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ARTICLE

Inmate Litigation, Legal Access, and Prison Privatization

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Abstract

Debates over prison privatization neglect to consider differences in legal access across private and public prisons. I argue that private prisons experience lower filing rates than public prisons, and that cases brought against publicly traded private prison companies are less likely to be dismissed and more likely to succeed than similar cases against public prisons. I find evidence consistent with these claims, a result that is not driven by other explanations of judicial decision-making. This paper has implications for skepticism of private interests in public policymaking, and encourages investigation of access to justice for inmates in public and private custody.

Keywords: private prisons; inmate litigation; judicial politics; judicial ideology

Shortly after taking office, President Joe Biden signed an executive order,[1] phasing out the federal government's use of private prisons. Although some celebrated this move as a necessary step in eliminating profit in American corrections, others lamented that this move did not go far enough. Though this order targeted the eventual renewal of existing contracts, the executive order did not immediately end contracts with private companies and did not address the tens of thousands of state and local prisoners held in private prisons across the country (Gunderson 2020). This order, while significant in theory, does not make a significant dent in privatization across the country, as dozens of governmental officials continue to sign and renew contracts with private companies to operate and manage correctional facilities. As public opinion continues to shift in opposition to private prisons (Enns and Ramirez 2018), the public and policymakers alike continue to grapple with the appropriateness of outsourcing punishment to the private sector. This policy is especially

[1]For the order text, see https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/executive-order-reforming-our-incarceration-system-to-eliminate-the-use-of-privately-operated-criminal-detention-facilities/.

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important as over 100,000 inmates across the country are housed in these private facilities (Carson 2020).

Research on private prisons tends to analyze the policy in direct comparison to public prisons: whether private prisons are more dangerous, whether inmates in private facilities face a higher risk of recidivism, whether private prisons are cheaper than public ones, among many other questions (Camp et al. 2002; Perrone and Pratt 2003; Spivak and Sharp 2008; U.S. Department of Justice 2016b). While these are all important questions to consider for policymaking purposes, this paper looks at an overlooked but vital aspect of incarceration, inmate legal rights. Some nascent research has examined the difference in court orders across private and public prisons (Burkhardt and Jones 2016) and overall perceptions of private prison providers among judges in court filings (Blakely and Bumphus 2005). Little speaks to the essential, albeit slightly mundane, action of inmate legal filings, typically unsuccessful and low stakes actions that largely do not seek structural reform of the criminal legal system but seek relief for individual violations of constitutional rights. Prisoner petitions are important to analyze as litigation provides one of the only (if not the only) avenues for relief while incarcerated, and access to justice remains an important consideration for inmates across the country.

This paper investigates district court civil rights and prison condition cases filed by inmates that are brought against publicly traded private prison companies and those brought against public authorities to excavate patterns in case outcomes across management types. I argue that private prisons ought to experience *lower* filing rates than public prisons, an empirical pattern that I suspect is driven by deficiencies in the legal infrastructure for inmates rather than substantively better prison conditions in private prisons. Moreover, I hypothesize that judges will be more skeptical of cases brought against private prison companies than similarly situated cases brought against public prison authorities (i.e., that these cases will be *less* likely to be dismissed and more likely to succeed).

I amass a dataset of over 800,000 prison condition and civil rights cases filed by prisoners in the federal district courts and identify the set of lawsuits filed against publicly traded private prison companies. I consider the filing rates in public or private prisons, and find a significant difference in filing *rates* for inmates in public or private prisons. Public prisoners file many more lawsuits per capita than private prisoners and though I cannot pinpoint the precise reason for these differences, a random sample of these cases suggests this may be attributable to neglect of inmate due process and access to justice in private prisons, a troubling implication if accurate. I next use exact matching methods to create a comparable set of lawsuits filed against public authorities (Iacus et al. 2012), and compare in total, about 1,000 private prison cases to about 33,000 public prison cases. I find that cases with private prison defendants are less likely to be dismissed, following my expectations. I also find tentative evidence that these cases are more likely to result in a likely favorable judgment for inmates. Importantly, these results are not driven by ascriptive characteristics of judges like ideology, race, sex, or judicial background. Though this paper provides some descriptive patterns and arguments, future research ought to excavate these relationships further, to see whether these results are driven by differences in legal deficiency, judicial skepticism, and/or by other characteristics of facilities, inmates, or the claims themselves. I emphasize that legal rights is another vital consideration in the decision to privatize prisons and the need for appropriate protections for these rights while incarcerated in public or private prisons.

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Inmate litigation

I propose two separate but related arguments: first, that private prisons will experience lower filing rates than public prisons, and second, that those cases brought against publicly traded private prison companies will be less likely to be dismissed and more likely to succeed than similar cases brought against public prisons. Though much scholarship has described discrepancies between public and private prisons among characteristics like cost or recidivism (Perrone and Pratt 2003; Spivak and Sharp 2008; U.S. Department of Justice 2016b), very little has sought to investigate whether and to what degree legal rights differ depending on whether the correctional operator is public or private. This is especially important as access to the courts is one of the foundations of American democracy. Nevertheless, inmates in public and private prisons both experience similar constraints and difficulties when entering the legal system.

Prisoners face exceedingly low odds of success, perhaps the result of their pro se status (filing without the aid of an attorney) rather than the merit of their legal claims (Gunderson 2021). Often, these cases are painted as frivolous, excluded from the analysis of judicial politics, and dismissed without regard to their merit (Schlanger 2003). Indeed, these perceptions were the driving force behind the federal Prison Litigation Reform Act (PLRA) of 1996 that made it more difficult to sue in federal courts and significantly reduced prisoner lawsuits (Alderstein 2001). Prisoners are perhaps the ultimate one-shot players following Galanter (1974): low-resourced, often under-educated, and facing formidable foes that have much more experience litigating. This theoretical perspective is borne out in analyses of the relative advantage of different groups, with criminal defendants disadvantaged in their cases against state governments, for example (Farole Jr. 1999).

