

**DRUG ENFORCEMENT  
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**Private Prison Companies  
and Sentencing**

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## ABSTRACT

*The use of private prisons in the United States to house federal and state inmates has added a voice to sentencing practice. This voice is unnecessary and should not exist as a concern in sentencing law and policy. Private prisons affect sentencing at the policy level through lobbying, networking, and by influence over judges' sentencing decisions in individual cases. These methods of influencing sentencing are not always blatant, but they do exist. The United States should end the use of private prisons or adopt a hybrid model similar to that used in Europe to help quiet this unnecessary voice. However, eliminating the use of private prisons will not end the United States' mass incarceration problem. Policy makers must address other causes of mass incarceration along with ending the use of private prisons. This paper will explore the history of private prisons in the United States, how private prisons influence sentencing, and potential solutions to end or improve the use of private prisons, while addressing the larger causes of mass incarceration. The suggested solution explored at the end of this paper is for the United States to develop and implement a hybrid model similar to that used in France, which eliminates completely private prisons, but still uses some private entities in the prison system. Eliminating private interests from the prison system entirely is unrealistic and unlikely given their long history of presence in the United States criminal justice system.*

## I. INTRODUCTION

In recent years in the United States, the use of private prisons has become a hot topic for debate. While not a main point, private prisons did come up even in the 2020 presidential election. Both Bernie Sanders and Joe Biden, from the Democrat Party, committed to ending for-profit detention at the federal level because of its ties to racial injustice and mass incarceration.<sup>1</sup> On the other hand, Republican nominee Donald Trump received campaign donations from the nation's largest private prison companies.<sup>2</sup> Biden ultimately won the 2020 election and hopefully will fulfill his campaign promise, which would be in stark contrast to the immigration detention policies during his tenure as Vice President from 2008 through 2016.

Private prisons are currently a large factor in immigrant detention. Because that alone could, and should, be its own paper, this paper will only focus on private prisons in the context of criminal sentencing and their use at the state and federal level for people convicted of crimes.

### A. A Brief History

The United States had a history of intersection between prison inmates and the private sector even before private prison use began. State and local governments were contracting with private entities for prison administration or labor since the colonial period.<sup>3</sup> And, in the 1700s and 1800s, prison inmates were employed by private businesses as a cheap source of labor.<sup>4</sup> But, the United States took capitalism to a new extreme in the 1980s with

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<sup>1</sup> Nomaan Merchant, *Private prison industry backs Trump, prepares if Biden wins*, AP (Aug. 13, 2020), <https://apnews.com/article/houston-ap-top-news-prisons-immigration-joe-biden-ca7f6e9fac1f287bb79ae55410112c46>.

<sup>2</sup> *Id.*

<sup>3</sup> Lucas Anderson, *Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts*, 39 Pub. Cont. L.J. 113, 117 (2009).

<sup>4</sup> *Id.*

the introduction of private prisons. In the earlier 1970s and 1980s, states and the federal government began to shift various prison administrative functions, such as food or medical services, to private entities.<sup>5</sup> Then, some prisons or jails started to be run entirely by outsourced services. In 1984, Corrections Corporation of America (“CCA”) contracted with Tennessee to run their Hamilton County Jail, becoming the first fully private prison in the United States.<sup>6</sup> Since that moment, private prisons have grown to run juvenile correctional facilities, prisons, and jails all over the country at the state and federal level. By 1996, there were thirteen states with private prison contracts.<sup>7</sup> By 2004, there were thirty-four.<sup>8</sup> As of 2017, 121,718 inmates are housed in private prisons, whether state or federal facilities, and there were 270 private prisons in the United States as of 2012.<sup>9</sup> This is about 8.2% of the prison population in the United States.<sup>10</sup> Only New York and Illinois have legislation preventing the state from contracting with private prisons.<sup>11</sup> Since 2000, the number of people in private prisons has increased 39.3% while the overall incarceration rate in the country has increased by 7.8%.<sup>12</sup> The private prison population peaked in 2012 with 137,200 people housed in private prisons.<sup>13</sup>

Private prisons have made themselves tempting to both states and correction officials who work in those states. As private prisons have expanded, they have offered opportunities to their host communities. A prison being built in a community means job opportunities that would be available for long periods of time.<sup>14</sup> Rural communities particularly have been eager to allow private prisons because their depressed economies need employment.<sup>15</sup> States and local communities would be willing to offer low or subsidized land prices, tax-free construction bonds, subsidized sewer or road connections and more to private prisons building in their community.<sup>16</sup> A private prison facility could start to be used rapidly and the state would not be solely responsible for the upkeep of the physical buildings.<sup>17</sup> This was appealing to states with limited budgets. Private prison companies marketed themselves as a cheaper option for states and the federal government than the government running operations of prisons themselves.<sup>18</sup>

The supposed-lower cost of private prisons compared to public prisons was important to some states with the explosion of the United States prison population that occurred in the later part of the 20th century. There are multiple reasons for this increasing incarceration rate that has led to the United States having a mass incarceration problem. One was the War on Drugs. In 1970, President Nixon deemed drug abuse to be “public enemy number one” and other policy makers advocated for harsh drug laws and severe punishments for drug

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<sup>5</sup> *Id.* at 118.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Private Prisons in the United States*, The Sentencing Project (Oct. 24, 2019), <https://www.sentencingproject.org/publications/private-prisons-united-states/>; Ryan Miller, *The False Promise of Prison Privatization in America*, 37 *Loy. L.A. Int'l & Comp. L. Rev.* 377, 385 (2016).

