid-1980s and continuing through 1996, the federal government and state legislatures passed a wealth of new sentencing legislation at the will of voters seeking answers to the social, political, and economic upheaval of the 1960s and 1970s.⁷² These policies included mandatory minimum sentences, truth-in-sentencing laws requiring prisoners to serve certain proportions of their sentences, three-strikes laws that automatically sentenced convicted individuals to life in prison upon a third repeated offense, and life sentences without the possibility of parole.⁷³

Elected judges and prosecutors and the dispersed law enforcement and criminal justice system responded in kind to the alarmism on the part of the general public in the wake of late-twentieth century social, economic, and political distress by upholding and enforcing such punitive criminal justice policies.⁷⁴ At the state level, there began to exist a correlation between Republican governments and higher incarceration rates.⁷⁵ Likewise, Democratic President Bill Clinton, for example, demonstrated his agreement with Presidents Richard Nixon and Ronald Reagan, who vociferously supported the “punitive turn” in American criminal justice policy, by presiding over legislation that perpetuated it.⁷⁶ Pursuant to the Violent Crime Control and Law Enforcement Act of 1994 – the “crime bill” passed during Clinton’s tenure – 28 states passed truth-in-sentencing laws by demonstrating that prisoners would serve as much or more than 85-percent of their sentences in order to receive federal funding.⁷⁷

THE DISPROPORTIONATE INCARCERATION OF PERSONS OF COLOR

The considerable increase in federal and state incarceration rates since the 1970s and the subsequent “punitive turn” in American criminal justice and penal policy has disproportionately affected individuals of color.⁷⁸ Throughout the 1970s and 1980s, the absolute and relative racial disparities in imprisonment between persons of color and whites increased dramatically.⁷⁹ This is true despite the fact that the commission of violent crime by individuals of color has significantly declined since the 1980s.⁸⁰

A wealth of empirics defend this assertion. In 2011, the combined federal and state incarceration rate for non-Hispanic black men was more than six-times higher than that for non-Hispanic white men.⁸¹ The rate of commission of drug crimes by individuals of color is only slightly higher than that of whites, but the rate of arrests of blacks for drug crimes in the 1980s was three- to five-times higher than that of whites.⁸² The rate of incarceration of young men of color with “little schooling” is “extraordinarily high.”⁸³ Indeed, the cumulative risk of imprisonment for *all* men without a post-secondary education has increased “substantially” and, for all men without a high-school diploma, “extraordinar[ily].”⁸⁴ For young men of color within the aforementioned two groups, however, the cumulative risks of imprisonment are significantly greater.⁸⁵ Individuals of color are disproportionately likely to be arrested for drug crimes and are arrested specifically for crack-cocaine offenses more often than are whites.⁸⁶ Persons of color are more likely to receive incarcerative punishments (as opposed to, for example, community service) and to be sentenced to the longest possible amount of prison-time for a given offense as compared to whites.⁸⁷

These findings deserve careful analysis. Social theorists argue that the punishment of the poor on the part of the general public is rooted in the perception that impoverished individuals’ involvement in kind disrupts social order.⁸⁸ Correspondingly, one focal point of the punitive American criminal justice and social apparatus was the intersection of crime, poverty, violence, unemployment, and single-parent hood in predominantly black and brown urban neighborhoods.⁸⁹ A decline in urban areas in the availability of gainful employment for lower-educated men such as low-skilled manufacturing jobs coupled with the movement of middle- and working-class Americans into suburbs forced individuals of color, circumscribed into neighborhoods rife with severe levels of poverty and unemployment, to resort to selling drugs and earning income by other illegal means.⁹⁰