Prisoners seeking to sue typically do so in federal courts and about two-thirds of all inmate litigation is filed there (Piehl and Schlanger 2004). I therefore consider litigation in the federal courts. Incarcerated people primarily bring cases in the federal district courts for two reasons: first, for habeas relief challenging the lawfulness of the petitioner's detention and second, for complaints about unconstitutional conditions of confinement (Thomas 1988). Though both of these are important sources of litigation activity for those incarcerated, I consider only civil rights or prison conditions cases, those brought to challenge the constitutionality of prison conditions. I do this primarily to focus on those cases that are more atypical (as presumably each person convicted of a crime has some reason or incentive to file a habeas claim) and directly relate to prison conditions, a key consideration in prison privatization. Within these condition cases, incarcerated people typically sue under Section 1983 of Title 42 of U.S. Code (Cheesman, Hanson and Ostrom 2000). Prisoners face an uphill battle when suing, as many state and federal statutes exist to make filing lawsuits more difficult in an effort to stem the growth of these lawsuits (Brill 2008; Schlanger 2003; Struve 2018). These steep barriers do not stop at the filing stage, however. These lawsuits are very unlikely to succeed, with a 2% to 20% success rate when considering a variety of favorable outcomes, from settlements to favorable judgments and the like (Gunderson 2021).

Private prisons further complicate the litigation process. Since the introduction of modern private prisons four decades ago, the law has evolved in this new context, but questions remain about legal liability within private prisons. For instance, should an inmate held in a private prison sue that company, the government that contracted

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with that company, the government monitor, or others for constitutional violations (Tartaglia 2014)? This confusion muddies an already complex litigation system for those who are incarcerated, who often lack substantive legal resources (Gilmour and Jensen 1998; Raher 2010).

Filing rates across private and public prison context

I began by considering how the legal infrastructure may differ across the private and public prison context. One open question is whether private prisons are subject to more stringent judicial overview or, on a related note, whether litigation is more difficult in private or public prisons (Gunderson 2020). Some scholars assume that the legal environment in private prisons is more difficult for inmates than those in public prisons, while others point to the potential for positive externalities in this relationship: some argue the law is more generous to those incarcerated in private facilities than those in public facilities (though the degree of this supposed benefit is not clear; Volokh 2013). My first hypothesis explicitly considers the filing rates of inmates across the private and public prison context, a direct implication of whether litigation is comparatively more difficult in the private prison context than in public prisons.

Why would litigation be more difficult for those incarcerated in private prisons? Research on this question is nascent and mixed. When considering overall conditions of confinement, inmate recidivism, or cost, there is inconsistent evidence about whether public or private prisons perform better or worse on a variety of metrics (Pratt and Maahs 1999; Camp et al. 2002; Perrone and Pratt 2003; Bayer and Pozen 2005; Lukemeyer and McCorkle 2006; Spivak and Sharp 2008; Mukherjee 2021). Though the research is inconclusive on this question, theoretical underpinnings of why exactly private provision of punishment may be deficient rely on expectations that the profit motives of private companies incentivize those firms to cut costs at the expense of quality (Hart, Shleifer and Vishny 1997).

Specific research on litigation or court involvement is much more sparse. Burkhardt and Jones (2016) find little difference in rates of judicial intervention between public and private prisons. On the other hand, other studies find that public prisons are more likely to be under court orders than private prisons (Austin and Coventry 2001; Makarios and Maahs 2012). And other research finds that judges tend to view private prisons more negatively than similarly situated public prisons (Blakely and Bumphus 2005). Absent a clear synthesis of these studies, it is difficult to know whether private or public prisoners are more litigious. Moreover, all these studies consider only those lawsuits that result in a court order, an extremely small proportion of the thousands of inmate cases filed each year. Nevertheless, I expect, on average, that private prisons have worse legal infrastructure for inmates, and thus, will experience lower filing rates, a result I suspect is driven by these legal deficiencies and not because of significantly better conditions. Private prisons, of course, could experience lower litigation rates because the conditions of private prisons are simply better than public ones. Though this is a possibility – and one that I cannot rule out definitively using the data below – I expect differences in filing rates to be primarily driven by deficiencies in legal protections for inmates following evidence that these facilities are worse than public ones (Hart, Shleifer and Vishny 1997; Blakely and Bumphus 2005; U.S. Department of Justice 2016b). A deficient legal infrastructure

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could refer to several aspects of the prison bureaucracy, including (but not limited to) a lack of access to attorneys, hesitance of prison officials to facilitate legal filings, poor legal resources like law libraries, and/or few or nonexistent staff to help inmates file their claims.

The question of whether private or public prisons differ in their quality of legal infrastructure, however, is difficult to determine as there exists little data on legal protections for the incarcerated. The little data that does exist comes from in-depth, time-consuming, and rare prison ethnographies (Wacquant 2002; Rios, Carney and Kelekay 2017). There is little systematic information on legal infrastructure within prisons, from law library access or ease of communication with attorneys. And the rich, qualitative data that comes from analyzing specific court cases or interviews with prisoners filing claims (e.g., Calavita and Jenness 2015; Palacios, Butler, and Griffin III 2020) typically consider only public prisons. Some scholars have made comparisons between public and private prisons in more detail as to the administrative and day-to-day operations, but these studies take place in the United Kingdom (e.g., Crewe, Liebling and Hulley 2015). Therefore, it becomes difficult to know definitively either the presence (or absence) of these legal protections, or the differences in these protections between public and private prisons in the United States. We know there are differences in legal filings between specific facilities and security classifications, however, though there is robust litigation activity at all facility types, from minimum- to maximum-security (Schlanger 2003; Calavita and Jenness 2013).

