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Judicial Intervention into Prisons: Comparing Private and Public Prisons from 1990 to 2005

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Abstract: A mid-20th century prisoners' rights revolution gave American prisoners unprecedented access to courts for exercising newly elaborated constitutional rights. The result was a tide of litigation brought by inmates and subsequent remedial court orders requiring corrections officials to improve conditions of confinement. It was in this context of aggressive judicial intervention into prison operations that the private prison industry emerged. Some early proponents of prison privatization claimed that the private sector could provide superior prison conditions and thereby reduce judicial intervention. This paper assesses this claim empirically. It uses data on state and federal adult correctional facilities from the Bureau of Justice Statistics to compare the prevalence of reported court orders among public and private correctional facilities in the United States from 1990 through 2005. Results from a series of logistic regression analyses reveal that privatization has had little effect on the likelihood of judicial intervention into correctional facilities.

Keywords: prison; privatization; court orders; judicial intervention; structural reform litigation

A revolution in prisoners' rights emerged in the 1960s that shifted the balance of power between inmates and corrections officials. Before the revolution, inmates had few enforceable legal rights and prison administrators had the autonomy to operate their facilities as they saw fit. After the revolution, inmates gained access to courts and prison officials' discretion was limited by remedial orders handed down by state and federal judges. The implications of the revolution were widespread and long-lasting; by 1993, forty states faced at least one court order or consent decree related to inmate populations or conditions of confinement (Koren 1993). This wave of judicial intervention, which empowered inmates and eroded prison administrators' autonomy, set the stage for the emergence of the modern private prison industry in the United States. Born in the early 1980s, the delegation of prison operations to private (often for-profit) firms was viewed by some as a means of reducing inmate litigation and judicial oversight (Logan 1990). Proponents argued that private firms, through market-inspired innovative practices, could provide superior prison conditions and thereby minimize the number of lawsuits brought by inmates (Johnston 1985a; Selman and Leighton 2010)

How did privatization affect the level of judicial intervention into prison operations? Have the private prisons been more (or less) subject to judicial intervention? This paper first reviews the history of judicial intervention into prisons and then describes prison privatization. It then uses data on state and federal adult correctional facilities from the Bureau of Justice Statistics to compare the prevalence of court orders and consent decrees among public and private correctional facilities in the United States from 1990 through 2005. Results from logistic regression analysis reveal that privatization has had little effect on the likelihood of judicial intervention into correctional facilities.

Structural Reform Litigation in American Prisons

The 1960s ushered in a sea change in relations between courts and prisons. Prior to this time, state and federal courts adhered to a "hands-off" doctrine when it came to prisons (Feeley and Rubin 1998). Prison administrators were given discretion to manage and discipline inmates in their custody. At the time, legal scholars and judges were uncertain about whether the Constitution allowed federal courts to interfere with state prison operations; whether the Bill of Rights should be applied to states (and their prisons); and whether prisoners should have access to the courts. Courts began resolving these issues in the 1960s. Federal courts increasingly came to view state prisons as within their jurisdiction, and they increasingly allowed prisoners to bring suits challenging their conditions of confinement (Angelos and Jacobs 1985; Ross 2005). More and more states modified their imprisonment practices in response to court orders (in which judges ordered prison reform) or consent decrees (in which a state correctional authority agreed to modify its practices as part of a legal settlement) (e.g., Schoenfeld 2010; DiIulio Jr. 1990). Reforms touched on various aspects of prison life, including staffing, inmate space, medical care, mental health care, food, sanitation, inmate classification, and various forms of discrimination (Schlanger 2006). After a nearly 15 year run of successful cases, the reform movement began facing judicial opposition. Beginning with *Bell v. Wolfish*, in 1979, the federal courts issued a number of rulings favorable to corrections agencies.¹ The general consequence was to raise the standard for what constitutes "cruel and unusual punishment" inside prisons (Feeley and Rubin 1998; Schlanger 2006, 609).

¹ See for example, *Bell v. Wolfish* 1979; *Rhodes v. Chapman* 1981; *Whitley v. Albers* 1986; *Wilson v. Seiter* 1991.

In the 1990s, Congress intervened in prison conditions litigation (Feeley and Rubin 1998). Conservative members of Congress had come to view prisoner lawsuits as onerous and oftentimes frivolous, and they placed part of the blame on activist judges who imposed undue burdens on corrections administrators (Schlanger 2006). Taking aim at these concerns, Congress passed the Prison Litigation Reform Act (PLRA) in 1996, a reform that had both the intention and effect of reducing inmate litigation (Scalia 2002; Piehl and Schlanger 2004). Among its many elements, PLRA required inmates to exhaust all administrative grievance procedures before filing a suit; imposed mandatory filing fees, even for indigent plaintiffs; sent all cases through a pre-screening process to weed out frivolous complaints; limited the amount of damages payments to plaintiffs; placed limits on attorney fees; and imposed time limits on extant and future court orders (Schlanger 2006; Schlanger 2003). Subsequent to the Act, the number of inmate civil rights suits plummeted and the federal courts became increasingly conservative and less interested in prison conditions (Collins 2004). While the PLRA restricted access only to federal courts, most states implemented their own versions of the PLRA that placed restrictions on prisoner access to state courts, further limiting inmates' opportunities to challenge the conditions in which they were held (Schlanger 2003).

The Emergence of Private Prisons

It was near the height of judicial intervention into prisons that the modern private prison industry arose (Culp 2005). Private prisons operate on a contractual basis between a government and a private firm, often operating for profit. The government seeks a private contractor that will assume all core responsibilities of operating the prison. The government provides direct payment to the firm, which attempts to minimize costs while also adhering to all contractual and legal

obligations (Harding 1997; Logan 1990; Selman and Leighton 2010). The federal Bureau of Prisons signed its first incarceration contract in 1984, allowing Eclectic Communications, Inc., a for-profit company, to hold 60 young adult offenders at a facility in La Honda, California. In 1986, Kentucky became the first state to contract with a private firm for operation of a secure adult detention facility. It was followed soon after by New Mexico, Texas, and California (General Accounting Office 1991). It was not long before correctional privatization spread across much of the country. Reports from the Bureau of Justice Statistics show that the total number of private correctional facilities used by state and federal authorities grew from 67 in 1990 to 415 in 2005 (Stephan 1997; Stephan and Karberg 2003; Stephan 2008).

