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THE COMPLICATED ECONOMICS OF PRISON REFORM

*John F. Pfaff**

CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT. BY *Hadar Aviram*. Oakland: University of California Press. 2015. Pp. xiii, 252. Cloth, \$75; paper, \$29.95.

CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS. BY *Marie Gottschalk*. Oxford and Princeton: Princeton University Press. 2015. Pp. xiv, 474. Cloth, \$35; paper, \$24.95.

INTRODUCTION

By now, the stratospheric, forty-year rise in the U.S. prison population is well known. From the mid-1970s to 2010, the U.S. prison population steadily and relentlessly rose from around 250,000 to 1.6 million;¹ the incarceration rate from around 120 per 100,000 to 510 per 100,000 (and to over 700 per 100,000 when counting those locked up in jails as well as prisons). It was a surge unprecedented in American history and unseen elsewhere in the world. The U.S. incarceration rate in the 1970s was comparable to those in Europe and Canada. But by the 2010s, the United States had earned the dubious distinction of being home to 5% of the world's population but nearly 25% of the world's prisoners.

In 2010, however, for the first time in four decades, the U.S. prison population began to decline. The drop has not been great—just under 3%—and some observers predict that total populations could still rise by as much as 3% by 2018.² But the decline has nonetheless been remarkable, not just because it ended years of constant growth, but because it reflected a rare

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1. To be fair, criminal justice outcomes in the United States vary significantly across states, and national-level aggregates can hide important interstate variation. Between 2000 and 2010, for example, the total U.S. prison population grew by 16%, but four states saw declines (including New York by 20% and New Jersey by 16%), and some states saw much faster growth rates, like 75% in West Virginia, 57% in Minnesota, and 52% in the federal system. Unless otherwise stated, statistics on prison populations come from the Bureau of Justice Statistics. *Corrections Statistical Analysis Tool—Prisoners*, BUREAU JUST. STAT., <http://www.bjs.gov/index.cfm?ty=NP&id=N4PR-YYTP>.

2. Pub. Safety Performance Project, *States Project 3 Percent Increase in Prisoners by 2018*, PEW CHARITABLE TR. (Nov. 18, 2014), <http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/states-project-3-percent-increase-in-prisoners-by-2018> [<http://perma.cc/V39B-T7HA>]. Prison populations actually did rise slightly in 2013, but that increase was undone by declines in 2014.

moment of true bipartisanship. At both the state and federal levels, Democrats and Republicans alike advocated for reforms aimed at restraining or even reducing prison populations.³ Solidly blue states like California and deeply red ones like Georgia and Mississippi enacted significant reforms,⁴ and both houses of Congress have introduced reform bills with bipartisan sponsorship.⁵

A major question reformers raise, however, is how long will this bipartisan moment last? Many find the timing of reforms—most of which followed the 2008 financial crisis—not coincidental. The assumption is that conservative support for reform is driven primarily by the desire to save money during a time of tight state budgets and low crime rates.⁶ The obvious fear is that if the economy recovers, vital conservative support may dissipate. And this fear is not unfounded: there was concerted talk about prison reform in the aftermath of the dot-com bubble popping in 2000, but as the economy recovered, reform efforts fell by the wayside (Gottschalk, p. 25).

Two recent books on prison growth directly address the relationship between penal change and economic conditions: Hadar Aviram's *Cheap on Crime* and Marie Gottschalk's *Caught*.⁷ Aviram's is the more optimistic of the two accounts, arguing that there is at least some potential in an economic-based reform effort. Gottschalk, on the other hand, fears not only that economic-based efforts could fail to lead to significant reforms, but that they could actually make prison life worse for inmates if states cut funding and support without cutting populations. Both books make many provocative points, but both also suffer from some surprising omissions. Ultimately, both books, and Gottschalk's in particular, are likely too pessimistic about economic-based reform, although for reasons that neither book adequately addresses.

I focus on two major themes in this Review. First, what exactly is the relationship between the current fiscal crisis and prison reform? While it is clear that the crisis has helped to push legislators and governors to enact some important reforms, it is perhaps unexpectedly unclear why this is. The

3. Bill Keller, *Prison Revolt: A Former Law-and-Order Conservative Takes a Lead on Criminal-Justice Reform*, *NEW YORKER* (June 29, 2015), <http://www.newyorker.com/magazine/2015/06/29/prison-revolt> [<https://perma.cc/4954-Q83G>].

4. Colleen Curry, *How Mississippi Slashed its Prison Population and Embraced Criminal Justice Reform*, *VICE NEWS* (Sept. 23, 2015), <https://news.vice.com/article/how-mississippi-slashed-its-prison-population-and-embraced-criminal-justice-reform> [<http://perma.cc/4S7K-T8K9>].