There are some reasons to believe that private prisons may be uniquely deficient in their legal infrastructure, however. For one, private prisons are typically understaffed and underresourced in all areas (U.S. Department of Justice 2016a; Bauer 2019), so it is likely this area is no exception. Second, some anecdotal evidence shows that private prison companies have barred attorneys from seeing their clients in their facilities (Eisen 2017). Private prison companies may be actively dissuading or even preventing inmates in their custody from seeking legal help. This is not to suggest that public prisons do not experience similar deficiencies, but rather that those deficiencies may be *more pronounced*, and occur at a *higher rate* in private prisons. And, given recent research that finds that private prisons may incarcerate their residents for longer than public prisons (Mukherjee 2021), a lower filing rate is especially indicative of this phenomenon. Legal infrastructure, like other essential services within private prisons, may be understaffed and under-resourced, thus leading to lower filing rates in private correctional facilities.

In practice, one recent court case provides an illustrative example of the mechanism of weaker legal infrastructure for inmates in private prisons. The U.S. Marshals Service arrested Rudy Rivera on a warrant for marijuana-related charges, and housed him in a CoreCivic facility. Rivera was not brought promptly to court, and instead spent 355 days in solitary confinement without a court appearance. CoreCivic employees discouraged Rivera from reaching out to the Marshals, "telling him to '[j]ust sit there and wait,' and that the federal government 'does what they want to' and will 'get you when they're going to come get you.'"[2] Rivera finally reached out to the Federal Public Defender's Office, and was promptly brought to a judge. He soon sued CoreCivic for charges related to his lengthy imprisonment without a court hearing, and on May 28, 2021, the U.S. Ninth Circuit Court of Appeals ruled in

[2]See https://cdn.ca9.uscourts.gov/datastore/opinions/2021/05/28/20-15651.pdf.

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Rivera's favor, writing "A jury could reasonably find CoreCivic's actions *extreme or outrageous* given the nature of plaintiff's liberty interest, the *egregious length of his detention without arraignment*, the ease with which CoreCivic could have corrected the problem, and the *callousness* of its disregard" (emphasis added). While this example is only one private prison inmate's experience, it illustrates the dynamics behind my first hypothesis.

Hypothesis 1 *On average, private prisons will experience lower inmate filing rates than public prisons.*

Prison privatization and judicial decision-making

If it is the case that private prisons have deficient legal infrastructure for inmates, what effect does that have on the eventual outcome of those cases that are brought? I next consider this question in the context of judicial decision-making. Standard typologies of advantage and lawsuit success before the courts ranks so-called repeat players as much advantaged in litigation against one-shotters (Galanter 1974). Those parties that have experience litigating tend to be more successful than those with little to no experience. Within those broad categories, variation remains in success before the courts. Largely, poor individuals or minorities are ranked as the least advantaged, and the federal government is ranked as the most advantaged, with other actors like individuals, corporations, and state governments ranking somewhere in between (Sheehan, Mishler and Songer 1992; Songer and Haire 1992; Dunworth and Rogers 1996; Songer, Sheehan and Haire 1999; Dumas and Haynie 2012; Boyd 2015).[3] As a result, we might expect that private companies will be relatively advantaged in litigation when they are facing one-shot litigants like prisoners. However, there is one key difference in the private prison context: these companies are involved in litigation because they directly administer or are involved in state duties and public policy.

I argue this difference is significant: whether a case involves a private company in a private dispute *or* it involves a private company directly involved in the administration of state policy. I suggest that if a judge considers a similarly situated case of an individual against a public entity or private entity, that the judge would be more likely, all else equal, to rule in favor of the individual if the defendant is a private entity than if it was a public entity (similar to the typology listed in Sheehan, Mishler and Songer 1992). This is not to suggest that private entities are not more likely to be victorious against individuals (Dunworth and Rogers 1996), but rather that judges would defer more to public entities than private ones in similar cases in which they are both sued for matters related to government policy.

In the prison context, we might expect judicial skepticism to be especially strong. I do not define judicial skepticism specifically, as I intend it to reflect a broad hesitance of judges to particular viewpoints or arguments (here, those arguments brought forth by private companies in public policymaking). Courts tend to defer to the justifications and positions of public prison officials (Wecht 1987), but are relatively more skeptical of claims brought against private parties that perform the same functions.

[3]Fully, the typology ranges from 0 to 10 and is as follows: poor individual (1), racial or ethnic minority (2), individual (3), unions or interest groups (4), small businesses (5), businesses (6), corporations (7), local governments (8), state governments (9), and the federal government (10).

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Anecdotal evidence from a review of judicial opinions against similarly situated cases against public and private prisons provides some qualitative support of this phenomenon. From Blakely and Bumphus (2005):

> "Experience, training, and temperament may become expendable virtues when their associated costs threaten the bottom line. The undisputed actions of CCRI [Capital Correctional Resources, Inc.] unfortunately, have *done little to assuage the Court's misgivings about the privatization of prisons.*" (Kesler v. Brazoria County, 1998, p. 22, emphasis added).

General Supreme Court jurisprudence, in particular, has highlighted judicial hostility to private interests that provide public policy. From Wecht (1987), "the Supreme Court has long evinced a hostility toward the delegation of discretionary or adjudicative powers to financially interested parties … the Court was concerned with the abdication of effective state power to profit seekers, citing a special danger when private parties seeking private gain can invoke state power" (p. 825–6). These private delegations have raised alarm in the state courts over issues of anti-competitive behavior and self-dealing (Freeman 2000). Indeed, judicial skepticism of private interests is a pattern borne out empirically (Volokh 2014), though this hostility may be waning over time (Metzger 2003).

Judicial skepticism is fueled in part by general legal hostility to private actors in public policy, but I argue it is fueled in part too by personal preferences of judges. Judges retain policy preferences following the canonical attitudinal model and make decisions on the basis of those preferences (Segal and Spaeth 2002). Above and beyond standard explanations like judicial ideology, though, I argue there are personal preferences about the appropriate role of government in the administration of punishment that are relatively common that judges may (consciously or unconsciously) rely on when they rule.[4] Thus, I expect judges to broadly mirror patterns in public opinion about prison privatization.

