

# **Who Punishes Whom? Bifurcation of Private and Public Responsibilities in Criminal Punishment**

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## **Who Punishes Whom? Bifurcation of Private and Public Responsibilities in Criminal Punishment**

**Abstract:** Who holds the legitimate right to punish criminals? While previous work has identified several factors that influence states' decisions to delegate punishment duties to the private sector, it has not considered variation in the level of security required to implement the punishment. Delegating coercive power challenges commonly held assumptions about the appropriate locus of coercive power, and resistance is likely to be strongest when delegating highly secure services that require the greatest levels of physical coercion. Using data on American adult correctional facilities from 1990 to 2005, this article describes the current bifurcation of correctional contracting, wherein private contractors house increasing numbers of inmates in less secure correctional settings (e.g., low-security, community-based facilities) and public authorities retain near-monopoly control over inmates in highly secure settings (i.e., medium and maximum security prisons). Multinomial regression analyses reveal that states' decisions to privatize highly secure facilities were associated with ideological and economic factors. However, the decision to privatize lower security facilities has become commonplace, and as a result has grown irrespective of state-level factors. These results suggest that handing over low security services to the private sector has become a legitimate policy option, while privatizing the most secure services remains shrouded in illegitimacy.

**Keywords:** punishment; privatization, legitimacy; policy

## **Who Punishes Whom? Bifurcation of Private and Public Responsibilities in Criminal Punishment**

Who holds the legitimate right to punish criminals? What type of punishment may be given over to private, as opposed to governmental, actors? In the United States, individuals convicted by the state and sentenced to a custodial punishment have traditionally been housed by government authorities at the local, state, or federal level. But inmates are increasingly likely instead to be held by the private sector, which comprises both for-profit and not-for-profit organizations. In the U.S., the wave of privatization that broke in the 1980s has increasingly seeped into the coercive realm of incarceration (Austin and Coventry 2001; Hallett 2006; Selman and Leighton 2010). While initially the private sector was limited to providing ancillary services (e.g., laundry, food service, maintenance, etc.) within a correctional facility (Camp and Camp 1984), private firms have increasingly taken over total operational responsibility for custodial correctional facilities. Recent estimates show that private firms hold over eight percent (130,941) of state and federal inmates (Carson and Sabol 2012), and some form of privately run correctional facility operates in 45 states (Bureau of Justice Statistics 2009a).

Yet these numbers obscure a pattern of *bifurcation* in the market for holding inmates: private firms increasingly control *low security* correctional facilities but government retains near-monopoly control over *higher security* correctional facilities. This bifurcation, little acknowledged in research on the privatization of punishment, suggests that privatization may proceed differently depending on the level of security involved. The remainder of the article begins with an introduction to correctional privatization, a review of prior empirical research on its origins, and a discussion of bifurcation in the market for punishment. The article then draws

on two lines of theoretical work—on the culture of punishment (Garland 2006; Melossi 2001; Smith 2008) and the legitimacy of innovative practices (Johnson, Dowd, and Ridgeway 2006; Scott 2001; Suchman 1995)—to motivate the empirical analysis. Both theoretical strands emphasize the cultural embeddedness of punishment, arguing that forms of punishment must be consonant with fundamental beliefs about appropriate ways of punishing.

Empirically, the article assesses the extent to which existing explanations of U.S. prison privatization—related to correctional pressures, economic pressures, and political ideology—can explain the bifurcation in correctional contracting. Multinomial logistic regression analyses of American states from 1990 to 2005 reveal that high security privatization and low security privatization are driven by different sets of factors. Specifically, conservative citizens, weak labor unions, and high unemployment rates are associated with high security privatization. However, none of the traditional predictors of prison privatization are associated with low security privatization. Together, these results suggest two distinct patterns of correctional contracting: low security privatization, which is a legitimate option available to all would-be adopters, and high security privatization, a less legitimate option only adopted by states with favorable circumstances. A concluding discussion argues that the meager expansion of the private sector into highly secure correctional management relative to less secure correctional management can be viewed as an example of how cultural beliefs—in this case, beliefs about the legitimate locus of physically coercive power—may hinder new forms of punishment.

This article makes three contributions. First, it documents the current bifurcation of the inmate market. Second, it provides a corrective to existing empirical research on the development of private corrections by disaggregating correctional facilities by security level, which reveals differential processes by which the private sector has penetrated the high security

and low security correctional markets. Third, it points to the importance of cultural beliefs about the legitimacy of punishment policies.

### **An introduction to correctional privatization**

Incarceration is inherently physically coercive, and the historical trend for most of the 20<sup>th</sup> century in the U.S. has been for government to hold coercive power and to punish criminals (DiIulio Jr. 1988; Moe 1987; Weber 1991; Zalar 1999).<sup>i</sup> With the emergence of correctional privatization in the 1980s, the governmental monopoly on imprisonment began to slip away. Privatization of correctional facilities happens through a contracting process, whereby a government entity specifies its needs via a request for proposals, and private firms then compete to win the correctional duties. A private firm then assumes full operational responsibility for the facility while attempting to keep expenses below the amount paid by the government (Harding 1997; Logan 1990).

The 1980s was a propitious era for correctional privatization in the United States. Fiscal conservatism was strong, buoyed by a belief in the power and efficiency of markets and the ineptitude of government (Culp 2005; Selman and Leighton 2010). Government at all levels identified more and more services that could be turned over to the private sector (Chi and Jasper 1998; Fixler Jr. and Poole Jr. 1987; President's Private Sector Survey on Cost Control 1983). Additionally, the imprisonment rate was beginning an historic rise, climbing from 139 people in prison per 100,000 in 1980 to 506 in 2007, its peak year (Bureau of Justice Statistics 2011; West, Sabol, and Greenman 2010).

Some states began contracting for management of small, special purpose community correctional facilities (e.g., halfway houses and drug treatment centers) in the early 1980s (Mullen, Chabotar, and Carrow 1985). In 1986, Kentucky became the first state to contract with

a private firm for operation of an adult detention facility. It was followed soon after by New Mexico, Texas, and California (General Accounting Office 1991:33; Logan 1990). Many of the early state-contracted facilities were restricted to minimum-security inmates, female inmates, pre-parole inmates, and inmates returned to custody (Logan 1990; McDonald 1992). From these early origins, 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 and Karberg 2003; Stephan 1997, 2008). By 2005 all but five states (Delaware, Nebraska, New Hampshire, Rhode Island, and Vermont) had some form of private correctional facility within their borders, and roughly seven percent (108,000) of state and federal inmates were held privately (Stephan 2008).<sup>ii</sup>

The privatization of incarceration involves delegating coercive power to private actors. This fact has caused prison privatization to come under fire since its early days. Critics assert that punishment is a core state function and cannot legitimately be handed to self-interested private actors. Such complaints have been voiced in public discourse on the issue of prison privatization (Burkhardt and Connor 2015; Burkhardt 2014). For example, one *Los Angeles Times* editorial argued that government bears a unique responsibility for law enforcement and punishment, and it “urge[d] the county not to relinquish its responsibility to enforce society’s laws” (Los Angeles Times 1988:2). Similarly, one Texas prosecutor argued that “government ought to be the ones involved in punishing offenders. It’s government’s rules, governments ought to be the ones to handle it” (Walt and Hughes 1996:1). Another letter writer insisted: “[s]elf-interested private profiteers are not answerable to the public and shouldn’t be given the

job of locking people up. What's next, contracting out the Highway Patrol and police?" (Fama 2007:A.25).