5. Russell Berman, *Can the Senate Reform Criminal Justice?*, *ATLANTIC* (Oct. 2, 2015), <http://www.theatlantic.com/politics/archive/2015/10/will-criminal-justice-actually-be-reformed/408538/> [<http://perma.cc/Q53D-PF4S>]. For a list of the current pending federal proposals, see *Lawmakers*, *FAMM*, <http://famm.org/lawmakers/> [<https://perma.cc/D3D8-UN82>].

6. Nancy A. Heitzeg, *The Myth of "Bipartisan Criminal Justice Reform": Mississippi Close-Up*, *TRUTHOUT* (Nov. 13, 2014), <http://www.truth-out.org/news/item/27420-the-myth-of-bipartisan-criminal-justice-reform-mississippi-close-up> [<http://perma.cc/ZB3L-QGZ5>].

7. Hadar Aviram is a Professor of Law, U.C. Hastings College of the Law; Marie Gottschalk is a Professor, University of Pennsylvania.

fraction of state spending given to prisons is actually surprisingly low, suggesting that even in a time of tight state budgets, cutting back on prison populations will not help state budgets much. Instead, contrary to the narrative that both Aviram and Gottschalk provide, the story of postcrisis reform is likely more one of politics (and the political cover provided by the crisis) than of economic necessity. Surprisingly, this could actually be a reason to be *optimistic* that reform efforts will survive an economic recovery.

The second issue I consider is narrower: the impact of private prison firms on prison reform. Both Aviram and Gottschalk view these firms, and their attendant lobbying, as major threats to reform efforts. And the fear is understandable. These firms earn profits off the number of inmates they hold, so they have an incentive to lobby hard to keep those numbers high. At first blush, their lobbying efforts appear significant. But upon closer inspection, this concern is overstated. The correlation between relying on private prisons and state prison growth is weak, and it is hard to isolate the *marginal* importance of private prison lobbying from lobbying by all the other often-public groups with incentives to push for tougher sentencing practices as well. Moreover, to the extent that private prisons do impede reform, the problem isn't with their for-profit status (which is what alarms Aviram and Gottschalk), but with the poorly designed contracts that states sign with them.

Before jumping into these two issues, I just want to stress that both books, Gottschalk's in particular, examine many more issues than just the fiscal ones that I examine here, and it would take another Review of equal length to give them the attention they deserve. Gottschalk's, for example, emphasizes that real reform requires changing how we treat violent offenders (an essential point that almost no politician has yet been willing to admit), persuasively argues that it is problematic to talk about reentry but not address the root causes of the initial failure, and discusses race and punishment in a particularly nuanced and sophisticated way (Gottschalk, Chapters Eight, Four, and Seven). That is not to say that I agree with every claim in the book, but this is not the place to go into those disagreements.⁸ My focus here is just on the fiscal part,⁹ which I turn to now.

I. THE FISCAL CRISIS AS AN OPPORTUNITY FOR REFORM

According to the conventional wisdom about the causes of and solutions to prison growth, the financial crisis that started in 2008 has created a major opportunity to implement real reforms. It is a logical assumption to make.

8. The arguments that both Aviram and Gottschalk make are generally nuanced, so while I may not agree with many of the claims they make, especially when it comes to the causes of prison growth, it is hard to briefly summarize the disagreements without reducing their arguments to caricatures, which would be unfair to what they have written.

9. And, to be fair, only *part* of the fiscal picture. Both Aviram and Gottschalk, for example, discuss some of the clever financial tactics, such as lease-revenue bonds, that governments used to (among other things) circumvent public accountability. Aviram, p. 45; Gottschalk, p. 50.

Crime is at a forty-year low while correctional spending is at an all-time high, giving legislatures a strong incentive to cut back on spending, and thus (perhaps!) on prison populations.¹⁰ Bolstering this claim is the fact that the first decline in total prison populations since 1973 occurred in 2010, with declines persisting through 2014 (despite a slight uptick in 2013).¹¹

Yet the reality of incarceration growth is often far more complicated than the conventional wisdom suggests,¹² and both Aviram and Gottschalk confront the conventional account of fiscal crisis and reform head on. Both are deeply skeptical of its likely impact, although in different ways, and the concerns they raise generally demand attention. At the same time, both Aviram and Gottschalk miss the extent to which, I think, the current fiscal-based reform effort is not *actually about* fiscal issues. The financial aspect of reform may be more of a smokescreen than it gets credit for, and once framed this way, there is more reason to be optimistic—and pessimistic—about the future of reform. But let us first look more closely at the concerns that Aviram and Gottschalk raise.