Data on public opinion about prison privatization in particular is relatively sparse, however, but the studies that do exist point to a public that is skeptical about the benefits of prison privatization (Thompson and Elling 2002; Ramirez and Lewis 2018). In the private military context, inferences about the profit-driven motives of private contractors are associated with citizen distrust and low evaluation of policy performance as compared to government officials that perform the same function (Ramirez 2020). Within the prison privatization context specifically, available evidence suggests that citizens may support market intervention into industries like janitorial services or garbage collection, but stop short of supporting that kind of intervention into prisons (Thompson and Elling 2002). A plurality of Americans appear to agree that the government should not privatize prisons (Enns and Ramirez 2018; Frost, Trapassi and Heinz 2019). Therefore, we ought to expect similar misgivings about privatization among the public and among judges. And, judges may be especially sensitive to public opinion and questions about appropriateness in the private prison context given incidents like the Kids for Cash

[4]Of course, the question of how judges form their opinions, whether it be by following general public opinion or changing their own opinions independently over time is a hotly debated question (e.g., Giles, Blackstone and Vining Jr. 2008; Epstein and Martin 2010; Casillas, Enns and Wohlfarth 2011; Johnson and Strother 2021). Here, I am agnostic about the precise source of judges' personal preferences.

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scandal in which private companies paid judges to send juveniles to their private facilities.[5] As a result, I expect judges in particular to be especially concerned about their behavior when private prisons are involved.

Importantly, this theoretical perspective argues that characteristics of judges – like ideology, race, sex, or age – should not be correlated with differences in rulings involving private prisons. This is an important departure from much of the literature on judicial politics that finds significant (though sometimes mixed) effects of ideology and ascriptive characteristics on a variety of case outcomes (Segal and Spaeth 2002; Schanzenbach 2005; Boyd, Epstein and Martin 2010; Clark and Lauderdale 2010; Lauderdale and Clark 2014; Boyd 2016; Cohen and Yang 2019; Kastellec 2020). Extralegal factors, like preferences or opinions on racial discrimination or the appropriate level of judicial lawmaking to engage in, can also influence how a judge behaves (Ulmer and Kramer 1996; Clair and Winter 2016). I depart from this literature here and argue that judicial opinions on prison privatization will be orthogonal to these variables like ideology, race, sex, or age.

If cases are more successful in private prisons, it could be attributable to at least two (if not more) reasons: first, that the claims brought by these inmates are "more legitimate" and second, that the conditions in private prisons are comparatively worse than public prisons. As a result, prisoners in private facilities have more reason to sue and more legal legitimacy for their claims. Scholarly consensus on which facility types experience worse conditions is unclear. Nevertheless, I expect that, on average, private prisons will experience worse prison conditions (and inmates there may, as a result, file "better" complaints) following empirical and theoretical evidence that privatization incentivizes cost-cutting and results in worse outcomes for those that are incarcerated in private facilities (Hart, Shleifer and Vishny 1997; Blakely and Bumphus 2005; U.S. Department of Justice 2016b). These worse conditions increase the likelihood that a lawsuit will succeed, I suggest, as judges observe these worse conditions and rule in private prisoners' favor.[6]

I argue that judges will be less likely to dismiss cases against private prison companies and those cases will be more likely to succeed. These results could be driven, as I tentatively suggest, by legal skepticism of private interests in public policymaking and the overall lack of support for prison privatization within the public, but could also be consistent with other mechanisms as well. Note that I will consider similar cases that are filed in public and private prisons to make appropriate comparisons between these facilities. I also consider publicly traded private prison companies because of data limitations (as described below), but you could imagine similar dynamics at play for any private company that operates within correctional facilities, publicly traded or not.

Hypothesis 2 *Cases brought against publicly traded private prison companies will be less likely to be dismissed than similar cases brought against public prison authorities.*

[5]See: http://www.heal-online.org/judges022309.pdf.

[6]Of course, cases could still slip through the cracks because of a general distrust of prisoner lawsuits (Calavita and Jenness 2015; Gunderson 2021). Nevertheless, I expect, on average, that more meritorious claims will be more likely to succeed.

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Hypothesis 3 *Cases brought against publicly traded private prison companies will be more likely to succeed than similar cases brought against public prison authorities.*

Data and methodology

Exploring the relationship between prisoner lawsuits and facility type is a difficult task in a large-N context. For one, there is not a consistent source for exactly which cases are filed against private prisons, as compared to public prisons. Moreover, the source of data on lawsuit success can be spotty and incomplete (Eisenberg and Schlanger 2003). Finally, econometric difficulties exist. Namely, public and private prisons tend to hold different types of inmates, with the former ranging from minimum- to maximum-security facilities and the latter ranging only from minimum- to medium-security facilities. This means that the types of lawsuits filed across contexts may be qualitatively different.

Existing research on the differences in litigation between public and private prisons is far and few between. This study is most similar to Blakely and Bumphus (2005), though those authors only look at a few dozen Section 1983 cases. While this important study provides essential context to these specific lawsuits, it provides less guidance on the overall patterns of behavior of litigation against public or private prisons. Another exception is Burkhardt and Jones (2016), as they examine patterns of court orders in public or private prisons and find little difference in judicial intervention between these two types. However, Burkhardt and Jones (2016; like Blakely and Bumphus 2005) only look at successful cases (those that resulted in a court order), which provides some information about the legal landscape in private prisons, but is not complete considering that the vast majority of inmate lawsuits are failures.

I argue that the relationship between all lawsuits (successful and the vast majority that are not) and privatization is important to consider precisely because only examining court orders neglects to consider the thousands of unsuccessful lawsuits filed each year that may include meritorious claims but for some reason are ultimately unsuccessful. Therefore, I rely on the Federal Judicial Center (FJC) data for civil claims filed under Nature of Suit codes 550 and 555, prisoner suits brought specifically for civil rights and prison conditions. I consider these claims filed from 1986 to 2016, approximately 800,000 cases.

