

PRIVATE PRISONS, PATH DEPENDENCE, AND POLICY IMPLICATIONS IN THE U.S.

By

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Abstract

Over the past thirty years, critiques of private, for-profit prisons by academic, journalistic, and governmental sources have been widespread and biting, and helped lead to the Department of Justice decision in 2016 to phase out and end the practice. However, even before the Trump administration assumed power, contracts were renewed with minimal changes, and private prisons continued operating as before and making millions of dollars in profits. Through the conceptual framework of path dependence, based on Pierson (2000), Levi (1997) and Page (2006), I will investigate the reasons why the status quo was able to remain strong in the face of proposed changes. Through budget and time constraints, private prisons maintain their position, reinforcing it through lobbying, campaign contributions, and the “revolving door” between public and private sector, which leads to policies that lock-in not only company profits, but also government reliance on the companies.

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Chapter 1: Introduction and Context

“... [Private prisons] simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and as noted in a recent report by the Department’s Office of the Inspector General, they do not maintain the same level of safety and security...”

Deputy Attorney General Sally Yates (2016)

Private prisons¹ are not a new topic of study or debate, and over the past thirty years have sparked controversy as to the nature of detention, immigration, and sentencing policy. Although some aspect of privatization in prisons (food, education) is nothing new, and the United States has a history of leasing out convict labor up into the 1930s, unprecedented is the private operation and management of the entire prison (Selman and Leighton, 2010). Currently in the U.S., private prisons play a large role, detaining/imprisoning² many thousands of people, in numerous facilities at numerous levels of government, with numerous different interpretations of standards. Numerous is in fact a fairly precise term in the industry, as transparency is not private prison companies’ forte, and with various contracts expiring, or being resigned by other departments, or new ones beginning, getting an exact count of private facilities, let alone inmates therein, is at times difficult.

Currently, the most transparent department is the Bureau of Prisons (BOP), which as of 1 June 2017 has twelve private prisons,³ housing 21,257 inmates, roughly 11% of the BOP

¹ I will use the term “private prison” to denote all privately run prisons, detention centers, and privately contracted state, county, or local jail beds. This involves various levels and forms of contracting, between all levels of government local to federal, departments within the federal level (BOP, DHS, USMS) along with private companies.

² Technically, there should be a difference between civil detention, and criminal imprisonment, and due process concerns arise—the length of detention, the right to a government provided attorney, and bail are all issues here. Civil detention cannot be “punitive” in nature, but often “detainees” are housed in similar facilities with similar conditions as “prisoners” sometimes even for similar amounts of time (see Chacón, 2014).

³ Taft-Correctional Institution and Taft-Camp are counted separately in the BOP population statistics (https://www.bop.gov/about/statistics/population_statistics.jsp), but jointly on the BOP webpage for the facility (<https://www.bop.gov/locations/ci/taf/>), and both counted together give the same inmate numbers, 2096. In totaling twelve BOP facilities, I count them separately.

population (Inmate Statistics). The Department of Homeland Security (DHS) through Immigration and Customs Enforcement (ICE) detains roughly 34,000 people on any given day, roughly 65% of which are in private prisons (~22,000) (DHS HSAC). However, private prisons or contracted local jails are where any increases in detention population are detained, as ICE is usually near capacity in their own facilities (DHS HSAC). In fiscal year 2016, ICE detained 352,882 people, meaning that at least 230,000 people were detained in private prisons, but perhaps more (DHS FY2016). The U.S. Marshals Service (USMS) also uses private prisons, along with BOP, state, and local jails for their detainees, and in 2016 the daily average population in private prisons was 9,464 people (18.5% of total), but again, this does not include local level government beds contracted to the USMS through private prison companies (USMS Fact Sheet, 2017).

As can be ascertained by the departments listed above, private prisons at the federal level are used almost exclusively to house immigrants. All detainees of ICE are, and all but approximately 1000 BOP inmates in private prisons are immigrants.⁴ It is (unfortunately) beyond the scope of this thesis to directly and consistently engage with the increasing criminalization of U.S. immigration policy, and the extremely detrimental effect it has on wider society. However, in any discussion of mass incarceration or private prisons in the U.S., immigration plays an integral part, and it will resurface throughout the thesis.

There are two main private prison companies operating in the U.S., GEO Group (GEO) and recently rebranded CoreCivic (formerly Corrections Corporation of America) (CCA). A third company, Management and Training Corporation (MTC) has some contracts, but GEO and CCA are the main players in the field. In 2016, CCA had \$1.85 billion in revenue, \$220 million in net income, and compensated Damon T. Hininger, CEO and President, \$3.1 million

⁴ Taft-Camp houses U.S. citizens, and roughly half of the inmates at Rivers-CI are U.S. citizens (OIG DOJ, 2016, notes 8 and 21) totaling between 900-1000 inmates together.

(CCA SEC 1 and 2). In 2016, GEO had \$2.18 billion in revenue, \$149 million in net income, and compensated George C. Zoley, Chairman of the Board, CEO, and founder, \$5.2 million (GEO SEC 1 and 2).

Hundreds of millions of dollars in profits, and high executive pay are arguably not a problem, if the companies are responsibly doing a good job in all the ways they should be and had promised to. However, there is an overabundance of journalistic, academic, and governmental reports on the wide-ranging controversies and shortcomings of the private prisons industry. This includes deadly medical mismanagement and neglect (Wessler, 2016a; ACLU-DWN-NIJC, 2016). Concerns about a lack of due process rights are an issue, as well as artificial distinction between civil and criminal detention (SPLC, 2016; Mendoza, 2015; Chacón, 2014; Hamilton, 2011), and a lack of general safety or sufficient staff training (Bauer, 2016). From the contracting side there is a lack of transparency and oversight (Valenzuela and Cullen 2015; ACLU of Texas and ACLU, 2014; Harding, 1997). Lobbying and campaign contributions negatively influencing immigration and sentencing policy are serious concerns, and the “revolving door” between public and private sectors amplifies those concerns (DWN, 2016; ITPI, 2016; Shah, Small, and Wu, 2015; Carson and Díaz, 2015; Gruberg, 2015; ITPI, 2013). There are studies disputing the real cost effectiveness of privatization (Sigler, 2010; Selman and Leighton, 2010), and even the morality of companies profiting from punishment, what is often considered an essential the duty of the state (Sigler, 2010; Genders, 2002; Harding, 1997). Taking these wide-ranging criticisms to heart, numerous groups, including former prisoners, local-level activists, and federal legislators have protested, lobbied, and introduced legislation against private prisons and the policies that support them, thus far without success (Carson and Díaz, 2015).

The criticisms do not only come from activists and academics, the U.S. Government has also raised concerns about the private prison industry. They have questioned the cost

effectiveness of privatization since the beginning (GAO, 2007; BJA 2001; GAO 1991); pointed to the lack of meaningful monitoring and oversight (OIG DOJ 2016; DHS HSAC 2016, GAO, 2014); and brought attention to the extremely poor medical care and food quality, inadequate staffing levels and training, high staff turnover, and contract noncompliance (OIG DOJ-CoreCivic, 2016; OIG DOJ-Reeves County, 2015).