<sup>10</sup> Miller, *supra* note 9 at 385.

<sup>11</sup> Anderson, *supra* note 3 at 118.

<sup>12</sup> *Private Prisons in the United States*, The Sentencing Project (Oct. 24, 2019), <https://www.sentencingproject.org/publications/private-prisons-united-states/>.

<sup>13</sup> *Id.*

<sup>14</sup> Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a for-Profit Nightmare*, 20 *U. Pa. J.L. & Soc. Change* 125, 143 (2017).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Miller, *supra* note 9 at 381.

users.<sup>19</sup> The Anti-Drug Abuse Act of 1986 basically criminalized drug addiction.

The 1990s was also filled with “tough on crime” rhetoric and policy.<sup>20</sup> This is likely because the Democrat Party was trying to take control of criminal issues from the Republican Party.<sup>21</sup> The Violent Crime Control and Law Enforcement Act (“the 1994 crime bill”) passed in 1994 and imposed tougher prison sentences at the federal level.<sup>22</sup> It offered funding to states to build more prisons and hire more police. It also provided funding for police to carry out more drug-related arrests.<sup>23</sup> The 1994 crime bill alone is not responsible for mass incarceration, mainly because it was a federal law and 88% of those in prison are in state prison, not federal prison.<sup>24</sup> But, simultaneously, similar laws were playing out at the state level, likely influenced by the national “tough on crime” rhetoric.

At the state level were criminal laws such as California’s three-strikes law, which sentences anyone already convicted of two serious felonies to essentially an automatic life sentence upon their commission of any third felony.<sup>25</sup> This has sentenced people to life in prison who have not committed violent or dangerous crimes, sometimes even for something as simple as shop-lifting socks.<sup>26</sup> Other states have three-strikes laws, but have limited the third felony to violent felonies. By 1994, all states had passed at least one mandatory minimum sentencing law and many took the 1994 crime bill as encouragement to pass “truth in sentencing” laws and reinstate the death penalty.<sup>27</sup> Some of these laws were even passed before the 1994 crime bill. States also increased prison sentence lengths around the 1990s and encouraged police and prosecutors to be tougher on criminals.<sup>28</sup> Incarceration rates were rising in the states even before the 1990s, but the 1990s seem to have been when the “tough on crime” rhetoric became a talking point of both political parties.

There is not one single policy or law that is responsible for mass incarceration. It comes from a combination of mandatory minimums, the War on Drugs, harsh sentencing policies, the “tough on crime” attitude, and the racism built into the United States’ history. But, regardless of the cause, because of mass incarceration, the United States needed more places to house inmates. That is where private prisons have come into play. The avalanche of litigation concerning the overcrowding issues in public prisons throughout the latter half of the 1990s also contributed to this concern.<sup>29</sup>

In the last five or so years, there has been much rhetoric about ending the use of private prisons at the federal level as one way to help end mass incarceration. As of 2017, 12% of the total prison population in the United States was in federal prison.<sup>30</sup> The other 88% were in state prison for state-level crimes. Of the people in federal

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<sup>19</sup> Andre Douglas Pond Cummings, *All Eyez on Me: America’s War on Drugs and the Prison-Industrial Complex*, 15 J. GENDER RACE & JUST. 417, 417-18 (2012).

<sup>20</sup> *Id.*

<sup>21</sup> Udi Ofer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, ACLU (June 4, 2019), <https://www.aclu.org/blog/smart-justice/mass-incarceration/how-1994-crime-bill-fed-mass-incarceration-crisis>.

<sup>22</sup> German Lopez, *The controversial 1994 crime law that Joe Biden helped write, explained*, VOX (Sept. 29, 2020), <https://www.vox.com/policy-and-politics/2019/6/20/18677998/joe-biden-1994-crime-bill-law-mass-incarceration>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Matt Taibbi, *Cruel and Unusual Punishment: The Shame of Three Strikes Laws*, ROLLING STONE (March 27, 2013), <https://www.rollingstone.com/politics/politics-news/cruel-and-unusual-punishment-the-shame-of-three-strikes-laws-92042/>.

<sup>26</sup> *Id.*

<sup>27</sup> Ofer, *supra* note 21.

<sup>28</sup> *Id.*

<sup>29</sup> See Robert Vasoli, *Crime and Corrections*, 2 NOTRE DAME J.L. ETHICS & PUB. POL’Y 359 (1987).

<sup>30</sup> Jennifer Bronson & E. Ann Carson, *Prisoners in 2017*, U.S. Department of Justice (April 2019), available at <https://www.bjs.gov/content/pub/pdf/p17.pdf>.

prison, 15.1% were held in some form of private prison facility.<sup>31</sup> This is not, in the grand scheme of things, a large amount of the prison population. There are significantly more people in state private prisons than federal private prisons. Because of this, efforts at ending private prison and also lowering mass incarceration must be focused on both the federal level *and* the state level.

In recent years as well, Democrats have situated themselves as the party for criminal justice reform, while Republicans are viewed as the party more likely to still be tough on crime. However, the private prison issue is not a red vs. blue issue, especially at the state level. Both red and blue states utilize private prisons. For example, Alabama is typically a red state, but only 1% of their prison population are in private prisons.<sup>32</sup> But New Jersey, typically a blue state, has 13.6% of their prison population in private prisons and New Mexico, also blue, has 50% of their prison population in private prisons.<sup>33</sup> Private prisons are not an issue that can be solved by electing one political party over the other. Both Democrat and Republican state leaders have embraced and accepted their use. This just further shows that attempts at developing a solution to private prison use will have to be focused at the federal level *and* the state level and with the help of Republican and Democrat leaders.