A. *The Limited Power of Fiscal-Based Reform*

As both Aviram and Gottschalk note, the total amount states have spent on corrections has risen in tandem with soaring incarceration rates. Figure 1A plots state spending on incarceration (for prisons, in real 2012 dollars)

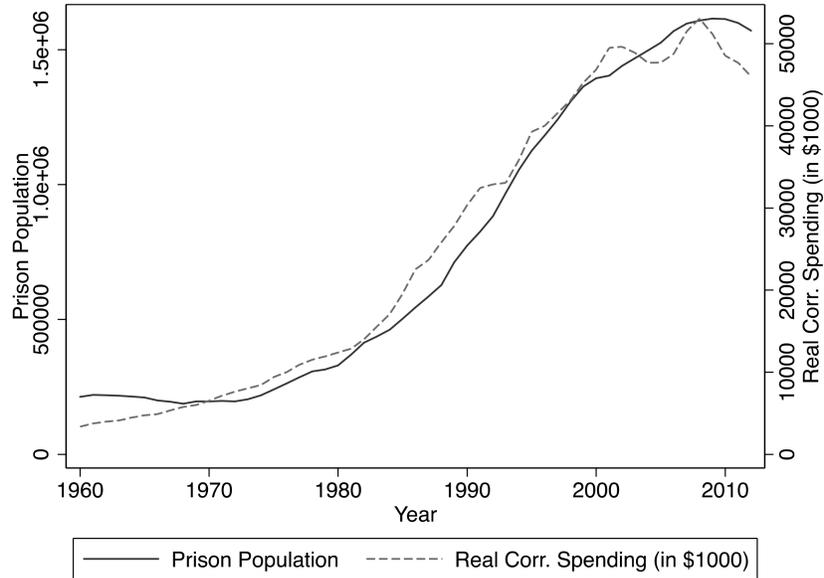
10. Note, though, that cutting spending need not lead to cutting prison populations, or at least not by as much as one would expect. Both Aviram and Gottschalk caution that financial crises may just lead to treating inmates worse rather than releasing them. And the converse need not hold either, as we will see: since a majority of prison spending is on salaries, releasing inmates without laying off guards—a politically difficult proposition—will result in less savings than expected.

11. See PATRICK A. LANGAN ET AL., BUREAU OF JUSTICE STATISTICS, NCJ-111098, HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925–86 (1988), <https://www.ncjrs.gov/pdffiles1/digitization/111098ncjrs.pdf> [<https://perma.cc/6PHB-R7LU>]; *Corrections Statistical Analysis Tool—Prisoners*, *supra* note 1.

12. For my previous criticisms of various aspects of this conventional wisdom, see generally John F. Pfaff, *The Durability of Prison Populations*, 2010 U. CHI. LEGAL F. 73 [hereinafter Pfaff, *Durability*]; John F. Pfaff, *Escaping from the Standard Story: Why the Conventional Wisdom on Prison Growth is Wrong, and Where We Can Go from Here*, 26 FED. SENT'G REP. 265 (2014); John F. Pfaff, *The Empirics of Prison Growth: A Critical Review and Path Forward*, 98 J. CRIM. L. & CRIMINOLOGY 547 (2008); John F. Pfaff, *Federal Sentencing in the States: Some Thoughts on Federal Grants and State Imprisonment*, 66 HASTINGS L.J. 1567 (2015) [hereinafter Pfaff, *Federal Sentencing in the States*]; John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1239 (2011) [hereinafter Pfaff, *Micro and Macro*]; John F. Pfaff, *The Myths and Realities of Correctional Severity: Evidence from the National Corrections Reporting Program on Sentencing Practices*, 13 AM. L. & ECON. REV. 491 (2011) [hereinafter Pfaff, *Correctional Severity*]; John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. ON LEGIS. 173 (2015) [hereinafter Pfaff, *War on Drugs*]; John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087 (2013) [hereinafter Pfaff, *Waylaid by a Metaphor*] (book review); John F. Pfaff, *The Causes of Growth in Prison Admissions and Populations* (Jan. 23, 2012) [hereinafter Pfaff, *Causes of Admissions*] (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990508 [<http://perma.cc/N9L9-F8UE>].

alongside the U.S. prison population.¹³ The nearly \$50 billion states spend on prisons is a striking number; county governments spend an additional \$30 billion on jails¹⁴ (which yields the widely cited \$80 billion). In an era of austerity and low crime, prison spending seems like a logical budget item to scale back.