Liability was a focal concern in the early days of the industry. Few, if any, parties believed that contracting with a private prison firm would absolve the state of its liability in instances of constitutional or civil rights violations (Hackett et al. 1987; Shichor and Sechrest 1995; Gold 1996). Nonetheless, there is evidence that governments and entrepreneurs were aware of the costs of liability and litigation—and the potential savings involved in off-loading them—in the early years of prison privatization. In one early contract, the state of New Mexico clearly recognized the issue of liability; it required Corrections Corporation of American (CCA) to maintain general liability and civil rights liability insurance, to defend the state in any lawsuits, and to indemnify the state against any claims stemming from the private operation of its prison for women (Logan 1990). Similarly, the Texas legislature wrote into its enabling legislation a requirement that private contractors carry adequate levels of insurance to protect against claims (Fair 1988). Concerns about liability exposure were also evident at the local level. The director of an early privately run jail in Minnesota said, "[W]e put ourselves at ease and, we think, the county at ease with a very, very substantial insurance package (Shipp 1985)."

The federal government gave some assurance to contracting jurisdictions; Ronald Reagan's 1987 presidential commission on privatization suggested that liability could be minimized by utilizing model prison contract provisions (Selman and Leighton 2010).

Private firms were also aware of the litigation and liability costs facing states. For example, when the private prison company Prisor, Inc. went public in 1987, it was clear at the initial public offering that the company sought to leverage conflict between the courts and prison administrators. The first substantive page of the company's prospectus provided investors with a map of states whose prisons were facing court orders (Selman and Leighton 2010). In 1985, CCA made a bid to take over the entire Tennessee state prisons system in the midst of ongoing litigation over prison crowding. Although legislators at the time balked at this wholesale takeover, they did pass legislation that would allow the state to experiment with private contractors (Folz and Scheb II 1989). Some private corrections firms, including CCA, claimed that they would reduce inmate litigation and civil rights violations by adhering to standards set by the American Correctional Association, a standard to which public facilities did not necessarily adhere. CCA made this claim to potential investors (and the Securities and Exchange Commission) in its prospectus for its initial public stock offering in 1986 (Selman and Leighton 2010). Similarly, the Vice President of another corrections company, Buckingham Security, acknowledged its liability but said that it could reduce it by holding itself to higher security standards than the government (Johnston 1985b). Thus, private firms pointed to the menace of litigation and proposed shifting the legal risks from the state to the private sector.

Private Prison Inmates' Access to Courts

Prisoners held in private facilities have access to courts, although their legal options differ somewhat from inmates held in state or federal facilities. Enacted in 1871, 42 USC § 1983 ("Section 1983") allows individuals to sue state officials in federal court for constitutional violations (Volkh 2013a). Until 1997, it was unclear whether inmates in private facilities could sue individuals employed as correctional officers for constitutional violations. Correctional officers in public facilities had traditionally been granted qualified immunity, which shielded them from lawsuits over conduct that does not violate a "clearly established" right (Harvard Law Review 1997; Dacosse 1999). In 1997, the Supreme Court ruled in *Richardson v. McKnight* (1997) that private prison guards do not have qualified immunity, which opened up individual employees to potential civil rights suits (Dacosse 1999). As a result, "[p]rivate prisons work just like public ones as far as §1983 liability is concerned, except that private prison employees lack qualified immunity—so private prison inmates even (at least in this respect) get more favorable treatment by the federal courts" (Volkh 2013b, 295).

Without recourse to Section 1983 claims, federal inmates have traditionally had more limited options in court. Federal officials became liable for constitutional violations in 1971, when the Supreme Court ruled in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* (1971) that plaintiffs could sue federal officials for money damages. In *Correctional Services Corp. v. Malesko* (2001), the Supreme Court ruled that *Bivens* actions may not be brought against a private firm operating a federal prison. More recently, federally sentenced inmates held in private facilities have had their access to federal courts limited by *Minneci v. Pollard* (2012), in which the Supreme Court denied *Bivens* actions to federal inmates when alternate remedies are available through state tort law (Volkh 2013b).

Despite having a different menu of legal options (Volkh 2013b, 297), privately held inmates have successfully filed—and won—prison reform cases. For example, one analysis found that inmates in private facilities filed 32 Section 1983 suits in federal courts between 1992 and 2002 (Blakely and Bumphus 2005). A portion of these resulted in judicial intervention, as at least nine private prisons were under a court order for conditions of confinement by yearend 1997 (Austin and Coventry 2001).

Methods and Data

We empirically assess the extent to which private corrections facilities have been subject to judicial intervention. To do so, we rely on the Bureau of Justice Statistics' *Census of State and Federal Adult Correctional Facilities* data series (Bureau of Justice Statistics 1993; Bureau of Justice Statistics 1998; Bureau of Justice Statistics 2004; Bureau of Justice Statistics 2009). Each dataset in the series is a census of all American adult correctional facilities in the country that hold primarily state or federal prisoners. As such, it covers a wide variety of public and private facilities, ranging from very high security confinement facilities to low security rehabilitation facilities that allow inmates to enter the community. For each year of data collection, the Census asks a series of questions about court intervention, two of which are utilized here: (1) "Was this facility under a State or Federal court order or consent decree to *limit the number of inmates it can house?*", and (2) "Was this facility under a State or Federal court order or consent decree for *specific conditions of confinement?*" Specific conditions of confinement listed on the questionnaire varied somewhat from year to year, but the following were consistently listed in all years: crowding, fire hazards, medical facilities or services, disciplinary procedures, grievance procedures, staffing, administrative or segregation procedures,

library services, recreation, inmate classification, food, counseling programs, education, and "other." In the analyses below, the reported presence of a court order or consent decree related to population limits or conditions of confinement indicates judicial intervention in a facility.²

Because our outcome variables are binary, we model judicial intervention using logistic regression. To account for confounding factors that may otherwise explain judicial intervention, we include several control variables in the models. Previous analyses have found that court orders are more likely in larger facilities and medium security facilities (relative to minimum security) (Makarios and Maahs 2012; Schlanger 2006). The models below therefore include a series of dummy variables for facility security level (minimum, medium, or maximum/supermax) and a continuous variable for the natural log of the facility's average daily population. The models also control for facility age to account for variation in facility conditions. To account for non-independence of facilities within states, standard errors are clustered by state (UCLA Statistical Consulting Group 2015).

