

LOCKED OUT OF BUSINESS: A LOOK AT THE FUTURE OF THE PRIVATE PRISON INDUSTRY

Comment

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I. INTRODUCTION AND OVERVIEW

The criminal justice system in the United States is composed of many different parts including law enforcement, courts, defense and prosecution attorneys, and correctional entities.¹ These entities have long worked together to serve a multitude of interests as the former Attorney General Alberto Gonzalez reminded us when he said, “Justice must serve offenders and victims as well as the economy and the general public.”² Even Corrections, the Federal Bureau of Prisons (BOP) for instance, attempts to serve these interests in the way it runs its correctional facilities and programs.³

It is the correctional component of the justice system that is now on the brink of great change. On August 18, 2016, Deputy Attorney General Sally Yates issued a memorandum for the director of the Federal Bureau of Prisons.⁴ This memo directed that the contracts for private prisons not be renewed.⁵ The memo maintained that the purpose for the roundabout deviation was the government’s interests in public safety, cost, control, and recidivism reduction.⁶

In light of this change in direction for the BOP, it is the purpose of this comment to go through the history and current atmosphere of the private prison industry and potential avenues to end the reliance that Federal and State governments have on private companies. First, this comment will detail the rise of the private prison industry in the United States and how Tough-on-Crime policies opened the door for private prisons. Second, it will discuss the current state of the private prison industry and how it has established itself as a necessity for the federal government and especially for the States. Lastly, this comment concludes with an explanation of how the private prison industry will not disappear without a massive change in the United States’ criminal justice mindset.

1. See *The Criminal Justice System*, THE NATIONAL CENTER FOR VICTIMS OF CRIME, <https://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/the-criminal-justice-system> (last visited Sept. 7, 2017).

2. *Feds opt against going after KPMG*, NBC NEWS, http://www.nbcnews.com/id/9114884/ns/business-corporate_scandals/t/feds-opt-against-going-after-kpmg/#.WAZYHIWcFzE (last updated Aug. 30, 2005, 5:22 PM).

3. See *About Our Agency*, FEDERAL BUREAU OF PRISONS, https://www.bop.gov/about/agency/agency_pillars.jsp (last visited Oct. 22, 2016) (“It is the mission of the Federal Bureau of Prisons to protect society by confining offenders in the controlled environments of prisons and community-based facilities that are safe, humane, cost-efficient, and appropriately secure, and that provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens”).

4. Memorandum from Sally Q. Yates, Deputy Att’y Gen., U.S. Dep’t. of Justice to the Acting Dir. of the Fed. Bureau of Prisons, *Reducing our Use of Private Prisons* (Aug. 18, 2016), <https://www.justice.gov/opa/blog/phasing-out-our-use-private-prisons>.

5. See *Id.*

6. See *Id.*

II. THE HISTORY OF PRIVATE PRISONS IN THE UNITED STATES

Private, or contract, prisons are government prisons managed by nongovernment entities on behalf of the government.⁷ While these facilities are not owned by the state, at all times the inmates are still the responsibility of the government.⁸

A. *The Rise of the Private Prison Industry*

Before the 1960s, the privatization of the prison system was minimal.⁹ States would contract with private, normally nonprofit charities, to hold juvenile offenders.¹⁰ Government facilities would contract with outside groups to provide specific services such as health care, counseling, education, maintenance, and food service.¹¹ At the time, this privatization did not cause any unrest because the government still fundamentally had authority over the prisoners.¹²

The beginning of the privatization of prisons began with the Federal Bureau of Prisons (BOP) in the 1960s when it began to contract with private operators to run halfway houses.¹³ The Federal government continued its growth into privatization in the 1980s, when the U.S. Immigration and Naturalization Service (INS) began to contract with private groups to detain undocumented immigrants awaiting deportation.¹⁴ By 1991, the INS had contracted with seven, privately owned and operated, detention facilities.¹⁵ These facilities held more than 500 persons, which totaled approximately a quarter of all detained immigrants awaiting deportation.¹⁶

State and local governments, on the other hand, began to use private correctional facilities in the 1960s mostly for halfway houses, residential treatment programs, and penal farms.¹⁷ It wasn't until the mid-1980s that private groups began to operate higher security prisons

7. Richard Harding, *Private Prisons*, 28 CRIME AND JUST. 265 (2001).

8. *See id.* at 266.

9. *See id.* at 267.

10. *See id.*

11. *See* Douglas C. McDonald, *Private Penal Institutions*, 16 CRIME AND JUST. 361 (1992).

12. *See id.* at 362.

13. *See id.* at 381 (detailing how the BOP contracted to have private entities run community treatment centers which evolved into what are present-day halfway houses. By the 1970's, most of the halfway centers were privatized and only nine centers were run by the BOP. All nine of these centers were closed in 1981, leaving only contracted halfway houses).

14. *See id.* at 381-82 (explaining that the main purpose for contracting with the private entities was that the INS did not have room to hold all the individuals awaiting deportation).

15. *Id.* at 382 (listing the facilities contracted out by the INS including the number of beds in each facility).

16. *Id.*

17. *Id.*

for state and local governments.¹⁸ By the end of 1990, there were forty-four adult prisons operated by private businesses totaling about 15,000 beds.¹⁹ The private prison industry boomed after this initial influx.²⁰ By 1996, there were 118 prisons in twenty-five states privately ran with 78,000 beds.²¹ By 1999, there were 162 privately ran facilities in thirty-one states with a capacity of 125,000.²²

B. Motivations for Privatization

There were numerous reasons for the drastic rise in the privatization of the prison industry. The most obvious reason is the increase in the number of incarcerated individuals.²³ In the 1970s there were only 110 incarcerated persons per 100,000 people.²⁴ By 1999, there were 700 incarcerated persons per 100,000 people.²⁵ During the 1990s it would have been necessary to build facilities with at least 1,500 beds per week to keep up with the rising incarceration rate.²⁶ The rapid increase in the incarceration rate can likely be attributed to government policies like the “War on Drugs”.²⁷

Due to mandatory minimum sentencing, three strike laws, less diversion, probation, and parole, there was more incarceration for crimes that would have had warranted merely rehabilitation or public service just a few years earlier.²⁸

Mandatory minimum sentencing has been around since 1790 and has always been reserved for what society saw as the most abhorrent

18. *Id.* at 382-83.