## B. Budgeting and Saving Money?

As mentioned earlier, private prisons were appealing to states and the federal government because they were marketed as cheaper than public prisons. That will now be explored in more depth. Private prisons claim to save tax-payer money since the government contracts with the private prison company and then the company pays for upkeep of the prison (usually).<sup>34</sup> And, because, supposedly, many companies compete for the contract with the government, companies create better and more innovative ideas for prisons in order to win these contracts, which improves them for the inmates.<sup>35</sup> This improvement could come in the form of more or better rehabilitative programs in the prison for inmates, which was hoped would lower recidivism rates.<sup>36</sup>

However, the promise of lower costs and better rehabilitate programs was never realized. Unlike what was promised to rural communities who built private prisons, private prisons have been connected with negative job growth and depressed wages.<sup>37</sup> Workers hired as guards and other employees in private prisons are generally paid much lower than those hired to work in public prisons, so a state building a private prison instead of a public prison causes the prison employees in that area to be paid lower. Some of these rural communities went deeply into debt building the new private prisons and then were never able to pay it off.<sup>38</sup> And, studies have shown that private prisons often end up costing the government more in the long-run than what was saved in the short-run compared to the costs of public prisons.<sup>39</sup> Because private prisons have higher recidivism rates than public prisons, the short-term cost-savings from the original contract are offset by the long-term costs for the state of dealing with recidivism.<sup>40</sup>

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<sup>31</sup> *Private Prisons in the United States*, THE SENTENCING PROJECT (Oct. 24, 2019), <https://www.sentencingproject.org/publications/private-prisons-united-states/>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Miller, *supra* note 9 at 394.

<sup>35</sup> Miller, *supra* note 9 at 394.

<sup>36</sup> Takei, *supra* note 14 at 143.

<sup>37</sup> *Id.* at 144.

<sup>38</sup> *Id.*

<sup>39</sup> Anderson, *supra* note 3 at 131.

<sup>40</sup> *Id.*

Finally, contracts for private prisons have not ended up being nearly as competitive as originally planned. Once states contracted with a private prison company, got a private prison set up, and then filled it with people, it was not at all easy to then try and negotiate or try to switch prison companies for better and improved contracts.<sup>41</sup> And, private prison companies have had the ability to cherry-pick which prisons to open and operate, unlike public prisons. Private prison companies can choose the most easy to manage prisons, which saves them money but then costs the state more money in the long-run.<sup>42</sup> Private prison companies also cut costs by reducing medical or other services to save money and protect their bottom line, which can cost the state money through later litigation.<sup>43</sup>

### C. False Promises: How Private Prisons Failed to Deliver

Along with being more expensive, private prisons also have failed to deliver the promise of improved rehabilitative programs and lower recidivism rates. Academic research has shown that those incarcerated in a private prison instead of a public one have higher recidivism rates.<sup>44</sup> Private prisons tend to be more violent than public ones, both from prisoner-on-prisoner violence and guard-on-prisoner violence. Inmates who experience violence while incarcerated are more likely to reoffend than those who do not.<sup>45</sup> Because of bed-quotas in private prison contracts, private prisons are often filled with people who are not from the area near the private prison. This makes it significantly harder for family to visit their loved ones who are incarcerated. And, private prisons are more likely to ban in-person visits and then charge inmates for phone and video calls. This makes more money for the private prison, but makes it difficult for inmates to remain in contact with their family. Remaining in contact and maintaining a relationship with family or friends while incarcerated lowers a person's risk of reoffending. By having these policies, private prisons are helping to raise recidivism rates, despite their promises to lower them.

Private prisons also tend to have less rehabilitative programs than their public counterparts.<sup>46</sup> Substance abuse treatment, vocational education, and sentence credits for good-behavior are difficult to find in private prisons.<sup>47</sup> Those private prisons that do have rehabilitative programming, usually because of contractual obligations, often administer the programs poorly.<sup>48</sup> For-profit prisons operators have almost no incentive to offer rehabilitative programs because recidivism is actually good for them as it keeps their beds full.<sup>49</sup>

Private prisons are worse for states and inmates in the long-run than public prisons. They are more expensive and offer less rehabilitative programming. This leads to higher recidivism rates, which is better for business for private prison companies. These factors give private prisons a reason to want to have a voice and influence in sentencing policy.

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<sup>41</sup> Takei, *supra* note 14 at 144.

<sup>42</sup> Matthew Clarke, *Study Shows Private Prison Companies Use Influence to Increase Incarceration*, PRISON LEGAL NEWS (Aug. 22, 2016), <https://www.prisonlegalnews.org/news/2016/aug/22/study-shows-private-prison-companies-use-influence-increase-incarceration/>.

<sup>43</sup> *Id.*

<sup>44</sup> Research Brief, *How Private Prisons Increase Recidivism*, ITPI (June 2016), <https://www.inthepublicinterest.org/wp-content/uploads/ITPI-Recidivism-ResearchBrief-June2016.pdf>.

<sup>45</sup> *Id.*

<sup>46</sup> Anderson, *supra* note 3 at 129.

<sup>47</sup> *Id.* at 130.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

## II. INFLUENCE ON POLICY

There are multiple private prison companies operating in the United States, but the two biggest and most active are Corrections Corporation of America (“CCA”)<sup>50</sup> and GEO Group (“GEO”). GEO operates 66 facilities in the United States and CCA operates 66 facilities and owns 53 of those.<sup>51</sup> These two groups have the most influence over policy through lobbying, campaign contributions, and networking. This gives private prison companies a voice in sentencing law.

