

Publicly Traded Justice

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Recommended Citation

Samuel Ludington, *Publicly Traded Justice*, 29 U. MIA Bus. L. Rev. 93 ()

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Publicly Traded Justice

Samuel Ludington

Abstract

Private prisons, like hotels, are most profitable when they are at maximum occupancy and their guests stay for longer periods of time. Because the business-model for private prisons is predicated on incarceration rates dictated by public policy, one would presume that private prison corporations expend great resources to advocating for stricter criminal laws and sentencing. This note explores the role of political lobbying and campaign contributions of private prison corporations to see if a correlative relationship exists between their advocacy and stricter crime laws. Part I of the note provides a history of private prisons in America and explores the laws which lead to the explosive growth in prison populations. Part II will provide an overview of the three largest providers of private prisons and analyzes their political contributions. Part III discusses other business development strategies employed by private prison operators, outside of traditional political lobbying schema. Part IV discusses the present threat to private prison organizations and concludes that public outrage with the capitalization of incarceration, poses an existential threat to private prisons. While private prisons have expended significant resources in political lobbying, the greatest dividends were attributable to their involvement in the American Legislative Exchange Council, which allowed private prisons to draft legislation that produced demand for their services. Nevertheless, these legislative victories are unlikely to withstand the threat posed by widespread public frustration, which has limited these corporations' access to the capital necessary to sustain their operations.

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PART I: OVERVIEW

A. Supply and demand economic theory

A fundamental theory in economics is, holding all else equal in a competitive market, the unit price of a good is a function of the quantity supplied and the quantity demanded for set good. The greater the demand for a good in limited supply, the higher the unit price. Conversely, surplus supply of an item in limited demand results in a lower unit cost. This theory of supply and demand has served as the foundation for economic theory since its postulation, and economist have used it to explain fluctuations in the market price for goods ranging from grocery items to global oil prices. However, do theories of supply and demand govern when the quantity demanded is a function of government policy and the traded commodity is incarceration?¹ Do private prison corporations, who contribute to the supply side of incarceration by virtue of prison capacities,

¹ See Kenneth L. Avio, *On Private Prisons: An Economic Analysis of the Model Contract and Model Statute for Private Incarceration*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 265, 279 (1991).

have a perverse incentive to advocate for longer prison sentences and stricter parole laws to increase demand for their product?²

“Corporations exist to make money. To see a return in a growing market, a profitable prison corporation must either trim inefficiencies, increase inmate numbers or do both . . . the privatized prison industry has incentives to increase incarceration rates, the lengths of sentences, . . . all while decreasing expenses.”³ Private prison corporations have been likened to the hotel industry, in which private prisons, like hotels, have “a strong economic incentive to book every available room and encourage every guest to stay as long as possible.”⁴ This note will investigate the political lobbying activities of the country’s three largest private prison corporations, both at the federal and state level, to explore whether a corollary relationship exists between their activities and sentencing policies that increase demand for prison capacity.

To begin, the note will provide a brief overview of the private prison industry and explain the social and political factors that contributed to its increased prominence in the criminal justice system. Secondly, the note will provide an overview of the three largest private prison operators, analyzing their individual political lobbying expenditures and their corporate policies governing their political lobbying. Part III will discuss the role of the American Legislative Exchange Council in the explosive growth of the prison population and will argue that membership in this council, more than traditional lobbying and other nefarious methods of increasing demand, was the primary contributor for the increased utilization of private prisons. In Part IV, the note will explore recent threats to the long-term business viability of private prison corporations and will argue that increased public scrutiny poses an existential threat to the privatization of prisons. The note concludes that despite its legislative victories which were the basis for mass incarceration and as a result, increased demand for its product, private prison corporations are ill-equipped to pacify the public’s disdain for the capitalization of criminal justice.

B. History of private prisons in the United States

Though thought to be a modern novelty in response to increased expenditures on prisons, the commoditization of incarceration began as

² See *id.*

³ See Matthew Mulch, *Crime and Punishment in Private Prisons*, 66 NAT’L LAW GUILD REV. 70, 71 (2009).

⁴ Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC MONTHLY, Dec. 1998, at 51, 64.

early as the 18th century.⁵ Government officials appointed a head jailer for a particular jurisdiction who would frequently sell the labor of his inmates, or accept payment for preferential treatment.⁶ Following the Civil War, prison populations in southern states increased dramatically, leading prison administrators to outsource inmate labor in a practice known as “convict leasing.”⁷ The practice became so widespread after the Civil War that every Southern state, except for Virginia, adopted inmate leasing relationships with private individuals or firms.⁸ Not surprisingly, an overwhelming majority of the inmates in the South were Black, and served disproportionately long sentences.⁹

It was market forces, rather than the moral abhorrence of inmate leasing systems, that led to the diminished popularity of such programs towards the end of the 19th century.¹⁰ Government officials, realizing the tremendous costs of basic inmate provisions and operational costs of maintaining prisons, determined that the programs led to diminishing returns.¹¹ Furthermore, competing industries and organized labor decried the competitive advantage gained by the minimal labor costs available through convict leasing.¹² At the Federal level, President Theodore Roosevelt signed an executive order prohibiting the use of convict labor on federal projects in 1905, followed by the Hawes-Cooper Convict Labor Act of 1929, allowing states to prohibit the interstate importation of goods manufactured by inmates.¹³ As the practice of convict leasing in state run institutions became less prevalent, operational and administrative management of correctional institutions became a function of the government, save for a few ancillary services which remained privatized.¹⁴

The first resurgence of privatized prisons was in the 1974, when Congress passed the Juvenile and Delinquency Prevention Act aimed at preventing juvenile delinquency through alternative programming and decrease reliance on traditional forms of incarceration.¹⁵ The landmark

⁵ See James Austin & Garry Coventry, EMERGING ISSUES ON PRIVATIZED PRISONS 19 (Bureau Just. Assistance, NCJ 181249, 2001), <http://www.ncjrs.gov/pdffiles1/bja/181249.pdf>.

⁶ *Id.* at 9.

⁷ See Mulch, *supra* note 3, at 71.

⁸ See Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 127 (2001).

⁹ See Mulch, *supra* note 3, at 72.

¹⁰ See *id.*

¹¹ See Austin & Coventry, *supra* note 5, at 11.

¹² See *id.*

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See Juvenile and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109.

legislation established federal standards for the treatment of juvenile offenders and also provided financial inducements for state compliance.¹⁶ There were two principle goals of the legislation: (1) to end the practice of housing juvenile offenders in adult jails and prisons, and (2) to find alternative methods of rehabilitating juveniles.¹⁷ The financial inducements coupled with the demand for innovative approaches to incarceration, created an incentive for the private sector to explore ways to capitalize the criminal justice sector.¹⁸

As a result, large corporations with no expertise in criminal justice and juvenile rehabilitative services, but recognizing the opportunity for lucrative government contracts, began operating juvenile correctional facilities. Two years after its passage, RCA Services, a division of Radio Corporation of America began operating Weaverville Intensive Treatment Unit in North Hampton, Pennsylvania, a juvenile center for serious offenders.¹⁹ Shortly thereafter, the Eckerd Corporation, a drug manufacturer and drug store chain, assumed control of the Okeechobee School for Boys in Florida.²⁰ In 1984, the Federal Bureau of Prisons signed a three-year contract with Eclectic Communications, Inc., to house sixty 18 to 26-year-old offenders at Hidden Valley Ranch in California.²¹ The Juvenile and Delinquency Prevention Act sought to improve juvenile outcomes by incentivizing innovative approaches to juvenile justice, and in doing so, transformed the entire criminal justice system by revealing its profitability.