19. *Id.* at 385 (This was slightly less than 2% of the all prison or jail beds in the country. By the end of 1991, Texas had eighteen different privately ran facilities, by far more than any other state).

20. *See* Harding, *supra* note 7, at 267 - 268.

21. Harding, *supra* note 7, at 268.

22. Harding, *supra* note 7, at 268.

23. *See* Harding, *supra* note 7, at 269.

24. Harding, *supra* note 7, at 269.

25. Harding, *supra* note 7, at 269.

26. Harding, *supra* note 7, at 269 (exploring the increasing incarceration rate in the United States. To keep up with the rate by building new facilities, it would have cost governments \$58 billion dollars over 15 years).

27. Michael Brickner & Shakyra Diaz, *Prisons for Profit: Incarceration for Sale*, 38 HUM. RTS. 13 (2011); *see also* Kathleen Miles, *Just How Much The War On Drugs Impacts Our Overcrowded Prisons, In One Chart*, THE HUFFINGTON POST (Apr. 3, 2014), https://www.huffingtonpost.com/2014/03/10/war-on-drugs-prisons-infographic_n_4914884.html (showing that 50% of the United States prison population, as of January 2014, was in prison for drug offenses. The War on Drugs was a term coined in the 1970s and coincided with a nationwide movement against drugs. Mandatory minimum sentences and three strike rules have increased the prison population in the United States steadily for the past four decades).

28. *Id.* at 13.

crimes of the time.²⁹ It wasn't until the 1950s that drug offenses began to receive mandatory sentences, first in Louisiana and then spread from there.³⁰

Three strike laws became popular after mandatory minimum sentencing, and were a natural outgrowth of such.³¹ The purpose of the laws was to stop recidivist felons from continuing to leave the justice system and commit more crimes.³² In 1994, Congress passed the Violent Crime Control and Enforcement Act, which set in place mandatory life sentences for persons convicted of three felonies.³³ The "Three Strikes and You're Out" included drug felonies and continued the government's war on drugs.³⁴

Probation and parole were created in the 19th century to give alternatives to additional prison sentences.³⁵ Parole gets its roots from the English "ticket of leave" law, which allowed prisoners to be released from prison in exchange for good conduct.³⁶ In the United States, parole is used to make sentencing better suited for individual cases.³⁷ Probation "involves placing offenders in community supervision rather than incarceration."³⁸ This idea is rooted in rehabilitation instead of simply punishing for the sake of punishment.³⁹ Sadly, in times of great fear of crime, parole and probation take a back seat to policies such as mandatory sentencing and three strike laws.⁴⁰

The increasing incarceration rate also presented a problem in federal courts for states.⁴¹ In 1991, federal courts found that prisons in forty states were operating in violation of constitutional standards due

29. See Julie Stewart, *Mandatory Sentences, Minimum Sense*, 38 INTL. SOC'Y BARRISTERS Q. 459, 460 (2003) (detailing the history of mandatory minimum sentences. They included homicide during bank robbery, first-degree murder of a president, and skyjacking).

30. See *id.*

31. See *id.* at 462 - 63.

32. See *The "Three Strikes and You're Out" Provisions of Current Crime Bills*, 49 REC. ASS'N B. CITY N.Y. 593, 603 (1994) (explaining how three strike laws reached too far in their goal of stopping repeat offenders).

33. *Id.* at 593.

34. *Id.*

35. See Andrew M. Hladik & Robert J. Taylor, *Parole, Probation and Due Process*, 70 PA. B. ASS'N Q. 168, 169 (1999) (recounting the history of probation and parole. Both were inventions that diverged from the status quo of just giving exact prison sentences for crime).

36. See *id.*

37. See *id.*

38. *Id.* at 170.

39. See *id.* at 171.

40. See *id.* at 175 - 176 (explaining that when a tough-on-crime mindset takes hold, people care less about who the person is and more about the crime they committed. The mid-to-late 20th century and the war on drugs are perfect examples of such a time).

41. See McDonald, *supra* note 12, at 392 (detailing the widespread overcrowding problem. For example, a third of jails in 1986 were operating under court orders due to overcrowding and confinement conditions).

to overcrowding.⁴² The problem of overcrowding in prisons reached the Supreme Court in 2011.⁴³ The Court upheld a district court's order for the California prison system to reduce its prison capacity to 137.5% of its design capacity within two years.⁴⁴

Ultimately, the increasing costs of corrections spurred governments to look to the private sector for its correctional needs.⁴⁵ For the federal government, it was too costly and slow to go through a complicated procurement process for building its own facilities.⁴⁶ For states that regularly issue construction bonds to finance new facilities, the ability to bypass the voter approval of such bonds was especially attractive.⁴⁷ With respect to voters, the primary argument was that private prisons would cost the government less and therefore relieve some of the burden that taxpayers held.⁴⁸

The costs of running a prison can be extensive when taken all into account. Besides needing to build new facilities to keep up with the ever-increasing number of inmates, the operating expenses can be substantial.⁴⁹ Expenses include officer training, salaries, benefits, inmates' clothing, food, medical care, and security.⁵⁰ With private prisons, the government pays a contracted amount that, supposedly, is less than the costs of building new facilities and operating them itself.⁵¹

II. THE INDUSTRY TODAY

As of December 2015, federal private prisons housed approximately 22,660 inmates, which constituted around 12% of the BOP's total inmate population.⁵² In 2014, a total of 131,300 inmates were held in private facilities across both the federal government and the 30 states that contract with private companies.⁵³

42. *Id.*

43. *See* *Brown v. Plata*, 563 U.S. 493 (2011).