Public opinion research on correctional privatization is meager, but what research exists finds ambivalence among citizens and lawmakers. For example, Becker and MacKelprang (1990), in a 1989 survey, asked 740 U.S. state legislators whether they believed it would be appropriate to contract for the private operation of prisons. A plurality (44 percent) of respondents viewed this form of contracting as appropriate, but 38 percent of respondents saw it as inappropriate. (Eighteen percent of respondents were neutral.) A 1998-1999 survey of Florida legislators found similar results: 46 percent of responding legislators supported private prisons and 32 percent opposed them. Nearly two-thirds (63 percent) of these respondents said they "do not feel state governments can properly delegate to private organizations the authority to use coercive force" (Vardalis and Becker 2000). And in a 1996 survey, Thompson and Elling (2000) asked Michigan residents whether government or private firms should operate minimum security and maximum security prisons. They found widespread support for government operation of prisons, especially maximum security ones: 77 percent of respondents favored government operation of minimum security prisons, and 85 percent favored government operation of maximum security prisons.

Besides opinion surveys, the historical record of organized opposition to private prisons also suggests its tenuous position in modern American punishment. Law enforcement (Donahue 1988; Kerle 2003; Ring 1987), legal (Donahue 1988), and labor groups (AFSCME n.d.; General Accounting Office 1991) were early opponents of prison privatization in the 1980s. In the late 1990s and early 2000s, religious organizations, student groups, and criminal justice reform groups agitated against prison privatization on the grounds of justice and morality (Culp 2005).

More recently, public backlash against a private prison company's purchase of the naming rights for a university football stadium caused the deal to be scuttled (Allen 2013), and two Democratic candidates for the 2016 presidential election have called for bans on private prisons (Burke 2015; Jackson 2015).

### *Previous analyses of correctional privatization*

Given public ambivalence toward contracting out coercive services (and outright opposition from some quarters), why have some states opted for correctional privatization while others have not? Prior work has highlighted several factors—correctional pressures, economic pressures, and political ideology—that help to explain patterns of correctional privatization. The first factor is pressure on the corrections system. A 1997 survey of officials in states with active contracts for imprisonment found that the two most commonly reported goals in contracting for prison management were reductions in overcrowding and operational expenses (McDonald et al. 1998). Statistical studies of state prison privatization have found only inconsistent evidence of a relationship between prison crowding and privatization. While Jing (2005) concluded that prison privatization was more likely in states with overcrowded prisons, other work failed to confirm this finding (Nicholson-Crotty 2004; Price 2002). One possible explanation for this is that states only responded to overcrowding when pressured by courts to do so (Feeley and Rubin 1998). Judicial oversight of and interventions into prisons was rampant from the 1960s into the 1990s, overlapping in part with the emergence of private corrections. States may have used contracting as a way of avoiding or remedying the pressures exerted by the courts to improve conditions and reduce crowding (Burkhardt and Jones 2015). Operational cost savings was another common justification for privatization (McDonald et al. 1998), but subsequent research has only partially confirmed these claims. Corrections spending was associated with private prisons in analyses by



Nicholson-Crotty (2004), Jing (2005), and Kim and Price (2012), but was not significantly related in analyses by Price (Price and Riccucci 2005; 2002).

Economic pressures may also encourage privatization. Nicholson-Crotty (2004, using data on capital debt restrictions and taxation limits) and Price (2002, using data on per capita income) concluded that a weak fiscal position overall encouraged privatization. Morris' (2007) case study of Mississippi also pointed to budget strains as an important factor in beginning to contract for imprisonment. However, this relationship was inconsistent in statistical analyses by Jing (2005, using data on taxation limits). Additionally, in a case study of Texas, Cummins (2000) observed that economically depressed local governments sought out private correctional facilities as a means of increasing employment in the area during the early years of prison privatization (also see Genter, Hooks, and Mosher 2013).

Multiple studies have found that correctional privatization has an ideological component: politically conservative states have been more likely to have private prisons (Jing 2005; cf. Kim and Price 2012; Nicholson-Crotty 2004; Price 2002). Political parties, however, seem to have been inconsequential for privatization (Price and Riccucci 2005; Price 2002). Perhaps surprisingly, several studies have found union strength to be unrelated to state-level privatization (Jing 2005; Kim and Price 2012; Nicholson-Crotty 2004; Price and Riccucci 2005), despite a history of organized opposition from particular unions, including the American Federation of State, County, and Municipal Employees (AFSCME) and the California Correctional Peace Officers Association (Page 2011).

### ***Bifurcation in punishment***

Although previous research has analyzed states' decisions to privatize corrections, it has never grappled with bifurcation in the inmate market. Correctional facilities vary greatly in terms

of physical security. The highest security facilities are reserved for those inmates deemed most risky. These higher security facilities ("maximum" or "medium") typically feature more overt and stringent forms of physical restraint: armed towers and/or patrols; entry and exit via secure trap gate or sally port; and (often) a double-layer perimeter. Lower security ("minimum") facilities house inmates deemed to be low risk, and they consequently have less imposing physical features: for example, single fence or "posted" perimeters, and entry and exit monitored via visual surveillance (Bureau of Justice Statistics 2009a). It is a little acknowledged fact that correctional privatization has occurred primarily among less secure facilities and only rarely among higher security facilities.

Figure 1 documents this bifurcation of the inmate market. It presents the share of inmates held in private facilities by security level from 1990-2005. Throughout this period, the private sector controlled a larger share of the less secure inmate market than the highly secure inmate market. Over time, the private sector increased its control over low security facilities while making little progress in high security facilities. By 2005, 25 percent of inmates in the low security facilities were held privately, compared to less than five percent of all inmates in higher security facilities. The different trajectories suggest a greater acceptance of low security privatization and a continuing resistance to high security privatization. This phenomenon can be understood by reference to punishment scholars' work on cultures of punishment and new institutionalists' work on legitimacy.