The analyses below consider four years: 1990, 1995, 2000, and 2005 (the most recent year for which data are available). For each year, two models are estimated (one for population-based court orders and one for conditions-based court orders), resulting in a total of eight

² An anonymous reviewer expressed concern about the validity of the BJS data on court orders, suggesting the possibility of misreporting by (especially small) private facilities after PLRA in 1996. These concerns motivated several of the robustness checks below, almost all of which confirm the main findings. As an additional external check on data validity, the first author contacted the Bureau of Justice Statistics. Tracy Snell, a Bureau statistician with knowledge of the BJS *Census* data, explained that the Bureau has no reason to suspect errors in the court orders data (personal communication with Tracy Snell, May 14, 2015).

models. The analytic sample includes all facilities in the Census that were operated by federal, state, or private authorities in a given year, with three exceptions. We omit "other"-operated facilities (n=61 over all four time periods), which are typically joint operations. In 2005, we further omit facilities from California (n=103)³ and Illinois (n=47)⁴ due to concerns about data reliability. And we omit "other" security facilities in 1995 (n=18), the only year reporting this category. As a form of maximum likelihood estimation, logistic regression models cannot estimate results for categories in which the dependent variable does not vary (Long and Freese 2006). In the Census data, no federal facilities reported a court order to limit population in any of the years considered here. No federal facilities reported a court order for conditions in 1990 and 2000. The situation was reversed in 1995, when *all* federal facilities reported a conditions order related to inmate phone service (Stephan 1997). Only in 2005 was there variation in court orders for conditions among federal facilities. As a result, the likelihood of a federal facility reporting a court order cannot be estimated in seven of eight models and federal facilities are omitted from those models.

Main Results

Figure 1 presents the proportion of state and private facilities reporting a court order to limit population and for conditions of confinement from 1990 through 2005. It reveals a dramatic decline in population-based orders. Whereas 22 percent of facilities reported an order to limit

³ California reported no conditions-based court orders in 2005, despite the existence of state-wide orders related to mental and physical health. We thank an anonymous reviewer for this insight. Also see Schlanger (2014: fn. 17).

⁴ Illinois did not report its own responses for the Census in 2005.

their population in 1990, only three percent of facilities reported such an order in 2005. Orders related to conditions of confinement increased through 1995 (peaking at 24 percent), but then tapered off (to 14 percent in 2005), a result of PLRA's restrictions on inmates' access to courts (Schlanger 2003).

[Figure 1 here]

Table 1 presents results from the logistic regression analyses of court orders for conditions of confinement and population limits. For conditions of confinement, state facilities were more likely than private facilities to report an order in 1995 and 2000. The two types of facilities, though, were indistinguishable in years 1990 and 2005.⁵ In 2005, federal facilities were significantly less likely than private facilities to report such an order. Among control variables, facility security level, facility age, and average daily population (ADP) were related to conditions-based orders, albeit inconsistently.

The pattern of court orders for population limits is different. For 1990, 1995, and 2000, there is no significant difference between state and private facilities in the likelihood of reporting such an order. Only in 2005 is there a significant difference, with state-run facilities being significantly *less* likely to report being under a population limit. The higher rate of population limits among private facilities in 2005 is perhaps not surprising. Private prison contracts often

⁵ Further analysis of the data show that the state and private sectors had similar profiles of conditions orders in the 1990s, but that these diverged somewhat in the 2000s. In the 1990s, crowding, medical care, and staffing were the three most common foci of conditions orders among both state and private facilities. In the 2000s, religion was the most common focus of conditions orders for both state and private facilities. This was followed by crowding and mental health among state facilities and inmate classification and counseling among private facilities.

stipulate a guaranteed minimum population, which may have the effect of increasing inmate counts and straining facility capacities (In the Public Interest 2013). Among control variables, facility security level and facility age (but not facility ADP) were related to population limits, although their predictive power varied across years examined.

[Table 1 here]

Overall, private and state facilities were equally likely to report a court order in five of eight comparisons; state facilities were more likely to report a court order in two of eight comparisons; and private facilities were more likely to report a court order in one of eight comparisons. And in the one model in which a direct comparison is possible, federal facilities were less likely than private facilities to report a court order.⁶

The results of the above models can be used to generate predicted probabilities of each type of facility having a court order in each year, which gives a sense of the magnitude of any statistical differences. Figures 2 and 3 depict the likelihood of reporting a court order in medium-security state and private facilities that are otherwise average. (The circle marker represents the estimated likelihood of reporting an order. The vertical bars represent the range of the estimates according to a 95% confidence interval.) Figure 2 presents predicted probabilities of reporting a conditions-based order. In 1990, state and private facilities both had a roughly 23% chance of

⁶ It is unclear whether any significant differences are due to new or pre-existing court orders. The 2000 and 2005 iterations of the BJS Census asked about the start date of court orders, which would allow us to distinguish between new orders from old orders. Unfortunately, these variables suffer from widespread missing data, and we therefore do not distinguish new from old orders.

reporting an order. In 1995 and 2000, private facilities were less likely than state facilities to report a conditions order: 26.2% for state and 12.7% for private in 1995; 22.3% for state and 9.9% for private in 2000. In 2005, state and private facilities were again equally likely to report a conditions order (approximately 9% for each). The model for 2005 also yielded predictions about federal facilities (see discussion above), which were significantly less likely than state or private facilities to report being under a court order for conditions of confinement (0.3%).