These developments converged with the “punitive turn” in American criminal justice policy.⁹¹ Both individuals of color forced to engage in the illegal drug-trade and individuals addicted to illegal drugs were collectively framed by politicians as enemies of themselves and of society – agents of the so-called ‘War on Drugs’ – and as the cause of the aforementioned historic-structural developments for which they were not wholly responsible: violent crime, dilapidated urban infrastructure, and the social and economic distress that was commonplace nationally and especially severe in predominantly black, urban neighborhoods.⁹² New federal drug laws that entered into force in 1986 and 1988 increased the severity of sentences for low-level drug offenses, and the incarceration rates for drug offenses alone increased dramatically.⁹³ In 1997, one-fifth of state prisoners were incarcerated for drug offenses.⁹⁴

Personal attitudes about race have influenced criminal justice and penal policy equally as much as have the aforementioned historic-structural developments.⁹⁵ Whites are more likely to equate blackness with violence and criminality and are therefore more likely to endorse harsh penal policies against individuals of color and reject claims that the criminal justice policy disproportionately affects

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blacks.⁹⁶ These attitudes are exacerbated by the disproportionate depiction of individuals of color as violent criminals in the media.⁹⁷ Additionally, darker-skinned individuals of color and those with “stereotypically African-American features (e.g wide nose, full lips)” are more likely to receive longer sentences as compared to lighter-skinned persons of color.⁹⁸

INDEPENDENT VARIABLE: INDIGENT DEFENSE

States and communities are legally obligated to provide counsel to defendants who are unable to afford the cost of legal representation and face the possibility of incarceration because of seminal rulings handed down by the U.S. Supreme Court including *Powell v. Alabama* (1932), *Gideon v. Wainwright* (1963), and *Argersinger v. Hamlin* (1972). Across the states, the characteristics of indigent defense programs vary widely, but programs typically take three forms:

- 1) **public defender programs** in which salaried, full-time, and/or part-time attorneys work under a government agency or a non-profit, public-private-partnership arrangement;
- 2) an **assigned-counsel** program in which private attorneys independently represent indigent defendants;
- 3) **contract programs** in which in which governments contract with individual attorneys, law firms, attorney consortiums, and bar associations to provide indigent defense.⁹⁹

COMPARISON OF PROGRAMS

Public defender offices are rare in jurisdictions with fewer than 50,000 residents, and assigned-counsel programs typically serve jurisdictions with fewer than 100,000 residents.¹⁰⁰ The per-case costs of contract systems and public defense systems are about the same and are slightly more expensive than assigned-counsel programs.¹⁰¹ In contracting for indigent defense, attorneys, law firms, attorney consortiums, and bar associations bid to represent clients during a specified term for a fixed income level; some contract programs are not-competitive and do not have bidding.¹⁰² Contract programs with competitive bidding are significantly more expensive than non-competitive contract programs.¹⁰³

Contract program advocates argue that shifting the indigent defense caseload onto private attorneys is more cost-effective and provides a higher-quality service than public defender programs.¹⁰⁴ When individual attorneys compete with one another, it is argued, the free market will ‘weed out’ attorneys who deliver an inadequate defense.¹⁰⁵ In the context of contract programs, higher expenditures on resources expert witnesses that allow for more investigative depth typically yield a higher-quality defense.¹⁰⁶ Jurisdictions with non-competitive contracting tend to have fewer resources to pay the higher prices charged by indigent defense contractors.¹⁰⁷ In the context of assigned-counsel programs, assigned counselors tend to provide a higher-quality defense for indigent defendants when the circumstances in which they work mirror those of attorneys representing paying clients.¹⁰⁸

Assigned counsel and contract programs have been criticized for failing to deliver attorneys with adequate expertise and the financial incentive to deliver a strong defense.¹⁰⁹ Not enough providers may be located in a particular county or municipality to ensure the deliverance of a high-quality defense, and private attorneys may cut corners and provide the minimal level of service necessary to ensure a profit for themselves.¹¹⁰ The ideal contract would be carefully structured so as to impose a cap on indigent defense caseloads; most contracts pay contractors a lump sum for a potentially unlimited number of cases, which is inefficient.¹¹¹ A maximum-caseload provision would ostensibly allow indigent defense contractors to effectively estimate the minimum necessary amount of time and energy to be expended per case and provide a higher-quality defense in each case, but most contracts contain no such provision.¹¹² The nature of indigent defense and the fact that the interactions between attorney and client are confidential make the oversight of assigned counsel and contract programs difficult.¹¹³