[FIGURE 1 HERE]

## **Culture, legitimacy, and punishment**

A major theme in the newly anointed field of "punishment and society" (Simon and Sparks 2013) concerns the role of culture in punishment. A number of authors in this field have documented ways in which cultural beliefs may facilitate or impede changes in the dominant form of punishment applied to criminals in a society. The "cultural embeddedness of social control" (Melossi 2001) means that forms of punishment are not freely fungible; it is not always possible simply to substitute a new form of punishment for an old one. To be viable, a punishment must be consonant with widely held beliefs about the proper scope of state power (Willis 2008), tolerance for visible suffering (Pratt 2013; Spierenburg 1984), methods of execution (Garland 2010; Smith 2008), and other cultural preferences. When a punishment is not properly embedded in a culture, rulers will have difficulty in instituting it or continuing it, even if that form of punishment holds considerable technical or legal merit (Smith 2008). In other words, cultural beliefs about appropriate (or more importantly, *inappropriate*) forms and degrees of punishment can place limits on the viability of a given punitive practice.

The claim that criminal punishment is dependent on cultural milieu echoes new institutionalist research on legitimacy, which describes the consonance between a practice and its environment (e.g., Aldrich and Fiol 1994; Johnson et al. 2006; Scott 2001). In an influential article, Suchman (1995) defined legitimacy as "a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions" (574). Thus defined, legitimacy is determined by the degree of fit between some practice and the cultural context in which it is embedded (Scott 1991:169–170). Legitimacy cannot be taken for granted. When an innovative practice arrives on the scene, it may or may not be validated by observers as "desirable, proper, or appropriate." If

the innovation succeeds in achieving external validation, it is likely to diffuse to other units in the field. However, if it does not receive external validation, it will remain on the fringes (Johnson et al. 2006). In such cases, adoption will be limited to those units that perceive a particular need to adopt the still controversial practice (Boyle, Kim, and Longhofer 2015; Jensen 2003).

Regarding punishment, legitimacy gets at the idea that punishment is always embedded in a social context and it will be most viable when it conforms to prevailing beliefs and assumptions about how punishment should (and should not) be done. Recent research on policy adoption indicates that features of a policy (in addition to features of the would-be adopter) make adoption more or less likely (Sliva 2014). For example, in the realm of criminal justice, Neill, Yusuf, and Morris (2014) have found that different types of punitive policies (e.g., policies that extend the scope of punishment versus those that increase the intensity of punishment) correspond to different features of states (e.g., economic, political, racial) (cf. Makse and Volden 2011). In other words, different types of criminal justice practices may be facilitated by different factors. In the case of privatization of criminal justice functions, this suggests the possibility that different forms of privatization will proceed differently. Early advocates of privatization faced the challenge of framing their innovations in such a way that did not violate commonly held beliefs that physical coercion is a responsibility exclusively handled by the state. This would have been all the more difficult for proposals to privatize high security prisons (as opposed to low security facilities).

The guiding principle in the analyses below is this: legitimate policies may be adopted by any state simply because they do not conflict with dominant beliefs about punishment in society, while illegitimate policies tend to be adopted only by states with a particular need or propensity.

In the case of correctional privatization, the privatization of *high security* incarceration is assumed to be an illegitimate policy. This assumption is based on the surveys of citizens and policymakers (Becker and MacKelprang 1990; Thompson and Elling 2000; Vardalis and Becker 2000) and organized opposition to private prisons (Black 2012; Hallett and Lee 2001; Page 2011). Conversely, the privatization of *less secure* adult correctional duties is assumed to be a relatively legitimate policy, more akin to government contracting in other less coercive and less secure areas (e.g., garbage collection, facility maintenance, information technology). In other words, states allowing high security privatization should do so because conditions on the ground make such a policy seem necessary (or at least plausible), while states allowing lower security privatization should do so because it does not conflict with cultural norms about the delegation of a core state function (i.e., punishment). Empirically, we should see strong relationships between privatization of highly secure correctional facilities and standard explanatory factors (correctional, economic, and ideological pressures); we should see attenuated relationships between privatization of less secure facilities and these same explanatory factors.

## **Data and methods**

The primary data source is the Bureau of Justice Statistics' *Census of State and Federal Adult Correctional Facilities* series (Bureau of Justice Statistics 1993, 1998, 2004, 2009a), conducted approximately every five years. This dataset 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 types of facilities, ranging from very high security confinement facilities to low security rehabilitation facilities that allow inmates to enter the community.<sup>iii</sup> The *Census* also reports whether a facility was operated by a private sector organization. For the regression analyses, the original facility-level variables were summed to construct state-level data for each

year of available data. The resulting dataset is longitudinal, covering 50 states at four time points (1990, 1995, 2000, and 2005). The analyses below exclude federal facilities and facilities located in Washington, D.C., in order to focus on contracting among state governments. All variables in the analysis come from this *Census* unless stated otherwise.

Using this dataset it is possible to assign states to one of three mutually exclusive categories indicating the type of privatization in place. A state with *high security privatization* has at least one medium or maximum (or "close" or "high) security facility that is operated by the private sector.<sup>iv</sup> A state with *low security privatization* has at least one minimum (but not maximum or medium) security facility operated by the private sector.<sup>v</sup> A state with *no privatization* retains government monopoly control over corrections facilities. From 1990 through 2005, the number of privatizing states grew and the number of states eschewing privatization declined (see Figure 2). The number of high security privatization states grew from four to 19, while the number of low security privatization states grew from five to 26. Whereas most states (39) had no privatization in 1990, only five states had no privatization in 2005.

[FIGURE 2 HERE]

States' adoption of high security or low security privatization (versus no privatization) is analyzed using multinomial logistic regression, where each form of privatization (low security and high security) is estimated in reference to no privatization. Each type of privatization is modeled as a function of correctional, economic, and ideological variables drawn from previous studies of prison privatization. Because the dependent variables (privatization) were collected at five-year intervals, all of the independent variables in the models (unless otherwise noted) are

measured at the previous time period, five years earlier. This ensures that the independent variable, with its supposed causal effect, preceded the dependent variable. All models estimate state-clustered standard errors to account for non-independence of states over time.

The first measure of correctional pressure is facility *crowding*: the sum of inmates in a state divided by the sum of reported design capacities in all facilities.<sup>vi</sup> To account for judicial pressure to reduce prison populations, the regression models also included a measure of *court orders*: the natural log of the sum of confinement facilities that reported being under such a court order.<sup>vii</sup> Because previous research has found that states that spent more on corrections budgets were more likely to use private correctional facilities (Jing 2005; Kim and Price 2012; McDonald et al. 1998; Nicholson-Crotty 2004), the models also include a variable for annual *corrections spending per capita* as compiled by the Bureau of Justice Statistics (2009b).