FIGURE 1A U.S. PRISON POPULATION AND STATE SPENDING, 1960–2012



Gottschalk, however, puts that number in an often-overlooked context. While \$80 billion is vast in absolute value, it comes to only 2% of the \$3.6 *trillion* that state and county governments spent in 2012; if we look at spending on corrections, policing, and the court system—to account for counties spending much more on policing than corrections—then total criminal justice expenditures still come to just about \$213 billion, or slightly under 6% of total spending.¹⁵ In other words, as Gottschalk cautions, for as much as we spend on corrections, we might not spend *enough* for budgetary pressures to make much of a real difference (Gottschalk, pp. 8–9).

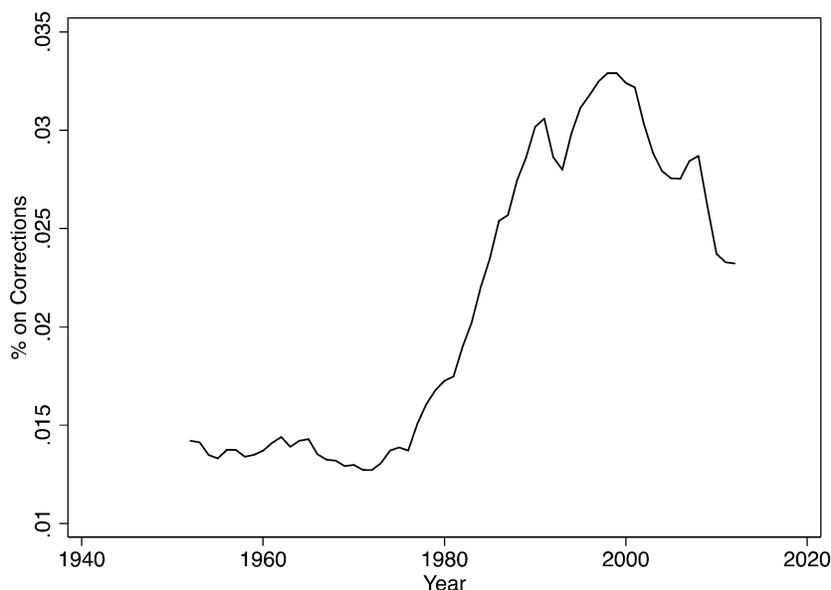
13. There is an obvious imperfection here: the financial data is for the states, while the prison data is for the states *and* the federal government (since disaggregated prison data are not easily available before 1978). Including the federal numbers does not alter the results in any meaningful way, especially prior to the 2010s.

14. Pfaff, *Federal Sentencing in the States*, *supra* note 12, at 1569–70.

15. Unless otherwise stated, all budgetary data come from my analysis of the Annual Survey of Government Finances, which is gathered by and available from the U.S. Census Bureau. *Annual Survey of State & Local Government Finances*, U.S. CENSUS BUREAU, <http://www.census.gov/econ/overview/go0400.html> [<http://perma.cc/HN9T-2VS9>]. I discuss these numbers in more detail in Pfaff, *Federal Sentencing in the States*, *supra* note 12, at 1576, 1579.

Moreover, the *level* of correctional spending has been fairly constant for a while now, as we can see in Figure 1B, which plots correctional spending as a share of total discretionary spending.¹⁶ From the late 1970s to 1991, as both crime and prison populations were rising, so too was corrections' share of the budget. But as crime leveled out in 1991, corrections' share did as well. To be clear, Figure 1B masks some variation across states—in about twenty-one states, spending leveled off by 1991 (in about sixteen states right around 1991), and in another twenty-one, growth continued through to 2001 (with perhaps a slight slowdown around 1991) and leveled off at that point, with corrections' share continuing to rise even after 2001 in just eight states.¹⁷ But the basic story from Figure 1B is that correctional spending, as a *share* of the budget, has been stable and fairly low for many years.

FIGURE 1B SHARE OF STATE BUDGETS SPENT ON CORRECTIONS, 1960–2012



Gottschalk further argues that not only is corrections' share of the budget too low to exert much pressure on policymakers, but that there are plenty of other reasons to assume that whatever sort of fiscal pressures states feel will not translate into real reforms. First, she is one of the few commentators to stress that analysts consistently overstate the savings that come

16. Several major budget categories—primary and secondary education, transportation, health and hospitalization, and welfare—are strongly regulated by statutory mandates and often heavily subsidized by the federal government; states have little control over these expenditures, but also do not incur the full cost of what they are required to spend. The discretionary budget reflects spending outside of these categories. Pfaff, *Federal Sentencing in the States*, *supra* note 12, at 1598–99.