With the prisoner cases collected, I next must develop a way to identify all of the lawsuits filed against private prisons. This is a difficult text processing task, however. The case names are not consistent over time or even within district, and there is considerable diversity in how the FJC lists the names of the plaintiffs and defendants in each case. I develop a conservative way of identifying these cases, however, by filtering for the names of publicly traded private prison companies identified in Gunderson (2020) in the defendant column of the data (see appendix for the list of the terms I search for). These cases correspond to the four publicly traded private prison companies of the last four decades: CoreCivic (formerly the Corrections Corporation of America), GEO Group (formerly Wackenhut Corrections), Correctional Services Corporation (formerly Esmor Correctional Corporation), and Cornell Companies. Because I will later link the lawsuits information to the private prison location data in

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Gunderson (2020), I only consider those lawsuits filed against publicly traded private prison companies.

Do private prisoners file more lawsuits?

Hypothesis 1 considers differences in the filing rates of prisoners in public or private facilities. Are private prisoners more or less litigious than their public counterparts? While the method described above does not necessarily provide an exhaustive list of each and every lawsuit filed against private prison companies, it does provide a fairly complete list of those filed against those companies that are publicly traded. We can conduct a preliminary test of Hypothesis 1, and compare the filing rates per capita in public and private prisons.

To calculate filing rates per capita, I use the dataset described above, which identifies the number of private prison facilities operated by publicly traded companies and their capacities each year (Gunderson 2020). I then link these data to the National Prisoner Statistics series from the Bureau of Justice Statistics (BJS), which provides the total population under states' jurisdictions in each year. I group these data by year to see the number of private prison inmates (operated in publicly traded facilities) and the number of public prison inmates (the total number reported by BJS minus the number of private prison inmates) annually. On average, between 1986 and 2016, there are over 86,000 inmates in publicly traded private prisons and more than 3.5 million in public facilities annually. I calculate a per capita rate per 100,000[7] incarcerated population, the number of inmate lawsuits filed against public or private facilities (as identified above) divided by the respective population of prisoners in

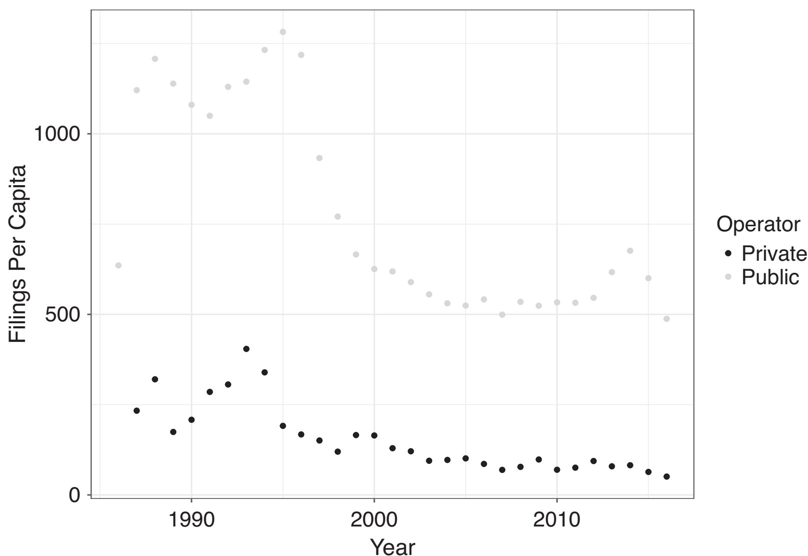

Figure 1. Filing Rates of Private and Public Operators, 1986 to 2016.

[7] Private prisoners file 0.0015 lawsuits per prisoner, and public prisoners file 0.0078 lawsuits per prisoner.

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those facility types. Figure 1 shows this per capita rate over time. Both private and public operators experience parallel trends in lawsuits – namely, increasing in the 1980s and 1990s before sharply decreasing in response to the PLRA in 1996 – but private operators consistently experience lower rates of lawsuits.

I then compare the means of these per capita rates to analyze whether and to what degree private prisoners sue at different rates than their public counterparts. Table 1 contains a t-test of these means. While about 154 lawsuits are filed per 100,000 inmates in private prisons, that number is much larger for inmates in public facilities, more than 778 lawsuits per 100,000 public prisoners. This difference is highly statistically significant, and does indeed point to variation in filing rates across facility type. Importantly, this test does not identify the precise *reasons* for these differences, but it is consistent with differences in the litigation regimes across facility types. One reason could be that private prisons make the litigation process more difficult; another is that private prisons are simply better than public ones and thus experience less litigation. Though I cannot pinpoint the precise reason, qualitative evidence below is suggestive of the first mechanism, rather than the second.

One potential concern with this initial test is that my method of labeling lawsuits, as described above, does not truly identify the universe of lawsuits filed against private prisons. Even if we underestimated the number of private prison lawsuits by half – which is extremely unlikely, given that the keywords I use include the private prison companies that comprise 85% of the total private corrections market – there remains a significant difference in filing rates across facility types. While this analysis is exploratory, it does paint a normatively troubling picture if this is indicative of weaker protections for inmates seeking to sue in private prisons. Future research ought to excavate provisions and protections for prisoners seeking to file lawsuits in public and private prisons. Another potential concern could be that conditions in private prisons lead to less filing, not because of deficiencies, but because of some characteristics of the inmates themselves. If individuals in private prisons, for example, have shorter sentences, we may expect them to sue less. However, some recent research finds private prisons incarcerate their inmates for longer than public ones (Mukherjee 2021). While that does not definitively eliminate some differences in inmate preferences, the existence of robust litigation activity across facilities of different types (Schlanger 2003; Calavita and Jenness 2013) suggests that we should see little difference between private and public correctional facilities. The fact that we do here is indeed consistent with deficiencies in legal infrastructure.

Comparing private and public prison claims

Though Table 1 is consistent with weaker legal infrastructure in private prisons than in public ones, it does not provide definitive evidence of this phenomenon. Namely, the lower filing rates could be driven by other characteristics, like lower sentence

Table 1. Results from Welch Two Sample *t* Test

	t Statistic	Confidence Interval	*p*-value
t	−11.63	−733.78 to −516.02	0.00

Note: Approximately 153.96 lawsuits were filed on average per 100,000 inmates in private prisons and 778.86 lawsuits per 100,000 inmates in public prisons on average.