All of these reports raise the question of how this seemingly bad policy can persist in the face of thirty years of varied criticisms. Many reports highlight the problems and abuses present in the private prison industry, but do not thoroughly interrogate the reason why it is able to persist. In an attempt to answer that, I will look to the concept of path dependence. To the best of my knowledge, there is not an academic investigation of path dependence in relation to the development and continuity of private prisons as an industry.⁵ The situation becomes more puzzling given the Department of Justice's (DOJ) decision in August 2016 to phase-out its use of private prisons in the BOP, but which led to no change. This lack of change, in the face of so much criticism, gives rise to the questions: Can the continued use and expansion of private prisons in the United States be explained through path dependence? If so, how might this influence future policy change efforts?

An analytical approach based on path dependence carries some leverage in explaining the maintenance of the status quo, despite challenges to the private operation of prisons. The fit is not perfect though, and some elements suggest that other factors may also be at play. However, other theoretical explanations do not explain the whole puzzle as well as path dependence, as expanded upon in section 2.4.

⁵ With the exception of Jing (2012), linking the relatively higher numbers of these institutions in the southern part of the U.S. to slavery and the civil war. However this account uses a very loose interpretation of path dependence, and does not evaluate alternative, more convincing, reasons for that fact—such as geographical proximity to the border, easing deportation, an important aspect given the high number of undocumented immigrants incarcerated and detained in private facilities.

The next chapter will be an overview of path dependence, critical junctures, and the specific definition I will use. Then, in chapter three, I will briefly examine the critical juncture that got the U.S. onto the path of private prisons, as well as the seeming critical juncture that did not lead to change in 2016. I will analyze the private prison industry through the path dependence framework in chapter four, followed by conclusions to that analysis in chapter five. Finally, in chapter six, I will consider what this means for attempts at policy change.

Chapter 2: Path Dependence and Critical Junctures

In this chapter, I will give an overview of the concept of path dependence, from its beginning in economics, transitioning to the social sciences, and address some of the critiques often brought up against it. I will also briefly reflect on critical junctures, as an explanation for changes within this conceptual framework. My explicit use of path dependence is based on the ideas of Pierson (2000) and Levi (1997), with the inclusion of Page's (2006) point on negative externalities, and will be more thoroughly explained.

Originally taken from the field of economics, path dependence is an economic theory developed by W. Brian Arthur (1994) and Paul David (1985), among others, that focuses on how “chance events, coupled with positive feedback, rather than technological superiority, will often determine economic developments” (Arthur, 1994, 5). Path dependence in its earliest stages helped to explain why technology and other knowledge-intensive sectors would sometimes be “locked in” to a particular choice, sometimes seemingly a “suboptimal” choice and persist regardless. Douglass North (1990) focused on path dependence arguments from technology and applied them to economic institutions, helping to explain the continued divergence in economies around the world. He won the Nobel Prize in Economics in 1993 for his work on a historical view of economic institutions (Nobel Prize).

2.1—From Economics to Politics

Continuing from North's work, Paul Pierson (2000) helped to formalize the concept of path dependence and increasing returns in the study of politics and social sciences. At the time of his writing (2000), path dependence was an increasingly popular topic in the literature, and was suffering (and still sometimes is) from a lack of precise, or consistent, definition. There

are numerous debates as to the scope, depth, and usefulness of path dependence. Often, broad (or bad) definitions of path dependence comes down to the idea that “history matters,” which is fairly obvious, or in the words of Margaret Levi, “both true and trivial” (1997, 28). Levi suggests a narrower definition, advocated by Pierson as well, that path dependence means “that once a country or region has started down a track, the costs of reversal are very high. There will be other choice points, but the entrenchments of certain institutional arrangements obstruct an easy reversal of the choice” (1997, 28). Along with Pierson’s formulation of increasing returns, this signifies that in path dependence the costs of reversal not only high, but *increasingly* high, and details of timing and sequencing matter (Pierson, 2000).

There are a number of differences between economic and political theory and life, and to bridge the gap between them Pierson (2000) emphasizes the difference, and argues that increasing returns processes and path dependence (which he sometimes equates, critics argue erroneously) are *more* likely to be present in politics than economics. This is due to: “1) the central role of collective action; 2) the high density of institutions; 3) the possibilities for using political authority to enhance asymmetries of power; and 4) its intrinsic complexity and opacity” (257). Arguably all four of these characteristics play a part in the U.S. private prison industry. Pierson also characterizes three primary reasons why aspects of economics that help diminish path dependence processes and increasing returns in economics are less effective in politics, making them more intense. They are “the absence or weakness of efficiency-enhancing mechanisms of competition and learning; the shorter time horizons of political actors; and the strong status quo bias built into political institutions” (2000, 257). Arguably all three of these characteristics are present in the U.S. private prison industry.

There are four features of political life (modified from the economic framework) that Pierson (2000, 263) identifies are likely to be present when path dependence and increasing returns are at work in politics. These give a strong guide of sorts to find path dependent

processes, but it is important to recognize do not somehow *prove* path dependence. They are as follows:

1. ***Multiple equilibria.*** Under a set of initial conditions conducive to increasing returns, a number of outcomes—perhaps a wide range—are generally possible.
2. ***Contingency.*** Relatively small events, if they occur at the right moment, can have large and enduring consequences.
3. ***A critical role for timing and sequencing.*** In increasing returns processes, *when* an event occurs may be crucial. Because earlier parts of a sequence matter much more than later parts, an event that happens “too late” may have no effect, although it might have been of great consequence if the timing had been different.
4. ***Inertia.*** Once an increasing returns process is established, positive feedback may lead to a single equilibrium. This equilibrium will in turn be resistant to change.

Pierson (2000, 263)

All of these features are present in the U.S. private prison industry, some in multiple ways, and will be examined in detail later on. The fourth feature is complemented by Levi’s observation that “[w]hen organization develops, the path is even more firmly established, for organization tends to bring with it vested interests who will choose to maintain a path even when it is not optimal” (1997, 29). North also reinforces the idea, positing that increasing returns are a key product not only for single organizations, but also that the “interdependent web of an institutional matrix produces massive increasing returns” (95). There certainly is an “institutional matrix” in the U.S. private prison industry, as we will later see.

2.2—Critiques of Path Dependence

However, even with Pierson’s attempts at bringing path dependence under one framework or set of indicators, the concept still has many varying interpretations and definitions. Scott E. Page (2006) highlights the diversity of cases that have used path dependence. From the metaphorical, he argues, in David (1985), to the theoretical, historical,

and empirical; path dependence—and history more generally—operate differently in those different cases, and Page advocates for further concentration, nuance, and differentiation between these different processes of path dependence. The differences aside, Page highlights four related, although he argues separate, causes of path dependence common in the literature: increasing returns, self-reinforcement, positive feedbacks, and lock-in (2006, 88). Important to note is that Page distinguishes between path dependence and increasing returns, and claims that the latter is “not necessary nor sufficient for historical dependence” (89), and attributes this to a “credit assignment problem” (90):

In many of the examples of path dependence, while increasing returns do exist, negative externalities are the true cause...any constraint, be it a budget constraint, a spatial constraint, or a time constraint, imposes negative externalities and can create path dependence. The logic of constraints applies to competing technologies, legal doctrines, and city locations. In each case, the exclusion of other options drives the path dependence.