Contemporaneously, state correctional institutions began contracting with private prison corporations. The Corrections Corporation of America (CCA) was contracted to manage the Hamilton County jail in Tennessee, and subsequently in 1985 was contracted to manage the complete operation of Florida's Bay County jail.²² The first privately owned and operated facility opened in 1985, when United States Corrections Corporation opened Marion Adjustment Center in Kentucky, functioning as a minimum-security facility for inmates nearing parole.²³

Shortly after their introduction, the demand for additional private prisons increased because of a rapid increase in the prison population

¹⁶ *See id.*

¹⁷ *See id.*

¹⁸ Patrick Bayer & David E. Pozen, *The Effectiveness of Juvenile Correctional Facilities: Public versus Private Management*, 4 (Economic Growth Center Yale University, Working Paper No. 863, 2003), http://www.econ.yale.edu/growth_pdf/cpd863.pdf.

¹⁹ Austin & Coventry, *supra* note 5, at 12.

²⁰ *Id.*

²¹ *See* Mulch, *supra* note 3, at 73.

²² *See id.*

²³ Austin & Coventry, *supra* note 5, at 12.

nationally. The explosive growth in the total number of privatized correctional facilities is closely correlated to the aggressive governmental policies adopted to combat crime beginning in the late 1980s. There are two primary contributors to the size of a prison population: the number of offenders that are admitted to prison and the duration of their sentences.²⁴ Between 1988 and 2012, the number of annual federal prison admissions nearly tripled, increasing from 19,232 to 56,952.²⁵ Concurrently, the average time served by released federal offenders doubled from 17.9 to 37.5 months.²⁶ In no other category of crime was this exponential increase more visible than in drug offense, in which the population of incarcerated drug offenders increased from 15,000 to nearly 100,000 between 1988 and 2012.²⁷

Predictably, this increase in both the volume of offenders admitted as well as the length of their prison sentences, resulted in the exponential growth of the federal prison population, increasing from 49,928 in 1988 to 217,815 in 2012, a 336 percent increase.²⁸ This upward trend in prison population was observed in both state and federal correctional facilities, with President Reagan's Commission on Privatization indicating that the number of federal and state inmates increased approximately 74 percent between 1979 and 1986.²⁹ From 1970 to 2007, the aggregate prison population increased from 196,000 to 1.5 million, representing an increase of nearly 800 percent.³⁰ The tougher sentencing guidelines and increased policing was accredited to the growing angst nationally surrounding perceived increases in violent crime, as well as the increased militarization of the criminal justice system to combat social ills, as evidenced by President Reagan's War on Drugs.

The motivation for sentencing reform has historically been attributed to the mood of the country on crime and punishment, vacillating between judicial autonomy and discretionary sentencing to proscribed sentencing

²⁴ The Pew Charitable Trusts, *Prison Time Surges for Federal Inmates*, 2, (Nov. 2015), https://www.pewtrusts.org/-/media/assets/2015/11/prison_time_surges_for_federal_inmates.pdf.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *See id.*

²⁹ *See* Gary Hunter & Peter Wagner, *Prisons, Politics, and the Census*, in *PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION*, 80, 81 (Tara Herivel & Paul Wright eds., 2007).

³⁰ *See* JFA Institute, *Unlocking America, Why and How to Reduce America's Prison Population* 1, 1 (2007), https://cdpsdocs.state.co.us/ccjj/Resources/Ref/2007-11_UnlockingAmerica.pdf; Mulch, *supra* note 3, at 73.

intended to create parity in punishment.³¹ The 1980s and 1990s was replete with “tough on crime” sentiments nationally, which resulted in sentencing requirements and release policies to become more restrictive.³² In the early 1970s, states typically allowed discretionary release of offenders by parole boards, who would review inmate behavior and participation in educational and work programs.³³ While allowing an individualized review of inmate sentences provided a mechanism to control prison populations, such discretion drew widespread criticism because of the resultant parity in sentencing.³⁴ As discretionary sentences continued to draw public criticism, national concerns with the crime rate increase translated into states developing sentencing guidelines, enacting mandatory minimums sentences and other measures intended to both provide uniformity in sentencing, while also increasing the severity of those sentences.³⁵

Not surprisingly, these new sentencing guidelines and limits on judicial discretion led to prison crowding in state correctional facilities, necessitating an infusion of federal subsidies.³⁶ In response, Congress appropriated funding in the form of incentive grants to build or expand correctional facilities through the Violent Offender Incarceration and Truth-in-Sentencing Incentive Grants Program in the 1994 Crime Act.³⁷ To qualify for these grants, states were required to adopt truth-in-sentencing laws which mandated that individuals convicted of a Part 1 violent crimes were obligated to serve a minimum of 85% of their prison sentence.³⁸ The incentive proved incredibly successful, with thirty-two states and the District of Columbia adopting laws meeting the Federal 85% truth-in-sentencing requirement.³⁹ Ironically, measures taken to assure parity in criminal punishment and sentencing substantially increased the prison population, creating the framework for the proliferation of private prisons.

³¹ PAULA M. DITTON & DORIS JAMES WILSON, U.S. DEP’T OF JUST., TRUTH IN SENTENCING IN STATE PRISONS 2 (1999).

³² *Id.*

³³ *Id.*

³⁴ *See id.*

³⁵ *See id.*

³⁶ *See id.*

³⁷ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

³⁸ *See id.*

³⁹ *See* U.S. DEP’T OF JUST., *supra* note 31, at 3.

C. Utility of Private Prisons

The exponential growth in aggregate prison population has resulted in substantial increases in government spending on corrections both locally and federally, while also resulting in prison overcrowding and unsafe conditions. Exacerbating this demand for alternative methods of incarceration, are mandates by the federal courts for states to employ corrective measures to alleviate the overcrowding in its prisons.⁴⁰ In 1991, federal courts found that overcrowding in prisons in forty states violated constitutional standards.⁴¹ In 2011, the Supreme Court of the United States contemplated the issue of prison overcrowding in *Brown v. Plata* and affirmed the district court's mandate that the California correctional system reduce its prison capacity to 137.5% of its design capacity within two years.⁴² Judicial mandate to alleviate prison overcrowding, directly attributable to tougher sentencing laws, has compelled states to seek immediately available alternative solutions to state operated facilities, for which contracts with private prisons presented as a viable solution.

Furthermore, as inmate populations increased, so did the government expenditures on incarceration, burdening state and federal budgets. Therefore, governmental agencies looked to the private sector to incorporate efficiencies and cost-cutting strategies that it employs to increase profit margins, as a strategy to decrease overall governmental expenditures on incarceration.⁴³ Federal prison spending increased 595 percent from 1980 to 2013, from \$970 million to more than \$6.7 billion, accounting for inflation.⁴⁴ In fact, the federal budget for prisons in 2013 equaled the federal budget of the entire U.S. Justice Department in 1980.⁴⁵ Contracting with private prison corporations also allowed government agencies to avoid cumbersome procurement and obligation bonds to finance the construction of new prison facilities.⁴⁶ Rather than construct and operate the prisons, governments contract with private prison operators at a fixed per diem amount (presumably lower than what would have been expended in the alternative) to house and provide basic services to the inmates. Prison privatization was perceived, and propagated, as a

⁴⁰ See Douglas C. McDonald, *Private Penal Institutions*, 16 CRIME & JUST. 361, 393 (1992).

⁴¹ Kade A. Rhodes, *Locked Out of Business: A Look at the Future of the Private Prison Industry*, 18 HOUS. BUS. & TAX L.J. 224, 228–29 (2018).

⁴² *Brown v. Plata*, 563 U.S. 493, 509–10, 546 (2011).

⁴³ 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>.

⁴⁴ THE PEW CHARITABLE TRUSTS, *supra* note 24.

⁴⁵ *Id.*

⁴⁶ See McDonald, *supra* note 40, at 393–94.

mutually beneficial solution to the financial strain of mass incarceration; governments were no longer burdened with the cumbersome management of correctional institutions, and private prisons could eliminate the bureaucratic inefficiencies to create a profitable enterprise.