[Figure 2 here]

Figure 3 similarly shows the likelihood of reporting a court order to limit population in medium-security state and private facilities that are otherwise average. In 1990, 1995, and 2000, the difference between state and private facilities is at most 8.5 percentage points (1990), but the lack of precision in the estimates (seen in the overlapping confidence intervals for each year) indicate that the differences are not statistically significant. Only the 2005 results revealed a significant difference between state and private facilities, with state facilities being less likely to report a court order to limit population. However, court orders were very rare by this time, and the difference is rather small; the probability of having such an order was 1.5% for state facilities and 4.4% for private facilities.

[Figure 3 here]

Robustness Checks

This section assesses the robustness of the above results by considering three factors that may account for the patterns found above: the clustered nature of facilities within states; the number of federal inmates in facilities; and the total population of the facilities. For each of these

factors, we conduct modified regression analyses using the data and analytic techniques described above, unless noted otherwise. The results are presented graphically in Figures 4 (conditions of confinement) and 5 (population limits) as estimated coefficients with 95% confidence intervals for the state (versus private) parameter. Thus, confidence intervals spanning zero indicate no significant difference between state and private facilities in the likelihood of reporting a court order. Coefficients with confidence intervals entirely to the right (left) of zero indicate that state facilities were significantly more (less) likely than private facilities to report a court order. The results from the previous models are included in Figures 4 and 5 ("Model1: Main") as a reference.

[Figures 4 and 5 here]

Non-Independence of States

The historical record shows that court orders may be imposed on many, or even all, prison facilities in a state. The first state-wide order came from the 1970 case of *Holt v. Sarver*, when District Court Judge J. Smith Henley, declared the entire Arkansas prison system to be in violation of the Constitution and ordered sweeping reforms (Feeley and Rubin 1998, 59–66). Between 1971 and 1993, 12 states had entire prison systems under court order for overcrowding (Levitt 1996). The existence of state-wide court orders complicates statistical analysis, which assumes that observations (here, prisons) are independent of one another. If observations are not independent, standard errors will tend to be underestimated and tests of statistical significance will be biased. To address the problem of non-independence, the models above used state-clustered standard errors, which produce larger standard errors and more conservative tests of statistical significance.

Clustered standard errors, however, cannot account for differences in the prevalence of court orders across states. Failing to account for varying levels of court orders across states can be viewed as a form of omitted variable bias; if states that use private prisons also have more (or fewer) court orders, then the original models will yield biased coefficients for the state (versus private) variable (Studenmund 2011). An alternate modeling approach would account for the varying levels of court orders by using fixed effects regression. Such an approach includes a dummy variable for all states except one, thereby effectively allowing each state to have its own intercept (Stock and Watson 2003). However, as a form of maximum likelihood estimation, logistic regression is unable to estimate results using categories in which the dependent variable does not vary (i.e., states with all or no facilities reporting a court order) (Long and Freese 2006). Therefore, we apply state fixed effects in a linear probability framework and estimate the difference between state and private facilities using Ordinary Least Squares regression (Studenmund 2011, 433–440).

The results are depicted as Model 2 ("OLS w/state FEs") in Figures 4 and 5. (The confidence intervals in Model 2 are much tighter than all other models due to the inclusion of state dummy variables.) For conditions orders, the inclusion of state fixed effects does not alter the substantive interpretation from the main model: state facilities were more likely than private facilities to report a conditions order in 1995 and 2000, but there was no difference in 1990 and 2005. (Adopting a less stringent 90% confidence level leads to the conclusion that state facilities were more likely than private facilities to report a conditions order in 2005.) For population orders, the use of state fixed effects leads to coefficients closer to zero in all years examined. However, the substantive interpretation of the results from the main model remain unchanged: state and private facilities do not differ significantly in their likelihood of reporting a population

court order in 1990, 1995, and 2000, but state-run facilities are significantly less likely to report such an order relative to private facilities in 2005. (Adopting a less stringent 90% confidence level leads to the conclusion that state facilities were more likely than private facilities to report a population limit in 1990.)

Federal Inmates

As noted above, federal inmates cannot make Section 1983 challenges. It is therefore possible that facilities with more federal inmates would have less judicial intervention because of lower filing rates among the federal inmates. Private facilities tend to have larger federal inmate populations compared to state facilities, a fact due in part to the industry's contracts with the federal government to hold illegal immigrants (Greene and Mazón 2012). For example, in the 2005 BJS data, state facilities averaged 20.3 federal inmates compared to private facilities' 91.1 federal inmates. Is the likelihood of judicial intervention into private facilities driven by their federal inmate populations?

The BJS Census contains information on the number of federally sentenced inmates in each facility 2000 and 2005. Figures 4 and 5 present the resulting state (versus private) coefficients when the natural log of federal inmates is added to the original model (see Model 3). For the 2000 analyses, controlling for federal inmates does not alter the substantive interpretation of the original analysis: state facilities are more likely than private facilities to report a conditions order, but both types of facilities are equally likely to report a population limit. The federal inmate variable itself is positively related to population limits ($p < 0.001$) and conditions orders ($p < 0.10$) (results available by request). The 2005 dataset suffers from missing data on federal inmate populations (37% missing), and the following results should therefore be treated with skepticism. With that said, the analysis suggests disparate patterns: state facilities were more

likely to report conditions orders, but private facilities were more likely to report population limits.