### A. Influence through Lobbying

The only client of private prison companies is the federal or state governments. So, private prison companies like CCA and GEO have an economic interest in incarceration. One of the ways they keep up on this economic interest is through lobbying for sentencing and criminal law policies that can benefit their companies.

Private prison companies use lobbying for securing contracts for prisons in states or at the federal level.<sup>52</sup> In 2016 and 2017, private prisons companies spent 12.4 million dollars on lobbying state lawmakers.<sup>53</sup> They also use lobbying to encourage sentencing law and policy that will increase the amount of people incarcerated and in their facilities. CCA states on its website that the company does not lobby on policies that affect “the basis for or duration of an individual’s incarceration or detention.”<sup>54</sup> But, they and other private prison companies are connected to policies that increase incarceration. For example, private prison companies have written model legislation and then lobbied for it for policies such as three-strikes laws, truth in sentencing laws, or immigration enforcement laws, all similar to the policies in the 1990s that drove up incarceration rates.<sup>55</sup> GEO and CCA have both warned shareholders that changes to existing state policies like these could hurt their bottom lines.<sup>56</sup> CCA’s annual report in 2014 even included the warning, “The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction or parole standards and sentencing practices.”<sup>57</sup>

One particular example of how private prisons do their lobbying is the American Legislative Exchange Council (“ALEC”). ALEC is a conservative organization that writes model legislation and provides networking opportunities for conservative lawmakers.<sup>58</sup> Its members are corporations and lawmakers. Lawmakers can introduce ideas for model legislation and then other members write that model legislation. Both the drafts of the legislation and the process for writing it are kept very hush-hush.<sup>59</sup> And, while the majority of ALEC’s members are lawmakers, most of the money comes from corporate members.<sup>60</sup>

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<sup>50</sup> CCA recently changed its name to Civic Core. This paper will use CCA because all the sources did.

<sup>51</sup> See [https://www.sourcewatch.org/index.php/GEO\\_Group](https://www.sourcewatch.org/index.php/GEO_Group); see <https://corecivic.gcs-web.com/>.

<sup>52</sup> Clarke, *supra* note 42.

<sup>53</sup> Christian Dippel & Michael Poyker, *How private prisons affect sentencing*, VOX EU (Aug. 6, 2019), <https://voxeu.org/article/how-private-prisons-affect-sentencing#:~:text=lt%20concludes%20that%20private%20prisons,biases%20in%20the%20judicial%20system>.

<sup>54</sup> Micheal Cohen, *How for-profit prisons have become the biggest lobby no one is talking about*, WASH. POST (Apr. 28, 2015).

<sup>55</sup> Clarke, *supra* note 42.

<sup>56</sup> Cohen, *supra* note 54.

<sup>57</sup> Dippel & Poyker, *supra* note 53.

<sup>58</sup> Yvonne Wingett Sanchez & Rob O’Dell, *What is ALEC? ‘The most effective organization’ for conservatives, says Newt Gingrich*, USA TODAY (Apr. 5, 2019), <https://www.usatoday.com/story/news/investigations/2019/04/03/alec-american-legislative-exchange-council-model-bills-republican-conservative-devos-gingrich/3162357002/>.

<sup>59</sup> *Id.*

<sup>60</sup> Beau Hodai, *Corporate Con Game*, IN THESE TIMES (June 21, 2010), <https://inthesetimes.com/article/corporate-con-game>.

ALEC has helped write model legislation that has benefited private prison companies and that they then lobby for to lawmakers. CCA and GEO are both corporate members of ALEC, along with some of the corporations that provide various supplies for inside prisons.<sup>61</sup> For example, ALEC helped draft both the No Sanctuary Cities for Illegal Immigrants Act and the Support Our Law Enforcement Act introduced in the Arizona legislature. The No Sanctuary Cities for Illegal Immigrants Act has anti-sanctuary cities provisions that prohibit any municipal, county, or state policy from hindering the ability of any government agency to comply with federal immigration law.<sup>62</sup> This makes it easier for suspected illegal immigrants to be detained. It also contains a provision that allows law enforcement to arrest anyone whom they have probable cause to believe may have committed a crime.<sup>63</sup> More immigrant or criminal detainees means more possible beds filled at immigrant detention centers and more possible criminal sentences being served in private prisons in Arizona. ALEC has also been responsible for laws criminalizing oil and gas pipeline protests.<sup>64</sup> The ALEC legislation makes trespassing with the intent to disrupt work a felony.<sup>65</sup> These laws are similar in impact to the tough on crime laws from the 1990s and likely will lead to more criminal sentences. Private prisons benefit from harsher sentencing law and policy. Lobbying is just one of the ways they ensure those laws exist.

## B. Influence through Campaign Contributions

Another way private prison companies ensure that harsher sentencing law and policy exists to keep their beds full and profits high is through campaign contributions. Since 2000, private prison companies have given 6,092,331 dollars to state politicians and 835,514 dollars to federal politicians through their political action committees in the form of campaign contributions.<sup>66</sup> These contributions give private prison corporations access to lawmakers who would be willing to pass favorable legislation for them.<sup>67</sup> During the 2020 election cycle, GEO's founder contributed 500,000 dollars to Republican campaigns and 10,000 dollars to Democrats.<sup>68</sup> Private prison companies focused on donating to Donald Trump, instead of Joe Biden, likely because of Trump's immigration policies.<sup>69</sup> Private prisons have donated significantly more money to Republican campaigns than to Democrat campaigns in recent years.<sup>70</sup> Republican lawmakers have been more likely to favor tougher on crime policies that fill private prisons and more likely to accept private sector takeover of public entities than Democrats, which is likely the reason for private prison companies to support them. And, some private prison companies have even donated to the campaigns of judges in state elections.<sup>71</sup> These campaign contributions give them influence in who is elected and thus what policies or bills are put forth in the legislatures, which then affects sentencing law and policy.