The models include two measures of economic pressure. To capture possible effects of *tax and spend limits* (Nicholson-Crotty 2004), the models include a dummy variable indicating whether a state had such a statutory or constitutional limit on revenues, spending, or appropriations. Data come from Waisanen (2008). To assess the possibility that economically depressed governments sought private corrections facilities in order to create jobs, the models below include a measure of state-level *unemployment rate* compiled by the Bureau of Labor Statistics (2008).

The models also include three measures of political ideology. Berry and colleagues' (Berry et al. 1998, 2010; Fording 2010) measure of *citizen liberalism* is based on the political ratings given by two liberal groups for each incumbent Congressperson and challenger in a district, with ratings weighted by the proportion of the vote received by each. District-level scores are then averaged to form a state-level citizen ideology measure (see Berry et al. 1998).

Scores range from 0, the least liberal, to 100, the most liberal. The models assess partisan politics by including a five-year index of recent Democratic control of the governorship. The original data on governors' party membership come from Klarner (Klarner n.d.), with Democratic governors coded as 1, Republican governors coded as 0, and third party governors coded as 0.5. The five-year *Democratic governor index* is a sum of the current year's value plus the previous four years' values. And despite its irrelevance in previous work (Jing 2005; Kim and Price 2012; Nicholson-Crotty 2004; cf. Page 2011; Price and Riccucci 2005), the models below include a measure of union strength, defined as *union membership* (Hirsch, Macpherson, and Vroman 2001, n.d.), in order to avoid omitted variable bias.

Both models include control variables for correctional populations and time periods. Each model includes the natural log of a state-year's inmate population in minimum security facilities and in medium and maximum security corrections facilities. Dummy variables for each time period are included to control for unobserved variation across time in all states' propensities to allow private corrections.

## **Results**

Results from a series of multinomial logistic regression analyses reveal that high security privatization and low security privatization were indeed influenced by different factors (see Table 1). Model 1—a fully specified model—indicates that correctional pressures were unrelated to either form of privatization. However, economic pressures and ideological pressures were differentially associated with high- and low-security privatization. In the economics category, the state unemployment rate was positively associated with high security privatization but was statistically unrelated to low security privatization. The difference in magnitude of the two unemployment coefficients is statistically significant (see "Sig.  $\Delta$ " column). Citizen liberalism



was significantly negatively related to high security privatization, but it was not significantly related to low security privatization. And although union membership is not a significant predictor of low- or high-security privatization (relative to no privatization), the coefficients are significantly different from each other.

Citizen liberalism and union membership are highly correlated in the sample ( $r = 0.57$ ,  $p < 0.05$ ). This collinearity may inflate the standard errors of these variables and depress their significance levels. To examine this possibility, models 2 and 3 omit union membership and citizen liberalism, respectively. The removal of union membership, in model 2, increases the magnitude and significance of the citizen liberalism coefficient for high security privatization (but not low security privatization). Additionally, unemployment rates continue to predict high security privatization but not low security privatization, although the difference between these coefficients is not statistically significant. No other substantive variables predict either form of privatization. The removal of citizen liberalism, in model 3, enhances the size and significance of the union membership coefficient for high security privatization. The union membership coefficients for low- and high-security privatization now differ significantly. The findings for unemployment rates are nearly identical to those from model 1; unemployment is associated with high security privatization but not low security privatization. As with model 2, no other substantive variables predict either form of privatization.<sup>viii</sup>

[TABLE 1 HERE]

The variable effects of unemployment, union membership, and citizen liberalism can be seen graphically by generating predicted probabilities of each type of privatization based on

results from the multinomial logistic regressions. Each of the following graphs presents probabilities of the three privatization outcomes for a hypothetical state with tax-and-spend limits in 2005 that is otherwise average (see Figures 3, 4, and 5).<sup>ix</sup> Figure 3 displays the probability of each privatization type at varying levels of unemployment. The probability of a state privatizing a low security facility was high (over 60%) and declined only slightly at higher levels of unemployment. The probability of a state privatizing a high security facility increased at higher levels of unemployment. Although states were more likely to privatize a low security facility than a high security facility at most levels of unemployment, this disparity disappeared at very high levels of unemployment—over 5 percent<sup>x</sup>—as indicated by converging probabilities and overlapping confidence intervals.

[FIGURE 3 HERE]

Figure 4 displays the probability of each privatization type at varying levels of citizen liberalism. The probability of states privatizing high security facilities decreases as they get more liberal. Specifically, the model predicts that high security privatization had a significant non-zero probability *only* for very conservative states (within the first two quartiles of liberalism), as indicated by confidence intervals that do not span zero. In contrast, privatization of low security facilities increased with citizen liberalism. The relationship between union membership and privatization types looks nearly identical (Figure 5). The likelihood of high security privatization declined at higher levels of union membership and was effectively nil above the 75<sup>th</sup> percentile of membership, as indicated by confidence intervals that overlap zero. Low security

privatization, however, increased with union membership and became significantly more likely than high security privatization above the 75<sup>th</sup> percentile of membership.

[FIGURE 4 HERE]

[FIGURE 5 HERE]

## **Discussion**

Who holds the legitimate right to punish criminals? As an empirical matter, the answer depends on the level of security required for the punishment. In the contemporary United States, the private sector has gained a great deal of responsibility for holding inmates in less secure correctional facilities—halfway houses, rehabilitation centers, and community corrections facilities. Yet the government retains the bulk of the responsibility for inmates in more secure facilities. Higher levels of security seem to have been a stumbling block to more extensive privatization. Highly secure services are less likely to be viewed as legitimate responsibilities of the private sector (Becker and MacKelprang 1990; Thompson and Elling 2000; Vardalis and Becker 2000). Yet, if highly secure services are less amenable to privatization, why have some states nonetheless allowed privatization of highly secure facilities? The analysis here shows that privatization of more secure facilities has been facilitated by high unemployment rates, conservative citizen populations, and weak labor unions. These conditions have offset potential political risks involved in implementing a controversial policy such as the delegation of highly secure correctional services.

In contrast to high security facilities, the privatization of less secure facilities has been a much more common affair. All but five states had at least one private minimum security facility by 2005. In a series of multinomial logistic regression analyses, none of the factors that explained high security privatization were associated with low security privatization. Privatization of less secure correctional duties, therefore, appears to be a legitimate policy option; nearly any state can do it, regardless of whether conditions on the ground encourage adoption.

The details of the differential influences of select variables—liberalism, union strength, and unemployment—across different levels of security deserve closer examination. As with prior research (Jing 2005; Nicholson-Crotty 2004; Price 2002), this study shows the importance of ideology in contracting for corrections management. Liberal citizens served as an effective bulwark against privatization of more secure correctional facilities. Yet, while liberal states resisted contracting for highly secure services, they remained amenable to contracting for less secure corrections facilities. This differential influence of citizen ideology can be seen in the two (and only two) states that banned privately operated prisons while exempting community-based corrections facilities: New York (N.Y. Corr. Law ch. 6 §121) and Illinois (730 Ill. Comp. Statutes §140), two states consistently above average on the liberalism index.