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Table 2. Comparing Complaints Against Public and Publicly Traded Private Prisons

	Operation	Sampled	Dockets Available	Legal Access Complaints	Percent Legal Access Complaints
1	Private	50	40	7	17.5
2	Public	50	22	2	9.1

Note: The *p*-value of the *t* test comparing the legal access complaints is 0.38.

lengths in private prisons or the different custody levels of these facilities. While it would be prohibitively time-consuming and expensive to review each of the nearly one million cases analyzed here, I conducted an exploratory analysis of 100 randomly selected cases: 50 against public prisons and 50 against publicly traded private prison companies. I then used PACER to pull the docket sheets, as well as any information on the complaints or the final outcome of the case. I then coded the complaints based on whether the complaint specifically mentioned a lack of legal access – whether it be access to the inmate's lawyer, law library, or other resources. Table 2 shows the coding of these randomly sampled cases.[8]

Of the 50 cases randomly sampled, 40 (80%) of the cases against publicly traded private prison companies had docket and complaint information available, compared to only 22 (44%) of cases against public prisons. Of those with available case information, about 18% of cases filed against publicly traded private prison companies were complaints specifically about legal access, compared to about 9% of public prison complaints. While this difference is not significant using a t-test (*p-value*= *0.38*), it is likely at least part of this insignificance is due to the small sample size. While not definitive, this initial examination is consistent with a lack of legal infrastructure in private prisons. Inmates in facilities operated by publicly traded private prison companies mention legal access more often in their complaints than public prisoners.

One case, *Febre vs. GEO Group*, filed in April 2005 in California's Eastern District Court, illustrates this phenomenon. Plaintiff Benito Febre was incarcerated at a GEO Group facility in California and, among other complaints, filed a lawsuit alleging his legal calls to lawyer were denied and the facility violated his right of access to the courts. In court documents, Febre writes that he was instructed by the Bureau of Prisons to file his complaint with GEO Group, and a response from the company detailed in court filings read, "The Taft Facility is a private operation that exercises its own discretion and applies its own regulations regarding attorney-client calls." This is suggestive of broader patterns of independent creation of legal infrastructure in private prisons, infrastructure that appears to be deficient (or, at least, is perceived to be deficient) by the inmates who reside there.

Differences in success rates across private and public prisons

Initial results above show that private prisons experience lower filing rates than public prisons. How do the lawsuits that do make it to the courts fare, however? I next consider this question.

[8]See the Appendix for the listing of these cases.

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Table 3. Exact Matching Sample

	Control	Treated
All	340,368	1,097
Matched	33,376	992
Unmatched	306,992	105

There is one primary concern with simply estimating the effect of private ownership on a variety of outcomes. Namely, can we make legitimate and appropriate comparisons between lawsuits filed in public prisons and private prisons? This is of particular concern given that public prisons and private prisons tend to hold different kinds of inmates. To partially account for this, I use exact matching techniques that preprocess the data to aim for improved balance between the treated units (those lawsuits filed by inmates in private prisons) and the control units (Iacus, King and Porro 2012). I exact match on the following pre-treatment variables available from the FJC: the lawsuit file year, circuit, district, office (the office within the district where the case is filed), origin (the manner in which the case was filed in the district), Nature of Suit code (either 550 or 555), section (the section of law the suit is filed under), jurisdiction (the basis for district court jurisdiction in the case), and title (the title that the suit is filed under).[9] These variables encompass nearly all the information available in the FJC data, as it can be messy and inconsistent in recording of other variables like award amounts or ultimate case outcomes (Eisenberg and Schlanger 2003). This approach means that conditional on matching on all *observable* information about the lawsuit, in theory the only difference between a matched treatment and control unit is whether the prison is privately operated. While of course there could be (and likely are) other important variables in the adjudication of these claims – like some measure of legal infrastructure or the merit of the claim – unfortunately, there are no pretreatment variables that measure this in the FJC dataset, although an ideal matching strategy would take into account these characteristics as well. Therefore, this analysis largely matches on legal characteristics as much as possible to approximate valid comparisons across facility type. Importantly, this strategy aims for improved balance among these covariates and while this approach certainly has limitations, it helps to assuage concerns about differences between private and public facilities.

Table 3 shows the number of treated and control units in the dataset, followed by the number that are exact matched. In the final sample, there are about 34,000 cases, approximately 33,000 of which are those filed against public prisons and about 1,000 filed against publicly traded private prison companies (meaning that one private lawsuit could be matched to multiple public lawsuits).

With the approximate 34,000 cases in the matched sample, I estimate the equation below to test Hypotheses 2 and 3:

$$y_{i,t} = \alpha_i * \delta_t + \beta_1 Private_Publicly_Traded_{i,t} + \beta_2 Pro_Se_{i,t} + \varepsilon_{i,t} \quad (1)$$

Equation 1 includes $y_{i,t}$, a set of three binary dependent variables for case i in year t: whether the case results in a favorable judgment for the plaintiff, the prisoner;

[9]See Appendix for the FJC codes for each of these variables.

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whether the case results in a likely favorable judgment for the plaintiff; and whether the case is dismissed. The first variable is whether the case was disposed of by entry of a final judgment in favor of the plaintiff or in the FJC codes, JUDGMENT equal to 1 or 3 (case disposed of by entry of a final judgment in favor of the plaintiff or both the plaintiff and the defendant). The second variable, likely favorable judgment, considers all those favorable judgments from the first variable, alongside cases that were voluntarily dismissed or settled, following Schlanger's (2015) assumption that these cases are likely plaintiff victories. In the FJC codes, this corresponds to JUDGMENT equal to 1 or 3 or DISP equal to 5, 12, or 13 (case disposed of by entry of a final judgment in favor of the plaintiff or both the plaintiff and the defendant; judgment on consent or case dismissed voluntarily or settled). This variable importantly captures alternative ways cases can be adjudicated that favor the plaintiff that may not be recorded as explicit victories for them. There is a fair amount of missing data in these variables, however. Thus, the third dependent variable I consider is whether the case is dismissed for lack of jurisdiction or other reasons, as it is recorded for nearly each case (DISP is 3 or 14).[10]