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Sophie Hayssen, *What Is ALEC? Learn About the Organization Writing Your State Laws*, TEEN VOGUE (Sept. 25, 2020), <https://www.teenvogue.com/story/what-is-alec-explainer>.

<sup>65</sup> *Id.*

<sup>66</sup> Clarke, *supra* note 42.

<sup>67</sup> Clarke, *supra* note 42.

<sup>68</sup> Derek Gilna, *Private Prison Industry Ramped Up Campaign Contributions, Favoring Republicans*, PRISON LEGAL NEWS (Nov. 1, 2020), <https://www.prisonlegalnews.org/news/2020/nov/1/private-prison-industry-ramped-campaign-contributions-favoring-republicans/>.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Dippel & Poyker, *supra* note 53.



## C. Influence through Networking

Networking and building social connections is the third way private prison companies attempt to influence sentencing law and policy. While lobbying and campaign contributions do help with networking, networking alone is also a distinct goal of private prison companies. They want to build relationships with the various government officials or corporate people who can help them meet their goals.

One of the ways these relationships are built are through organizations such as ALEC. ALEC hosts conferences every year for its lawmaker members and corporate members.<sup>72</sup> Private prison company employees go to these conferences to build relationships with the lawmakers who are also there in order to be able to influence their policy decisions or the model legislation that ALEC writes. Private prison companies also build relationships with public correctional officials with sponsorships and contributions to industry associations like the American Correctional Association, the American Jail Association, and the National Sheriff's Association.<sup>73</sup>

And, private prisons companies use a revolving door between employment in the public sector and employment in the private sector to build beneficial relationships. People leave careers in the public sector and then enter the private sector. For example, Harley Lappin became an executive official at CCA less than a month after his retirement as Director of the Federal Bureau of Prisons.<sup>74</sup> And, Stacia Hylton left the Office of the Federal Detention Trustee to consult for GEO Group.<sup>75</sup> The Federal Detention Trustee is responsible for managing federal detention acquisition for the Board of Parole, Immigration and Customs Enforcement, and the U.S. Marshall Service.<sup>76</sup> Having connections in the public sector helps private prison companies to also influence policy at the administrative level and the legislative level.

## III. INFLUENCE ON JUDGES

Beyond just making contributions to judges' election campaigns, private prisons are able to exert some influence over the individual decision-making of judges in sentencing. The influence is seemingly small for the most part, but it should not exist at all. There are two identified ways this can happen. One is significantly more obvious than the other.

The first way that private prisons can influence judges making sentencing decisions is directly. This can be through campaign contributions, as mentioned above, or through situations such as outright bribes. Judges who are seeking reelection might be tougher in sentencing leading up to the election in order to appear tough on crime to ensure they get the campaign contributions from private prison companies instead of their opponent.<sup>77</sup> The second direct way that private prison companies can influence judges' sentencing decisions is more nefarious and also much rarer. It is through outright bribes. Judges could accept bribes from private prison companies to give out harsher, longer prison sentences that keep the beds full in private prisons and keep the companies'

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<sup>72</sup> Sanchez & O'Dell, *supra* note 58.

<sup>73</sup> Takei, *supra* note 14 at 150.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> NPR Staff, 'Kids For Cash' Captures A Juvenile Justice Scandal From Two Sides, NPR (March 8, 2014), <https://www.npr.org/2014/03/08/287286626/kids-for-cash-captures-a-juvenile-justice-scandal-from-two-sides#:~:text=of%20SenArt%20Films-.Kids%20for%20Cash%20chronicles%20the%20story%20of%20Judge%20Mark%20A,received%20a%20%22finder's%20fee.%22&text=In%202009%2C%20a%20major%20corruption,justice%20system%20of%20northeast%20Pennsylvania>.

pockets full. There is one example of this happening.

In Pennsylvania, there was the infamous “kids for cash” private prison scandal. In northeast Pennsylvania in 2009, two judges, Mark Ciavarella and Michael Conahan, began implementing a no tolerance for “bad behavior” policy for juveniles.<sup>78</sup> Juveniles were sent to detention facilities for even minor offenses, such as fighting in school or underage drinking.<sup>79</sup> DayQuawn Johnson was sent to a private juvenile detention center for several days in 2006 for failing to appear at a hearing as a witness to a fight, even though his family had never received notice about the hearing and Johnson had already told school officials that he had not seen anything.<sup>80</sup> Judge Ciavarella would even go around to schools in the area and give talks warning the children about what punishment he would give if they ever ended up in his courtroom.<sup>81</sup> He had been elected after a tough on crime campaign and was praised in the community for his stance. At least, until it was revealed that he and Judge Conahan were actually getting kickbacks from the juvenile detention centers where they were sentencing children.<sup>82</sup> The juvenile detention centers, private prisons, were paying them to impose harsh sentences in order to get their beds full.<sup>83</sup> The two judges had made the deal with the builder of the private juvenile detention center, Robert Powell, in 2000.<sup>84</sup> By the time they were caught in 2009, the judges had made 2.6 million dollars in kickback money. And, Judge Conahan was the judge in charge of the courthouse budget. He was able to divert funds and juveniles away from the county juvenile detention center, which eliminated the competition for the private juvenile detention center.<sup>85</sup> Judge Ciavarella and Judge Conahan were caught after nine years of sentencing children to detention centers who should not have been sent there and were both sentenced to serve time in federal prison for tax evasion and wire fraud. Many of the juveniles they sentenced had their sentences overturned.<sup>86</sup>