Facility Size

As discussed above, the 1996 PLRA imposed a number of hurdles designed to limit inmate litigation over prison conditions. Beyond these hurdles, it required a three-judge court to rule on cases involving "prisoner release orders" (including population limits).⁷ Thus, since 1996, inmate plaintiffs and their attorneys have faced an arduous process if they seek new injunctive relief, especially relief involving population limits. It is somewhat surprising, then, that the BJS Census data indicate some very small facilities having court-ordered population limits in 2005. In fact, 2005 is the only year in which the mean Average Daily Population (ADP) was lower among facilities reporting a population limit than those not (although this difference is not statistically significant in t-tests; results available upon request). Given the high legal bar for winning a court-ordered population limit, it is fair to be skeptical of very small facilities reporting the existence of such orders. Since many of these small facilities are privately operated, over-reporting by small facilities may equate to over-reporting by private facilities.⁸ We therefore provide three additional sets of models to determine whether the main results were influenced by possible over-reporting of court orders among small facilities.

The first alternative set of models omits from the sample all facilities within the first 10th percentile of ADP (i.e., facilities with fewer than 47 inmates). If over-reporting of court orders was prevalent in small facilities, then omitting them from the analysis should yield results

⁷ 18 U.S.C. §§ 3626(a).

⁸ We thank an anonymous reviewer for this observation.

different from those in the main models. Model 4a in Figures 4 and 5 reveal small changes in the point estimates for state facilities (relative to private facilities), but there is no change in the substantive interpretation of seven of the eight analyses. The only exception is the analysis of conditions-based orders in 1995 (before the onset of PLRA), when the state-private difference becomes non-significant.

A second alternative set of models goes further and omits from the sample all facilities within the 25th percentile of ADP (i.e., facilities with fewer than 106 inmates). Model 4b in Figures 4 and 5 again reveal shifts in the point estimates, but six of the eight analyses result in the same substantive interpretation. Omitting facilities in the 25th percentile of size does cause the significant difference in conditions orders in 1995 to become non-significant. And, in line with skepticism regarding the presence of population limits after PLRA, the significantly lower rate of such orders among state facilities becomes null in the analysis of 2005. This latter finding, therefore, suggests that the original 2005 analysis of population limits should be treated with some skepticism.

All previous models have statistically controlled for facility size using the natural log of ADP. As a final alternative specification, we instead model a quadratic functional form between size and court orders by including ADP and ADP squared (and dropping the natural log of ADP). Such a specification allows for a non-linear relationship between size and court orders, which could perhaps account for unusually high or low rates of reporting among very small and very large facilities. These results (4c in Figures 4 and 5) do not alter any of the substantive findings from the main models.

Discussion

Private prisons emerged on the heels of an inmates' rights revolution that saw courts aggressively intervening into prison operations. For some, delegating imprisonment responsibilities to the private sector was seen as a possible way to reduce government liability. Although governments were never freed of their legal obligation to protect inmates, did they succeed in shifting judicial scrutiny to the nascent private prison industry? Were private prisons more (or less) likely to be targets of judicial intervention? The analyses presented here suggest that any differences between state and private prisons have been small and inconsistent. Summarizing the main and supplemental results by type of court order and year (eight combinations) reveals scant evidence for consistent cross-sector differences. Four analyses consistently found no significant difference (conditions in 1990 and population in 1990, 1995, and 2000); three analyses found mixed results (conditions in 1995 and 2005; population in 2005); and only one analysis consistently found higher rates of orders among state facilities (conditions in 2000).

The set of findings presented here informs prior work on prison privatization. In a wide-ranging analysis of private prison performance, Makarios and Maahs (2012) found that, in 2000, state prisons were significantly more likely than private prisons to have a court order for conditions of confinement. The analysis here confirms this finding, but also puts it into perspective. First, the difference is specific to conditions-based orders; it does not hold for orders to limit population. Second, the difference is time-specific; it holds for 2000 (and, in some models, for 1995) but not 1990 or 2005. Thus, there is little evidence to support claims that one sector is consistently superior to the other when it comes to judicial scrutiny and intervention.

The inconsistent findings suggest that there is no robust difference in exposure to judicial oversight between the public (specifically, state) and private sectors. Does this mean that private and public correctional facilities provide the same level of quality? Not necessarily. While some research suggests that private and public prisons produce comparable quality (Lundahl et al. 2009; Bales et al. 2005; Makarios and Maahs 2012), other work finds private prisons perform worse (Camp and Daggett 2005; Camp and Gaes 2002; Spivak and Sharp 2008; Duwe and Clark 2013). Judicial intervention is a crude measure of quality. Inmate grievances must overcome a series of procedural hurdles before ever becoming a formal legal challenge, much less a binding court order (Calavita and Jenness 2013). In many ways, the current post-PLRA legal regime is designed to address possible constitutional violations in-house, thereby nullifying the need for judicial intervention (Schlanger 2006). A more valid measure of quality would therefore examine conditions on the ground in prison.

Both proponents and opponents of privatization may find something of value in these findings. Empirically, the results show that private prisons have failed to consistently avoid judicial intervention. Critics of privatization may hail this as a success: inmates held in private prisons are being "protected" by judicial oversight at roughly the same rate as their public counterparts (assuming equal rates of violations in each sector). Proponents may also claim a victory: private prisons have not performed worse than public ones, and in at least one case they have performed better. (The latter claim, however, is subject to the previous caveat regarding the validity of judicial intervention as an indicator of quality.) In the end, the political implications of these results may be played out in public debate (Burkhardt 2014). What researchers can conclude is that delegating correctional responsibilities does not have predictable (and, in most cases, any) effects on judicial intervention into prisons.

Conclusion

With the Prison Litigation Reform Act and its state counterparts limiting inmates' access to courts, and with judges less inclined to intervene in prison administration, court orders are likely to become increasingly rare events. Despite this increased deference to prison administrators, courts are not likely to abdicate their responsibility for protecting the constitutional rights of inmates. Perhaps the most visible example of recent judicial intervention is the case of *Brown v. Plata* (2011), in which the Supreme Court ordered the state of California to reduce its prison population by more than 30,000 (Schlanger 2013). To date, public and private operators have been roughly equally susceptible to judicial intervention, as seen in the present research. Only time will tell if private operators can live up to the early promises of superior performance and effectively mitigate judicial oversight.