The variable effect of liberalism may reflect cultural understandings of the appropriate locus of coercive power. Previous studies have found that citizen ideology is significantly associated with support for state action in other areas, including welfare spending, tax progressivity, and public funding for abortion (Berry et al. 1998). The findings here suggest that ideology is also relevant in capturing support for state (as opposed to private) power when it comes to coercive forms of punishment. In liberal states, proposals to contract out high-coercion

services are likely to violate prevailing norms and understanding about the appropriate locus of punitive power (Willis 2008). Yet, variation in levels of liberalism across the country means that high security privatization will be tolerable in areas in which citizens do not hold strong beliefs about the state monopoly on coercive power. This fact allows for the possible growth of high security privatization moving forward, a point discussed further below.

This study also finds that union membership is negatively associated with high security privatization but not low security privatization. Previous work failed to find any relationship between union strength and correctional privatization. The discrepancy in findings may be attributable to the correlation between the size and security level of correctional facilities. High security privatization involves medium and maximum security facilities, which are larger than minimum security facilities. One interpretation of the present results is that unions likely viewed privatization as more threatening when a large maximum security facility was at stake compared to a small minimum security facility (Price 2007). These larger threats may have prompted more vigorous union opposition.

Economics also played a role in correctional contracting, but only in terms of highly secure confinement facilities. High unemployment rates were associated with an increased likelihood of a state having a private high security facility. States' unemployment rates, however, were not significantly associated with the presence of private low security facilities. The unemployment effect documented here raises two questions. First, were economically depressed states seeking private corrections firms or were private corrections firms targeting economically depressed states? Cummins (2000) has observed that economically depressed local governments in Texas sought out private correctional facilities as a means of increasing employment in the area during the early years of prison privatization. One explanation is that a similar dynamic

operated at the state level, with poor states seeking to bolster their economies by luring private corrections firms. Alternatively, private firms may have targeted states with depressed economies on the assumption that they would be less resistant to turning over government services to a private employer promising jobs. Rao, Yue, and Ingram (2011) have explicated a *corporate opportunity structure*, in which private firms make decisions about siting on the basis of perceived (lack of) legal and social opposition. It is possible that private corrections firms similarly assessed the landscape and targeted areas of the country most in need of economic development, but that this form of arbitrage was limited to parts of the country where political and cultural values viewed punishment as just another service to be provided. The question of strategic private prison siting cannot be directly addressed with these data, but it warrants future investigation elsewhere.

The second question is, Why would the relationship between unemployment rates and privatization apply to highly secure facilities but not less secure facilities? As with the discussion of union opposition, the differential effect of unemployment may be related to the size of low security versus high security facilities. Larger, high security facilities have greater job creation potential than small, low security facilities (cf. Genter et al. 2013). If state officials viewed private corrections facilities as job creators, then it is reasonable to think that efforts to attract such a facility would be targeted at larger facilities.

## **Conclusion**

This examination of high-coercion and low-coercion correctional contracting makes three contributions. First, it documents the current bifurcation of the inmate "market", whereby the private sector has gained a substantial foothold in the market for inmates in low security facilities and the public sector has largely retained its monopoly over inmates in high security facilities.

Second, it provides a corrective to existing research on the development of private corrections by distinguishing types of correctional facilities according to their security level. Third, it points to the importance of cultural beliefs about the legitimacy of punishment policies. Will the bifurcation continue? Will the private and public sectors continue to specialize in low-security and high-security incarceration respectively?

On the one hand, cultural and ideological opposition to states delegating highly secure services to private actors may be robust. One possibility then is continued bifurcation: state actors will retain authority over highly secure corrections tasks and private actors will (increasingly) control less secure corrections. A variant on this is that high security privatization will increase, but only in those states with favorable ideological and economic conditions. On the other hand, the current ambivalence toward privatizing highly secure facilities may represent a liminal period in American punishment, a stop on the road to more completely privatized high security corrections. In this scenario, private actors will increasingly gain entry into the markets for the most secure forms of punishment, and punishment will be viewed increasingly as just another service to be contracted out in an era of neoliberalism (Aviram 2015; Garland 2001).

Given the relative success of the private sector in taking over less secure corrections, it seems unlikely that government will reclaim total authority over this segment of the inmate population in the near future. Kevin Wright (2009) has argued that private prisons could be used to reaffirm the goal of rehabilitation in corrections (see also Genders 2002). A commitment to rehabilitating prisoners has fallen off since the 1990s, with fewer staff and resources dedicated to this goal (Phelps 2012). By writing contracts that offer incentives for (or simply require) the private firm to effectively carry out educational and rehabilitative programs that are known to reduce recidivism, private corrections could represent the beginning of a return to a more

rehabilitative ideal. Less secure institutions are perhaps the most appropriate locations to embark on a return to rehabilitation. If, as Wright concludes, private corrections is here to stay, governments should make the most of it by orienting future contracts explicitly toward rehabilitation.



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730 Ill. Comp. Statutes §140.

N.Y. Corr. Law ch. 6 §121.

## Notes

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<sup>i</sup> A notable exception was convict leasing, which allowed private entrepreneurs to lease the labor power of inmates in exchange for feeding and housing them. It was especially common in Southern states, where it provided a replacement for cheap labor following the emancipation of slaves and also minimized the potential political power of newly freed African Americans. The practice continued in select states into the early 20<sup>th</sup> century (Hallett 2006:43–51).

<sup>ii</sup> These figures refer to inmates held in private custody within a state, regardless of whether the inmates were sentenced by another jurisdiction.

<sup>iii</sup> The *Census* excludes local jails, immigration detentions facilities, privately operated facilities that are not primarily intended for state or federal inmates, juvenile facilities, military facilities, U.S. Marshals Service facilities, Bureau of Indian Affairs facilities, or hospital wings or wards dedicated to prisoners.

<sup>iv</sup> There are no private supermaximum security facilities in the data.

<sup>v</sup> Because states without low security facilities were not at risk of privatizing such a facility, five state-years (Alaska in 1990; Minnesota in 2000; North Dakota in 1995; and South Dakota in 1990 and 1995) were omitted from the analysis.

<sup>vi</sup> For 1990, the crowding variable is lagged six years, to 1984, the most recent available data point for the crowding variable.