The second way private prisons can influence judges making sentencing decisions is indirectly. This is harder to observe than something like campaign contributions or outright bribery, but studies have shown it is a factor. Studies have shown that judges internalize the cost-savings associated with private prisons.<sup>87</sup> They then develop a belief that because private prisons are marketed as cheaper and better for the state budget, that it is fine to sentence defendants more harshly and for longer terms. This is often an unconscious effect that the judges do not realize is influencing them.<sup>88</sup>

While influence as overt as outright bribes is rare for private prison companies and judges, it can happen and should be acknowledged as a possibility for influence on sentencing. The indirect influence is more likely to occur more often, but would be harder to notice than influence as direct as bribes. Direct or indirect influence from private prison companies on judges’ sentencing decisions should not happen, as private prison companies should have no voice in sentencing.

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Ian Urbina, *Despite Red Flags About Judges, a Kickback Scheme Flourished*, NY TIMES (March 27, 2009), <https://www.nytimes.com/2009/03/28/us/28judges.html>.

<sup>81</sup> NPR Staff, *supra* note 77.

<sup>82</sup> *Id.*

<sup>83</sup> Urbina, *supra* note 80.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> NPR Staff, *supra* note 77.

<sup>87</sup> Aurélie Ouss, *Incentives Structures and Criminal Justice* (July 3, 2015), available at SSRN: <https://ssrn.com/abstract=2685952>.

<sup>88</sup> *Id.*

## IV. THE OVERALL EFFECT OF PRIVATE PRISON COMPANIES ON SENTENCING

The overall effect of private prisons on sentencing policy is seemingly small, but large for an effect that should not exist. It has not been shown yet that private prisons in a jurisdiction make it more likely that a defendant will be incarcerated. But, private prisons can affect sentence length in multiple ways.

The first way is that the existence of private prisons in a jurisdiction can lead to longer sentence lengths. In a study conducted by researchers at UCLA, sentence length increased by an average of 23 days after the opening of a private prison.<sup>89</sup> The study authors found that the longest sentences are handed down in states where private prisons offer the largest cost-savings.<sup>90</sup> Another study found that doubling private prison capacities in a state increased sentence lengths in that state's courts by 1.3%, or 18 days, compared to sentence lengths given out by adjacent courts in other states.<sup>91</sup> Researchers theorized that judges in jurisdictions with private prisons are aware of fiscal concerns, but feel that because a private prison is advertised as cheaper than a public one, it is acceptable to hand out longer sentences. And, if a judge knows a prison is at or near capacity, he might be more likely to give a shorter sentence when possible. But, if he knows a private prison has room, he might be more likely to give a longer sentence.<sup>92</sup>

Another way that private prisons can affect sentence length is through parole decisions. This is less straightforward. Private prisons are often staffed poorly in comparison to public prisons. The guards working in private prisons usually receive less training and less pay than their public counterparts, and private prisons tend to have higher staff turnover.<sup>93</sup> They are "lower quality" than their public counterparts.<sup>94</sup> Private prisons are also more dangerous and experience more violence than their public counterparts.<sup>95</sup> The combination of these two factors: higher violence and guards with less training make it more likely for inmates to rack up infractions while incarcerated. And, inexperienced guards may be more inclined to hand out violations to inmates as opposed to other de-escalation methods because infractions are often the easiest way to maintain authority.<sup>96</sup> Inmates then go before parole boards with more infractions on their record than they would have gotten in a public prison. This makes them less likely to be granted parole by the parole board because they appear more dangerous or less reformed. They then remain in prison longer.

Both of these ways for private prisons to affect sentencing should not exist. Private prison companies are not the officials who are elected to write sentencing laws or to hand out sentences in a courtroom. They should have no say in the process, whether that say is intentional or not. The goal of a private prison, as a company or corporation, is to make money. Making money is not and should not be the goal of a sentencing system. The

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<sup>89</sup> Anita Mukherjee, *Do Private Prisons Distort Justice? Evidence on Time Served and Recidivism*, American Economic J.: Economic Pol'y (2020), available at <http://dx.doi.org/10.2139/ssrn.2523238>.

<sup>90</sup> *Id.*

<sup>91</sup> Dippel & Poyker, *supra* note 53.

<sup>92</sup> Scott Weybright, *Privatized prisons lead to more inmates, longer sentences, study finds*, WSU INSIDER (Sept. 5, 2020), <https://news.wsu.edu/2020/09/15/privatized-prisons-lead-inmates-longer-sentences-study-finds/#:~:text=Privatized%20prisons%20lead%20to%20more%20inmates%2C%20longer%20sentences%2C%20study%20finds,-September%2015%2C%202020&text=When%20states%20turn%20to%20private,the%20length%20of%20sentences%20increases.&text=The%20study%20found%20that%20private,per%20million%20population%20per%20year>.

<sup>93</sup> Anderson, *supra* note 3 at 125-26.

<sup>94</sup> *Id.*

<sup>95</sup> Research Brief, *How Private Prisons Increase Recidivism*, ITPI (June 2016), <https://www.inthepublicinterest.org/wp-content/uploads/ITPI-Recidivism-ResearchBrief-June2016.pdf>.