No consensus has been reached in regard to the superiority of contracting for indigent defense over traditional public defender programs.¹¹⁴ An evaluation of representation-effectiveness measures including the number of motions filed and the number of days taken close a case yields no significant differences between program-types.¹¹⁵ There is some evidence that contract programs may yield greater

levels of client satisfaction than public defender programs.¹¹⁶ Finally, the fragmented nature of indigent defense programs and the nature of the availability of information about those programs make multi-jurisdictional case-studies difficult or impossible.¹¹⁷

Program Implementation and Expenditures

The anti-big-government, pro-privatization zeitgeist that was characteristic of the Reagan presidency induced a shift in the provision of indigent defense to counties and municipalities.¹¹⁸ In 2002, 23 state governments fully funded their indigent defense programs.¹¹⁹ Thirteen state governments covered fewer than 25-percent of program-costs and shifted most of the financial burden of program implementation onto counties and municipalities.¹²⁰ In Utah and Pennsylvania, counties were entirely responsible for funding indigent defense programs.¹²¹ County- and locally-funded programs have been criticized as being inequitable; poorer jurisdictions, many of which exhibit a greater need for strong indigent defense programs because of high crime and unemployment rates, necessarily spend less money on indigent defense as compared to wealthier communities.¹²²

In addition to the variability in the extent to which state governments fund indigent defense programs, the actual amounts of money that state and local governments spend on indigent defense vary widely.¹²³ In 2002, indigent defense programs across states were budgeted at between two million dollars and \$500 million, with a median of \$30 million.¹²⁴ Median per capita state expenditures on indigent defense were \$6 compared to \$118 for welfare and \$750 for corrections.¹²⁵

Indigent defense programs are “severely underfunded” in the aggregate.¹²⁶ State reimbursement rates for indigent defense are typically lower than are those for private indigent defense work; in general, prosecutors exhibit larger budgets than do indigent defense programs; legislation may dedicate money for indigent defense, but such funding may appear elsewhere.¹²⁷ Davies and Worden (2009) offer the following assessment of indigent defense in the United States:

Just as a close look at actual welfare benefits tends to convince one that welfare hardly brings people out of poverty, a close look at expenditures on indigent defense suggests that the services provided to poor defendants cannot be consistently comparable with what most Americans would want or pay for if they were accused of crimes.¹²⁸

DATA AND METHODS OF ANALYSIS

A SUMMARY OF CONNECTIONS BETWEEN THE LITERATURE AND MULTIVARIATE MODEL

Conservative politicians and policymakers – especially southern conservatives – made a concerted effort to stoke and exacerbate public anxiety about crime and societal disorder in the wake of the momentous social, political, and economic change of the 1960s and 1970s.¹²⁹ Adopting a punitive approach to crime – a ‘tough-on-crime’ approach – by increasing the severity of incarcerative punishments for criminals, they argued, would yield societal stabilization.¹³⁰ It is not my intention to paint southern conservatives with a broad brush; if many conservative Republicans became champions of punitive criminal justice and penal policies in the late twentieth century, so too did many liberal Democrats.¹³¹

The result of this “punitive turn” in American criminal justice policy was the absolute and relative explosion of national and state incarceration rates.¹³² Moreover, the convergence of a variety of historic-structural factors – for example, a decrease in the availability of manufacturing jobs and the movement of whites out of cities and into suburbs – arguably forced individuals of color to engage in illegal means of earning income, namely open-air drug transactions.¹³³ Both Republican and Democratic politicians painted these individuals as manifestations of societal disorder and urban decay and argued that these were precisely the individuals who deserved long prison sentences. Impoverished, low-educated individuals of color – especially men of color without a high-school diploma – were disproportionately affected by the “punitive turn.”¹³⁴