17. Pfaff, *Federal Sentencing in the States*, *supra* note 12, at 1589.

from cutting back on prison populations. The conventional estimate of savings-per-prisoner is the average cost of incarcerating someone, which is calculated by simply dividing total annual spending on corrections by the total number of prisoners; estimates come out around \$17,000 to \$60,000, depending on the state.¹⁸ But a lot of correctional spending goes to fixed costs that do not change much when one prisoner is released; Gottschalk, for example, notes that as much as 75% of correctional spending is on salaries (Gottschalk, p. 27),¹⁹ and states are very good at *not* laying off guards, even when closing prisons.²⁰ So the *marginal cost* savings from a one-inmate release are often as little as *one-fifth* the average cost, unless enough inmates are released to close a wing, thus laying off guards, cutting back on food and heating, etc.²¹

Along these lines, Gottschalk also notes that public-sector unions pose a major threat to fiscal-based reforms (Gottschalk, p. 48). After all, if reforms need to be justified by pointing to savings, they will only work if they effectively cut payroll. And while the power of prison guard unions is likely overstated,²² these unions will nonetheless resist reforms that threaten payroll and membership too deeply. And other public-sector lobbying groups will oppose reforms as well, such as the towns that hold at-risk-of-closure prisons, as well as any legislators who depend on inmates to maintain their current districts.²³ With insufficiently large amounts of budgetary dollars at stake, these groups are better able to defend their “turf.”

18. See, e.g., CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS 10 fig.4 (2012), <http://www.vera.org/Sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf> [<http://perma.cc/9ADV-AXX9>].

19. Aviram cites 50%, but the point holds for both numbers. Aviram, p. 44.

20. In 2012, for example, Pennsylvania closed two prisons but laid off only three guards in the process. Bret Bucklen (@kbucklen), TWITTER (Mar. 2, 2015, 9:00 AM), <https://twitter.com/kbucklen/status/572441442464993280> [<http://perma.cc/976L-8X2R>]. Bret Bucklen is currently the Chief of Projections and Population Statistics in the Pennsylvania Department of Correction’s Bureau of Planning, Research, Statistics, and Grants.

21. For example, the average cost per inmate in Pennsylvania is around \$35,500. But releasing one inmate saves the state only \$5,800. It takes the release of 300 to close a wing and (potentially) impose deeper cuts. See Bret Bucklen (@kbucklen), TWITTER (Mar. 2, 2015, (9:00 AM), <https://twitter.com/kbucklen/status/572433681207439360> [<https://perma.cc/NF9K-9D2B>].

22. Most accounts of prison-guard union strength take the form of: “Prison guard unions are quite powerful. See, for example, the California Correctional Peace Officers Association.” But it is *always* the CCPOA that is given as the example. Gottschalk, p. 71. California likely *isn’t* an example, but an *outlier*.

23. In all but four states—California (as of 2020), Delaware (as of 2020), Maryland, and New York—inmates are treated as residing in the area where they are housed, not where they come from, for the purposes of redistricting. See *Prison Gerrymandering Project*, PRISON POL’Y INITIATIVE, <http://www.prisonersofthecensus.org/> [<http://perma.cc/B5SA-VRAR>]. Since offenders disproportionately come from urban areas, and prisons are disproportionately in nonurban areas, this counting effectively transfers legislative power from cities to more rural areas. In some cases, without a sizable prison population a rural district would lack enough people to avoid redistricting. Gottschalk points to one shocking case of a city council district in which 96% of the “population” was made up of inmates in that district’s prison. Gottschalk, pp. 254–55.

Gottschalk then notes that effective decarceration—decarceration that does not result in rising crime levels—may actually be *more* expensive than prison. Training and other rehabilitation programs are not necessarily cheap, especially if run well. So if reform is driven by costs, it may be stymied by the bleak fiscal reality that serious cuts to the prison populations are not feasible.

Finally, both Gottschalk and Aviram raise the concern that fiscal-based reform can play out in two ways: fewer prisoners or worse conditions *per* prisoner. Gottschalk, for example, points to some anecdotal evidence of a tougher-conditions trend, such as rising suicide rates that could be tied to cuts in mental health services. Of particular concern to Gottschalk is that the Prison Litigation Reform Act makes it harder for federal courts to oversee prison conditions today than before the Act was passed in 1995, perhaps giving prison systems more leeway to tighten up how they treat inmates.