<sup>96</sup> Josh Sanburn, *Privately-Run Prisons Hold Inmates Longer, Study Finds*, TIME (June 19, 2015), <https://time.com/3928184/private-prisons-longer-incarceration/>.

influence and effect of private prison companies should be limited so they cannot be a “who” in the sentencing process.

## V. THE FRENCH SYSTEM OF UTILIZING PRIVATE PRISON COMPANIES

France is another country that utilizes private prison companies in some aspects of their prison programs. However, they differ significantly from the United States in what aspects of the prison industrial complex that private prison companies are allowed to participate. The theories of punishment the French value and the way the French government is set up are the reasons for this.

In France, all correctional services fall under the Ministry of Justice.<sup>97</sup> There are not states that also run correctional services like in the United States. The budget from the Ministry of Justice for correctional services covers all prisons and all levels of prison, unlike in the United States where federal institutions, state institutions, and local and county institutions can all have different budgets and leaders.<sup>98</sup> This centralized management system gives the French government significantly more power and control over correctional services, which would be impossible in the United States because of federalism. And, in France the overarching goal of the criminal justice system is rehabilitation and reintegration.<sup>99</sup> All aspects of the French prison system are designed to reflect this. French sentencing law does not have mandatory minimums and judges are given discretion for maximum sentences.<sup>100</sup> The ability to work and be employed is considered a right in France, so inmates are given a lot of work opportunities with pay that would be the same as someone in that job outside of prison.<sup>101</sup> The money made from these jobs goes to victim restitution and a reintegration fund for the inmate.<sup>102</sup> The goal of the criminal justice system is rehabilitation, and so incarceration is only viewed as a means to that end, instead of the end itself.<sup>103</sup>

These goals are reflected in the way France utilizes private prison companies. France uses private prison companies for design and construction of prison facilities and for some ancillary and rehabilitative services, but ownership, control, security, and management of prisons have remained under the control of the French government.<sup>104</sup> There are not any prisons in France under the complete control of private prison companies like there are in the United States. The French government can ensure its own goals of rehabilitation and reintegration are being met in every facility.<sup>105</sup> This hybrid model makes prisons more expensive, but provides higher quality services to the inmates in them. Private prison companies have been gaining more of a foothold in French prisons since the early 2000s, but not yet to the extent in the United States.<sup>106</sup> Private prison companies there also have no interest in policies that would lower the incarceration rate, but the incarceration rate in France is already much lower than that in the United States. As of 2011, 93 people in France were incarcerated for every 100,000

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<sup>97</sup> Lila Kazemian & Catrin Andersson, *The French Prison System: Comparative Insights for Policy and Practice in New York and the United States*, RESEARCH AND EVALUATION CENTER (June 2012), available at <https://jrec.files.wordpress.com/2014/04/rec20121.pdf>.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Miller, *supra* note 9 at 389-92.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Miller, *supra* note 9 at 389-92.

residents compared to 743 per 100,000 residents in the United States.<sup>107</sup> This difference in incarceration rate may contribute to France not needing to rely on private prisons as much as the United States does.

## VI. SUGGESTED SOLUTION: IMPLEMENT POLICIES TO END MASS INCARCERATION

The best solution to preventing private prisons companies from having a voice in sentencing law and policy is to stop using them entirely. However, given their prevalence at the state and federal level, that solution is both unrealistic and unlikely. The prison population in the United States is currently also much too big to rely entirely on public prisons without overcrowding problems. The United States, both at the federal level and the state level, should implement policies to decrease the prison population and the mass incarceration problem and then consider switching to a hybrid model similar to that used in France that contracts with private prisons for some services, but leaves management and control of prisons in the hands of federal and state government entities. This would prevent bed quotas and the problems with private prison staff compared to public prison staff, which would address the parole problem in private prisons.

There have been steps taken at both the federal level and in some states to decrease the amount of people who are incarcerated. In 2019 the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act (“First Step Act”) was passed. It eases some mandatory minimums under federal law by expanding the safety valve provision and easing some “three-strikes” laws.<sup>108</sup> It also makes retroactive the reforms enacted by the Fair Sentencing Act of 2010, which reduced the disparity between crack cocaine and powder cocaine sentences at the federal level.<sup>109</sup> And, it increases the amount of good-time credits federal inmates can earn and allows inmates to get “earned time credits” by participating in more vocational and rehabilitative programs.<sup>110</sup> While very much a first step toward needed and greater criminal justice reform, the First Step Act will help to decrease sentence lengths and the prison population.

In December of 2020, the House of Representatives voted to decriminalize marijuana through the Marijuana Opportunity Reinvestment and Expungement Act (“MORE Act”).<sup>111</sup> The MORE Act would remove marijuana from the Controlled Substances Act and eliminate criminal penalties for individuals who manufacture, distribute, or possess marijuana.<sup>112</sup> It would also create a process for expungement of prior federal marijuana convictions.<sup>113</sup> However, the bill is unlikely to pass the Senate. But, this shows there is at least conversation and support at the federal level for redoing drug and sentencing policy.

The 2020 election saw multiple states pass marijuana legislation. Arizona, Montana, New Jersey, and South Dakota joined the ranks of states that legalized marijuana for adult recreational use. Currently, 36 states have

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<sup>107</sup> Kazemian & Andersson, *supra* note 97.