I therefore expect, with a high degree of certainty, that the racial and economic characteristics of individual states will be key determinants of their incarceration rates; bluntly, it is nearly undeniable that

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states with higher concentrations of impoverished individuals of color will exhibit comparatively higher incarceration rates. This assertion is the basis of my inclusion of the following variables in my multivariate model: proportion of state residents holding a high-school diploma; state median income; proportion of black state residents; proportion of Asian state residents; proportion of Latino/Hispanic state residents. Correspondingly, I expect more politically conservative states and southern states to exhibit comparatively higher incarceration rates. For this reason, I include the state government ideology and southern-state variables in my model.

Prison privatization in the United States is now a central tenet of incarceration in the United States.¹³⁵ No compelling evidence exists, however, to conclude that private prisons are definitively more cost-effective than public prisons.¹³⁶

I therefore view the pervasiveness of federal and state prison privatization in the United States as a function of politics, not economics. This is to say that the prevalence of private prisons has more to do with the political calculus of elected representatives and the great lengths to which PPCs go to lobby and support financially those same representatives in order maintain their profitability than it does with the theoretical cost-savings achieved by privatizing a government-provided service.¹³⁷ To the extent that elected representatives base their actions on the mood of their constituents and attempt to maximize the probability of reelection, it is politically expedient to reject increasing capital outlay – and, subsequently, taxes – to facilitate the construction of a new public prison and instead sign private prison contracts and/or accept campaign donations from private prison companies.¹³⁸ For these reasons, I include the proportion of private state prisoners variable in my multivariate model and expect that higher values on this variable will yield higher state incarceration rates.

The impoverished individuals of color disproportionately affected by the “punitive turn” in American criminal justice and penal policy, and, indeed, all impoverished persons, are those who would arguably benefit to the greatest extent from high-quality, well-funded indigent defense programs.¹³⁹ Ostensibly, higher-quality indigent defense programs would decrease the rate at which individuals of color are given incarcerative punishments. Scholars acknowledge, however, that indigent defense programs in the aggregate are not adequately funded.¹⁴⁰ I expect that states spending more money on indigent defense will exhibit lower incarceration rates, but the severely low funding-levels of indigent defense programs across jurisdictions may prevent this causal chain from occurring.

Now that the theoretical linkages between the literature and the variables included in my multivariate analysis have been established, I will delineate each of my variables individually and elaborate upon the data of which they are comprised.

DEPENDENT VARIABLE: INCARCERATION

I compiled data from the Bureau of Justice Statistics detailing the number of sentenced prisoners under the jurisdiction of state correctional systems between 2008 to 2012 and divided these figures by the corresponding population of each state to yield the rate of incarcerated and sentenced prisoners for each state during each of the years included in my period of study. I do not study prisoners who are awaiting trial and not actually serving a sentence. Puerto Rico, Washington, D.C., and the remaining U.S. territories are not included in my analysis.¹⁴¹

KEY INDEPENDENT VARIABLES

INDIGENT DEFENSE EXPENDITURES

Indigent defense data is sparse. The compilation of state indigent defense expenditures for the years 2008 to 2012 by Herberman and Kyckelhahn (2014) is likely the only comprehensive survey of its kind available. As has been emphasized, the authors note that the sources and levels of indigent defense program funding vary considerably.¹⁴² This data is therefore reliable but may not fully reflect the true nature of the extent to which indigent defense expenditures are made (or not) at the state level or of other characteristics about indigent defense that remain unknown. I divided these figures – the amount of money states spent on indigent defense each year during the period of 2008 to 2012 – by the total population in each state during the period of study to yield indigent defense expenditures per capita.