D. Private Prison Viability Inextricably Bound to Political Climate

Because the private prison business model is largely predicated on procuring government contracts to build and manage correctional facilities, their financial viability is inextricably bound to the political and legislative sentiment towards criminal justice broadly and privatization more specifically. Private prison corporations are acutely aware of the financial risk that policies to reducing the prison population pose to their profitability and advise their investors accordingly.⁴⁷ Correctional Corporation of America, in its 2010 Annual Report to the Security and Exchange Commission (SEC) cautioned investors:

Our ability to secure new contracts to develop and manage correctional and detention facilities depends on my factors outside our control. Our growth is generally dependent upon our ability to obtain new contracts to develop and manage new correctional and detention facilities. *This possible growth depends on a number of factors we cannot control, including crime rates and sentencing patterns in various jurisdictions and acceptance of privatization.* The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction or parole standards and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our criminal laws. *For instance, 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.* Legislation has been proposed in numerous jurisdictions that could lower minimum sentences for some non-violent crimes and make more inmates eligible for early release based on good behavior. Also, sentencing alternatives under consideration could put some offenders on probation with electronic monitoring who would

⁴⁷ See JUST. POL'Y INST., GAMING THE SYSTEM: HOW THE POLITICAL STRATEGIES OF PRIVATE PRISON COMPANIES PROMOTE INEFFECTIVE INCARCERATION POLICIES 29 (2011).

otherwise be incarcerated. Similarly, reductions in crime rates or resources dedicated to prevent and enforce crime could lead to reductions in arrests, convictions and sentences requiring incarceration in correctional facilities.⁴⁸

This recognition that the company's growth is contingent upon factors outside of its control, such as the decriminalization of substance abuse or changes to illegal immigration policies, is illustrative of the dependence of private prison corporations on favorable criminal justice policies and lends credence to theories of political maneuvering to ensure those policies. The GEO Group articulated a similar vulnerability to variance in public or legislative sentiment towards government utilization of public-private partnerships for correctional facilities in its 2019 second-quarter SEC filing:

Any report prepared by or requested by a governmental agency or public official, investigation or inquiry, public statement by any governmental agency or public official, policy or legislative change, or other similar occurrence or action, that seeks to, or purports to, prohibit, eliminate, or otherwise restrict or limit in any way, the federal government's (or any state or local government's) ability to contract with private operators of these facilities and centers, could adversely impact our ability to maintain or renew existing contracts or to obtain new contracts.⁴⁹

Private prison operators recognize that their business models are susceptible not only to fluctuations in the prison populations but are inherently aware that their businesses are intimately bound to the government policies that govern incarceration and utilization of public-private partnerships. Because the long-term viability of private prisons is dependent on strong, positive relationships with government officials, significant investments in political lobbying and governmental relations is justifiably considered a necessary business expenditure.

Investors are similarly cognizant of the considerable influence that public policy and governmental agencies have on the fiscal viability of private prison operators. This was evidenced by the market response to the August 2016 announcement by the U.S. Department of Justice that it would stop contracting with private prisons to operate federal prisons. After the announcement, the Correctional Corporation of America's stock

⁴⁸ Corr. Corp. of Am., 2010 Annual Report (Form 10-K), 19-20 (Dec. 31, 2010) (emphasis added).

⁴⁹ GEO Group Inc., 2019 Annual Report (Form 10-K) (Feb. 12, 2020).

price decreased by fifty percent.⁵⁰ In response, the company adopted a more expansive name, CoreCivic, to demonstrate that its focus was not limited to criminal corrections, rather the business provided a wider array of public-private solutions.⁵¹ Despite its broader focus, CoreCivic's valuation remained low until the day after Donald Trump's election, in which its stock price rose by 40 percent.⁵² Similarly, GEO experienced a 30 percent increase in stock valuation after the 2016 presidential election.⁵³

Recognizing the immediate threat that this policy posed to their business, GEO Group contributed a total of \$200,000 to support the election of Donald Trump, with the largest contribution recorded on the day after the Justice Department's announcement that it would end the use of private prisons.⁵⁴ In 2017, the stock prices for both CoreCivic and GEO Group more than doubled after U.S. Attorney General Jeff Sessions announced that it would continue contracting with private prisons.⁵⁵ Because government action and legislative policy are highly determinative of their financial viability and long-term sustainability, it stands to reason that these companies would benefit from maintaining relationships and advocating for policies that would promote their business interests. David Shicor, a prominent author in opposition of prison privatization opined, "Through political lobbying, PACs, campaign contributions, and the provision of perks to politicians (as industrial and business corporations do), corporations are likely to continue to support and even accelerate incarceration-oriented legislation and policies by which more people will spend longer periods of time in correctional institutions."⁵⁶ The drastic change in stock valuation in response to the Obama Department of Justice announcement as compared to after the election of Donald Trump is illustrative of the inextricable nature of private prisons and government policy, thus incentivizing firms to financially support "law and order" candidates.

⁵⁰ Matt Stroud, *Private Prisons Get a Boost from Trump*, BLOOMBERG BUSINESSWEEK (Nov. 18, 2016); see KARA GOTSCH & VINAY BASTI, THE SENT'G PROJECT, CAPITALIZING ON MASS INCARCERATION: U.S. GROWTH IN PRIVATE PRISONS 12 (2018).

⁵¹ See Gotsch & Basti, *supra* note 50, at 12.

⁵² See Stroud, *supra* note 50.

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See Gotsch & Basti, *supra* note 50, at 12.

⁵⁶ DAVID SCHICOR, PUNISHMENT FOR PROFIT: PRIVATE PRISONS/PUBLIC CONCERNS 236 (1995).

PART II: PRIVATE PRISON CORPORATION PROFILES: POLITICAL LOBBYING AND BUSINESS DEVELOPMENT

The rate of growth of inmates housed in private prisons far exceeds the overall rate of growth in national incarceration rates.⁵⁷ Between 1990 and 2009, the number of people incarcerated in for-profit prisons grew more than 1,600%, increasing from approximately 7,000 to 129,000 inmates.⁵⁸ Private prisons operating in the United States housed 121,718 people in 2017, representing 8.2% of the aggregate state and federal prison population.⁵⁹ The Federal Bureau of Prisons maintains the highest prison population managed by private prison contractors, in 2017 the aggregate population in federal custody managed by private contractors—including those in prisons, half-way houses and home confinement—totaled 27,569.⁶⁰ There is significant variance in state utilization of private correctional facilities.⁶¹ For instance, while New Mexico Department of Corrections reports that 53% of its prison population is in private facilities, whereas there are twenty-two states who do not contract with private prisons.⁶² The three largest and most prominent private prison operators are, CoreCivic (formerly Corrections Corporation of America), GEO Group, and Management and Training Corporation.⁶³

A. CoreCivic

One of the most established private prison corporations is CoreCivic, who previously operated as Corrections Corporation of America. The company website suggests that the principle motivation for its formation was the federal judicial mandate that states prison overcrowding and similar practices were unconstitutional.⁶⁴ CoreCivic, a publicly-traded real estate investment trust (REIT) on the New York Stock Exchange, is the “nation’s largest owner of partnership correctional, detention, and residential reentry facilities.”⁶⁵ In 2018, the company posted an annual

⁵⁷ See AM. C.L. UNION, *BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION* 5 (2011).

⁵⁸ *Id.*

⁵⁹ THE SENT’G PROJECT, *FACT SHEET: PRIVATE PRISONS IN THE UNITED STATES* (2019).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ See *id.*

⁶⁴ Tom Beasley, *A New Industry Emerges to Meet a Very Real Need*, CORECIVIC, <http://www.corecivic.com/about/history> (last visited Feb. 20, 2020).