<sup>vii</sup> For brevity, the term "court order" is used to refer to both court orders and consent decrees. The court order variable refers to "confinement" facilities—those allowing fewer than half of inmates to leave the facility—in order to ensure data availability throughout the time series. The natural log of court orders is used because the raw distribution is highly skewed to the right. Because many states had zero court orders, and the natural log of zero is undefined, the variable is defined as  $\ln(\text{court orders} + 1)$ .

<sup>viii</sup> Supplemental versions of the three main models included regional dummy variables to control for unobserved regional differences within the United States. The results of these supplemental models were largely consistent with the main models. The effect of unemployment differed by type of privatization in

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one model; the effect of liberalism differed by type of privatization in two models; and the effect of union membership differed by type of privatization in one model, although levels of significance were lower ( $p < 0.10$ ) due to multicollinearity among regional dummies and these variables.

<sup>ix</sup> Figure 3 uses estimates from Model 1. Figure 4 uses estimates from Model 2. Figure 5 uses estimates from Model 3.

<sup>x</sup> The 2005 graph uses unemployment rates lagged to the year 2000. Overall unemployment was particularly low in 2000, which is why an unemployment rate of 5 percent appears to be high in the figure.



## Figures

**Figure 1: Share of inmates held by the private sector, by security level of facility**

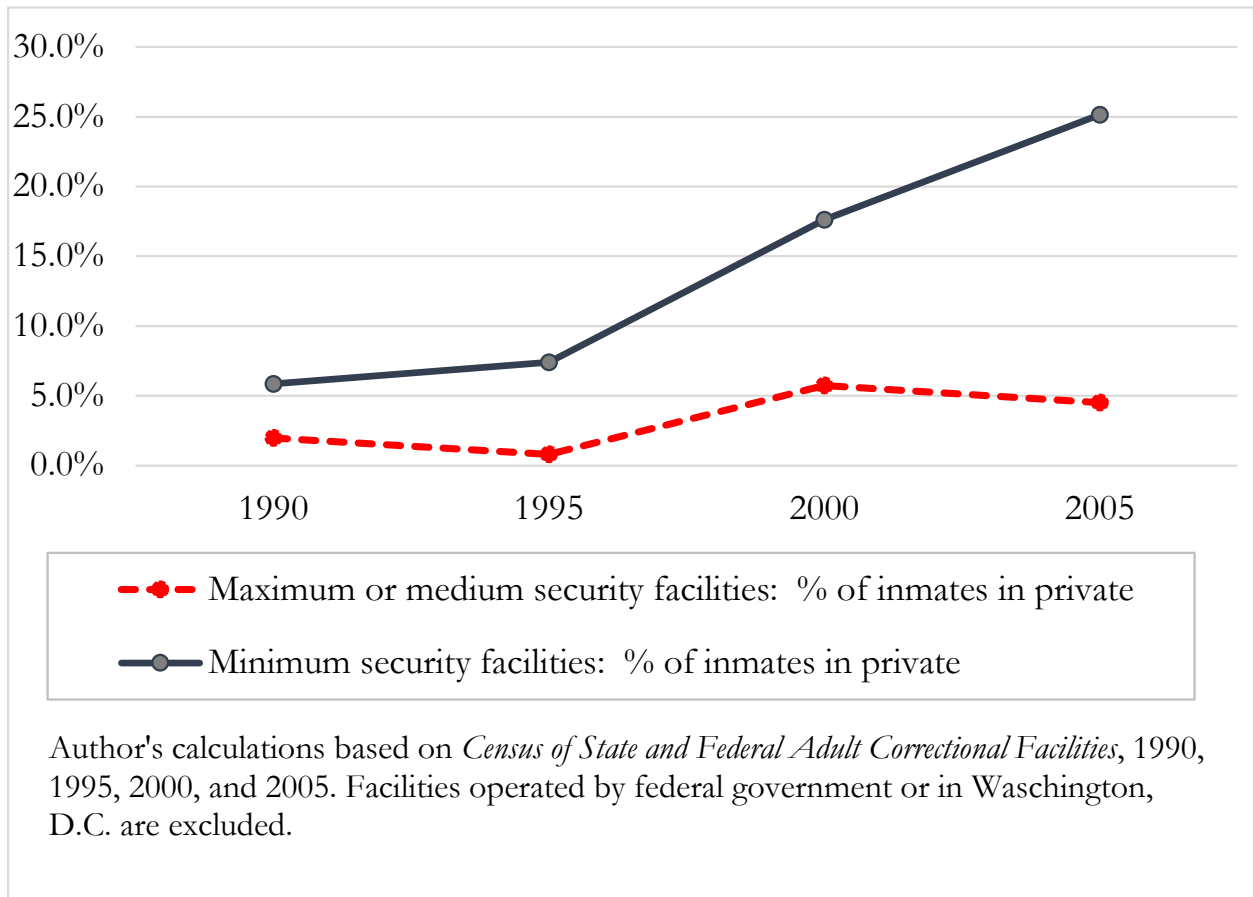
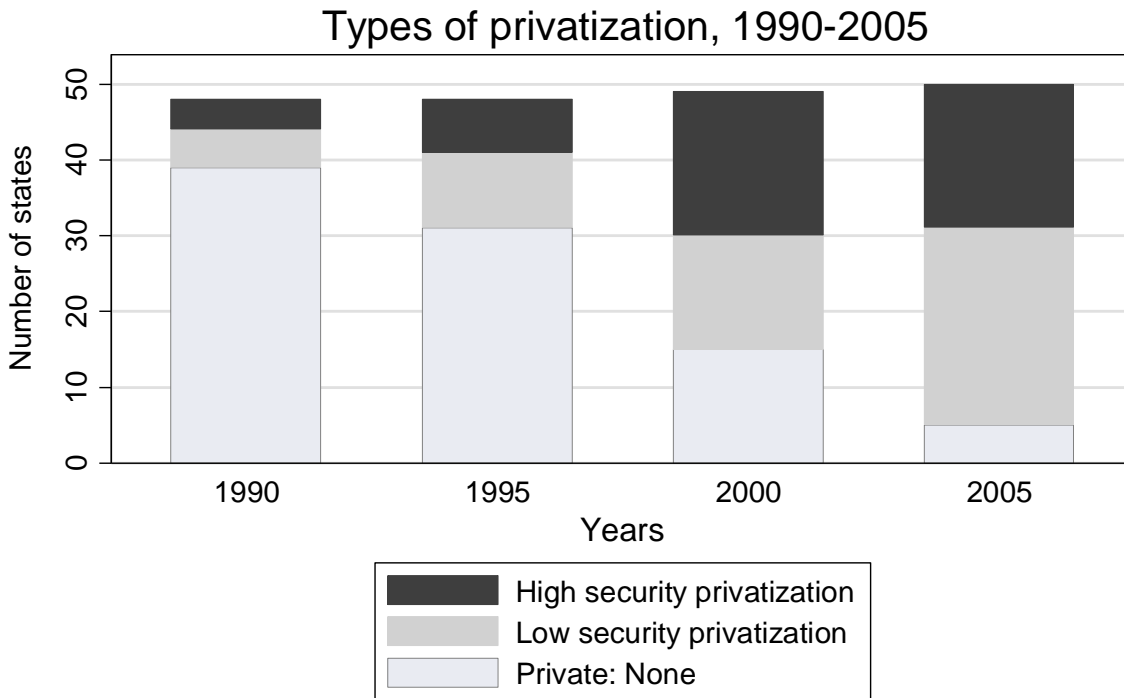


Figure 2: Types of privatization, 1990-2005.