44. *Id.* at 545.

45. *See* Lisa Lambert, *States Seek to Escape Rising Prison Costs*, REUTERS (May 20, 2011), <https://www.reuters.com/article/us-usa-states-prisons/states-seek-to-escape-rising-prison-costs-idUSTRE74J3S920110520>.

46. *See* McDonald, *supra* note 11, at 393–94 (explaining how a federal facility would take years to build but a private detention center in Denver for the INS was built in only three months).

47. *See* McDonald, *supra* note 11, at 394.

48. *See* McDonald, *supra* note 11, at 394 (decreasing the burden on taxpayers has been a driving force for much of the government's outsourcing).

49. *See* Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L. J. 437, 456 (2005).

50. *See id.*

51. *See id.* at 460.

52. OFFICE OF THE INSPECTOR GENERAL: U.S. DEPARTMENT OF JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS, i (2016)

53. E. Ann Carson, *Prisoners in 2014*, BUREAU OF JUSTICE STATISTICS 13 (2015) <https://www.bjs.gov/content/pub/pdf/p14.pdf> (showing that although the federal government houses almost 20% of its inmates in private facilities in 2014, state governments housed only about 6% of their inmates in private facilities).

A. *The Big Three*

Today there are three corporations that house inmates: CoreCivic (formerly Corrections Corporation of America or CCA), GEO Group, Inc., and Management and Training Corporation (MTC).⁵⁴ Both CoreCivic and GEO Group are publicly traded companies that get around half of their revenue from the federal government.⁵⁵ These same two companies are also technically real estate investment trusts (REITs).⁵⁶ By classifying as REITs, these two corporations avoided a combined \$113 million in federal income taxes in 2015.⁵⁷ This was accomplished by having a tax rate 30% lower than it otherwise would have had if it was not a REIT.⁵⁸ However, legislation that has been introduced in 2016 that would close the REIT loophole for private prison corporations.⁵⁹

The Corrections Corporation of America was incorporated in January of 1983.⁶⁰ It received its first contract in November of 1983 and opened its first facility in 1984.⁶¹ After only 20 years, CoreCivic was operating 60 facilities in 21 states.⁶² In 2015, CoreCivic had \$1.7 billion in revenue and net income of \$221 million.⁶³ In 2012, CoreCivic had 91,000 beds available for inmates.⁶⁴

54. See *A look at private prison companies*, FOX NEWS (Aug. 18, 2016), <http://www.foxnews.com/us/2016/08/18/look-at-private-prison-companies.html> (describing the three companies that house inmates in the United States. Both the MTC and GEO Group began in the 1980's).

55. See *Id.*

56. Mike Ludwig, *How Private Prison Companies Use Big Tax Breaks and Low Wages to Maximize Profit*, TRUTHOUT (Apr. 8, 2016), <http://www.truth-out.org/news/item/35564-how-private-prison-companies-use-big-tax-breaks-and-low-wages-to-maximize-profit>; see also 26 U.S.C. § 856 (2017) (detailing the REIT status that private prison companies use to receive lower tax rates).

57. *Id.*

58. *Id.* (detailing how the tax benefits are paid out to shareholders in the form of dividends. The employees of the companies do not share in the wealth of the profits as evidenced by their average salary of \$32,000, an amount almost \$10,000 less than their counterparts at publicly run prisons).

59. See Mike Ludwig, *Senate Bill Would End Tax Breaks for Private Prison Companies*, TRUTHOUT (Jul. 19, 2016), <http://www.truth-out.org/news/item/36879-senate-bill-would-end-tax-breaks-for-private-prison-companies>.

60. *The CCA Story: Our Company History*, <http://www.cca.com/our-history> (last visited Oct. 22, 2016).

61. *Id.*

62. *Id.*

63. CORRECTIONS CORPORATION OF AMERICA, SUPPLEMENTAL FINANCIAL INFORMATION FOR THE QUARTER ENDED DECEMBER 31, 2015 3 (2016).

64. Suevon Lee, *By the Numbers: The U.S.'s Growing For-Profit Detention Industry*, PROREPUBLICA (Jun. 20, 2012), <https://www.propublica.org/article/by-the-numbers-the-u.s.-growing-for-profit-detention-industry>. (It is also interesting to note that CoreCivic had spent \$17 million on lobbying and \$1.9 million on political contributions).

The GEO Group started out as the Wackenhut Corrections Corporation in 1984.⁶⁵ It received its first contract in 1987 for immigration detainment.⁶⁶ By 1993, GEO Group had expanded into both the UK and Australia.⁶⁷ Today, GEO Group has 58 facilities with approximately 66,500 beds.⁶⁸ In 2015, GEO Group had \$1.8 billion in revenue and \$511 million in net income.⁶⁹

Management and Training Corporation (MTC) is the only non-publicly traded company that houses inmates in the United States.⁷⁰ MTC was founded in 1981 but did not get into the corrections business until 1987.⁷¹ The company operates 25 facilities in eight states and houses approximately 26,000 inmates daily.⁷²

B. *Staying Strong with State and Local Governments*

The private prison industry continues to be strong at the state and local level.⁷³ In 2014, in seven states, private prisons housed at least 20% of the total inmate population.⁷⁴ Idaho did decide to take over a formerly privately managed prison in 2014, which decreased its percentage of private prisoners by 77%.⁷⁵ With thirty-five privately managed prisons within the state, Texas had the largest number of private facilities in the United States in 2015.⁷⁶ This is more than double the number of private facilities of the next closest state, California.⁷⁷

California continues to confront overcrowding by using private corporations.⁷⁸ County governments and law enforcement support

65. *GEO Group History Timeline*, GEO (last visited Oct. 22, 2016), http://www.geogroup.com/history_timeline.