Aviram is perhaps a bit more optimistic that fiscal-based reforms can lead to reductions in the severity, not quality, of punishment, though not by much. She introduces the clever, if slightly awkward portmanteau of “humonetarianism” to refer to cost-based reform efforts, which she views as a “new discourse of costs, frugality, and prudence.”²⁴ She sees this discourse as one that is “far from a critical examination of punitivism, and even farther from an embrace of dignity and human rights,” and that is “shallow and focused on the short term” (Aviram, p. 6). Though clearly not an ideal path to reform, she believes humonetarianism has been successful in bringing in more conservative voters to support efforts such as repealing the death penalty, legalizing marijuana, rolling back some of the more oppressive aspects of California’s three-strikes laws, and perhaps softening attitudes toward elderly inmates. That said, she also claims (in keeping with Gottschalk) that humonetarianism has been unsuccessful so far at targeting the scale of prison populations, which is after all one of the primary goals, if not *the* primary goal, of reformers (Aviram, p. 162).

Taken together, Gottschalk and Aviram paint a fairly bleak picture: prison expenditures aren’t big enough to demand too much attention and any cuts will be less than hoped for anyway, much of what the correctional budget is spent on (salaries) is protected by politically powerful groups, states might respond simply by making conditions harsher, successful reforms may be too expensive, and what few successes have occurred have been for fairly fringe issues in the grand scheme of things.²⁵

24. Aviram, p. 4. Part of the awkwardness is that the trend here involves *fiscal* policy, not monetary, so the term should be the less-mellifluous “humonefiscalism.” But that’s a tangential, somewhat churlish point that I feel compelled to make only because I’m an economist. Somewhat more confusing for me was that it sounds like something akin to “humanitarianism,” which gives it an uplifting sound, when in fact Aviram is referring to something quite harsh.

25. The death penalty and marijuana legalization get a lot of attention, but neither is necessarily that important when it comes to incarceration. This is especially so for the death penalty. Death row holds a negligible fraction of the prison population. With about 3,000 inmates sentenced to death, the nation’s death rows hold about 0.2% of the country’s 1.5

If the only way the budget crisis could influence prison growth was directly through its impact on the budget, I would share Aviram's and Gottschalk's skepticism that the 2008 crisis will lead to substantial reform. And it very well may not: as a general matter, I expect that the reform movement will founder and underperform expectations for a wide array of reasons.²⁶ But there is an important reason to push back against some of the wariness expressed by Aviram and Gottschalk. The recession may help fuel reform not because of *economics*, but because of *politics*. There are certain structural defects in the politics of crime that help explain why prison populations have boomed the way they have, and an economics-based reform effort has the rhetorical power to circumvent them in a way that may prove more durable than Aviram and Gottschalk suggest.

B. *The Politics of Punishment*

Both Aviram and Gottschalk tell a political story in which incarceration is a top-down-driven process. Building off of the work of people such as David Garland and Katherine Beckett,²⁷ Aviram argues that rising incarceration does not reflect a bottom-up political demand for safety in an era of rising crime, but instead reflects an elite-led, political choice. As Aviram states quite clearly:

[T]he political turn to punitiveness and “tough on crime” stances was not an organic response to bottom-up public concerns about rising crime rates. Rather, public awareness of the rise in crime rates was brought about by a concerted top-down governmental effort to draw attention to those rates. (Aviram, p. 33)

million prisoners and about 0.04% of the 7 million under some form of correctional control (prison, jail, probation, parole, etc.). As for marijuana, only about 1.1% of people in state prisons are there on a marijuana charge. But marijuana legalization could matter to the extent that low-level drug arrests that never result in incarceration still destabilize the future lives of those arrested. See Pfaff, *War on Drugs*, *supra* note 12, at 174. A recent Human Rights Watch paper, however, reports that over 90% of those arrested in New York City on marijuana charges between 2003 and 2004 were not convicted of a felony as of mid-2011. See HUMAN RIGHTS WATCH, *A RED HERRING: MARIJUANA ARRESTEES DO NOT BECOME VIOLENT FELONS* 19 (2012), <https://www.hrw.org/report/2012/11/23/red-herring/marijuana-arrestees-do-not-become-violent-felons> [<http://perma.cc/PL46-E9H9>]. These results suggest both that (1) widespread marijuana arrests are likely not efficiently targeting a particularly at-risk population and that (2) these criminal justice contacts do not appear to drive up future offending significantly, or at least not as much as many fear.