⁶⁵ *About CoreCivic*, CORECIVIC, <https://www.corecivic.com/about> (last visited Feb. 20, 2020).

revenue of \$1.8 billion, netting \$520 million gross profit.⁶⁶ Over half of the company's annual revenue is generated by federal correctional contracts.⁶⁷ In addition to the operational management of its correctional facilities, CoreCivic invests in political and government relations to "educate federal, state and local officials on the benefits of partnership corrections."⁶⁸

CoreCivic maintains a clearly articulated and robust policy governing its political contributions and lobbying activities, and asserts that transparency is critical to its relationship with government partners, taxpayers and shareholders.⁶⁹ Direct governance of the company's political and government relations activities and compliance is provided by the Risk Committee of the Board of Directors.⁷⁰ The company sponsors a political action committee, bearing its name, that makes contributions to federal candidates and candidates in jurisdictions which corporate contributions are not permitted.⁷¹ In 2018 CoreCivic, through its corporate and political action committee, contributed \$1,186,390.46 in political contributions to candidates, political parties, and committees.⁷² Since 1995, CoreCivic has contributed \$5,749,467.00 to 1,533 state-level candidates nationwide.⁷³ Interestingly, while there was a slight advantage in contributions made to Republican candidates (62%) as compared to Democratic candidates (33%), contributions tended to be directed to incumbents (79%) and ultimately the winning candidate (86 percent).⁷⁴ In 2018, CoreCivic expended \$1.43 million in payments and fees to support direct lobbying at the Federal, state and local levels, of which \$617,797 was attributable to Federal direct lobbying.⁷⁵

⁶⁶ CoreCivic, Inc. (CXW US Equity), BLOOMBERG LAW, <https://www.bloomberglaw.com/company/financials/CXW%20US%20Equity/Overview> (last visited Feb. 20, 2020).

⁶⁷ CORECIVIC INC, AM. FRIENDS SERV. COMM. (Jul. 19, 2019), [https://investigate.afsc.org/company/corecivic#:~:text=In%202018%2C%20CoreCivic%20reported%20%241.83,Bureau%20of%20Prisons%20\(BOP\)](https://investigate.afsc.org/company/corecivic#:~:text=In%202018%2C%20CoreCivic%20reported%20%241.83,Bureau%20of%20Prisons%20(BOP)).

⁶⁸ *Political & Lobbying Activity*, CORECIVIC, <http://ir.corecivic.com/corporate-governance/political-lobbying-activity> (last visited Feb. 20, 2020).

⁶⁹ *See generally Political Activity and Lobbying Report 2018*, CORECIVIC, 1, <http://ir.corecivic.com/static-files/e621a712-a923-43b7-8533-0fef1c04cab0> (last visited Nov. 8, 2019).

⁷⁰ *Id.* at 2.

⁷¹ *Id.*

⁷² *Id.* at 3.

⁷³ *CoreCivic FKA Corrections Corp of America / CCA*, NAT'L INST. ON MONEY IN POL.: FOLLOWTHEMONEY, <https://www.followthemoney.org/entity-details?eid=695> (last visited Jan. 16, 2020).

⁷⁴ *Id.*

⁷⁵ CORECIVIC, *supra* note 69, at 7.

Although the company maintains robust government relations activities, the company has a longstanding policy which prohibits lobbying “for or against policies or legislation that would determine the basis for or duration of an individual’s incarceration or detention.”⁷⁶ Rather, the company asserts that its government relations activities are principally focused on “legislative, regulatory and executive actions that may impact the construction, operation and leasing of privately owned or managed prisons, detention facilities, and residential reentry centers.”⁷⁷ Despite sizeable investments in the political process, an analysis of CoreCivic’s historical giving patterns do not exhibit the trends one would expect, namely, giving to a particular party or committee members responsible for crafting legislation dealing with criminal justice; instead, CoreCivic’s political strategy seems to favor incumbent candidates and those with the greatest probability of victory.

Surprisingly, the company has committed sizeable government relations resources and expertise to advocate for policies that would appear to be antithetical to their business-model, in particular policies to reduce recidivism, including: “Ban-the-Box” designed to improve job prospects for individual’s with felony convictions; reducing legal barriers and liabilities for companies looking to hire former inmates; increased funding for reentry programming; and, social impact bond pilot programs which tie contractor performance measures and payment to positive outcomes for participants.⁷⁸ On first-glance, these recidivism-reducing policies would appear to be adverse to its business interests, which is predicated on higher volume and duration of incarceration, however CoreCivic maintains that successful reentry, and thus reduced recidivism, to be fundamental to its mission as a corporation.⁷⁹

B. The GEO Group, Inc.

The second largest private prison corporation is The GEO Group Inc. (“GEO”), which operates facilities primarily in the United States, but also operates in Australia, Canada, New Zealand and South Africa, is publicly traded real estate investment trust on the New York Stock Exchange.⁸⁰ In its corporate mission statement, GEO states that it seeks to develop “innovative public-private partnerships with government agencies around

⁷⁶ *Id.* at 2.

⁷⁷ *Id.*

⁷⁸ See generally *Reentry Policies*, CORECIVIC, <http://www.corecivic.com/reentrypolicies> (last visited Nov. 8, 2019).

⁷⁹ *Id.*

⁸⁰ *The GEO Group Inc. (GEO U.S. Equity)*, BLOOMBERG LAW, <https://www.bloomberglaw.com/company/ticker/GEO%20US%20Equity> (last visited Nov. 8, 2019).

the globe that deliver high quality, correctional, community reentry, and electronic monitoring services”⁸¹ GEO employs 22,000 globally and reported an annual revenue of \$2.3 billion dollars in 2018 derived from its fully diversified array of correctional services.⁸² As a company whose business is predicated on public-private partnerships, GEO cultivates relationships with government agencies in the United States and globally.⁸³

GEO’s government relations and political contributions are closely monitored by its legal department and Board of Directors, to ensure that all activity is in accord with state and federal law.⁸⁴ GEO also sponsors a non-partisan political action committee, funded exclusively by voluntary employee contributions and makes contributions to federal candidates and state candidates in those in jurisdictions in which they are permitted.⁸⁵ In 2018, between its corporate donations and its political action committee, GEO donated \$3,324,690 to individual candidates, parties and committees, at the federal, state and local levels. Aggregating the political contributions of GEO Group, which includes Cornell Companies and Correctional Services Corp. which were acquired by GEO, the company has contributed \$11,351,381.00 to 1,128 candidates seeking state office.⁸⁶ As was with CoreCivic, GEO prioritizes campaign contributions to incumbents (76 percent) and eventual winners (76 percent), as compared to exhibiting a party allegiance; giving to Republican candidates sixty-seven percent of the time and Democratic candidates twenty-four percent of the time.⁸⁷ Additionally, GEO expended an aggregate amount of \$4.3 million to consultant government relations professionals involved in direct lobbying at the federal, state and local levels.⁸⁸ Notably, one of the lobbyist employed by the GEO Group in 2019 is Pam Biondi, who served as the Florida Attorney General from 2011 to 2019.⁸⁹

⁸¹ See *Who We Are*, GEO GROUP, https://www.geogroup.com/who_we_are (last visited Apr. 29, 2021).

⁸² See generally The GEO Group, Inc. Quarterly Report (Form 10-Q) (July 31, 2019).

⁸³ *Political Activity and Lobbying Report 2018*, THE GEO GROUP, 1, https://www.geogroup.com/Portals/0/SR/Political%20Engagement/Political_Activity_and_Lobbying_Report_2018.pdf (last visited Nov. 8, 2019).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See *Client Profile: GEO Group*, OPENSECRETS, <https://www.opensecrets.org/federal-lobbying/clients/lobbyists?cycle=2019&id=D000022003> (last Visited Jan. 16, 2020); see also *Former Florida Attorney General Pam Biondi Joins Ballard Partners*, FLORIDA TREND (Jan. 22, 2019), <https://www.floridatrend.com/article/26199/former-florida-attorney-general-pam-bondi-joins-ballard-partners>.

GEO asserts that its engagement in legislative and regulatory proceedings is imperative to promoting the benefits of public-private partnerships and are focused on government actions that directly impact public-private partnerships in its service areas.⁹⁰ The company insists that its political contributions and lobby expenditures do not seek to influence criminal justice or immigration policies, nor does GEO lobby for or against any “policies or legislation that would determine the basis for an individual’s incarceration or detention, the length of sentences or the criminalization of behavior.”⁹¹ An analysis of the totality of GEO’s political contributions reveals that its giving patterns are far more indiscriminate than what was evidenced by the sizeable contribution to the Trump administration immediately following the Department of Justice decision to no longer contract with private prisons to operate federal prisons. No correlative relationship can be inferred between GEO’s political activity, and policies and legislation that would increase the volume or duration of imprisonment.