Indigent defense is a criminal justice policy, but it is also a welfare policy; it redistributes wealth by providing legal services to low-income individuals who would not otherwise be able to afford legal representation.¹⁴³ A disproportionate quantity of persons of color are impoverished and rely on welfare benefits, and individuals of color are disproportionately incarcerated in the United States.¹⁴⁴ Indigent defense caseloads are partially a function of crime and poverty; states with larger impoverished populations face larger indigent defense caseloads.¹⁴⁵ Additionally, resource-rich states may spend more money on “redistributive enterprises” such as indigent defense as compared to resource-poor states.¹⁴⁶ It seems logical, then, to hypothesize that states spending more money on indigent defense will assist larger numbers of individuals facing incarceration – a disproportionate quantity of whom are individuals of color – and may decrease the rate at which persons facing state imprisonment are incarcerated.

State Prison Privatization Rate

I obtained the number of prisoners residing in private state prisons during the 2008 to 2012 period of study and divided these figures by the number sentenced prisoners in each state to yield the per-state rate of prison privatization.¹⁴⁷ Given the pervasiveness of private prisons at the time of writing and the increasing significance of the activities of private prison corporations as they relate to the national incarceration apparatus, I felt it worthwhile to include data regarding private state prisons. I hypothesize that states exhibiting higher proportions of state prisoners residing in private prisons will exhibit higher incarceration rates overall compared to states with fewer prisoners in private prisons.

State Government Ideology and Southern Status

Given the influence of southern conservatives on the national proliferation of the “punitive turn” in American criminal justice policy, I felt it necessary to classify states by ideology and region. I hypothesize that more conservative states and southern states will exhibit higher rates of incarceration as opposed to less conservative states and non-southern states. I use the nominate measure of state government ideology for each state during the 2008 to 2012 period of study formulated by Berry et al. (2010). In this case, ideology is measured on a scale of 1 to 100; a lower ideology measure indicates a higher magnitude of conservatism. I also code the following states as southern states: Alabama; Arkansas; Delaware; Florida; Georgia; Kentucky; Louisiana; Maryland; Mississippi; North Carolina; Oklahoma; South Carolina; Tennessee; Texas; Virginia; West Virginia.¹⁴⁸

CONTROL VARIABLES

ECONOMIC VARIABLES

I compiled the median income per-state and proportion of state residents with a high-school diploma for each of the years included in the period of study. The disproportionate impact of the “punitive turn” on impoverished, low-educated, predominantly black and brown urban areas and the concurrent victimization of poor individuals leads me to hypothesize that states with lower median-incomes and lower proportions of residents with high-school diplomas will exhibit higher incarceration rates as compared to states with higher median-incomes.

DEMOGRAPHIC VARIABLES

I compiled the number of black, Asian, and Latino/Hispanic individuals residing in each state during the 2008 to 2012 period of study and divided these figures by the total population in each state to yield the proportion of black, Asian, and Latino/Hispanic individuals residing in each state. I view the disproportionate quantity of black and Latino Americans who are incarcerated as validating the inclusion of these variables. The literature on incarceration and private prisons that I have examined thus far includes little or no discussion of Asian-Americans; I therefore felt it worthwhile to include this data in my analysis. It is nearly certain given the research on incarceration and race that states with higher populations of individuals of color will exhibit higher incarceration rates than states with lower minority populations.

ANALYSIS PLAN

I regress my key independent variables, state indigent defense expenditures per capita, state government ideology, southern status, and state prison privatization rate, and my control variables, median income

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and proportion black, Latino, and Asian, on my dependent variable, incarceration. I attach the *L1* operator to my main independent variable – indigent defense expenditures per capita – when executing a multivariate regression with these variables in Stata to facilitate a pooled cross-sectional analysis of each of the years included in the 2008 to 2012 period of study. I then use Clarify, a statistical software package for Stata, to generate the average predicted increase in state incarceration rates given simulated proportions of sentenced state prisoners residing in private prisons.¹⁴⁹