Page (2006, 90)

It may be useful in the private prison industry to think of this more as who faces increasing returns/positive feedback or negative externalities in this path. While constraints/negative externalities for one actor can lead to a path—say time and budget constraints for building more prisons—the same path produces increasing returns and positive feedback for another actor—for example increasing profits, used partially for lobbying, for more private prison contracts—seemingly reinforcing the path from multiple sides.

S. J. Liebowitz and Stephen E. Margolis have offered critiques of path dependence in the theoretical and empirical realm of economics (1995). They have claimed that, in economics, “remediability” of a now-known to be inefficient choice stuck in a path dependent process is the only kind of path dependence worth investigating, and that market forces will make that an infrequent occurrence (1995). It means that, in essence, “feasible alternatives exist” and offers a baseline for relevance of path dependence in policy studies—which for this thesis seems an

acceptable and achievable standard. Pierson (2000) engages with Liebowitz and Margolis' critique, and while he agrees that remediability is useful in policy, it is not necessary if one wants to "understand—perhaps ex post—why aspects of societies move in particular directions and the consequences of such actions" (2000, 256). Further, Pierson concludes that one can accept their critique of the infrequency of path dependence in economics, but it still holds for the study of politics, for reasons mentioned above.

Further critics include Herman Schwartz (2004) who brings attention to the fact that "path production" is distinct from "path reproduction" and is often conflated in the path dependence literature (2004, 2). This is an important point: path dependence, per definition, describes a relative lack of change, a "locked in" quality, but also increasing returns. To explain how a path begins Schwartz (along with others) suggests the concept of "critical junctures," which is detailed below.

2.3—Critical Junctures

A critical juncture is a "period of significant change, which typically occurs in distinct ways in different countries (or in other units of analysis) and which is hypothesized to produce distinct legacies" a concept formally developed by Collier and Collier (1991) working off the ideas of Lipset and Rokkan (1967). The concepts of critical junctures and path dependence are quite complementary, if not indivisibly bound (Capoccia, 2015), and Collier and Collier mention this explicitly in their description of critical junctures—they cite David (1985), as well as Arthur Stinchcombe (1968), an early proponent of path dependent-like "historical causes."⁶

⁶ Historical causes are explained as, conditions still present and continuing even after the initial cause of those conditions is gone (Collier and Collier, 1991, 35). One common critique of path dependence is that it is simply a re-hashing of these earlier ideas, going all the way back to Max Weber (Schwartz, 2004). A critique that Pierson (2000) also tries to address by still claiming significance even if that is the case.

The issue becomes distinguishing between the critical juncture that changes the path, or small gradual changes within the path. With hindsight, one could easily show selection bias and simply claim that the situation did not change because it was not a critical juncture, or that when it did, this was clearly a critical juncture. However, even if it lacks predictive power of some sort, looking back at events and seeing if critical junctures produce change or not can be insightful. For example, the Reagan administration's "war on drugs" and push for privatization could be argued a critical juncture, significantly changing the criminal justice and imprisonment situation in the U.S. and presenting the opportunity for the private prison industry (Selman and Leighton 2010). Conversely, after years of government reports on the ineffectiveness of private prisons both in terms of rights, quality, and finances, decreasing inmate population, as well as the Department of Justice declaring they would change policy and end the use of private prisons, change did not come. The seeming critical juncture did not do much to change the status quo. This raises a question.

2.4—Why Path Dependence?

The question this raises is what accounts for this difference in policy impact between the decision to privatize and de-privatize? Can this be explained by path dependence? If it can, what are the policy implications? The argument that de-privatization is simply more difficult than privatization in the neoliberal, free-market U.S. context is not a satisfying answer, as the prison sector is not fully privatized. In June 2017, roughly 11% of BOP inmates were held in private facilities (Inmate Statistics). Institutionally, the U.S. government is unfortunately well practiced at imprisoning people, with all the "necessary" tools at their disposal. If a government commits to a policy (privatization), and then reverses that policy (de-privatization) citing a lack of usefulness, why can this system persist? This is a practice that has survived and expanded under both Democrat and Republican administrations—it is not strictly a partisan issue. Vested

interests of the private prison industry likely do play a role, but this does not disqualify path dependence as an explanation, and perhaps even strengthens the argument, as Levi (1997) emphasizes.

The ideas of “subsystems” brought up by Sabatier and Jenkins-Smith (1999) in their Advocacy Coalition Framework may have some merit in the private prison industry in the U.S., and be useful in explaining some parts of the situation, as will be touched on in the analysis. However, similar to Kübler (2001), it may need the help of other theories to explain change or lack thereof—in his case, social movement theory. Building up a sustained and widespread advocacy coalition against private prisons from the bottom up could be particularly difficult, especially as many people detained and imprisoned in private facilities are immigrants, of whom many are undocumented. Many former inmates are deported, and thus it stays out of many citizens (i.e. voters) minds. There is also the issue of general discontent with the entire prison system, public and private, so any advocacy coalition may be focused more broadly. However, even if there were a stronger, more visible coalition against it, it is unclear at what point it would change the situation, as those groups would still be facing the entrenched interests of the private prison industry and friendly politicians. Path dependence describes the continuity of those entrenched interests quite well.

Rational choice analysis perhaps could lead to interesting findings (Friedman and Hechter, 1988; Arrow, 1990; Scott, 2000). Given that the private prisons “do not save substantially on costs” (Yates, 2016) and provide generally lower quality service, it would seem hard for the government to justify this rationally, in the economic meaning of the term. However, if we were to look at the individual level, connecting key politicians and officials who promote private prisons, and coincidentally also receive financial contributions from private prison companies, this would likely provide clear insight into the corruption that takes place. However, it is not likely that the majority of lawmakers are so friendly with private

prison companies so as to explain the continued use of these inefficient institutions. There seems to be more at play here than bribery, campaign contributions, and favor trading. Especially as some departments have used a cost benefit analysis to justify ending the practice, its continuity is perplexing.

Path dependence presents a promising theoretical framework through which to examine this situation, and can help explain why ineffective institutional arrangements continue to persist. I will use the concept of critical junctures of Collier and Collier (1991) to explain how the U.S. initially got on this path, as well as examine the attempted policy change to de-privatize in 2016. The explicit formulation of path dependence I will use for this analysis will be a combination of both Pierson's and Levi's ideas, with the inclusion of Page's credit assignment problem. I will first examine the features Pierson (2000) highlights as a guide to identify path dependence in the political sphere, mentioned previously, to see how "likely" the presence of path dependence might be.