<sup>108</sup> German Lopez, *The First Step Act, explained*, Vox (Feb. 5, 2019), <https://vox.com/future-perfect/2018/12/18/18140973/state-of-the-union-trump-first-step-act-criminal-justice-reform>.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Veronica Stracqualursi & Lauren Dezenski, House passes bill decriminalizing marijuana at federal level, CNN (Dec. 4, 2020), <https://www.cnn.com/2020/12/04/politics/house-vote-more-act-marijuana-legislation/index.html>.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

legalized marijuana for medical use.<sup>114</sup> And, 15 states have legalized marijuana for adult recreational use.<sup>115</sup> The Sentencing Project mapped out the top trends in state level criminal justice reform for 2019.<sup>116</sup> One of those was “Reducing Prison Populations Through Sentencing Reform.”<sup>117</sup> For example, Oklahoma passed House Bill 1269 to retroactively apply a 2016 ballot measure that reclassified low-level felony drug and property offenses to misdemeanors and increased the felony theft threshold from 500 dollars to 1,000 dollars.<sup>118</sup> And, California repealed the one-year sentence enhancement for each prior prison or county jail felony term by passing Senate Bill 136.<sup>119</sup> Illinois and New York authorized expungement for prior marijuana convictions.<sup>120</sup>

In 2019, some states also took action against private prison companies. Nevada passed Assembly Bill 183, which bans the Department of Corrections from contracting with private prison companies starting in 2022.<sup>121</sup> California passed Assembly Bill 32 to prohibit private immigrant detention centers, although it does allow for some contracting with private entities for some services.<sup>122</sup>

Because the prison population is so much larger at the state level than the federal level, more action must be taken at the state level to decrease private prison use. Currently, there are not really incentives for states to decrease private prison use. If truly committed to ending private prison use, the federal government could pass legislation that would provide incentives for states to limit private prison use to only services in prisons and not entirely privately-run and operated prisons. The federal government could offer more funding for state corrections departments that commit to ending full private prison use and switching to a hybrid model like in France. Or, they could offer incentives to states who commit to policies to lower the prison population, which in turn would decrease the need for private prisons. As drug-policy is being reexamined at the federal level, the federal government could offer incentives to states who also redo their drug policies. And, they could do the same for states committed to restructuring their sentencing systems. The decentralized nature of government in the United States might make these changes slow, but the federal government has encouraged the states to make policy changes in the past through funding and other incentives.<sup>123</sup>

The 2020 covid-19 pandemic might also have some effect on incarceration and the need for private prisons. The ACLU released a study finding that a reduction in jail population was unrelated to crime rates.<sup>124</sup> The study examined data on jail populations and crime rates from the 29 biggest cities in the United States. All but one city (Denver, Colorado) saw a reduction in crime rates from March to May compared to 2019, despite the jail population also shrinking.<sup>125</sup> Covid-19 stay-at-home orders likely contributed to the decreased crime rate, but this finding will provide support for decreasing pre-trial detention and other jail populations. Decreasing the jail population can also lead to a reduction in sentence length and the amount of people in prison. Covid-19 has also

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<sup>114</sup> Norml, *The Clear Winner of Election 2020: Marijuana*, NORML (Nov. 4, 2020), <https://norml.org/blog/2020/11/04/the-clear-winner-of-election-2020-marijuana/>.

<sup>115</sup> *Id.*

<sup>116</sup> See Nicole D. Porter, *Top Trends in State Criminal Justice Reform, 2019*, THE SENTENCING PROJECT (Jan. 17, 2020), <https://www.sentencingproject.org/publications/top-trends-in-state-criminal-justice-reform-2019/>.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Catherine Kim, *Private prisons face an uncertain future as states turn their backs on the industry*, VOX (Dec. 1, 2019), <https://www.vox.com/policy-and-politics/2019/12/1/20989336/private-prisons-states-bans-california-nevada-colorado>.

<sup>122</sup> *Id.*

<sup>123</sup> For example, raising the drinking age to 21.

<sup>124</sup> Marsoo Farivar, *How COVID-19 Jail Releases Are Impacting US Crime Rate*, VOA (July 27, 2020), <https://www.voanews.com/covid-19-pandemic/how-covid-19-jail-releases-are-impacting-us-crime-rate>.

<sup>125</sup> *Id.*

lead to some compassionate releases for incarcerated people. The death rate from covid-19 is significantly higher in prisons than in the general population of the United States, which caused calls to release inmates who are at a higher-risk of getting the virus.<sup>126</sup> The percentage of people in state prisons who are 55 and older more than tripled between 2000 and 2016 because of the “tough on crime” policies of the 1990s that brought long prison sentences.<sup>127</sup> These are the people who are often targeted for compassionate release. As these people are released and do not reoffend, it is possible that this could be used as ammunition for calls for decreased sentence lengths at the state level, which would get people incarcerated for shorter periods of time and further reduce the overcrowding problems that helped cause the need for private prisons.

Small steps like those above will eventually grow to bigger reform. The United States is starting to address the problems caused by mass incarceration. But, a real end to the influence of private prison companies cannot happen until the United States ends mass incarceration and the overcrowding and other problems that come with it. Once that happens the United States could utilize a hybrid model similar to France to decrease the power private prison companies would have over prisons themselves and sentencing law. The voice of private prison companies must be removed from sentencing law and policy discussions because an organization with a monetary concern should have no place in criminal justice system decision-making.

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<sup>126</sup> *Covid-19's Impact on People in Prison*, EJW (Aug. 21, 2020), <https://eji.org/news/covid-19s-impact-on-people-in-prison/>.

<sup>127</sup> *Id.*