RESULTS OF ANALYSIS

MULTIVARIATE REGRESSION

The results of my multivariate regression model that are contained in Table 1, which is located in Appendix A. Indigent defense expenditures appear to have no effect on incarceration rates. In the same vein, the above discussion regarding the promulgation of a ‘tough-on-crime’ approach by Republicans, especially in the South, makes the significance of the ideology variable unsurprising. The sign on the ideology variable is correct; higher ideology measures, which indicate a lower magnitude of conservatism, are associated with lower incarceration rates. It is likely that insignificance of the southern-state variable is due to the fact that it is so highly correlated with the government ideology variable such that it is ‘canceled out.’ The significance of the state prison privatization variable is noteworthy and arguably an avenue to be explored in future research.

It is unsurprising that larger proportions of black and Latino state residents are associated with a higher incarceration rate considering the above discussion of the disproportionate impact of the “punitive turn” in the American criminal justice system on persons of color. The significance of the median income variable is as expected considering the greater cumulative risk of imprisonment for low-educated, low-income, minority men.

PREDICTED PROBABILITIES

The predicted mean increases in state incarceration rates given simulated proportions of sentenced state prisoners residing in private prisons are contained in Table 2, which is located in Appendix A. I predict given the results of my multivariate regression that if every state prisoner in the United States were incarcerated in private state prisons, the incarceration rate in each state would increase by an average of 28.1-percent, a dramatic increase that would have far-reaching consequences. This is a disturbing and intriguing finding. Of course, this is a hypothetical analysis, but I think that this speaks to the pervasive influence of private prison companies on incarceration in the United States and on the federal and state policymakers who formulate criminal justice and penal policies.

DISCUSSION AND CONCLUDING REMARKS

In this paper, I attempt to merge scholarly discussions about indigent defense and incarceration. Within the realm of incarceration, I sought specifically to emphasize the increasingly pervasive influence of private prison companies. I find no evidence suggesting states that spend more on indigent defense exhibit lower incarceration rates than states that devote fewer resources to indigent defense. I do find, however, that higher incarceration rates are present in states that are home to more conservative state governments, are responsible for larger proportions of state prisoners incarcerated in private prisons, exhibit lower median incomes, and exhibit higher minority populations than in states that do not satisfy these conditions. All of my findings are in keeping with my original hypotheses with the exception of my hypothesis of the effect of the indigent defense expenditures variable.

The study of indigent defense is evolving at the time of writing given the relatively large extent to which data about indigent defense in the United States is unavailable. Suffice it to say that the data compiled by Herberman and Kyckelhahn (2014) is an anomaly. The same is true regarding the study of private prisons. The extensive research compiled by Eisen (2018) is likely the most up-to-date compendium of prison-privatization, but if indigent defense research is still evolving, so too is research about private prisons.

I assign the most weight to my finding regarding private prisons. Using simulated proportions of private state prisoners, I predict that the complete privatization of every state prison system in the United States would yield an average increase of 28.1-percent in the rate at which state prisoners are incarcerated. This is a considerable increase considering that state prisoners account for under two-thirds of the nationally incarcerated population. PPCs clearly occupy a sizeable niche in the realm of incarceration, and their efforts to quell attempts to curb their activities have been largely successful. I will be very eager to monitor the trajectory of the private prison industry in the years to come.

Despite the significance of the state prison privatization variable in my analysis, it is possible that such is simply a case of endogeneity. This is to say that it is possible that a higher magnitude of state prison privatization is associated with a higher incarceration rate in an individual state because prison privatization, marketed as a cheaper form of incarceration without a sacrifice in service-quality, makes the execution of incarceration easier for that state and not because the private prison industry engages in enough lobbying and campaign-financing to maintain a foothold in the industry.

I think, however, that this is a weak argument. Scholars have been attempting for many years to gather enough data and perform appropriate analyses in order to give credence empirically to assertions on the part of prison privatization advocates that privately-executed incarceration is absolutely cheaper than what the government will deliver itself. They remain at an impasse. At the time of writing, the research on prison privatization simply does not support the argument that the function of incarceration is definitively more cost-effective efficient when it is executed by the private sector. For this reason, I stand by the assertion that the political calculus of elected representatives and the painstaking efforts on the part of PPCs to lobby and support financially those representatives are key determinants of prison privatization at the state level.