1. Multiple equilibria
2. Contingency
3. A critical role for timing and sequencing
4. Inertia

An examination of the causes of path dependence in the private prison context will follow. Pierson deliberately conflates the ideas of increasing returns and positive feedback (as well as self-reinforcement) (2000, 251-252), however Page (2006) argues that these should be viewed separately, but it comes down to more mathematical differences. For the context of the political realm rather than strictly economic, I will follow Pierson's (2000) lead and join the slightly different ideas of increasing returns and positive feedback under one umbrella. The following are the causes of path dependence I will investigate:

1. Increasing returns/positive feedback/negative externalities—“the probability of further steps along the same path increases with each move down the path,” (Pierson 2000, 252) or the cost of exiting the path are high and increases with time (Levi, 1997). Here is where attention to Page’s (2006) idea of constraints/negative externalities is important. This can be seen in the private prison industry in terms of budget and time constraints and positive feedback at the (especially economically struggling) local level from having a private prison operation.

2. Self-reinforcement—in the political context of an “institutional matrix” this takes an active meaning, and enters the worlds of policy and lobbying, campaign contributions, and the revolving door between public and private sectors.

3. Lock-in—generally meaning that once a critical mass of users make a choice, it becomes the clearly dominant one. In the private prison industry there are numerous attempts to lock-in at the macro level of increasing the overall number of facilities, a large number in individual states, or within certain departments. But also lock-in manifests through profit maximization aspects in policy, such as the so-called “bed quota” in the DHS, contracting with guaranteed payment of a certain level capacity, and pushing harsh immigration and sentencing policy. These policies in turn help to lock-in the government’s reliance on the companies.

Through these explicit causes and characteristics, in the fourth chapter I will investigate the private prison industry in the U.S. and show how it shows signs of path dependence. My methodology will be to analyze government, journalistic, and academic reports and documents—including official policies and laws, expert interviews (conducted by others), financial statements, and company statements—through the conceptual framework of path

dependence. However, I will first look at the critical juncture that got the U.S. onto the private prison path and the attempted policy change in 2016.

Chapter 3: Critical Junctures 1980s and 2016

“...We could sell privatization as a solution, you sell it just like you were selling cars, or real estate, or hamburgers”

Thomas Beasley, co-founder of CCA (in Selman and Leighton, 2010, 58)

3.1—Critical Juncture 1980s

The changes in the early 1980’s in the U.S. provided the perfect conditions for the establishment and growth of the private prison industry. Collier and Collier (1991, 29) describe a critical juncture as “a period of significant change...which is hypothesized to produce distinct legacies”—which certainly describes this era. Almost all accounts of prison privatization, both for and against, describe the unique combination of “tough on crime” sentencing and the “war on drugs,” which exponentially increased the prison population, as well as the Reagan administration’s push for privatization as the key aspects that jumpstarted the industry (Selman and Leighton, 2010; Logan, 1990; ACLU of Texas and ACLU, 2014). In his inaugural address, Reagan set the tone by claiming “government is not the solution to the problem; government is the problem” (Reagan Speech). This, along with the tripling of the state and federal incarceration rate between 1975-1990 (Selman and Leighton, 2010), or more than doubling (2.28x) of the total jail and prison population from 1980-1990 (Sourcebook of Criminal Justice Statistics), created significant stress on the U.S. corrections system.

Another influential, although less-often discussed factor, is how prison conditions litigation from the 1970’s inadvertently pushed the expansion of the prison industry, while also decreasing the legitimacy of the publicly run prisons—thus opening them up more easily to privatization (Schoenfeld, 2010). Attempting to address widespread overcrowding and poor conditions, successful litigation brought 40 states prison systems under court order to reduce prison overcrowding by 1993, but policy makers interpreted that to mean “a court order to build [more] prisons” (Schoenfeld, 2010, 731). The court supervision of the state corrections systems

led to the need to build more prisons in the eyes of policymakers, because the ideas of releasing non-violent (often drug) offenders, or changing sentencing policies would have risked serious political capital given the “tough on crime” and “war on drugs” policy and rhetoric of the time (Selman and Leighton, 2010). However, with the unpopularity of raising taxes to pay for new prisons, states were in a bind—enter the private sector.

Selman and Leighton (2010, 46) argue that only one of the two main aspects (increasing prison population and privatization push) would likely not have been enough to spur the growth of the private prison industry. The exploding prison populations needed the ideological shift as well to lead to privatization of prison operation. Altogether, these conditions provided the critical juncture that allowed private prisons to enter the scene, and start down their “path.”

3.2—Critical Juncture 2016?

As mentioned previously, over the years various academic, journalistic, and governmental reports on the problems of private prisons. The rate and depth of these reports increased in the years leading up to the DOJ decision in August 2016, and played a part in the policy change. Sally Q. Yates, the Deputy Attorney General referenced the DOJ Office of the Inspector General report in her memo announcing the decision (Yates, 2016).

This combined with the decreasing inmate population, at least in the BOP, due to some reforms and changes at the federal level. From a peak at 220,000 inmates in 2013, the numbers were below 195,000 at the release of the memo (and now are at 188,000) (Inmate Statistics). Yates references this decrease, and acknowledges that private prisons played “an important role during a difficult period” when the population was increasing, but that they are no longer needed (due also to the poor comparison) (Yates, 2016). The memo to the BOP says:

“I am eager to enlist your help in beginning the process of reducing—and ultimately ending—our use of privately operated prisons...I am directing that, as each contract reaches the end of its term, the Bureau should either decline to renew the contract or substantially reduce its scope...”

Yates (2016, 2)

They did mention the steps they were already taking, declining to renew one contract, and reducing the number of beds of another. The stocks of GEO and CCA dropped 42% and 40% respectively immediately after the announcement, and the policy shift was widely discussed (Witkowski, 2016).

However, two months later the BOP had renewed two contracts, for McRae and D. Ray James facilities, slightly reducing the number of inmates held there, but not “substantially” by any means (only 8%) (Kozłowska, 2016). The Cibola County Correction Center was shut down in October 2016, four years before the contract expired due to medical neglect and other problems (but also was contracting with ICE less than a month later as a detention center) (Wessler, 2016b). As the Trump administration came in, private prison companies fortunes were freshly reassured, and new Attorney General Jeff Sessions rescinded the Yates memo, saying that it “changed long-standing policy and practice, and impaired the Bureau’s ability to meet the future needs of the federal correctional system” (Sessions, 2017).

Chapter 4: Analysis of Features and Causes of Path Dependence

“I would say that being around 30 years and being in operation in many, many states, and also doing work with the federal government going back to the 1980s, where you had Clinton White House, you had a Bush White House, you had Obama White House, we’ve done very, very well.”

Damon T. Hininger CEO and President of CCA (in Fang, 2016)

In this chapter I will first briefly look at the four features of political life “likely” to be present when path dependent processes are at play, as described by Pierson (2000, 263). Secondly, I will investigate the three causes of path dependence, highlighted previously.