C. Management & Training Corporation

Of the three largest private prison contractors, Management & Training Corporation (“MTC”) is the only privately held corporation.⁹² Maintaining sixty-two contracts in twenty-one states and internationally, MTC employs 8,446 people globally.⁹³ Because MTC privatized in 2016, the last available financial statement indicates that its total revenue in 2015 was \$753 million, yielding a net profit of \$30 million.⁹⁴ MTC employs a political action committee, the majority of whose donors are senior executives of MTC or their spouses.⁹⁵ In 2018, its political action committee contributed \$111,950 to federal candidates; sixty-seven percent of which were to Republican candidates.⁹⁶

⁹⁰ See Political Activity and Lobbying Report 2018, *supra* note 83.

⁹¹ See Political Activity and Lobbying Report 2018, *supra* note 83.

⁹² DANNY JASPERSON AND KARIN RUEFF, AMERICA’S MASS INCARCERATION PROBLEM: CAN PRISON CONTRACTORS ACTUALLY BE PART OF THE SOLUTION? 4 (2017).

⁹³ *Id.*

⁹⁴ *Management & Training Corp (41311365Z US Equity)*, BLOOMBERG LAW, <https://www.bloomberglaw.com/company/financials/4131365Z%20US%20Equity/Overview> (last visited Feb. 21, 2020).

⁹⁵ See *Management & Training Corp.*, OPENSECRETS.ORG, <https://www.opensecrets.org/political-action-committees-pacs/management-training-corp/C00208322/donors/2018> (last visited Apr. 27, 2021).

⁹⁶ *Management & Training Corp.*, OPENSECRETS.ORG, <https://www.opensecrets.org/pacs/lookup2.php?cycle=2018&strID=C00208322> (last visited Feb. 21, 2020).

D. Day 1 Alliance

To combat the growing criticism of prison privatization, the three aforementioned companies formed a trade group called the Day 1 Alliance, which is designed to redefine the public perception of the industry.⁹⁷ The description of the alliance indicates that its name affirms the responsibility of private prison contractors to provide humane and respectful treatment of incarcerated and detained individuals for the entirety of the moment they enter into their care.⁹⁸ Among the issues that the Day 1 Alliance champions are policies aimed at reducing recidivism, including the passage of the First Step Act.⁹⁹

PART III: ALTERNATIVE FORMS OF BUSINESS DEVELOPMENT

A. American Legislative Exchange Council (“ALEC”)

Despite the sizeable investments made to support traditional political lobbying and campaign contributions, the greatest dividends for private prison corporations appear to derive from their membership and participation in a relatively unknown public policy non-profit organization, the American Legislative Exchange Council.¹⁰⁰ ALEC is a voluntary, nonpartisan membership organization of state legislators committed to espousing the principles of limited government, free markets and federalism.¹⁰¹ Nearly one-quarter of the country’s state legislators and stakeholders are members of ALEC, collectively representing more than 60 million Americans.¹⁰² These elected officials work collaboratively with ALEC’s other paid-membership base, corporations and private sector interest groups, to propose policy recommendations in a multitude of areas.¹⁰³ Private sector representatives work with legislative members to draft model legislation, bills that serve as templates for actual legislation

⁹⁷ Daniel Lippman, *Meet the K Street types giving to the Democratic candidates*, POLITICO INFLUENCE (Oct. 25, 2019), <https://www.politico.com/newsletters/politico-influence/2019/10/25/meet-the-k-street-types-giving-to-the-democratic-candidates-781560>.

⁹⁸ About, DAY ONE ALLIANCE, <https://day1alliance.org/about/> (last visited Nov. 8, 2019).

⁹⁹ Issues, DAY ONE ALLIANCE, <https://day1alliance.org/issues/> (last visited Apr. 27, 2021).

¹⁰⁰ See JUST. POL’Y INST., *supra* note 47, at 29.

¹⁰¹ About ALEC, AMERICAN LEGISLATIVE EXCHANGE COUNCIL, <https://www.alec.org/about/> (last visited Jan. 16, 2020).

¹⁰² *Id.*

¹⁰³ Allison Boldt, *Rhetoric v. Reality: ALEC’s Disguise as a Nonprofit Despite Its Extensive Lobbying*, 34 HAMLINE J. PUB. L. & POL’Y 35, 36 (2012).

to be proposed in the elected officials' home states.¹⁰⁴ On average, ALEC drafts approximately 1,000 pieces model acts every year, which are introduced by ALEC's legislative members; approximately 20 percent of which are enacted as law.¹⁰⁵ Thousands of ALEC model acts have been adopted by state legislatures and enacted nationwide, and have been the basis for a number of highly controversial laws. One such law that has been the source of widespread public animus is the Stand Your Ground law, which gained national notoriety because of its association with the senseless murder of Trayvon Martin.¹⁰⁶

All ALEC model legislation is developed in one of ALEC's nine Task Forces, comprised of both private sector and legislative members.¹⁰⁷ Task Forces develop draft model acts in response to an ALEC member's request for model legislation on a topic within the Task Force's subject matter jurisdiction.¹⁰⁸ To be adopted, an ALEC model act must be approved by its Governing Board and have majority support from legislative Task Force members, as well as its private sector members, who are polled separately.¹⁰⁹ This collaborative drafting process, coupled with the required consensus between its legislative and private sector members, provides private sector members unfettered access to draft legislation that promotes their business interests.¹¹⁰

Until their departure in 2010, two notable private sector members and supporting contributors of ALEC were Corrections Corporation of America and GEO, paying between \$7,000 and \$25,000 in annual membership.¹¹¹ CCA maintained a seat, and at times co-chaired, the Public Safety Task Force (formerly the Criminal Justice and Homeland Security Task Force), which developed model legislation with respect to criminal justice and national security.¹¹² Over the span of two decades, CCA was actively involved in the development of more than 85 model bills and resolutions that mandated tougher criminal sentencing, increased immigration enforcement and facilitated the privatization of prisons.¹¹³ In the mid-to late 90's, CCA's senior director of business development served as the private sector chair of the task force that drafted and adopted model legislation that would increase both the volume and duration of

¹⁰⁴ *Id.*

¹⁰⁵ *See* JUST. POL'Y INST., *supra* note 47, at 28.

¹⁰⁶ *See* Boldt, *supra* note 103, at 44-45.

¹⁰⁷ *See id.* at 45.

¹⁰⁸ *See id.* at 46.

¹⁰⁹ *See id.* at 47.

¹¹⁰ *Id.* at 36.

¹¹¹ *See* KARA GOTSCH AND VINAY BASTI, CAPITALIZING ON MASS INCARCERATION: U.S. GROWTH IN PRIVATE PRISONS 11 (2017); JUST. POL'Y INST., *supra* note 47, at 29.

¹¹² JUST. POL'Y INST., *supra* note 47, at 29.

¹¹³ *See* AM. C.L. UNION, *supra* note 57, at 15.

incarceration.¹¹⁴ Contemporaneously, ALEC drafted model bills which established mandatory minimums, three strikes laws (mandating 25 years to life in prison for repeat offenses), and “truth-in-sentencing” (requiring inmates to serve a majority of their sentence without the possibility of parole), which served as the foundation for the exponential growth in incarceration.¹¹⁵ In its 1995 Model Legislation Scorecard, the ALEC Criminal Justice Task Force states, “ALEC’s Truth in Sentencing Act and Three Strikes You’re Out Act have been the most effective bills supported by the Task Force. At least one of these model bills has been enacted in half of the states in the country.”¹¹⁶ In an article entitled *Getting Tough Works: Old Strategies Are the Weapons in the New War on Crime*, a former ALEC Task Force Director stated, “Truth-in-sentencing, based on ALEC model bill, require inmates to serve 80 to 90 percent of their sentences before becoming eligible for parole.”¹¹⁷ Membership in ALEC allowed private prison corporations to circumvent the traditional legislative process by working collaboratively to author favorable model legislation without the burden of cumbersome public disclosure laws that govern the legislative process.