66. *Id.*

67. *Id.*

68. *Management & Operations*, GEO (last visited Oct. 22, 2016), http://www.geogroup.com/Management_and_Operations.

69. GEO GROUP, INC., 2015 ANNUAL REPORT 20 (2015).

70. *See supra* note 54.

71. *Overview & Mission*, MANAGEMENT & TRAINING CORPORATION (last visited Oct. 23, 2016).

72. *Corrections Overview*, MANAGEMENT & TRAINING CORPORATION (last visited Oct. 23, 2016), <http://www.mtctrains.com/corrections/corrections-overview>.

73. James Austin, *Emerging Issues on Privatized Prisons*, BUREAU OF JUSTICE ASSISTANCE: U.S. Department of Justice (February 2001), <https://www.ncjrs.gov/pdffiles1/bja/181249.pdf>.

74. Carson, *supra* note 53, at 14 (showing that New Mexico had the highest percentage at 44%, with Montana (39%), Oklahoma (26%), and Hawaii (24%) following).

75. *Id.*

76. Beryl Lipton, *Texas, the Private Prison State*, MUCKROCK (Jun. 11, 2015), <https://www.muckrock.com/news/archives/2015/jun/11/texas-private-prison-map/>.

77. *Id.*

78. *See* Bob Egelko, *As U.S. cuts ties with private prisons, state to keep using them*, SFGATE (Aug. 28, 2016), <http://www.sfgate.com/news/article/As-U-S-cuts-ties-with-private-prisons-state-to-9189667.php> (In fact, the situation in California is so bad that the state exports thousands of its convicted criminals to private facilities outside the state).

private prisons, but the public has begun to raise its voice.⁷⁹ A bill passed by the State Assembly, and is now awaiting Senate approval, would end the use of private prisons for undocumented immigrants in the state of California.⁸⁰ Some state governments have publicly compared the cost of private facilities to publicly operated prisons.⁸¹ An Arizona Correction Department study found that daily per inmate costs in state-run facilities were almost \$5 less than in privately run facilities.⁸² Still, many states will continue to use private prisons because of overcrowding and wrongly perceived cost savings.⁸³

C. *Behind Bars at the Federal Level*

The stability of the private prison industry is shaky at best at the federal level. The Attorney General's memorandum, instructing the Federal Bureau of Prisons to not renew any private contract with the big three companies, caused the industry to take a frightful tumble.⁸⁴ CoreCivic shares dropped 35% and GEO Group shares dropped 39% the day following the memo's release.⁸⁵ Currently, 11% of the BOPs' inmate population, or 22,104 inmates, are housed in private facilities.⁸⁶ Of the thirteen privately ran facilities, six are operated by GEO Group, and five are operated by CoreCivic.⁸⁷

The memo cited a review by the Inspector General concerning the performance of private prisons versus their public counterparts.⁸⁸ In its

79. *See id.*

80. *See id.* (This bill would not completely end the state's reliance on private prisons as it only pertains to undocumented immigrants. At the time of publication, the Bill had been vetoed by the Governor of California.)

81. *See* Johnathan Reid, *Fact Check: Are state prisons cheaper than private prisons?*, AZCENTRAL (Oct. 21, 2014), <http://www.azcentral.com/story/news/politics/fact-check/2014/10/21/az-fact-check-state-prisons-cheaper-private-prisons/17680289/> (checking the statements by a state politician, the author describes a study by the Arizona Corrections Department which found per inmate costs).

82. *Id.* (documenting that the state-run daily per inmate cost was \$48.42 compared to \$53.02 in private institutions).

83. *See* Alan Johnson, *Ohio won't follow federal lead in ending private prison contracts*, THE COLUMBUS DISPATCH (Aug. 19, 2016), <http://www.dispatch.com/content/stories/local/2016/08/18/ohio-wont-follow-federal-lead-in-ending-private-prison-contracts.html#> (stating that Ohio will continue to utilize their two private facilities operating within the state as long as they save at least 5% annually compared to public facilities).

84. *See* Alexander Mosher, *Private-prison stocks plunge after DOJ memo*, USA Today (Aug. 18, 2016), <http://www.usatoday.com/story/money/2016/08/18/private-prison-stocks-plunge-after-doj-memo/88955932/> (detailing the immediate stock windfall after the memo was released); *see also* Yates, *supra* note 4.

85. *See* Mosher, *supra* note 84.

86. *See* Mosher, *supra* note 84.

87. *See* Mosher, *supra* note 84. (CoreCivic did publicly state that only 7% of their business comes from these five facilities and after this statement, shares rose 6%).

88. *See* Yates, *supra* note 4.

review, the Office of the Inspector General (OIG) found several issues in the fourteen privately ran facilities.⁸⁹ Problems included high rates of assaults, eight times as many contraband cell phones being confiscated, and less telephone monitoring.⁹⁰ There were also nearly twice as many weapons confiscated at contract prisons than Bureau prisons.⁹¹ The OIG review also takes issue the private prisons for not giving a breakdown of costs for their services.⁹² The annual per capita cost for BOP institutions was \$25,251 in 2014.⁹³ For private prisons, this cost is only \$22,159.⁹⁴ Still, the OIG takes special exception to say it is impossible to compare the worth of the private prisons since their beneficial inmate programs and services expenditures are not known.⁹⁵