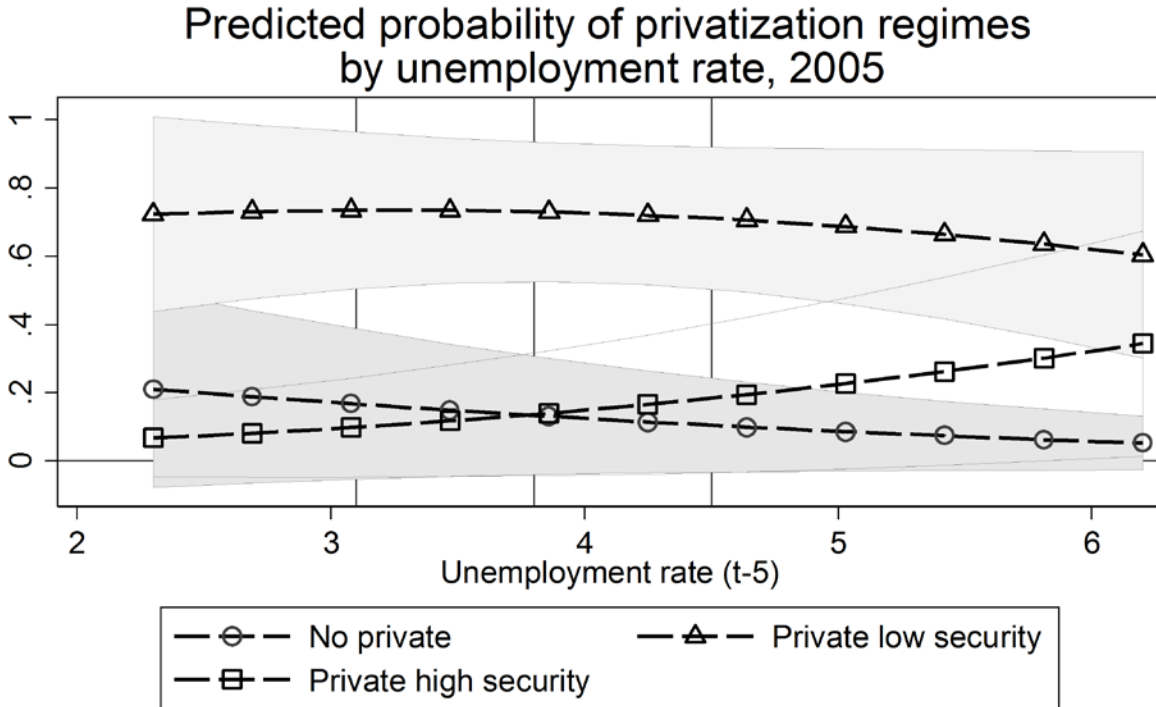
Note: 'Low security' refers to private minimum security facilities. 'High security' refers to medium and maximum security facilities. Five state-years are missing because they did not have any minimum security facilities and thus were not at risk of low security privatization.

**Table 1: Multinomial logistic regression of privatization by security level, 1990-2005.**

	1					2					3				
	Low security privatization only		High security privatization		Sig. Δ	Low security privatization only		High security privatization		Sig. Δ	Low security privatization only		High security privatization		Sig. Δ
	b	se	b	se		b	se	b	se		b	se	b	se	
<i>Corrections</i>															
Crowding (t-5)	1.577	[1.265]	1.161	[1.571]		1.524	[1.264]	0.556	[1.676]		1.333	[1.159]	0.748	[1.338]	
Court orders (ln) (t-5)	0.266	[0.345]	-0.087	[0.337]		0.308	[0.324]	0.028	[0.352]		0.229	[0.343]	-0.131	[0.342]	
Corrections spending per capita (t-5)	0.002	[0.010]	0.005	[0.010]		0.002	[0.010]	0	[0.009]		0.003	[0.010]	0.006	[0.010]	
<i>Economics</i>															
Tax and spend limits (t-5)	-0.17	[0.551]	0.051	[0.713]		-0.174	[0.549]	0.174	[0.728]		-0.149	[0.553]	0.045	[0.685]	
Unemployment rate (t-5)	0.31	[0.195]	0.776***	[0.228]	*	0.296	[0.175]	0.581**	[0.209]		0.301	[0.199]	0.786***	[0.213]	**
<i>Ideology</i>															
Citizen liberalism (t-5)	-0.024	[0.023]	-0.073**	[0.027]		-0.03	[0.021]	-0.109***	[0.026]	**					
Union membership (t-5)	-0.023	[0.068]	-0.145	[0.080]	*						-0.06	[0.061]	-0.232***	[0.069]	**
Democrat governor index	0.005	[0.135]	-0.163	[0.155]		-0.002	[0.134]	-0.161	[0.153]		0.024	[0.130]	-0.136	[0.154]	
<i>Controls</i>															
# inmates in max. or med. security (ln)	0.44	[0.246]	1.103**	[0.343]	*	0.398	[0.236]	1.171**	[0.395]	*	0.431	[0.246]	1.014**	[0.322]	*
# inmates in min. security (ln)	0.142	[0.300]	0.115	[0.246]		0.147	[0.300]	0.099	[0.265]		0.197	[0.299]	0.184	[0.244]	
Constant	-9.045***	[2.394]	-13.345***	[2.891]		-8.743***	[2.410]	-12.147***	[3.225]		-9.437***	[2.363]	-14.285***	[2.793]	
Year dummies		Yes		Yes			Yes		Yes			Yes		Yes	
Log likelihood		-131.94		-135.467			-135.727		-135.727			-135.727		-135.727	
p		0		0			0		0			0		0	
Pseudo R <sup>2</sup>		0.363		0.346			0.345		0.345			0.345		0.345	
BIC		411.524		408.031			408.553		408.553			408.553		408.553	
N		195		195			195		195			195		195	