26. Gottschalk, p. 168. Most significantly—and this is a point that Gottschalk makes as well in chapter 8—the insistence on aiming reforms primarily on “nonviolent drug offenders” misses the point that over half of all state prisoners are in prison for violent crimes, and that almost all long-serving inmates are violent offenders. It will be impossible to impose deep cuts to U.S. prison populations without reforming how we manage violent offenders, and no one is doing this yet. In fact, much of the rhetoric used to defend reforms for nonviolent offenders—“we are still keeping you safe by locking up the violent people!”—may foreclose reforms aimed at violent offenders in the future. See Gottschalk, chapter 8.

27. KATHERINE BECKETT, *MAKING CRIME PAY* (1997); DAVID GARLAND, *THE CULTURE OF CONTROL* (2002).

Or, as she puts it more bluntly elsewhere, “crime rates did not fuel mass incarceration” (Aviram, p. 20).

Gottschalk discusses the politics of incarceration less explicitly, preferring to focus on “neoliberalism penalty” more broadly. But it is clear that she too sees rising punitiveness as a top-down policy choice motivated by issues other than crime:

[T]he neoliberal punitive turn was not just a response to the economic and political disorders of the 1960s and 1970s. It was deeply conditioned by the political struggles in the 1940s and 1950s over law and order and civil rights. It also was deeply conditioned by the reconfigurations of black politics and the broader political terrain with the demise of the civil rights and Black Power movements. (Gottschalk, pp. 13–14)

This too is not a political story that foregrounds crime as a major engine of prison growth. And Aviram and Gottschalk are not alone in de-emphasizing crime. Michelle Alexander does the exact same thing in her widely read *The New Jim Crow*,²⁸ and other leading scholars such as Michael Tonry have made similar claims.²⁹

This is a peculiar flaw, and it is one that leads both Aviram and Gottschalk astray in appreciating how the budget crisis and prison reform truly interact. Recent empirical work suggests that (1) popular (not elite) punitiveness closely tracks crime rates, and (2) incarceration growth tracks these popular political attitudes.³⁰ Taken together, these results suggest that the financial crisis can lead to real reform not because of the fiscal *pressure* it creates but because of the political *cover* it provides.

First, it is important to examine, if briefly, the relationship between rising crime and rising incarceration rates. Figure 2A plots violent and property crime rates from 1960 to 2014. The rise in both types of crime rates is striking, with violent crime rates rising by 563% between 1960 and 1991 and

28. MICHELLE ALEXANDER, *THE NEW JIM CROW* (2d ed. 2012). For a criticism of Alexander’s claim, see Pfaff, *Waylaid by a Metaphor*, *supra* note 12, at 1098 n.28.

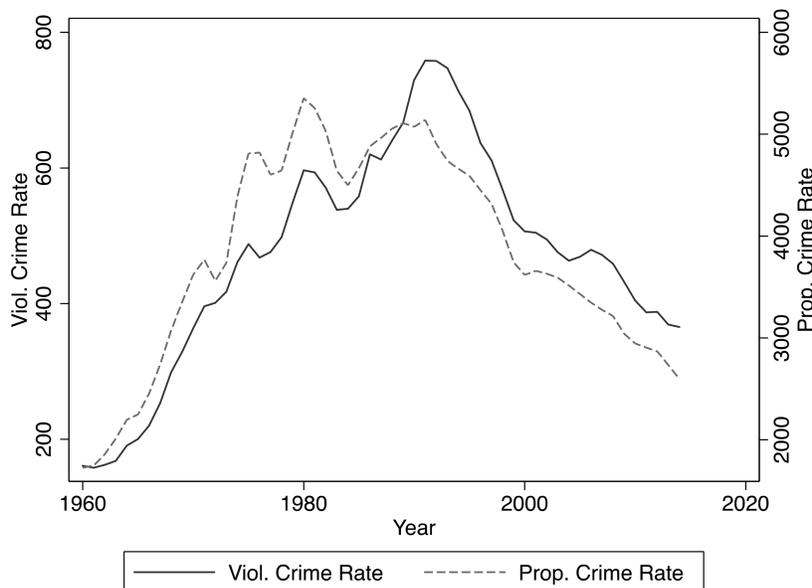
29. See e.g., MICHAEL TONRY, *THINKING ABOUT CRIME* 14 (2004) (“Governments decide how much punishment they want, and these decisions are in no simple way related to crime rates.”).