Ultimately the Department of Justice decided that the increased cost of housing inmates in public prisons is more desirable than continuing to outsource to private companies.⁹⁶ Even more concerning for the big three prison companies is that the Department of Homeland Security is now also reviewing its position on private facilities to house undocumented immigrants.⁹⁷ What was originally the route private prisons took to get into the business; immigration detention may now be the beginning of their demise. Upon learning of the DHS review, stocks again plummeted for both CoreCivic and GEO Group.⁹⁸ CoreCivic has 12% of its revenue coming from DHS contracts, equating to \$689 million since 2008.⁹⁹ While approximately 35% of GEO Group's comes from DHS contracts equaling \$1.18 billion since 2008.¹⁰⁰

Not surprisingly, GEO Group and CoreCivic are already making steps to fight back. In October of 2016, GEO Group filed a formal protest

89. See OFFICE OF THE INSPECTOR GENERAL: U.S. DEPARTMENT OF JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS, ii (2016). At the time of the review there were fourteen privately ran facilities for the BOP. In 2015, two contracts ended and one new contract was entered into, leaving the number of private prisons at thirteen. *Id.* at 4 n.12.

90. *Id.* At 60-61.

91. *Id.* at 17.

92. See *Id.* at 12-13.

93. *Id.* at 12 (showing a gradually increasing cost every year since 2011).

94. *Id.* (showing a relatively constant cost, most likely due to the fixed rate contracts and minimum capacity clauses in the contracts).

95. See *id.* at 13 (inferring that the BOP prisons spend more on rehabilitation and inmate care programs than private prisons; however, this inference cannot be certain).

96. See Yates, *supra* note 4.

97. Press Release, DHS Press Office, Statement by Secretary Jeh C. Johnson on Establishing a Review of Privatized Immigration Detention (Aug. 29, 2016) (on file with author).

98. See Julia Edwards, *U.S. to review use of private immigration prisons, shares slide*, REUTERS (Aug. 29, 2016), <http://www.reuters.com/article/us-usa-prisons-immigration-idUSKCN1141W7> (showing that CoreCivic stocks dropped 9.4% and GEO stock fell 6% after news from the DHS of a forthcoming review).

99. *Id.* (compared to 7% of its revenue from BOP contracts); Edwards, *supra* note 99.

100. Edwards, *supra* note 98.

arguing that getting rid of private prison contracts would be illogical.¹⁰¹ Both CoreCivic and GEO Group commenced intensive lobbying campaigns, and even got involved in the looming presidential election.¹⁰² These efforts, at the time, seemed to be somewhat effective. A small group of Republican lawmakers asked the DOJ to refrain from ending private prison contracts.¹⁰³ Also, on October 18, 2016, CoreCivic renewed a contract with DHS for a detention center in Texas, despite the review.¹⁰⁴

III. THE FUTURE

The future of the private prison industry will rest in the hands of profitability and necessity. Private prisons were a necessity due to the influx of inmates in the late 20th century, for whom state and federal correctional entities could not provide enough housing.¹⁰⁵ To keep up with the demand, the state and federal government would have had to dramatically increase funding for its prison systems.¹⁰⁶ It was overcrowding that gave rise to the private prison industry and it will be overcrowding that continues to sustain it.¹⁰⁷

Even today, prisons struggle with overcrowding.¹⁰⁸ In 2014, twenty-eight states had more prisoners than beds in their correctional facilities.¹⁰⁹ Even the BOP was operating above capacity at 128% in

101. Michelle Mark, *Private prisons are fighting to survive with big money and pressure on Republicans*, BUSINESS INSIDER (Oct. 20, 2016), <http://www.businessinsider.com/private-prison-companies-are-fighting-back-2016-10> (quoting the CEO of GEO Group who argued that reducing private prison contracts is illogical when “the need is still there because the Bureau of Prisons is still overcrowded, and these communities have extended themselves financially”).

102. *See id.* (describing the efforts that GEO Group and CoreCivic have undertaken since the announcements by the DOJ and DHS. GEO Group initiated and publicized support for Republican nominee Donald Trump subsequent to his support of the private prison industry, along with opponent Hillary Clinton’s praise of the DOJ’s directive).

103. *See id.* The lawmakers claimed that the DOJ was putting “politics ahead of policy when it comes to maintaining flexibility in our prison system, encouraging vital criminal alien law enforcement, and providing the best value for our taxpayers”. *Id.*

104. *Id.*

105. Harding, *supra* note 7.

106. Harding, *supra* note 7.

107. *See Brown v. Plata*, 563 U.S. 493 (2011) (showing how even in the 21st century, state prisons are still dealing with overcrowding, States find themselves stuck between violating federal law and increasing the taxpayer burden. States will continue to use private companies to relieve them of these burdens).

108. *See id.*; *see also Hernandez v. County of Monterey*, 110 F. Supp. 3d 929, 942 (N.D. Cal 2015) (explaining how a prison operating at 136% capacity was unable to properly screen for tuberculosis among its prisoners and therefore was violating the rights of the prisoners).

109. Carson, *supra* note 53, at 11 (detailing that the top three most overpopulated states were Illinois (150%), Ohio (132%), and Massachusetts (130%). Both Illinois and Massachusetts do not use private prisons).

2014.¹¹⁰ All of this is buttressed by the fact that private prisons commonly remain near or at capacity due to contractual provisions.¹¹¹

A. *A Possible Crack in the Foundation*

Recent data shows an interesting trend that may not be welcomed by private prison companies. The most recent data collected by the Bureau of Justice Statistics show that in 2014, and for the second year straight, the number of people incarcerated in the United States dropped.¹¹² More than one-third of this decrease can be attributed to a drop in the BOP population.¹¹³ It is vital to look at why this happened and if this could be a sign of a changing future.