Not only did ALEC model legislation serve as the catalyst for the exponential growth of America’s prison population, another ALEC model legislation, the “Private Correctional Facilities Act” allowed states to contract with private prison operators.¹¹⁸ The model act allowed for “any unit of government to contract with the private sector to perform services currently provided by a corrections agency.”¹¹⁹ In fact, in one session prison privatization was identified as the principle issue by ALEC’s Criminal Justice Task Force.¹²⁰ Membership in ALEC not only afforded private prison corporations the opportunity to draft legislation that led to the explosive growth in the domestic prison population, but the very laws that allowed for their existence are attributable to their membership in this organization.¹²¹

¹¹⁴ See *id.*

¹¹⁵ See JUST. POL’Y INST., *supra* note 47, at 29.

¹¹⁶ BRIGETTE SARABI & EDWIN BENDER, THE PRISON PAYOFF: THE ROLE OF POLITICS IN THE INCARCERATION BOOM 4 (2000) (quoting ALEC 1995 *Model Legislation Scorecard*, July 1995).

¹¹⁷ See AM. C.L. UNION, *supra* note 57, at 15 (quoting Michael Hotra, *Getting Tough Works: Old Strategies Are the Weapons in the New War on Crime*, American Legislative Exchange, Oct. 9, 1996, at 8).

¹¹⁸ *Id.* at 16.

¹¹⁹ *Id.* (quoting American Legislative Exchange Council, Volume 1: Sourcebook of American State Legislation 1995, at 144 (1995)).

¹²⁰ See Sarabi & Bender, *supra* note 116, at 4.

¹²¹ See JUST. POL’Y INST., *supra* note 47, at 29.

B. Single Issue Lobbies

While the lobbying efforts of private prison corporations have elicited the greatest public angst because of the perceived moral abhorrence for private entities profiting from mass incarcerations, some theorists posit that single issue lobbies, like the public-sector corrections unions, are more responsible for the enactment of tough-on-crime legislation.¹²² For instance, the California Correctional Peace Officers Association (“CCPOA”), one of the largest and most active public sector single issue lobbies, has made significant financial contributions to tough-on-crime voter initiatives and crime victims’ groups.¹²³ The CCPOA was actively involved in the drafting and subsequent passage of California’s three-strikes law.¹²⁴ Shortly thereafter, the association began advocating for the passage of a 10-20-life set of mandatory minimum penalties for crimes committed with firearms.¹²⁵ Theorists opine that because single-issue lobbies are cause-driven and are dependent on a cause for their existence, achievement of one objective leads cause organizers to quickly identify another cause for their survival. This was evidenced by CCPOA’s immediate support of strict sentencing for gun laws, shortly after successful passage of the three-strikes laws. Similar to private prison corporations single issue advocacy groups, like the public-sector correctional unions, derive a pecuniary benefit from mass incarceration, except their dividends are in the form of more correctional jobs and thus increased union membership, as compared to distributed profits.¹²⁶

C. Nefarious Business Development Strategies

In addition to political advocacy, there are concerns that private prison operators employ nefarious business development strategies to fill vacancies in their facilities.¹²⁷ An example of such troubling behavior gained national attention in February 2011, when a federal jury convicted Pennsylvania Judge Mark Ciavarella of racketeering, money laundering, and conspiracy in what prosecutors called a “kids for cash” scheme.¹²⁸ Ciavarella was convicted of accepting nearly one million dollars from developers of a private juvenile facility in Pennsylvania in exchange for giving excessive sentences juveniles to excessive sentences in the private

¹²² Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197, 1203 (2008).

¹²³ *See id.*

¹²⁴ Franklin Zimring, *The New Politics of Criminal Justice: Of Three Strikes, Truth-in-Sentencing, and Megan’s Laws*, 4 PERSP. ON CRIME & JUST. 8 (1999).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *See* AM. C.L. UNION, *supra* note 57, at 8.

¹²⁸ *See id.*

facilities.¹²⁹ In a five year time period, Ciavarella's rulings accounted for 22% of juvenile detentions in Pennsylvania, despite Luzerne County accounting for only 3% of Pennsylvania's population.¹³⁰ In one incident, Judge Ciavarella purportedly based a juvenile's sentence based on "the number of birds perched outside a courtroom window."¹³¹ The unscrupulous business dealings casted such uncertainty about the merit of Ciavarella's rulings that the Supreme Court of Pennsylvania dismissed 4,000 juvenile cases in which he presided, stating "[T]his Court cannot have any confidence that Ciavarella decided any Luzerne County juvenile case fairly and impartially while he labored under the specter of his self-interested dealings with the facilities."¹³² Judge Ciavarella's actions were particularly egregious and likely not widespread, nevertheless there is concern that the occupancy-driven business model of private prisons engenders perverse incentive to engage in nefarious activities in order to fill vacancies.

PART IV: THREATS TO PRIVATE PRISON BUSINESS VIABILITY

Despite the legislative victories which served as the foundation for mass incarceration and established the basis for the proliferation of private prisons, as well as the restored confidence following the election of Donald Trump, these corporations are experiencing an existential threat from an unexpected source, public opinion.¹³³ Ironically, the catalyst for the widespread scrutiny and public outcry against private prisons was the Trump administration's use of private facilities for its controversial family separation immigration policy.¹³⁴ Despite the Trump administration's embrace of prison privatization, constituents are not only using their democratic influence to pressure local elected officials to take action against private prisons, they have leveraged their influence as consumers to pressure banks and other financial institutions to reevaluate their business dealings with the industry.¹³⁵

¹²⁹ See *id.* at 33.

¹³⁰ See *id.*

¹³¹ Editorial, *Shouldn't Delay Justice*, PHILA. INQUIRER, Aug. 11, 2010.

¹³² *In re Expungement of Juvenile Records and Vacatur of Luzerne County Juvenile Court Consent Decrees or Adjudications from 2003-2008*, No. 81 MM 2008, at *9 [Pa. Oct. 29, 2009].

¹³³ Catherine Kim, *Private Prisons Face an Uncertain Future as States Turn their Backs on the Industry*, VOX (Dec. 1, 2019, 3:53 PM), <https://www.vox.com/policy-and-politics/2019/12/1/20989336/private-prisons-states-bans-california-nevada-colorado>.

¹³⁴ See *id.*

¹³⁵ See *id.*

A. State Bans of Private Prisons

Public frustration with the privatization of prisons, coupled with the growing percentage of state expenditures on incarceration have caused state legislatures to reevaluate the utility of private prisons.¹³⁶ There are a total of 22 states, governed by both Republican and Democratic administrations, that do not contract with for-profit companies to operate correctional facilities.¹³⁷ Additionally, there have been a number of state legislatures that have passed legislation banning the use of private prisons in their states.¹³⁸ Nevada passed such a law, prohibiting the use of private prisons to operate state and local correctional facilities after June 30, 2022, and placed more stringent compliance standards for private prison operators.¹³⁹ A month after the passage of the Nevada bill, Illinois, which banned for-profit prisons in 1990, expanded that law to include privately operated immigration detention centers.¹⁴⁰

Subsequently, California passed a bill in October 2019 that would seemingly end the use of for-profit prisons and detention centers in the state.¹⁴¹ The legislation establishes that over four years, the state will close three private prisons that house 1,400 inmates and will stop operating four private detention facilities holding 4,000 individuals in 2020.¹⁴² There are, however, concerns that the porous bill language which provides an exemption for facilities that provide “educational, vocational, medical or other ancillary services,” will allow for the continued use of private prisons.¹⁴³ There is also a provision in the law that would not prohibit the department of corrections from renewing or extending a contract to house inmates to comply with a court-ordered population cap.¹⁴⁴ Despite the perceived loopholes, private prison corporations view this legislation as an assault on their viability and have filed a lawsuit in federal court to challenge the ban.¹⁴⁵

¹³⁶ Lauren-Brooke Eisen, *Are Private Prisons in Trouble?*, Expert Brief, BRENNAN CENTER FOR JUSTICE, Nov. 18, 2019, <https://www.brennancenter.org/our-work/research-reports/are-private-prisons-trouble>.