A first point of comparison between path dependence and private prisons versus other areas that explore path dependence is that, as described in the first section, not *all* prisons are privatized. Even looking at a department that is most reliant on them (DHS), there are still publicly run detention centers. This makes some aspects of analysis less convincing, but still provides some useful insights.

4.1—Four Features of Political Life

Multiple equilibria. *“Under a set of initial conditions conducive to increasing returns, a number of outcomes—perhaps a wide range—are generally possible” (Pierson, 2000, 263).*

This feature of political life was present at the “initial” point, and continues to be so. With the initial increase in prison population and the push for privatization in the early 1980’s in the U.S., the choice to privatize was not necessarily a forgone conclusion. This can be further seen by the variety of ways that prison privatization has taken off, or not, in other countries. Although this critical juncture provided the right “ingredients” for prison privatization to take off, it did not guarantee it. There were doubts about the legality of private operation of Federal

BOP prisons to house U.S. citizens due to a lack of statutory authority (GAO, 1991). Additionally, some argue that the unconstitutionality of “delegation of government services” argument applies to prisons, which the allocation of punishment certainly is, and administration of punishment could be argued as well (Sigler, 2010). Continuing even today, there is a wide range of situations regarding the degree of prison privatization, some states do not have any and others have at times considered privatizing the entire state system. Privatization was and is not the only option by any means, but it is also well established, to varying degrees at various levels and departments. For this feature, I would argue that private prisons do fit, but due to the whole system not being privatized, it is not as strong a point.

Contingency. “*Relatively small events, if they occur at the right moment, can have large and enduring consequences*” (Pierson, 2000, 263).

With relatively little experience, and only a single contract in the state, CCA made a splash in 1985 with a widely publicized offer to buy the rights to operate the entire Tennessee state prison system in response to a federal court order to reduce unconstitutional overcrowding (Selman and Leighton, 2010). Although the offer was not accepted, “whether it was strategically planned or just luck, the timing of the offer could not have been better” as there was a conference of the National Association of Criminal Justice Planners taking place at the same time, and two months later an additional national conference on the “jail crisis” (Selman and Leighton, 2010). That offer, along with widespread press coverage, and suddenly CCA vice president Richard Crane found himself testifying as a “distinguished witness” at the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, and “elevated the legitimacy of not only CCA but operational privatization in general. On this stage, operational prison privatization became a permanent part of the national corrections agenda” (Selman and Leighton, 2010, 63).

Although this may not have been enough to lock prison privatization into a path dependent process, and other aspects certainly played a part, a relatively small event that could have easily been taken as an arrogant, outlandish proposal for the time, instead helped put private prison companies in government hearings as key witnesses, and more directly influencing future policy.

A critical role for timing and sequencing. “*In increasing returns processes, when an event occurs may be crucial. Because earlier parts of a sequence matter much more than later parts, an event that happens “too late” may have no effect, although it might have been of great consequence if the timing had been different*” (Pierson, 2000, 263).

It could be argued that, if the DOJ had announced in the late 1980s that they would end their use of private prisons (which at that point were many fewer than now and only in the USMS), the effect would have been more consequential than when they made the same announcement in 2016. This has to do with vested interests, and fits with the conception of path dependence of Levi: “once a country or region has started down a track, the costs of reversal are very high. There will be other choice points, but the entrenchments of certain institutional arrangements obstruct an easy reversal of the choice” (1997, 28). Although it may be interesting to hypothesize about non-existent DOJ announcements from the 1980’s, what is clear is that the “event that happened too late” (the 2016 announcement) had “no effect,” as even before Trump was sworn in, the BOP renewed two contracts (Kozłowska, 2016).

This feature of “political life” is arguably the weakest conceptually, presenting itself in “mays” and “might haves” with a strong chance for selection bias or self-fulfilling tendencies. However, it is useful to see how later on in the sequence of events, a seemingly strong action may not matter. This can be further explained through inertia and self-reinforcing processes.

Inertia. “Once an increasing returns process is established, positive feedback may lead to a single equilibrium. This equilibrium will in turn be resistant to change” (Pierson, 2000, 263).

As there is no single equilibrium (besides the existence) of private prisons, this feature does not initially seem to fit well. The entire system is not privatized. However, inertia may be useful in highlighting that “[w]hen organization develops, the path is even more firmly established, for organization tends to bring with it vested interests who will choose to maintain a path even when it is not optimal” (Levi, 1997, 29). Taking Levi’s ideas of organization and vested interests, along with North’s (1990) ideas of an “interdependent web of an institutional matrix” (95) provides some interesting insight. There are numerous actors, departments, institutions, economically depressed towns, among others, all linked together in the prison privatization “matrix,” all with their different concerns and interests. Through this lens, one can see the single equilibrium being the simple existence of private prisons, even if not the *only* option. As the organizations develop and engrain themselves in the political life of the country, this inertia is underlined and sustained by self-reinforcing processes, resistant to any perceived negative change. This inertia, even in the simple form of contracting length, is a potential hurdle for policy to end privatization. However, inertia will be more clearly highlighted below in the section on self-reinforcement.

If we look at the single equilibrium being the existence of private prisons, this feature fits quite well. If it were only considered if *all* prisons were privatized, then clearly it does not. Regardless, inertia does play a significant role, especially in relation to policy change, as we will see later on.

Taken together, these four features of political life are present in the U.S. in relation to private prisons, to varying degrees, giving some support to Pierson’s (2000) idea of what the political landscape will include when path dependent processes are present. To more fully understand how, I will investigate the causes of path dependence in the following section.

4.2—Causes of Path Dependence

In this section, I will analyze the private prison industry through the three causes of path dependence previously highlighted, based on the ideas of Pierson (2000), Levi (1997), and Page (2006): increasing returns/positive feedback/negative externalities, self-reinforcement, and lock-in.

4.2.1—Increasing Returns, Positive Feedback, and Negative Externalities

Path dependence can be caused by negative externalities, or constraints, in addition to or instead of increasing returns (Page, 2006), and this cause can be seen even in just thirty seconds of U.S. congressional testimony. In September 2016, ICE director Sarah Saldaña was asked if ICE could follow the (at that point seeming) lead of the BOP and end its use of private detention centers, and her answer demonstrates the reliance ICE has on private prisons. According to her, ending the practice “would pretty much turn our system upside-down...we are almost completely contractor-run with respect to our detention facilities” (C-SPAN, 2016). She went on to confirm that ICE could not maintain the 34,000 detention beds required of it by Congress without the use of private prisons as, “we would have to build detention centers, we would have to hire staff” (C-SPAN, 2016). This shows constraints leading to path dependence that Page (2006) highlights, as well as Pierson’s (2000) definition of increasing returns as “[t]o put it a different way, the costs of exit—of switching to some previously plausible alternative—rise” (252). Here the previously plausible alternative would be prisons without privatization of operation, and the costs of exit certainly rise with time.