The Federal Government has been turning back the clock on much of its old school, “War on Drugs” ideology.¹¹⁴ Along with his permission of states to experiment with drug reform by legalizing marijuana, President Obama also shortened prison sentences for federal drug offenders.¹¹⁵ The DOJ has done its part by lowering the mandatory sentencing for certain drug offenses¹¹⁶ and giving more discretion to federal prosecutors in the hopes of targeting only the most serious of drug crimes.¹¹⁷

Many States are now trying to create alternatives to incarceration in hopes of lowering costs and decreasing recidivism.¹¹⁸ In Texas, efforts to create incarceration alternatives have saved the state \$3 billion in 10

110. Carson, *supra* note 53, at 11.

111. See Chris Kirkham, *Prison Quotas Push Lawmakers To Fill Beds, Derail Reform*, THE HUFFINGTON POST (Sep. 20, 2013), http://www.huffingtonpost.com/2013/09/19/private-prison-quotas_n_3953483.html (detailing how private prisons include provisions in their contracts with governments to maintain a certain capacity).

112. Carson, *supra* note 53, at 1, 2 (“the decrease observed in 2014 was the second largest decline in the number of prisoners in more than 35 years.” At the time of writing, the 2014 data was the most recent).

113. Carson, *supra* note 53, at 2. The large drop in federal populations may have been a reason for the decision to end relations with the private prison industry by the BOP but not by the States.

114. See Tim Dickinson, *The War on Drugs is Burning Out*, ROLLING STONE (Jan. 8, 2015), <http://www.rollingstone.com/politics/news/the-war-on-drugs-is-burning-out-20150108> (detailing the wave of change sweeping the United States about how to deal with nonviolent drug crimes).

115. See *id.*

116. See *id.* (explaining the decrease in mandatory sentencing that the federal government enacted. However, the minimum sentencing still is used, much to the dissension of many justice reformists).

117. See Patrick O’Neill, *New, Softer War on Drugs Pushes Federal Prison Population to 32-Year Low*, THE DAILY DOT (Feb. 17, 2015), <http://www.dailydot.com/layer8/eric-holder-war-drugs-mandatory-minimums-prison-population/>.

118. See The Natural Reentry Resource Center, *Reducing Recidivism: States Deliver Results*, COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER (June 2014), https://csgjusticecenter.org/wp-content/uploads/2014/06/ReducingRecidivism_StatesDeliverResults.pdf.

years and have kept crime at its lowest rate since 1968.¹¹⁹ California has reduced its incarcerated population by more than 50,000 in 10 years.¹²⁰ California achieved this by reclassifying “some drug and property offenses as misdemeanors instead of felonies” and by decreasing the number of parole violators sent back to prison.¹²¹

B. *The First Frontier in Reform*

Lightening sentencing and seeking alternative punishment for drug crimes is a driving force in decreasing the incarceration rate in the United States.¹²² A reform in the punishment for drug crimes is vital to decreasing the incarceration rate in the United States because over 50% of inmates in federal prisons and over 15% in state prisons were convicted of drug crimes, including trafficking and possession.¹²³ At the federal level, less than a quarter of drug offenders in prison also had some weapon involvement with their crime.¹²⁴ Only 1.2% of inmates convicted of a drug crime involving marijuana received less than one year in prison.¹²⁵

Ultimately, all this accumulates to the fact that almost half of all prisoners in the United States are in prison for non-violent crimes.¹²⁶ The incarcerated population in the United States could therefore be decreased dramatically without putting more innocent civilians in danger of violent criminals.

This decrease is being done first by decriminalizing marijuana and second by using rehabilitation instead of incarceration for those convicted of non-violent drug crimes.¹²⁷ It is well documented that

119. Christine Leonard, *Reforming Our Justice System Will Require Fair Sentencing and Fair Chances*, THE HUFFINGTON POST (Jun. 22, 2016), http://www.huffingtonpost.com/christine-leonard/reforming-our-justice-sys_b_7639370.html.

120. Ryken Grattet and Joseph Hayes, *California's Changing Prison Population*, PUBLIC POLICY INSTITUTE OF CALIFORNIA (April 2015).

121. *Id.*

122. *See* Carson, *supra* note 53, at 16, 17.

123. Carson, *supra* note 53, at 16, 17 (noting that only 7.3% of federal prisoners were convicted of a violent crime. On the other hand, 53% of state prisoners were convicted of a violent crime).

124. Sam Taxy, et al., *Drug Offenders in Federal Prison: Estimates of Characteristics Based on Linked Data 5*, BUREAU OF JUSTICE STATISTICS (Oct. 2015). These convictions however did not include a violent crime associated with the weapon. The data only includes inmates whose most serious crime was a drug offense. *Id.*

125. *Id.* at 6 (51% of convictions had sentences of 1-5 years, 25% had 5 - 10 years and 21% were for over 10 years).

126. *See* Carson, *supra* note 53, at 11.

127. *See* Ruochen Huang, *Criminals Decriminalized: Countering Prison Overcrowding*, BERKELEY POL. REV. (Jan. 2, 2015) (discussing Proposition 47, a California bill designed to reclassify non-violent drug felonies as misdemeanors); *see also* Loni Hancock, *Texas an Unlikely Model for Prison Reform*, SFGATE (Feb. 22, 2014) (explaining how Texas has used better probation and rehabilitation efforts successfully to lower incarcerated populations in the state).

marijuana is gaining steam, state-by-state, towards national legalization.¹²⁸ Rehabilitation is an established method of deterrence and has been used effectively in some of the most conservative and hard-on-crimes states.¹²⁹ The federal government has also tried to focus more on diversion programs for drug offenders in the last decade.¹³⁰

C. *If Not Money, Politics Will at Least Remain Influential*

Even if the incarcerated population in the United States continues to decrease, there could still be monetary and political pressures to continue relationships with private prisons.¹³¹ Some would argue that the conservative support for justice reform enjoyed today is only a product of “tight state budgets and low crime rates”.¹³² If the economy recovers it is feared that much of the support for reform would dissipate.¹³³

It could be argued that correctional spending is too small a portion of state budgets to warrant being a determinative factor in reform.¹³⁴ It is important too that most of the costs of housing an inmate is in fixed costs, such as salaries and property expenses.¹³⁵ Still these costs are dependent on the number of inmates held in prisons.¹³⁶ The more inmates, the more housing needed to hold them and the more personnel needed to safely run the prisons. Just because corrections is only a small portion of budgets does not mean it is not subject to budget cuts.¹³⁷ It will likely continue to be a motivation behind any possible reform.