¹³⁷ See Kim, *supra* note 133.

¹³⁸ See *id.*

¹³⁹ Assemb. B. 183, 2019 Leg., 80th Sess. (Nev. 2019).

¹⁴⁰ See Kim, *supra* note 133.

¹⁴¹ See *id.*

¹⁴² See *id.*

¹⁴³ Assemb. B. 32 §9502(c), 2019 Leg., (Ca. 2019).

¹⁴⁴ *Id.*

¹⁴⁵ Andrea Castillo, *Firm Sues California Over Law Banning Private Prisons and Immigration Detention Centers*, LOS ANGELES TIMES, Dec. 31, 2019, <https://www.latimes.com/california/story/2019-12-31/prison-company-sues-california-over-law-banning-private-immigration-detention-centers>.

The lawsuit, filed by GEO Group ten days after federal officials signed contracts with GEO and two other companies to operate California's four private immigrant detention center for an estimated \$6.5 billion dollars, asserts that the California legislation is an attempt to subvert the authority of the federal government and is thus unconstitutional.¹⁴⁶ GEO alleges that the legislation violates the Supremacy Clause by imposing a state policy which interferes with enactment of Federal immigration law.¹⁴⁷ These new contracts would double the number of immigrant detention beds in California to 7,200.¹⁴⁸ Furthermore, GEO manages two federal prisons in the state with a combined capacity of 1,237 beds for federal inmates.¹⁴⁹ GEO asserts that if the legislation results in the closing of its facilities in California it would lose an average of \$250 million dollars in revenue per year for fifteen years, as well as an additional \$300 million invested in acquiring and retrofitting the buildings.¹⁵⁰

A month after GEO filed suit, the Trump administration filed a similar lawsuit in federal court seeking injunctive relief of California's Assembly Bill 32.¹⁵¹ The complaint also asserts that legislation violates the Supremacy Clause by dictating how federal inmates and immigration detainees can be housed.¹⁵² In the complaint, the Trump administration asserts that there are about 3,200 federal inmates in California in private detention facilities between the U.S. Marshals Service and the Bureau of Prisons, in addition to nearly 5,000 Immigration and Customs Enforcement detainees in private facilities.¹⁵³ The complaint alleges that compliance with AB 32, which would require transporting inmates and detainees out of state, would adversely impact the U.S. Marshals operation in California and critically undermine ICE's mission.¹⁵⁴ Nevertheless, the complaint acknowledges that California is free to regulate its state prisons and jails as it sees fit, and thus only challenges the applicability of the legislation to federal action.¹⁵⁵

Despite the expansive loopholes included in the bill language, as well as the pending legislation challenging its constitutionality, the California

¹⁴⁶ *See id.*

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*

¹⁴⁹ *See id.*

¹⁵⁰ *See id.*

¹⁵¹ Liam Dillon, *Trump Administration Sues California over Private Prison Ban*, LOS ANGELES TIMES (Jan. 25, 2020 at 11:05am), <https://www.latimes.com/california/story/2020-01-25/trump-administration-sues-california-over-private-prison-ban>.

¹⁵² *See id.*

¹⁵³ *See id.*

¹⁵⁴ *See id.*

¹⁵⁵ *See id.*

bill, because of the state's substantial prison population, is illustrative of the threat posed to the economic viability of private prison corporations by local elected officials responding to pressure from their constituents.¹⁵⁶ This vulnerability was articulated by an investment analyst who opined that, "Government (given they are the largest client) is uniquely positioned to effectively regulate the sector, --or, as many would argue, to eliminate private prisons entirely, given their problematic incentive to encourage the criminalization of vulnerable communities."¹⁵⁷ Although state legislative action prohibiting the privatization of incarceration presents an existential threat through demand-side pressures, public animus has threatened private prison corporations' access to capital which is critical to their operational management.

B. Divestment by Pension Plans

Citing records of human rights violations, as well as the volatility of private prison corporations subject to political influence, several pensions have chosen to divest from private prison corporations.¹⁵⁸ Trustees for New York City's five pensions voted in May 2017 to become the first retirement fund in the U.S. to divest assets, approximately \$48 million in stock and bonds from GEO Group Inc., CoreCivic Inc. and G4s Plc.¹⁵⁹ The decision to divest was also motivated by lawsuits and reports of abuse, wrongful deaths, and increased violence resulting from insufficient staffing in private facilities, which the pension managers cited as a long-term financial threat to investors.¹⁶⁰ In an editorial published in the New York Times and written by New York City Comptroller, Scott Stringer, he encourages other pension funds to divest from private prison corporations stating, "Pension funds have a fiduciary duty to make sound

¹⁵⁶ Steve Gorman, *California Bans Private Prisons and Immigration Detention Centers*, REUTERS (Oct. 11, 2019, 5:40 PM), <https://www.reuters.com/article/us-california-prisons/california-bans-private-prisons-and-immigration-detention-centers-idUSKBN1WQ2Q9>.

¹⁵⁷ Morgan Simon, *New York Could Become First State to Be Completely Done with Private Prisons*, FORBES (June 18, 2019, 2:50 PM), <https://www.forbes.com/sites/morgansimon/2019/06/18/new-york-to-become-first-state-to-be-completely-done-with-private-prisons/#972c7b1725b0>.

¹⁵⁸ Scott M. Singer and Javier H. Valdes, *More Cities and States Should Divest From Private Prisons*, NEW YORK TIMES, (July 20, 2018), <https://www.nytimes.com/2018/07/30/opinion/private-prisons-immigration-divest.html>.

¹⁵⁹ Henry Goldman, *NYC Pension Funds Withdraw Investments From Private Prisons*, BLOOMBERG NEWS, (Jun 08, 2017, at 3:05 PM), <https://www.bloomberg.com/news/articles/2017-06-08/nyc-pension-funds-to-divest-private-prison-company-stocks-bonds>.

¹⁶⁰ *See id.*

investments . . . That means constantly evaluating the long-term viability and risk of investments across the pension funds' portfolios . . . Private prisons fail that basic assessment. That's because the industry's bottom line depends on locking people up."¹⁶¹ The cited motivation to divest, not because of the moral abhorrence of profiting from mass incarceration and immigrant detention, rather a fiduciary obligation to its investors, signals that investors perceive a business model that is predicated on fractious government contracts are too uncertain to maintain investments.

Since the decision to divest by the New York City Employee's Retirement System, the New York State Common Retirement System and the Philadelphia Board of Pensions and Retirements, Chicago Teacher's Pension Fund and the California State Teacher's Retirement System have divested their direct stock holdings of private prison corporations.¹⁶² In August 2018, the New Jersey Pension Fund divested \$1.3 million in stock it held in GEO stating, "Our division of investment reviewed the investment merits, including consideration of environmental, social and governance issues, and consistent with its fiduciary responsibility elected to sell the security."¹⁶³ Pension fund managers, recognizing a fiduciary responsibility to their investors, have concluded that the political volatility of prison privatization coupled with litigation alleging inhumane treatment of inmates, have rendered investments in private prison operators imprudent.¹⁶⁴ Divestment by pension funds pose a grave threat to the long-term financial viability of publicly-traded prison corporations, who are dependent on stock offerings as a method of accessing capital to maintain its business operations.

C. Commercial Bank Financing

While the decision by pension funds to divest their stock holdings in private prison corporations will likely lead to decreases in stock valuation, perhaps the gravest threat to private prisons is the recent decision by commercial lenders to terminate their relationship with private prison corporations.¹⁶⁵ The majority of publicly recognized commercial lenders have committed to not renewing an estimated \$2.4 billion in credit lines and term loans to GEO Group and CoreCivic once their current facilities expire.¹⁶⁶ In its decision to end its business relationships with private

¹⁶¹ Singer and Valdes, *supra* note 158.

¹⁶² Am. Fed'n of Tchr., *Private Prisons and Investment Risks: Part Two*, Ranking Asset Managers Report 2019, <https://www.aft.org/private-prisons-and-investment-risks>.