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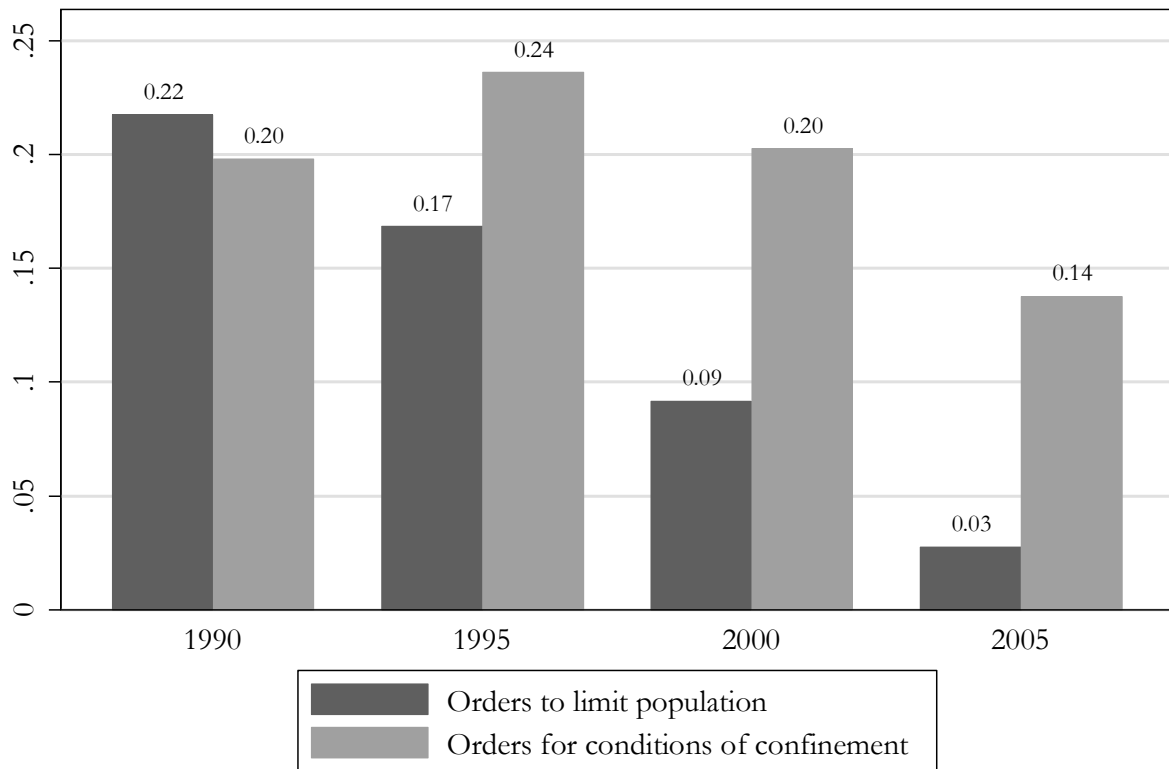
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Figures

Figure 1: Proportion of correctional facilities reporting court orders, 1990-2005



Note: Bars represent proportion of state and private facilities with a court order or consent decree. Federal, Other operator, Other security, and CA (in 2005) and IL (in 2005) facilities are omitted; see text for explanation.

Table 1: Logistic regression of court orders, by year.

	Conditions of confinement				Population limits			
	1990	1995	2000	2005	1990	1995	2000	2005
Operator: Private (reference)								
Operator: State	0.0439 [0.76545]	0.88880* [0.42145]	0.95879* [0.46322]	0.01463 [0.32321]	0.52045 [0.82689]	0.35492 [0.49031]	-0.28644 [0.37147]	-1.12219* [0.44830]
Operator: Federal	.	.	.	-3.64797* [1.46493]
Security: Max or Super (reference)								
Security: Med	-0.21339 [0.28462]	-0.38023 [0.23334]	0.22435 [0.30828]	0.00262 [0.46077]	0.03997 [0.26868]	-0.50885 [0.40824]	0.02485 [0.24760]	0.83072 [0.65951]
Security: Min	-1.17927* [0.54321]	-1.08108* [0.47190]	-0.37646 [0.46488]	0.75079 [0.69177]	-0.27378 [0.47019]	-1.19310* [0.57690]	-1.30732* [0.53548]	1.35209* [0.63703]
Facility Age	0.00423 [0.00421]	0.01196* [0.00540]	0.00387 [0.00223]	-0.00112 [0.00443]	-0.00092 [0.00358]	0.01093* [0.00556]	0.00201 [0.00298]	0.00748 [0.00424]
ADP (natural log)	0.30969 [0.18512]	0.22637 [0.20630]	0.67162*** [0.14806]	0.91555** [0.33917]	-0.01187 [0.23003]	-0.22682 [0.18820]	-0.11047 [0.27537]	0.22155 [0.21824]
Intercept	-2.84792* [1.16527]	-3.22125* [1.28028]	-6.53636*** [1.15784]	-7.80816*** [2.18637]	-1.55662 [1.15154]	-0.31817 [1.14492]	-0.99015 [1.52925]	-5.49213*** [1.29361]
p	0.00002	0	0	0	0.86018	0.00912	0.00264	0.00003
N	1196	1352	1489	1467	1196	1352	1489	1384

Coefficients are presented in log odds. Standard errors [in brackets] are clustered by state: * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$. For Conditions models, federal facilities are omitted due to lack of variation in dependent variable (no court orders in any of the years). For Population models, federal facilities are omitted for years 1990, 1995, and 2000 due to lack of variation in dependent variable (no facilities with court orders in 1990 and 2000; all facilities with court orders [related to phone service] in 1995). Samples omit 'other'-operated facilities, 'other' security level facilities, and facilities (for 2005) in CA and IL; see text for details.