What could be more influential in the future of reform and the future of private prisons is what happens behind closed doors. As private prison companies have grown in size and pockets, so has their

128. See Ilya Somin, *A watershed moment for marijuana legalization*, THE WASHINGTON POST (Nov. 5, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/05/a-watershed-moment-for-marijuana-legalization/>.

129. See Mike Ward, *Texas prison population shrinks as rehabilitation programs take root*, STATESMAN (Aug. 11, 2012), <http://www.statesman.com/news/state—regional-govt—politics/texas-prison-population-shrinks-rehabilitation-programs-take-root/qbrfs8rNrj78J5F3Ssha6/> (explaining how Texas had decreased its incarcerated population by over 2,000 in one year due to cost efficient rehabilitation programs).

130. See Joe Palazzolo & Ashby Jones, *‘Diversion’ Programs Send More to Treatment, Instead of Prison*, THE WALL STREET JOURNAL (Aug. 19, 2013), <http://www.wsj.com/articles/SB10001424127887323455104579015123945361590>.

131. See John F. Pfaff, *The Complicated Economics of Prison Reform*, 114 MICH. L. REV. 951, 952-53 (2016).

132. *Id.* at 952.

133. See *id.* (There was growing conservative movement in 2000 but after the economy recovered, the support fell off).

134. See *id.* at 956 (Since 1950, correctional spending has not been over .035% of total states budgets).

135. See *id.* at 957 (Almost 75% of correctional spending is on salaries).

136. *Id.*

137. See *id.* at 953-53.

political influence. Since 1989, the GEO Group and CoreCivic have spent almost \$25 million dollars lobbying and more than \$10 million aiding candidates who will support them.¹³⁸ Private prison companies desire to keep incarceration rates high to keep their business afloat. In fact, much of the lobbying efforts by the GEO Group and CoreCivic have been towards harsher sentencing laws.¹³⁹

The war in legislatures will also include the voice of the people and the people want change.¹⁴⁰ In a nationwide telephone poll conducted in June 2015, 69% of voters believed decreasing the prison population was important and 87% believe that “drug addicts and those with mental illness should not be in prison, they belong in treatment facilities”.¹⁴¹ Even in the face of intense lobbying, these voices could possibly make a difference.

Political power is most especially evident with the election of Donald Trump. The new President has spoken publicly about his desire to continue using private prisons at the federal level.¹⁴² As head of the executive branch, President Trump will have the authority to disregard the Department of Justice Memo and renew BOP contracts with private facilities.¹⁴³

GEO Group and CoreCivic knew how important it was to get a President who would back them. It was for that reason that GEO Group gave \$225,000 to Rebuilding America Now, a Trump supporting super PAC and \$200,000 to the Senate Leadership Fund, a Republican super PAC.¹⁴⁴

138. Michael Cohen, *How for-profit prisons have become the biggest lobby no one is talking about*, THE WASHINGTON POST (Apr. 28, 2015), https://www.washingtonpost.com/posteverything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about/?utm_term=.8a1e74ab25ae.

139. See Pfaff, *supra* note 131, at 968.

140. See Letter from Danny Franklin, Benenson Strategy Group, to Interest Parties (Jul. 15, 2015) https://www.aclu.org/sites/default/files/field_document/aclu_polling_cjreform_2015.pdf.

141. *Id.*

142. See John Burnett, *Will The Private Prison Business See A Trump Bump?*, NPR (Jan. 4, 2017), <http://www.npr.org/2017/01/04/508048666/will-the-private-prison-business-see-a-trump-bump> (describing a comment by President Trump in the spring of 2016 when he said ‘with prisons I do think we can do a lot of privatizations and private prisons. It seems to work a lot better’).

143. See *id.*

144. See Lauren Etter, *America’s Private Prisons Are Back in Business*, BLOOMBERG (Jan. 10, 2017), <https://www.bloomberg.com/news/articles/2017-01-10/trump-deportation-plan-to-hand-windfall-to-a-dying-u-s-industry> (speaking about how Donald Trump being elected is a huge boon to the private prison industry).

D. Immigration Reform Could be the Nail in the Coffin

At the Federal level, use of private prisons in the future will depend on immigration reform.¹⁴⁵ Though nearly 23,000 federal inmates are housed in private prisons, there are a daily average of 41,000 undocumented immigrants in detention facilities mostly operated privately.¹⁴⁶ For the companies themselves, DHS contracts are incredibly lucrative, much more so than contracts with the BOP.¹⁴⁷

Following the suit of the BOP, the DHS commissioned a review of its private prison use to determine if they too should find that using public facilities would be more cost efficient or humane.¹⁴⁸ The review garnished a report that ultimately recommended the continued use of private companies for the Department's detention needs.¹⁴⁹ The main reasons given by the committee for the continued use of private facilities was fiscal considerations and sudden population changes.¹⁵⁰ Though the report does not dive more into the fiscal considerations issue it does discuss the problem of incarcerated population changes.¹⁵¹

Like the BOP, the Immigration and Customs Enforcement, or ICE, is unable to house all of their detainees in government run facilities.¹⁵² To fix this problem, ICE uses both privately operated facilities and county jails.¹⁵³ Since county jails are not desirable to ICE, private companies are the answer. Something that cannot be fixed by a change in the criminal justice system or immigration system is how many undocumented immigrations come to the United States.¹⁵⁴ In September of 2016, there were 39,501 new arrivals apprehended at the southwest

145. See HOMELAND SECURITY ADVISORY COUNCIL, REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES, EXHIBIT A (2016)[hereinafter HOMELAND SECURITY ADVISORY COUNCIL](detailing the extensive revenue made off of immigrant by for-profit prisons).