These constraints are amplified by the short time horizons in politics making path dependence more likely in politics than in economics (Pierson, 2000). In a budget and time constrained world of politics, getting the funding together to build at least 22,000 detention beds in one department is much harder to come by than paying the per diem of privately

operated and existing beds, and harder to survive as a politician, where perceived “waste,” even in the short run, can cost much political capital. Even some sober-minded advocates for ending privatization recognize that it is not likely in the short run for ICE to transition to a fully publically run detention system even if they wanted to, due to a lack of resources and infrastructure (Hamilton, 2011). This keeps politicians and government officials reliant on private prisons to house detainees and inmates, given that they hope to maintain the current levels and practices of detention and incarceration (something that also costs much political capital to question).⁷

Where positive feedback comes in, is when we look at the small towns that benefit from having a private prison operating in their area. These towns economic lifeblood comes from the prison—with the towns other businesses, and public finances tied directly to the operation of the prison. Private prison companies know this as well, and often seek these communities out, as labor costs will be lower, and there is an increased likelihood of tax breaks and other benefits. To illustrate this positive feedback (and to show the resiliency of the companies in the decentralized “institutional matrix” of U.S. corrections, even in the face of abuse), Raymondville, Texas provides a worrying and insightful example.

Taking advantage of President Bush’s push to criminalize unauthorized entry and reentry (through programs like Operation Streamline) the town of Raymondville, Texas issued \$100 million in bonds to build the Willacy County Correctional Center (WCCC), which was opened in 2006 under contract with MTC and ICE to detain undocumented immigrants (Mehrotra, 2017). After numerous and varied reports of abuse, including congressional briefings and convictions of sexual abuse by guards, ICE declined to renew the contract with MTC in 2011 (Reigstad, 2017). One month later, the BOP signed a ten-year contract with the

⁷ Dolovich (2009) speaks to this point. The debate between the “comparative efficiency” of public and private prisons rhetorically reinforces the reliance on prisons generally, and only asks who is less bad. By limiting the debate by not questioning the uniquely and catastrophically high detention and incarceration rates in the U.S., we are missing an essential point.

same company, for the same facility, but this time as a federal prison for undocumented immigrants convicted of a crime (Reigstad, 2017). Unfortunately problems continued, to the point that in February 2015, protesting poor medical care and general conditions, prisoners took control of the facility and burned some parts to the ground, the BOP cancelled the contract, and the WCCC stood empty (Mehrotra, 2017). Willacy County is the second poorest county in Texas, with an unemployment rate of over 13%, and when the prison closed the county's budget of \$7.3 million decreased by one-third (Mehrotra, 2017). It was estimated that there was a loss of \$8 million annually for the salaries of the 400 or so employees who were laid off contributing to a roughly \$32 million "ripple effect" for the greater economy (Mehrotra, 2017). The town was struggling, as those were some of the better paying jobs in the area, and in the next year Walmart closed—taking 200 jobs—and many small businesses noticed a sharp decrease in business (Mehrotra, 2017). Two news stories broke in March 2017: that the county had deeded the still-vacant facility to MTC and dropped a lawsuit against MTC in agreement that MTC took the remaining \$69 million outstanding debt left over from construction, and secondly that ICE was talking with MTC about opening up the WCCC once again as a detention center (Mehrotra, 2017). There is hope in Raymondville that Trump's aggressive immigration detention policies will bring back jobs. In the words of Aurelio Guerra, judge and member of the county government: "The immigration policy will have a negative impact nationwide, and probably on Willacy, too... But we can't turn down jobs. We just can't" (Mehrotra, 2017). This statement aptly illustrates the role of positive (or negative) feedback that fuels path dependence at the local level.

Path dependence stemming from negative externalities and constraints can be seen at the national political level, and from positive feedback at the local level. In addition, both of these are strengthened through self-reinforcement.

4.2.2—Self-Reinforcement

Even more than naturally occurring increasing returns and positive feedback, self-reinforcement drives path dependence in the private prison industry. This is done through complementary actions of reinvesting profits in extensive lobbying, campaign contributions, and through the revolving door between public institutions, private companies, and lobbying firms.

It is unsurprising that private prison companies lobby the government for favorable policy decisions to their bottom line. It is something they have done from the beginning, with CCA lobbying to get Tennessee to pass privatizing-enabling legislation in the 1980s, even before having a contract (Selman and Leighton, 2010). This trend continues exponentially today. In 2014, CCA and GEO combined to spend at least \$5.9 million on “influence” through lobbying and campaign contributions (ITPI, 2016, 2). From 2004-2008 CCA spent at least \$10 million on lobbying (Selman and Leighton, 2010, 99). In 2015, CCA hired 102 lobbyists in 25 states, while GEO hired 79 lobbyists in 15 states—together both companies hired 20 Washington DC lobbyists at a cost of at least \$1.6 million (ITPI, 2016). What is especially problematic about the situation is that: “[s]ince private prison companies’ revenues come from government contracts, when CCA and GEO Group spend money influencing public officials, taxpayers in effect pay for these companies to grow their businesses” (ITPI, 2016, 2).

But not only to grow their businesses, or perhaps because of their business model requires a steady stream of prisoners and detainees, private prison companies not only lobby against legislation aimed directly at them, but also against immigration and criminal sentencing reform, and for ever-increasing appropriations. Unsurprisingly, private prisons lobbied hard against the “Justice Is Not For Sale Act” which would have ended the use of private prisons (JINFS Act, 2015). They have also twice killed the “Private Prison Information Act” which would have held private prisons to similar reporting and transparency standards as public

prisons, in 2008 and 2015 (PPI Act, 2015) (Fang, 2013b). All these bills have died in congressional subcommittee without a vote.

More controversially, private prison companies lobby against attempts at immigration reform. In 2013, as Congress was attempting to draft legislation, GEO made the following statement: “The GEO Group has never directly or indirectly lobbied to influence immigration policy. We have not discussed any immigration reform related matters with any members of Congress, and we will not participate in the current immigration reform debate” (Fang, 2013a). Unfortunately, this proved to be untrue. In later filings with the government, it was revealed that GEO paid lobbyists roughly \$40,000 in the first quarter of 2013 to lobby the House on “[i]ssues related to comprehensive immigration reform” according to the filings (Fang, 2013a). In 2012, CCA’s SEC filings revealed clearly that any reform is a business risk: “any changes with respect to drugs and controlled substances or illegal immigration could affect the number of persons arrested, convicted, and sentenced, thereby potentially reducing demand for correctional facilities to house them” (ACLU of Texas and ACLU, 2014). Of course, private prison companies will do anything they can to increase the profitability of their business—another effective way they do so is through campaign contributions.