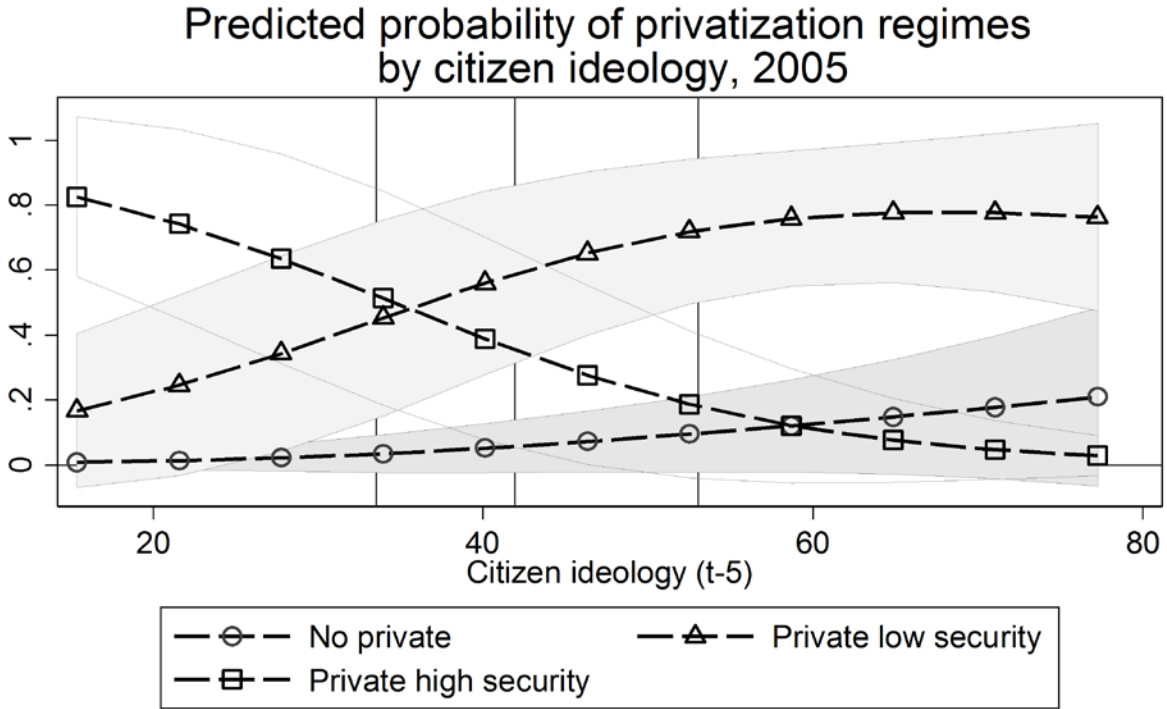
Note: Reference category is no private corrections facility of either type. Analysis omits state-years with no minimum security facilities (see discussion in text). Standard errors are clustered by state. "Sig. Δ" indicates whether coefficients differ significantly across outcome categories in a Wald test. Stars indicate significance levels: \* p<0.05, \*\* p<0.01, \*\*\* p<0.001.

*Figure 3: Predicted probability of high security and low security privatization in 2005, by unemployment rate.*



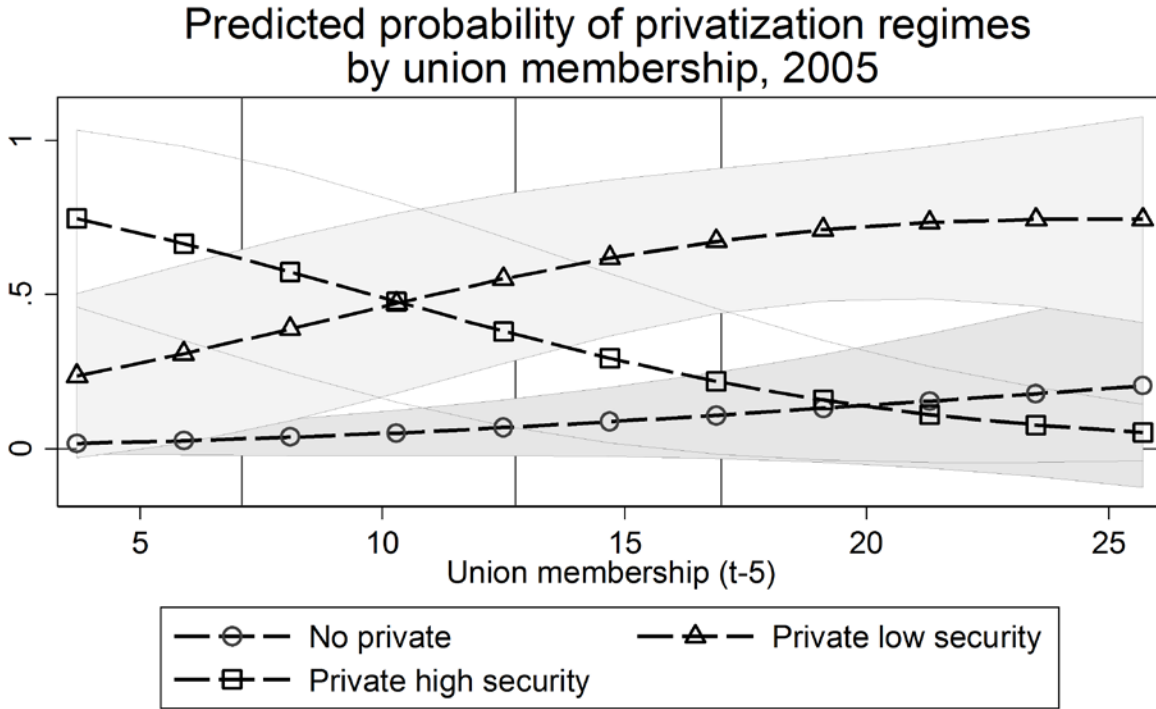
Dashed lines represent the predicted probability of each privatization regime for varying levels of unemployment given a state with tax and expenditure limits in 2005 and all other variables at their mean values. Vertical lines represent the 25th, 50th, and 75th percentile of unemployment in the sample in that year. Shaded areas indicate 95% confidence intervals.

*Figure 4: Predicted probability of high security and low security privatization in 2005, by citizen liberalism.*



Dashed lines represent the predicted probability of each privatization regime for varying levels of ideology given a state with tax and expenditure limits in 2005 and all other variables at their mean values. Vertical lines represent the 25th, 50th, and 75th percentile of ideology in the sample in that year. Shaded areas indicate 95% confidence intervals.

*Figure 5: Predicted probability of high security and low security privatization in 2005, by union membership.*



Dashed lines represent the predicted probability of each privatization regime for varying levels of union membership given a state with tax and expenditure limits in 2005 and all other variables at their mean values. Vertical lines represent the 25th, 50th, and 75th percentile of union membership in the sample in that year. Shaded areas indicate 95% confidence intervals.