146. See Etter, *supra* note 144; see also HOMELAND SECURITY ADVISORY COUNCIL, *supra* note 145, at 5 (2016)(showing that 65% of ICE detainees are housed in private facilities, compared to only 10% in federally operated facilities).

147. See Edwards, *supra* note 99 (showing that CoreCivic has 12% of its revenue come from DHS contracts and GEO Group has 35% of its revenue from DHS contracts. These numbers are substantially higher than the amount of revenue from BOP contracts). Cf. Sharita Gruberg and Tom Jawetz, *How the U.S. Department of Homeland Security Can End Its Reliance on Private Prisons*, CENTER FOR AMERICAN PROGRESS (Sept. 14, 2016) <https://www.americanprogress.org/issues/immigration/news/2016/09/14/144160/how-the-u-s-department-of-homeland-security-can-end-its-reliance-on-private-prisons/>.

148. See DHS Press Office, *supra* note 97 (answering the motion started by the BOP, the DHS released a statement that it too would look into its private prison use and would have a report completed by November 30, 2016).

149. See HOMELAND SECURITY ADVISORY COUNCIL, *supra* note 145, at 2.

150. See HOMELAND SECURITY ADVISORY COUNCIL, *supra* note 145, at 10.

151. See HOMELAND SECURITY ADVISORY COUNCIL, *supra* note 145, at 7.

152. See HOMELAND SECURITY ADVISORY COUNCIL, *supra* note 145, at 6.

153. See HOMELAND SECURITY ADVISORY COUNCIL, *supra* note 145, at 7 (The Committee seems very hesitant to rely further on county jails as they are "the most problematic facilities for immigration detention").

154. See HOMELAND SECURITY ADVISORY COUNCIL, *supra* note 145, at 7-8.

border who were sent to a detention facility.¹⁵⁵ This number increased to 46,195 in October, which presents the problem that the committee fears.¹⁵⁶ According to the report, the only reasonable way to handle such surges would be to continue to maintain relationships with private facilities.¹⁵⁷

The only real solution to this problem would be the same as that with the overcrowding in BOP prisons. The laws and policies themselves, that result in the massive number of detainees must be changed if the use of private facilities is going to decrease.¹⁵⁸ The future for this front does not look bright.

President Trump has promised during his campaign to deport millions of undocumented immigrants.¹⁵⁹ This proposition would reportedly cost the federal government between \$400 and \$600 billion.¹⁶⁰ This expenditure would include the costs of detaining the additional immigrants until they are removed.¹⁶¹ The daily average of detained immigrants under such a plan would increase from 34,000 to an estimated 160,000.¹⁶² Since federally ran facilities do not have the capacity to carry such an increase the burden, and profit, would fall to private correctional businesses.¹⁶³

IV. CONCLUSION

Ever driven by capitalism, the United States does not tend to be in the business of suffocating profitability. It is for this reason that private prisons will continue on into the future unless something changes the status quo. Private prison businesses are as profitable as ever.¹⁶⁴ Lobbying efforts will likely continue to garner support in Congress and

155. See HOMELAND SECURITY ADVISORY COUNCIL, *supra* note 145, at 7.

156. See HOMELAND SECURITY ADVISORY COUNCIL, *supra* note 145, at 7.

157. See HOMELAND SECURITY ADVISORY COUNCIL, *supra* note 145, at 7.

158. See HOMELAND SECURITY ADVISORY COUNCIL, *supra* note 145, at 1.

159. See Etter, *supra* note 144.

160. See Etter, *supra* note 144.

161. See Etter, *supra* note 144.

162. Chris Riotta, *Immigration Reform 2017: Deportations, Detention Increase A 'Human Rights Crisis Waiting To Happen'*, INTNL. BUS. TIMES (Jan. 5, 2017) (explaining the ramifications for President Trump's plan to deport millions of undocumented immigrants).

163. See *id.*

164. See Etter, *supra* note 144 (detailing how CivicCore stock jumped 78% and Geo Group jumped 53% after Donald Trump was elected).

in the current Republican Party.¹⁶⁵ Finally, overcrowding is still an issue in prisons across the nation.¹⁶⁶

In the immediate future, President Trump seemingly will harken in a term of increased reliability on large correctional businesses. This may mean more private prisons at the federal level than before, but with a steadily decreasing incarcerated population, the need for more private prisons is not high.¹⁶⁷ The future beyond depends on America's attitude toward crime, especially drug crimes. The legalization of marijuana will play a big role in prison reform, as will the future of mandatory minimum sentences and three strike laws. Until the tough on crime mentality is abandoned, overcrowding in prisons will necessitate the relationships states and the Federal government have with private prison operators.

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165. See Michelle Mark, *Private prisons are fighting to survive with big money and pressure on Republicans*, BUS. INSIDER (Oct. 20, 2016), <http://www.businessinsider.com/private-prison-companies-are-fighting-back-2016-10> (detailing the support that private prisons have from the Republican party and the lobbying done in favor of Republican candidates).

166. See Carson, *supra* note 53, at 16 (stating that 18 states and the Bureau of Prisons met or were above the maximum capacity of their facilities and 26 states plus the Bureau of Prisons exceeded the minimum number of beds for inmates).

167. With a declining prison population, any new contracts with private prisons would coincide with either a closing or reduction of a federally operated detention facility. As this could be more cost efficient than housing the inmates itself, the new administration's Bureau of Prisons may very well adopt this strategy.