I use state population figures in order to make my indigent defense variable a relative measure. It is important to note, however, that a more valid measure of indigent defense expenditures would be one that is relative to the total number of indigent defendants served by a state during a given year rather than my indigent defense variable, which uses the total state population. Unfortunately, indigent defense data is difficult to collect, and I was unable to perform my analysis with an ideally-formulated indigent defense expenditures variable.

Researchers might engage in the following endeavors in the future:

- 1) Repeat analyses as indigent defense data becomes more widely and readily available and as dynamics of state prison privatization grow and/or change;
- 2) use a wider period of study;
- 3) calculate the extent by which indigent defense expenditures would have to increase in order for that variable to be significant in a multivariate analysis, if such is possible;
- 4) conduct analyses that include the demography of prisoners, not just aggregate state-level statistics.

Appendix A

Table 1. OLS Regressions of Indigent Defense Expenditures and Controls on Incarceration

	Coefficient	Standard Error
State Indigent Defense Expenditures Per Capita	0.0000108	(0.0000113)
State Government Ideology	-0.00000659+	(0.00000336)
Southern State	-0.000187	(0.000280)
State Prison Privatization Rate	0.00281*	(0.00120)
Proportion High School	-0.00828	(0.00520)
Median Income	-6.88e-08**	(1.54e-08)
Proportion Black	0.00788**	(0.00145)
Proportion Asian	0.00231	(0.00152)
Proportion Latino/Hispanic	0.00239+	(0.00125)
Constant	0.0136**	(0.00434)

+ p < 0.1
 * p < 0.05
 **p < 0.01
 Adjusted R² = 0.596
 N = 141

Table 2. Predicted Incarceration Rate Increases using Simulated Private Prison Populations

Simulated Proportions of Sentenced State Prisoners Incarcerated in Private Prisons (Percent)	Average Predicted Increase in State Incarcerated Populations
10	0.031708
20	0.0594066
30	0.0871053
40	0.1148039
50	0.1425025
60	0.1702012
70	0.1978998
80	0.2255984
90	0.2532971
100	0.2809957

Appendix B

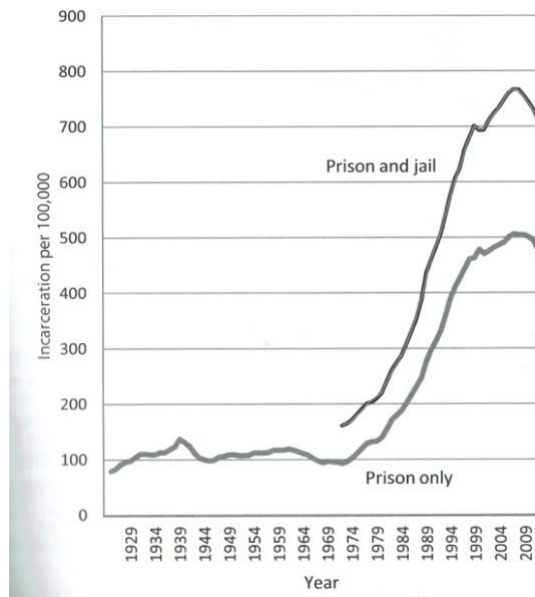


Figure 1. National Incarceration Rate, 1929 – 2009; Travis, Western, and Redburn 2014, 35.