¹⁶³ *Id.*

¹⁶⁴ Singer and Valdes, *supra* note 158.

¹⁶⁵ See Eisen, *supra* note 136.

¹⁶⁶ Morgan Simon, *GEO Group Running Out of Banks as 100% of Known Banking Partners Say 'No' to the Private Prison Sector*, FORBES, (Sept. 30, 2019, 7:33 PM),

prisons, Bank of America cited both legal and policy concerns, as well as employee and stakeholder apprehensions regarding its financing of private prison operators.¹⁶⁷ Similarly, PNC Bank announced that it would cease business relationships with private prison operators in response to a petition circulated from the Families Belong Together coalition of over 250 groups, representing over 11 million individuals.¹⁶⁸ The decision to no longer provide financing is acutely detrimental to private prison corporations, who rely on the capital to sustain their operational management.¹⁶⁹

GEO Group and CoreCivic operate as Real Estate Investment Trusts (REITs), meaning that most of their assets and income are derived from real estate investments.¹⁷⁰ In exchange for favorable tax benefits, REITs are required to distribute at least 90 percent of taxable income as dividends to shareholders.¹⁷¹ The one year returns to shareholders for both GEO Group and CoreCivic are down nearly 30%, resulting in their designation as underperforming relative to other REITs.¹⁷² This mandated payout of dividends leaves the companies with little cash on hand to cover day-to-day operations, such as salaries and other administrative costs and therefore are reliant on revolving credit from commercial banks to run their operations.¹⁷³ Although the REIT business model yields favorable tax benefits and results in higher shareholder dividends, without access to capital from financial institutions the long-term business viability of private prisons is uncertain save for adoption of an alternative business model which maintains a higher percentage of capital gains.

GEO Group articulated the threat posed to its long-term viability if additional financial institutions cease financing in its most recent SEC filing:

[S]everal financial institutions, including some of our lenders, have recently announced that they will not be

<https://www.forbes.com/sites/morgansimon/2019/09/30/geo-group-runs-out-of-banks-as-100-of-banking-partners-say-no-to-the-private-prison-sector/>.

¹⁶⁷ Catherine Kim, *Bank of America Cuts Ties with the Private Prison Industry*, VOX (Jun. 27, 2019, 1:55 PM), <https://www.vox.com/policy-and-politics/2019/6/27/18761140/bank-of-america-private-prison-industry-detention-center-homestead>.

¹⁶⁸ Morgan Simon, *PNC Bank Pulls Out of the Private Prison Industry*, FORBES (Aug. 29, 2019, at 2:09 PM), <https://www.forbes.com/sites/morgansimon/2019/08/09/pnc-bank-pulls-out-of-the-private-prison-industry/>.

¹⁶⁹ *Id.*

¹⁷⁰ See Eisen, *supra* note 136 at 4.

¹⁷¹ See *id.*

¹⁷² See Simon, *supra* note 166.

¹⁷³ See *id.*

renewing existing agreements or entering into new agreements with companies that operate such facilities and centers pursuant to public-private partnerships. Some of these same institutions have ceased their equity analyst coverage of our company. *While we believe we will continue to have access to the capital and debt markets on a cost-effective basis to support the growth and expansion of our high-quality services, if other financial institutions or third parties that currently provide us with financing or that we do business with decide in the future to cease providing us with financing or doing business with us, such determinations could have a material adverse effect on our business, financial condition and results of operations.* Increased resistance to the use of public-private partnerships for our facilities and centers in any of the markets in which we operate, as a result of these or other factors, could have a material adverse effect on our business, financial condition, results of operations and the market price of our securities.¹⁷⁴

Despite its articulated confidence that it will maintain access to capital and debt markets, the prospect of securing additional financing remains uncertain. In total, the commitments by commercial banks to no longer provide financing to private prison operators represents 87.4% of all financing available to both CoreCivic and GEO Group.¹⁷⁵ The uncertainty regarding the ability of private prison corporations to secure financing, vital to its business operations, has resulted in Fitch Ratings downgrading CoreCivic's business outlook from stable to negative.¹⁷⁶

In June 2019, the New York State Senate passed Bill S5433, which prohibits banks chartered in the state from financing private prisons.¹⁷⁷ In a speech introducing the legislation, bill sponsor Senator Benjamin said, "The goal is to starve private prisons of capital. My constituents do not put their hard-earned savings in a bank . . . expecting that those funds will be used to finance mass incarceration."¹⁷⁸ Senator Benjamin recognizes that a concerted effort to limit access to capital, coupled with community

¹⁷⁴ GEO Group Inc., 2019 2nd Quarter Report on Form 10-K 58 (June 2019) (emphasis added).

¹⁷⁵ See Simon *supra* note 166.

¹⁷⁶ See *id.*

¹⁷⁷ See Simon, *supra* note 166.

¹⁷⁸ See Simon *supra* note 166.

pressure to end privatization, are important strategies to combat the use of private prisons.¹⁷⁹

Some speculate that if traditional lenders are no longer available, non-bank lenders, such as private equity investors or hedge fund investors, will provide the financing needed to operate.¹⁸⁰ While this infusion of capital will be essential to sustain its business operations under the REIT business model, these funding sources are likely to charge higher interest rates because of the elevated risk of the loans and diminish profitability.¹⁸¹ Because private prison corporations rely on financing from shareholders and commercial lenders to sustain their business operations, the decision by pension funds and private banks to terminate business relationships pose the most immediate, and gravest, threat to the vitality of private prisons.¹⁸²

PART V: CONCLUSION

Like hotels, private prisons are predicated on a business model that requires maximum occupancy to assure profitability. However, unlike hotels, whose occupancy is subject to a myriad of externalities, private prison occupancy is a function of the domestic prison population and government sentiment towards public-private partnerships for incarceration.

Because their business viability is predicated on high rates of incarceration and favorable relationships with state and federal government representatives, one would presume that private prison corporations would have a perverse incentivize to advocate for the enactment of laws that increase the number of inmates and the duration of their sentences. While private prison operators do maintain robust political advocacy and lobbying efforts; their success, beginning in the 1980s, appears to be less attributable to their traditional lobbying efforts and more likely the result of another form of advocacy, the collaborative drafting of policy.

Many of the nation's most consequential criminal sentencing laws and frameworks responsible for the explosive in the prison population between the 1980s and 1990s, were drafted collaboratively as model legislation in the American Legislative Exchange Council (ALEC). It was membership in ALEC that afforded the Correctional Corporations of America (CCA) and GEO Group, Inc. the opportunity to work collaboratively with state

¹⁷⁹ See Simon *supra* note 166.

¹⁸⁰ See Eisen, *supra* note 136.

¹⁸¹ See *id.*

¹⁸² *Id.*

legislatures nationwide to develop model legislation that would serve as the basis for truth-in-sentencing and three strikes laws and resulted in the explosive growth of prison populations. Both CoreCivic and GEO Group are correct when they assert that they do not actively lobby for legislation that increases the amount and duration of incarceration, because rather than lobby for the legislation, membership in ALEC allows for a far more effective method, they draft it.

While private prison operators have enjoyed unprecedented growth and proven to be incredibly profitable, recent events, beginning with the Obama administration's decision to end the use of private prisons for federal inmates, have demonstrated their vulnerability to political and public sentiment. Widespread consternation with the privatization of prisons has resulted in increased democratic and consumer pressure to sever relationships with private prison corporations. Recent state legislative action prohibiting the contracts to private entities for state correctional facilities reveals the demand-side susceptibility of private prisons, nevertheless actions by the Trump administration reveal that demand is malleable and can be supplemented, as evidenced by the extension of service offerings to include immigration detention. Far more menacing to the long-term financial viability of private prisons are the decisions by pension funds and commercial lenders to terminate business relationships with private prisons corporations. These decisions by financial institutions demonstrate that they are more responsive to public dismay than potential profitability. Therefore, if private prison enterprises want to remain financially viable, they would be better served concentrating their efforts on improving public sentiment and redefining the narrative around privatization of prisons, rather than relying solely on favorable government action to drive demand for their product.