Campaign contributions prove a direct way to influence key decision makers. Members of Appropriations Subcommittee on Homeland Security, who decide on funding for private prisons, as well as the “bed quota” (see lock-in section below), are especially important people for private prisons. For example, Texas Democrat and member of the Appropriations Subcommittee, Henry Cuellar’s largest campaign contributions in the last two campaign cycles come from GEO (ITPI, 2016). GEO and CCA have jointly contributed more than \$500,000 in each federal election since 2006, although those numbers are increasing with their profits (ITPI, 2016). In December 2016, it was revealed that GEO violated the ban on government contractors making political contributions, or “pay-to-play” schemes. Through a subsidiary (sharing the

same address and corporate staff), GEO gave more than \$225,000 to a pro-Trump super PAC, their defense being that the subsidiary was not a federally contracting company, so it was legal (Hamilton, 2016). With such large profits made, and on the line, it is not a shock that private prison companies do such things, and likely the full effects are hard to find, given the complexity of U.S. campaign finance law.

It is not only money that reinforces private prisons' place in the U.S. corrections business, but also personal connections—the “revolving door.” The situation relates somewhat to the idea of “subgovernment” from the military industrial complex, as argued for private prisons by Lilly and Knepper (1993) as the Corrections-Commercial Complex.⁸ This has been true from the very beginning. One founder of CCA was the former Tennessee Republican Chairman Tom Beasley; another was T. Don Hutto, former director of corrections for Arkansas and Virginia, then-president of the American Correctional Association (ACA—the main accreditation agency of U.S. prisons) (Selman and Leighton, 2010). Private prison companies have been happy to offer friendly members of government contracts that pay much more upon leaving public service. The list is a long one, but to give a small sample: BOP director Norman Carlson went on to work at GEO, the BOP director who replaced him, Michael Quinlan, went on to be an executive at CCA, BOP director Harley G. Lappin went to CCA, U.S. Attorney General Benjamin Civiletti went to GEO, (Selman and Leighton, 2010). Stacia Hylton revolved both ways, from the Federal Detention Trustee, to GEO as a consultant, to head of the USMS (Ridgeway, 2011). Recently, Daniel Ragsdale, second in command at ICE, left to join GEO—following the footsteps of David Venturella, Julie Myers Wood, and Mary Loiselle, all former DHS/ICE officials who joined GEO as executives (Woodruff, 2017). GEO also hired two former aides of Jeff Sessions as lobbyists, David Stewart and Ryan Robichaux, shortly before the 2016 election hoping that Sessions would have a position in the administration and they

⁸ The term “Prison-Industrial Complex” is also commonly used.

could use the personal connection company benefit—Attorney General is not bad for influence (Dayen, 2017). These personal connections from government agencies and private prison companies reinforce and deepen the dependence of the government on private prison companies.

4.2.3—Lock-in

Constraints and self-reinforcement are a part of path dependence in the private prison industry, but a further aspect is lock-in. The aspects of self-reinforcement discussed above are key for advancing policy to “lock-in” private prisons. Lock-in manifests in two important ways in the private prison context: companies attempting to get departments, or states “locked-in” to the point that they cannot easily reverse policy (relating to constraints in the first part of this section), and also through policy aspects that lock-in profits for the companies. The main ways they lock-in profits are the DHS bed quota, guaranteed minimums in contracts, mandatory detention as part of the criminalization of immigration.

Although there have been attempts to do so, private companies have never been the sole actor in incarceration at any level or department, they have gotten some departments heavily reliant on their services. For example as highlighted earlier, ICE cannot easily change policy now because of the percentage of detainees in private facilities. In the December 2016 report by the DHS Homeland Security Advisory Council on private detention centers, some members concluded that they were locked-in, and had no choice but to continue relying on private prisons. However there was disagreement:

Based on the review this subcommittee conducted, I respectfully dissent from the conclusion that reliance on private prisons should, or inevitably must, continue. I concede, as reflected in this recommendation, that overall enforcement policy, historical reliance on private prisons, and geographic concerns are presently driving reliance on private facilities. I also acknowledge that any shift away from such reliance would take years, carry significant costs, and require congressional partnership. As a result, I understand the position

adopted by the subcommittee, but I disagree that these obstacles require our deference to the status quo.

DHS HSAC (2016, 11)

Unfortunately, as discussed in the constraints section, the short time horizon of political actors makes overcoming those “obstacles” much more difficult, and does increase the degree private prisons are locked-in.

As publicly traded companies CCA and GEO have pressure to not only do business, but also to continually make a profit—“[e]xpansion is essential to the private prison industry. Without growth, investor confidence quickly wanes, and executive stock options lose value” (Greene and Mazón, 2012). These companies must not only expand, but also guarantee revenue. The mechanisms to do this also guarantee government dependence on the companies—the bed quota, guaranteed minimums in contracts, and criminalization of immigration ensure that private prisons get revenue and that the government will use them. If resources are already allocated to private prisons, then departments will use them before their own, so as not to “waste” the already used resources (Shah, Small and Wu, 2015).

The bed quota, or immigrant detention quota, was quietly added in 2009 to the Department of Homeland Security Appropriations Act of 2010—a budget, it was not publically debated—not in response to a drastic change in immigration patterns, but due to private prison companies influence (Carson and Díaz, 2015). The quota dictates that ICE “maintain” 34,000 detention beds, although there has been some controversy from this, as it has been taken by some politicians and ICE officials to also fill the beds with people, influencing detention and immigration policy and enforcement (Carson and Díaz, 2015). This quota is unique in the U.S., as no other law enforcement agency has such a policy. The bed quota has been dubbed an “insurance policy” for companies against changes in immigration patterns or policy changes, and it does act that way, guaranteeing government funding to a largely privately operated part of the federal detention system (Carson and Díaz, 2015).

The ICE bed quota at the national level is only one part of lock-in, as many contracts also include “guaranteed minimums” of payment, regardless of the number of people detained. Guaranteed minimums have been used since at least 2003 (Shah, Small, and Wu, 2015). In a report by the group In The Public Interest (2013), of 62 contracts analyzed, 65% had guaranteed minimums, between 80 and 100%, with many around 90%. This not only stabilizes companies’ revenue, but also influences detention and sentencing policies—it is in effect a “low crime tax,” penalizing areas for having fewer people incarcerated (ITPI, 2013). This has a direct effect on local level enforcement, as ICE Field Offices have faced criticism from higher-ups for failing to meet their guaranteed minimums, and thus being financially “inefficient” (Shah, Small and Wu, 2015). In sharp contrast, if the occupancy rate decreased in a public prison, this would be financially beneficial, saving money.⁹

These issues, and detention numbers, are further increased by the criminalization of “improper” immigration. It is beyond the scope of this thesis to go into depth on the disturbing topic, but a brief overview is necessary. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 increased the number of categories subject to mandatory detention, including those in removal proceedings (Mendoza, 2015). Operation Streamline is a controversial program started in 2005 that includes mass trials of immigrants found guilty of “improper entry and re-entry” and dramatically increased the length of time served to six months and two years respectively (Mendoza, 2015). This is important to keep in mind when the U.S. government reports that they only deport convicted criminals—through their unduly harsh policies they manufacture the “criminals” they need (Wessler, 2016c). This follows on the back of other mass incarceration pushes (war on drugs) and greatly benefits private prison companies. As Carl Takei of the ACLU has bluntly explained: “The fate of the private prison

⁹ This is actually a more complex issue, as many local jails also have a financial incentive to fill beds with ICE or USMS detainees and receive the per diem fee through Intergovernmental Agreements (IGAs). So, although public prisons/jails can save money from reducing their numbers, they can also make money by increasing their numbers through IGAs, they are not immune to perverse incentives when it comes to detention.

industry and the fate of mass incarceration are inextricably intertwined...If mass incarceration ends, that destroys the entire reason the private prison corporations exist” (in Hamilton, 2015). These policies of mass incarceration of immigration created the opportunity for private prisons, and now the policies continuance keeps the government dependent on the companies.