Figure 2: Predicted probability of reporting a court order for conditions of confinement, by facility type and year

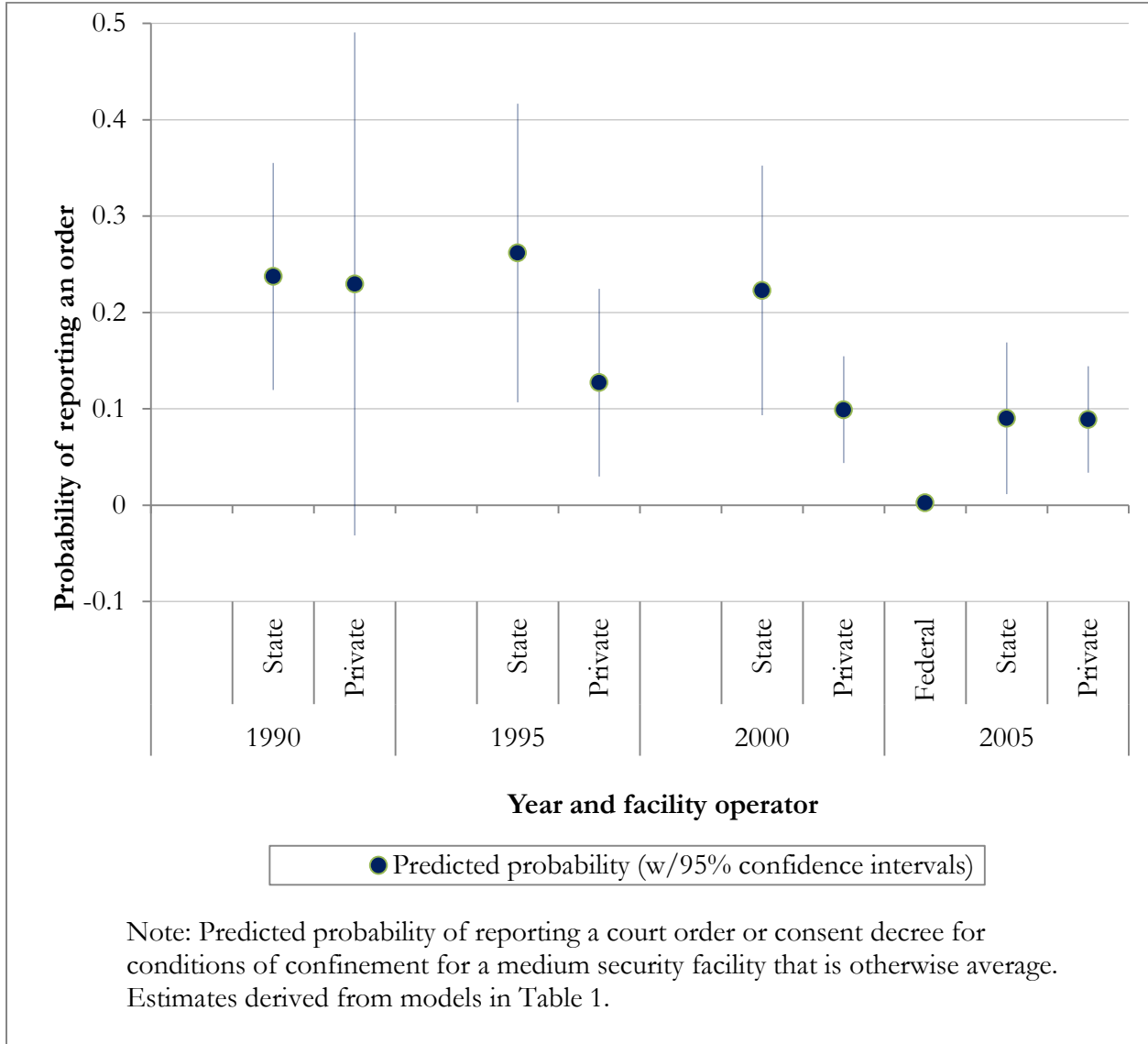


Figure 3: Predicted probability of reporting a court order to limit population, by facility type and year