The main independent variable is also binary and takes on the value of 1 if the suit is brought against a publicly traded private prison company, and 0 if not. I also include results with and without β_2, a control variable that measures whether the case is brought by a pro se inmate given evidence that these cases are much less likely to be successful (Gunderson 2021). I include interacted district-year fixed effects, $\alpha_i * \delta_t$, to account for significant heteroegeneity across districts and years (Eisenberg 1988; Schlanger 2006; Hübert and Copus 2019). I also cluster standard errors by district. Finally, I weight the observations using the weighting procedure in R, as one private prison lawsuit could be matched to multiple public prison lawsuits.[11]

Table 4 contains the summary statistics of those lawsuits filed against publicly traded private prison companies as compared to those filed against public entities. I look at the three dependent variables described above, as well as the length of the case and whether the case was filed pro se, without the aid of an attorney. The table also contains results from several group F-tests comparing means across these two groups.

There is no statistical difference in means in terms of favorable judgment. On the other hand, lawsuits brought against public prisons are significantly more likely to be brought by a pro se plaintiff. This provides some initial support for the idea that private prison claims are more likely to attract the attention of advocacy groups or other lawyers – that they may be more meritorious, or at least perceived to be more meritorious. This could also be consistent with more legal resources and thus more access to attorneys, I argue it is more likely this is driven by the increased visibility of inmates in private facilities and the increased likelihood of attracting a lawyer, rather than differences on average in complaint quality. On the other hand, lawsuits against private prison companies are more likely to result in a likely favorable judgment, are

[10]Other cases in the data are dismissed voluntarily or settled, but I exclude those here since they could result in positive outcomes for inmates. I investigated those cases in the content analysis sample from above with a DISP code of 14, following evidence that some of these are incorrectly coded as dismissals when they are settled or conclude in a different way (Hadfield 2004). Of the 35 cases with a DISP code of 14, two were transferred and one was settled (two were unavailable on PACER). This suggests there is some inaccuracy in the coding, but not in the majority of cases. While this is only a subset, it provides some encouraging evidence that most of the cases with a DISP code of 14 are likely actual dismissals.

[11]The results are substantively identical if the observations are not weighted. See the Appendix.

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Table 4. Summary Statistics of Private and Public Prison Litigants (Matched Sample)

Operation	Private			Public			
Variable	n	Mean	SD	n	Mean	SD	Test
Length to Termination, Days	992	347.78	336.5	33390	261.85	353.64	F = 57.039*
Pro Se Plaintiff	926	0.93	0.25	29495	0.97	0.18	F = 39.509*
Favorable Judgment	992	0.01	0.1	33390	0.01	0.09	F = 0.145
Likely Favorable Judgment	992	0.08	0.28	33390	0.05	0.22	F = 19.826*
Dismissed	992	0.28	0.45	33390	0.31	0.46	F = 3.713***

Note: SD, standard deviation.
*$p < 0.01$, **$p < 0.05$, ***$p < 0.1$.

less likely to be dismissed, and are also longer, on average.[12] We may expect the longer timeline of these lawsuits to reflect their greater complexity or merit. These results, while not causal, are consistent with Hypotheses 2 and 3.

Table 5 estimates Equation 1 first without pro se status and second, with that variable, whether the plaintiff is filing the lawsuit without the aid of an attorney. I also add a series of judicial characteristics (see below) to account for judge-level heterogeneity in judicial outcomes. There is some evidence that lawsuits brought against publicly traded private prison defendants are more likely to receive a likely favorable judgment and are less likely to have their cases dismissed. Once we control for pro se status, however, the coefficient on the private prison defendant becomes insignificant when we consider favorable or likely favorable case judgments. So while this provides some initial evidence for Hypothesis 3, it is not definitive. The negative coefficient on the case dismissed variable, however, is consistent across specifications. Cases brought against publicly traded private prison defendants are about 3% less likely to be dismissed, consistent with the expectations of Hypothesis 2. The coefficient on β_2 comports with results found elsewhere, that those inmates that file without the aid of an attorney experience worse outcomes and are more likely to have their cases dismissed (Gunderson 2021).

Next, I add a series of pre-treatment judicial variables to consider whether the results above are driven by differences in other judicial characteristics, like ideology, sex, race, or age following research that finds differences in case outcomes based on these ascriptive characteristics (Boyd 2016; Cohen and Yang 2019; Kastellec 2020).[13] If it is the case that these differences are driven by these variables and not instead, as I argue, by judicial skepticism, then there should be a significant effect of these variables on case outcomes.[14] Here, I use information on the identity of the judge on the case from Bonica and Sen (2017). I control for judicial ideology, race, sex, birth year, and whether the judge is a former prosecutor given that these carceral actors may behave differently in these cases than judges without that experience. Columns

[12]See the Appendix for logged days to termination as an alternate dependent variable. I find evidence that private prison defendants' cases are significantly longer than their public prison counterparts.

[13]Unfortunately, I cannot control for length of litigation, for example, or other variables as they are post-treatment.

[14]I do acknowledge that this design suffers from difficulty in estimating the effect of immutable characteristics in a non-causal framework (Sen and Wasow 2016).