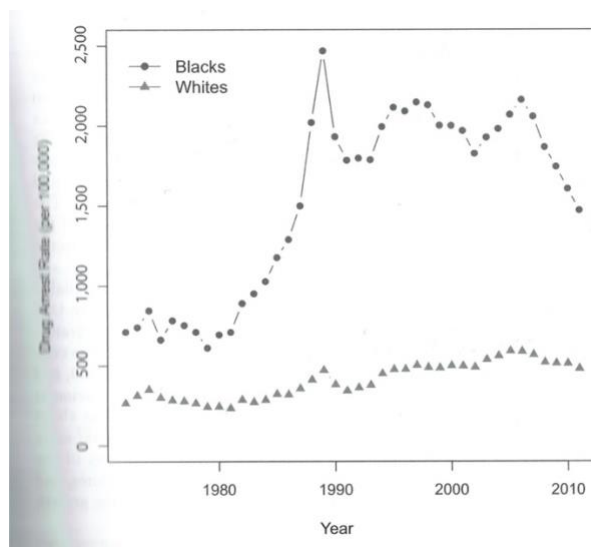


Figure 2. Drug arrest rates for blacks and whites per 100,000 population, 1972 – 2011
 Source: Travis, Western, and Redburn 2014, 61.

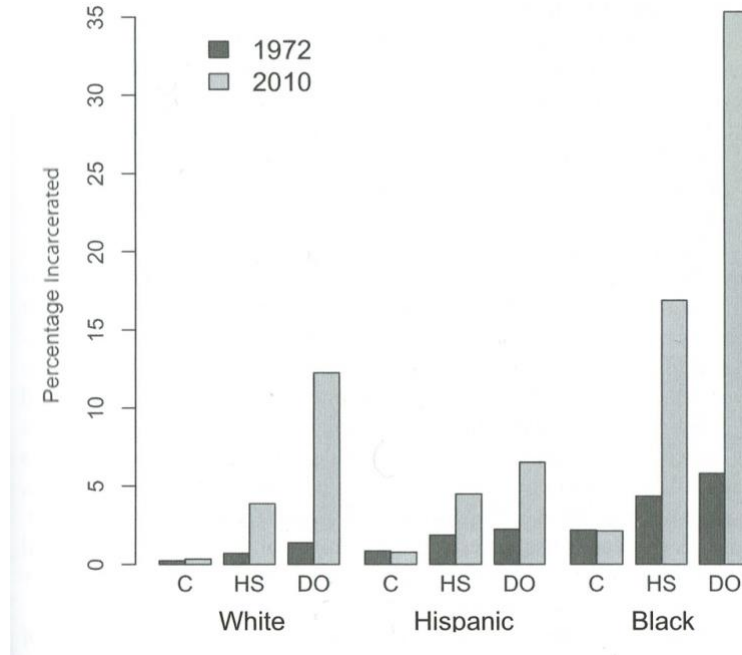


Figure 3. Prison and jail incarceration rates for men aged 20-39 by educational attainment and race, 1972 and 2010; C = some college; HS = all non-college men; DO = fewer than 12 years of completed schooling; Travis, Western, and Redburn 2014, 63.

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¹³⁷ Eisen 2018.

¹³⁸ Downs 1960; Eisen 2018.

¹³⁹ Davies and Worden 2009; Travis, Western and Redburn 2014.

¹⁴⁰ Davies and Worden 2009.

¹⁴¹ I do not include in my analysis the federal prison system or prisoners in Washington, D.C., Puerto Rico, or any other U.S. territory besides the 48 contiguous states, Alaska, and Hawaii. This is not to say that the federal system is not undeserving of its own analysis. In 2000, the federal system in terms of persons incarcerated was the third largest in the United States behind Texas and California; Travis, Western, and Redburn 2014, 55.

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¹⁴³ Travis, Western and Redburn 2014.

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¹⁴⁵ Davies and Worden 2009, 197, 203.

¹⁴⁶ Davies and Worden 2009, 198.

¹⁴⁷ It should be emphasized again that these figures do not account for private prisons that are under the jurisdiction of the federal government (e.g. Federal Bureau of Prisons; Immigration and Customs Enforcement; U.S. Marshals Service); Eisen 2018. I study state prison privatization exclusively.

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