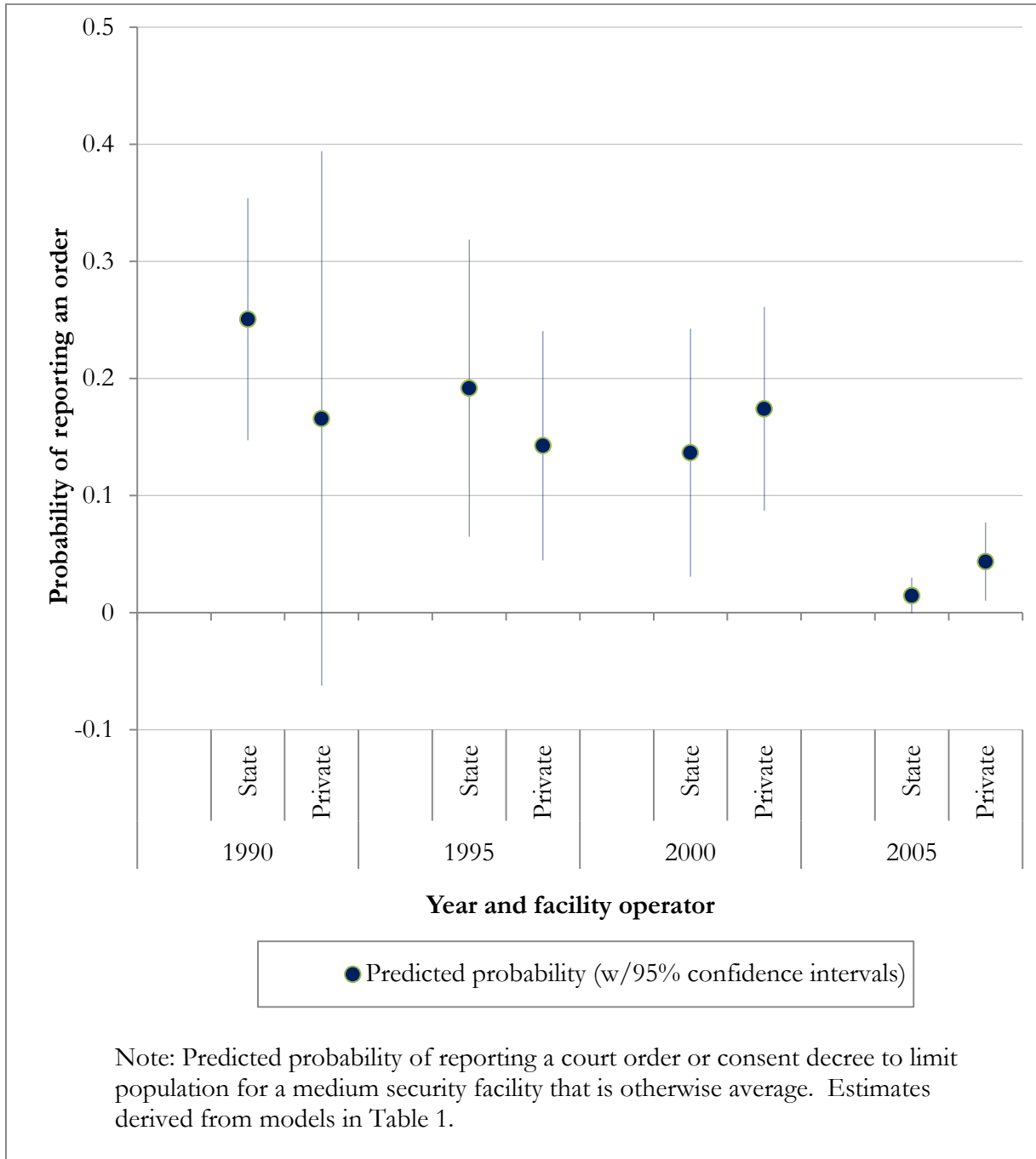


Figure 4: Estimated coefficients for state (versus private) facilities reporting a court order for conditions of confinement.

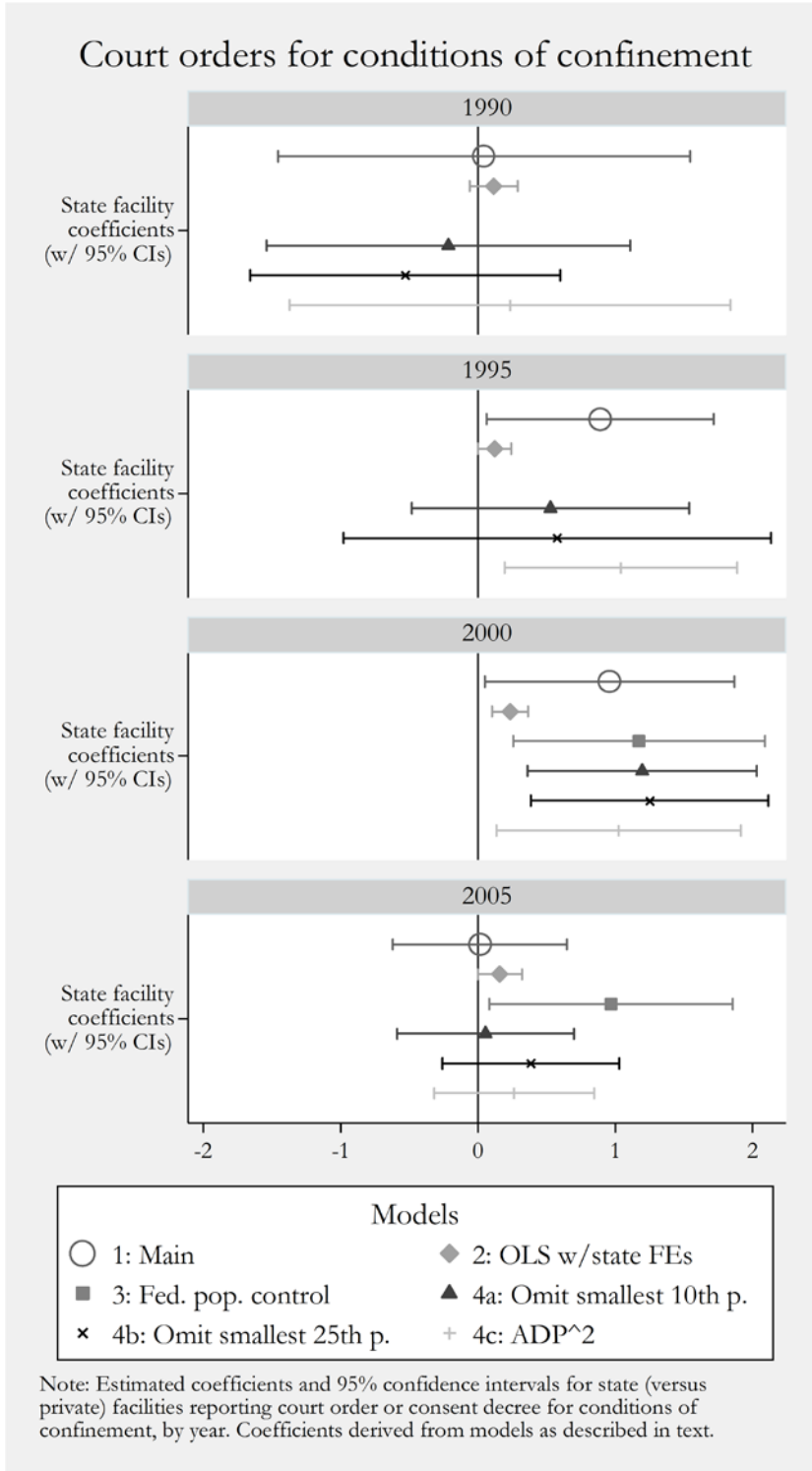


Figure 5: Estimated coefficients for state (versus private) facilities reporting a court order with population limits.