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Table 5. Inmate Lawsuits Filed Against Public and Private Prisons Operated by Publicly Traded Companies (Comparison)

	Favorable Judgment	Likely Favorable Judgment	Case Dismissed	Favorable Judgment	Likely Favorable Judgment	Case Dismissed
	(1)	(2)	(3)	(4)	(5)	(6)
Private Prison Defendant	−0.003 (0.004)	0.023* (0.012)	−0.023** (0.010)	−0.008 (0.005)	0.015 (0.012)	−0.030** (0.012)
Judge Ideology (Bonica and Sen)				0.0003 (0.002)	−0.004 (0.005)	0.020 (0.017)
Judge Former Prosecutor				0.005 (0.005)	0.016 (0.012)	−0.028 (0.056)
Black Judge				−0.003 (0.004)	0.023 (0.029)	0.080* (0.047)
Male Judge				−0.002 (0.003)	0.007 (0.009)	−0.019 (0.025)
Judge Birth Year				−0.0001 (0.0001)	−0.00002 (0.0003)	−0.001 (0.001)
Pro Se Plaintiff				−0.078** (0.033)	−0.385*** (0.052)	0.206*** (0.040)
N	34,382	34,382	34,382	21,687	21,687	21,687
R^2	0.164	0.120	0.536	0.239	0.209	0.552
Adjusted R^2	0.147	0.102	0.526	0.219	0.188	0.541
Residual Standard Error	0.096	0.227	0.317	0.089	0.217	0.318

Note: All standard errors clustered by district. Interacted district-year fixed effects included. Observations are weighted. *$p < 0.1$, **$p < 0.05$, ***$p < 0.01$.

4-6 in Table 5 show these results. Private prison defendants remain associated with a lower rate of case dismissals and, in some specifications, increasingly likely favorable judgments. Nearly none of the judicial characteristics that may explain decision-making are significant, however: ideology, whether the judge is a former prosecutor, sex, or birth year is significantly associated with differences in case judgments or dismissals. The coefficient on the Black judge variable is significant only in one specification in column 6 and only at the $p < .1$ level. Though this analysis is not definitive – as there could be other judicial characteristics that influence decision-making – it is suggestive that other variables like ideology or race do not drive decisions involving private prison defendants.

I find support consistent with my hypotheses, but I cannot pinpoint precisely the reason for these empirical patterns. I suggest the lower filing rates and lower likelihood of case dismissal is indicative of potential deficient legal infrastructure and judicial skepticism of private interests, but one important limitation of this paper is that I cannot identify the merit of these legal claims using my data. However, results in Tables 4 and 5 that find private prisoners are less likely to file pro se and have longer cases, on average, are also suggestive of the legal infrastructure explanation. If private prisons (unintentionally or intentionally) block inmates' from seeking legal relief, then it follows that only the most meritorious complaints would ever make it in front of a judge. This suggests that both case merits and judicial skepticism could play a role in the adjudication of these kinds of disputes, and it is likely that both do.

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Discussion

This paper considered the potential differences in case outcomes and filing rates for inmates in public or private prisons, and provides some initial descriptive patterns on the differences in litigation regimes between facility types. I hypothesized that private prisons ought to experience lower filing rates than public prisons because of a lack of legal protections in private correctional facilities. Following that logic, I argue that cases brought against publicly traded private prison companies will be less likely to be dismissed and more likely to succeed than similar cases brought against public prison authorities. I find evidence consistent with these claims. Many more lawsuits are filed per capita in public prisons than in private prisons. Importantly, however, the analysis here is descriptive and therefore cannot distinguish precisely why these patterns exist – whether it be differences in prison conditions, legal claims, the kinds of inmates housed, or legal infrastructure. I provide some tentative qualitative evidence that deficient legal infrastructure is part of the story, but future research ought to excavate these patterns in more detail.

Cases brought against publicly traded private prison defendants are also less likely to be dismissed and, in some specifications, are more likely to result in a likely favorable judgment. I find this to be driven not by judicial characteristics like employment, ideology, sex, race, or age. These results are consistent with judicial skepticism of private interests in public policymaking, though future research can explore that phenomenon in more detail. This evidence also comports with the Department of Justice's evaluation of legal claims brought against privately or publicly operated federal prisons (U.S. Department of Justice 2016b). This theoretical perspective is distinct from studies of judicial decision-making, and points to the importance of analyzing factors above and beyond ideology in the adjudication of specific cases.

This particular analysis seeks to understand the private prison industry as it has been a source of much public and political scrutiny and controversy over the last few decades (Eisen 2018; Gunderson 2020). Given that hundreds of thousands of people are incarcerated in private prisons nationwide each year, it is vital that we understand the contours of life inside those facilities. Though this study begins to excavate legal infrastructure for inmates in both public and private prisons, future work ought to explore this in more detail. Comparisons of lawsuits or examinations of internal grievance processes would help illuminate these patterns further. Moreover, a more detailed comparison would help adjudicate between multiple explanations for these patterns, whether it be driven by differences in conditions, inmates, legal claims, or legal infrastructure – or a mix of all four. This qualitative evidence could be paired with the development of larger-scale quantitative data on legal infrastructure for the incarcerated, as we do not yet know the extent of the presence (or absence) of legal resources for prisoners.

These results have implications outside of criminal justice, moreover. For instance, this paper can speak to the potential of judicial skepticism of private interests, and in particular when those private interests are involved in the administration of state policy. One could imagine extensions of this analysis in other areas of public policy that have been privatized at least partially: foster care, probation or parole, and even education. It is worth investigating whether judicial skepticism of private interests involved in public policymaking is at work here, and also whether it extends to these other arenas. Does judicial skepticism drive case outcomes in all

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policy areas when private interests are involved in public policymaking? Future work ought to extend the results and findings here to these other contexts to see if private prisons are similar to other privatized industries or if there is something distinct about this particular industry. Surveys of judges, for instance, of their attitudes toward public or private actors, would contribute to a fuller understanding of how judges may evaluate who they are seeing in their courtrooms, above and beyond the merit of their legal claims.

This paper adds some essential context to the debate over public and private prisons. Though studies often focus on questions of cost or recidivism (Pratt and Maahs 1999; Camp et al. 2002; Perrone and Pratt 2003; Lukemeyer and McCorkle 2006; Spivak and Sharp 2008), access to justice and the ability to adjudicate legitimate concerns is an essential concern for correctional facilities. If there are differences in filing rates across facility types, which I find here, or differences in assumed similarly situated cases, which I also find, it paints a troubling picture of variation in judicial success and access depending on where inmates are housed. In theory, a just criminal legal system would allow equal access to justice and opportunities to adjudicate claims regardless of the facility that an inmate may be housed in. Evidence of the contrary is indicative of a legal system in need of provisions and protections for legal access for all those incarcerated.

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