There are many ways that path dependence is present in the private prison industry in the U.S., and I will sum them up and make conclusions in the following chapter.

Chapter 5: Conclusions on Path Dependence

After an in depth analysis of the private prison industry in the U.S., I conclude that the conceptual framework of path dependence does help to explain the persistence of the industry. As hinted at in the end of the previous section, private prisons are able to thrive in part due to the abnormally high levels of incarceration and harsh sentencing in the U.S., especially in the area of immigration. The decentralized and opaque nature of contracting from various levels in the “institutional matrix” of U.S. corrections allows these practices to continue more easily.

Through both budget and time constraints, private prisons become a more palatable option for politicians and officials to handle compared to building and financing the “required” detention capacity publically. This fits well with Page’s (2006) ideas on constraints driving path dependence. The situation is reinforced through lobbying, targeted campaign contributions, and the revolving door between business and government. These self-reinforcing actions lead to policies that guarantee funding and revenue for private prison companies, such as the bed quota, guaranteed minimums in contracts, and harsh sentencing providing a steady and sustained supply of people to be detained or incarcerated. As these policies play out, and private prison companies lock-in enough of the industry, so that even those who advocate against for-profit detention are forced to acknowledge that there is not an easy immediate option to end the practice in some departments, such as DHS.

The description of path dependence advocated by both Pierson (2000) and Levi (1997) illustrates the private prison situation quite accurately: “once a country or region has started down a track, the costs of reversal are very high. There will be other choice points, but the entrenchments of certain institutional arrangements obstruct an easy reversal of the choice” (Levi, 1997, 28). Agreeing that there is not an “easy reversal” of choice, what are some policy

changes that could be advocated for to confront the situation? What does the conclusion of path dependence imply for policy change? I will offer recommendations in the following chapter.

Chapter 6: Policy Recommendations

Given that path dependent processes are prevalent in the U.S. private prison industry what are some policy recommendations to try to undermine them? By looking to ways that path dependence is sustained and maintained, we can try to address some of the key issues upholding the practice. It may be best to work backwards, starting with smaller aspects of lock-in (bed quota, guaranteed minimums) and work towards more fundamental aspects. Given the dependence and the entrenched interests at stake, I do not pretend that this is a quick or easy solution. Nevertheless, it is also an important and serious issue to work on.

Perhaps the most achievable goals in the short term would be removal of the bed quota and ending contracts with guaranteed minimums. Removing the bed quota from the DHS Appropriations bill would free up decision makers options in regards to funding. It would require the members of the DHS Appropriations Committee to act, people usually targeted by campaign contributions and lobbying from the private prison companies, but it could happen, especially with wider political pressure. Removing guaranteed minimums from contracts at the state or local level would also be possible. Texas, a state with the many private prisons, does not sign contracts with guaranteed minimums due to state law (ITPI, 2013). This could prove a useful approach at the state level in the face of corrupted national level policy makers—but again, does not necessarily come easily, private prisons companies also lobby at the state level. By removing these two aspects of the “lock-in” of the private prison industry, it could give government more room to maneuver in the future, and help confront artificially high levels of detention.

Getting more into the contracting, beyond removing guaranteed minimums, efforts should be made to restructure the payment and incentives. Currently, most private facilities are paid based on how many inmates they hold. Efforts in Australia and Pennsylvania (among

others) have tied private prisons' contracts extension and/or bonus pay to reducing recidivism rates—termed “performance based contracting” (Eisen, 2017). Restructuring the incentives in the contracting process could help to improve the quality of programs and care in private prisons. However, for immigrant detainees, this would be more difficult (how to measure recidivism rates, if people are deported after serving their sentence/detention?). At the state level this could prove promising, as the Pennsylvania example showed, recidivism rates fell 11.3% after instituting this contract structure (Eisen, 2017).

Another way to make private prison companies more responsible is to limit their ability to contract through different departments in the “institutional matrix,” such as the Willacy County example demonstrated previously. If a contract is terminated for substantial failures on the company's side, there should be a more significant period of time that the company must wait before they can contract that same facility again. Enough time that the financial incentive to do a proper job outweighs the incentive to cut corners and operate short-staffed. Relating to this point, the financial penalties written in the contract should be more significant than what they are penalizing. One facility, that was caught short staffed, continued paying the fine as written in the contract—it cost them less to do this than to hire the staff they were being penalized for not having (Wessler, 2016a). This has to end if we want to improve the care of inmates and detainees.

As almost every governmental, academic or journalistic report suggests, that there needs to be improvement in oversight and transparency in the private prison industry. As lobbying has killed related legislative measures twice recently, it could be difficult. However, it is also essential to improve the situation in private prisons. The current congress may not pass something to improve transparency and oversight, but it cannot be taken off the table.

Other efforts to combat mass incarceration may at this point be long-term goals, and directly contrast with Trump administration policy goals. Reducing sentencing of “improper

entry and re-entry” would be a good place to start, along with not detaining asylum seekers who have passed a credible fear interview, or other vulnerable groups such as children and families (Gruberg, 2015).

A final policy recommendation, but one that is dangerous in the private prison context is that of Alternative to Detention (ATD) programs, such as ankle monitors, halfway houses, and other less invasive (and less expensive) ways to supervise people (Gruberg, 2015; Mendoza, 2015; ITPI, 2013). This is concerning as private prison companies have moved into these alternative programs, and there is concerns that their perverse incentives may lead to more trouble rather than reducing it, as is hoped by advocates of ATD programs. As Gruberg notes, rather than an alternative to detention: “in practice, monitoring is used as an alternative to release. The result is an increase in the number of people under government supervision, not a decrease in the number of people detained by ICE” (2015, 7). In fact, with the current contracting system, halfway houses are an extremely dangerous place for private, for-profit companies to be working. Carl Takei of the ACLU bluntly explains that “[f]or people entangled in this corporatized criminal justice system, there is only one outcome that would not benefit corporate shareholders: successfully exiting the criminal justice system and not returning” (Joseph, 2016). ATD programs have potential, but only if they are used correctly, not as a further expansion of the prison industrial complex, but as a more humane reduction of it, with legitimate incentives driving it.

Given the path dependent processes supporting private prisons in the U.S., by definition they will be hard to change. Especially with the vested interests of the companies that have hundreds of millions of dollars in profit from it each year, and the politicians who benefit financially from it as well. Nevertheless, in the words of the dissenting DHS HSAC member, “I disagree that these obstacles require our deference to the status quo.”

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