30. See Peter K. Enns, *The Public’s Increasing Punitiveness and Its Influence on Mass Incarceration in the United States*, 58 AM. J. POL. SCI. 857 (2014). A common critique of the crime-caused-prison-growth claim is that Canada and other European countries also saw steep rises in crime in the 1970s and 1980s but did not raise their incarceration rates in any comparable way. For crime in Europe versus the United States, see Paolo Buonanno et al., *Crime in Europe and the United States: Dissecting the ‘Reversal of Misfortunes’*, *ECON. POL’Y*, July 2011, at 347 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1889952 [<https://perma.cc/9UKF-YV7R>]. For crime in Canada versus the United States, see Roger Boe, *Comparing Crime and Imprisonment Trends in the United States, England, and Canada from 1981 to 2001*, *CORRECTIONAL SERV. CAN.*, <http://www.csc-scc.gc.ca/research/b29-eng.shtml> [<https://perma.cc/LW9F-9SQ5>]. While true, all this demonstrates is that rising crime does not *mechanistically guarantee* rising prison populations. It says nothing about the claim that the reason *why* Americans decided to become more punitive was in no small part because of rising crime. So at one level rising incarceration is a policy *choice*, but perhaps one strongly influenced, or *politically* required, by (among other things) rising crime.

property crime rates (from a much higher baseline) by 319%. And even with crime steadily dropping since 1991, crime rates in 2014 remain substantially higher than they were in 1960. In fact, if anything, Figure 2A should make us wonder why U.S. incarceration rates didn't start rising until the mid-1970s, about fifteen years after the crime boom was well underway.³¹

31. Figure 2A raises the question: Why do so many academics downplay the role of crime in driving incarceration? One answer is statistical. It is generally well known that crime and punishment are endogenous—each influences the other—and that failing to correct for this will lead models to systematically and substantially underestimate the impact of crime on incarceration. Unfortunately, almost no papers attempt to control for this problem, leading them all to incorrectly estimate that crime has almost no impact on prisons. See Pfaff, *Empirics of Prison Growth*, *supra* note 12, at 591–92. The one paper—uncited by Aviram and Gottschalk alike—that *does* attempt to control for this problem yields estimates that suggest rising crime in the 1970s and 1980s explains as much as *half* of the rise in prison populations. Yair Listokin, *Does More Crime Mean More Prisoners? An Instrumental Variables Approach*, 46 J.L. & ECON. 181 (2003). I show that Listokin's estimates imply half of prison growth comes from rising crime in Pfaff, *Micro and Macro*, *supra* note 12, at 1245–47. In other words, other factors mattered, but crime was of central importance. Listokin's paper is not without its limitations, so its conclusions should be viewed carefully, *see id.* at 1245 n.9, but it nonetheless indicates that the impact of crime cannot be easily dismissed.

There may be an intriguing cultural factor at play as well. In her book *Ghettoside*, journalist Jill Leovy suggests that liberals—which describes most academics writing on criminal justice issues, at least within the legal academy—are uncomfortable talking about violent crime. JILL LEOVY, *GHETTOSIDE* (2015). Writing in the context of academic silence about elevated rates of black homicide (both offending and victimization), she states that “[r]esearchers describe skirting the subject for fear of being labeled racist. Activists have sought to minimize it. ‘When the discussion turns to violent crime,’ legal scholar James Forman, Jr., has pointed out, ‘progressives tend to avoid or change the subject.’” *Id.* at 11 (quoting James Forman, Jr.). This could apply to writing on incarceration growth as well, which must similarly confront the challenging issue of elevated rates of minority offending and punishment. To be clear, I bring this up not to make any assumptions about Aviram's or Gottschalk's thoughts or motives, just to consider why the literature as a whole may systematically understate the role of crime. As noted above, Gottschalk for one very directly confronts the issue of race and punishment. Gottschalk, chapters 4, 7, 8.

FIGURE 2A VIOLENT AND PROPERTY CRIME RATES, 1960–2014³²

In fact, we can see how slow incarceration rates were to respond to rising crime by changing the denominator for “incarceration rates” from prisoners per 100,000 *people* to prisoners per 1,000 *crimes*; call this the “effective incarceration rate.” Figure 2B plots the remarkable results, using both violent and property crimes as the denominator.³³ From 1960 to about 1980, this effective incarceration rate *falls* or remains flat; the effective rate doesn’t return to its 1960 level until the mid-1990s, several years into the post-1991 drop in crime. As William Stuntz, one of the few commentators to really pay close attention to this phenomenon, points out, “[a]s for politics, the punitive turn was partly the consequence of the trends that preceded it. Simultaneously rising crime and falling punishment were bound to create a backlash, and the backlash was bound to result in rising prison populations.”³⁴

In a recent study on the relationship between popular punitiveness and prison populations, the political scientist Peter Enns provides striking evidence that supports Stuntz’s concerns and points to errors in the elite-led story. Popular punitiveness, he finds, moves with the crime rate, and the rate of growth of this incarceration tracks that popular punitiveness. So as crime

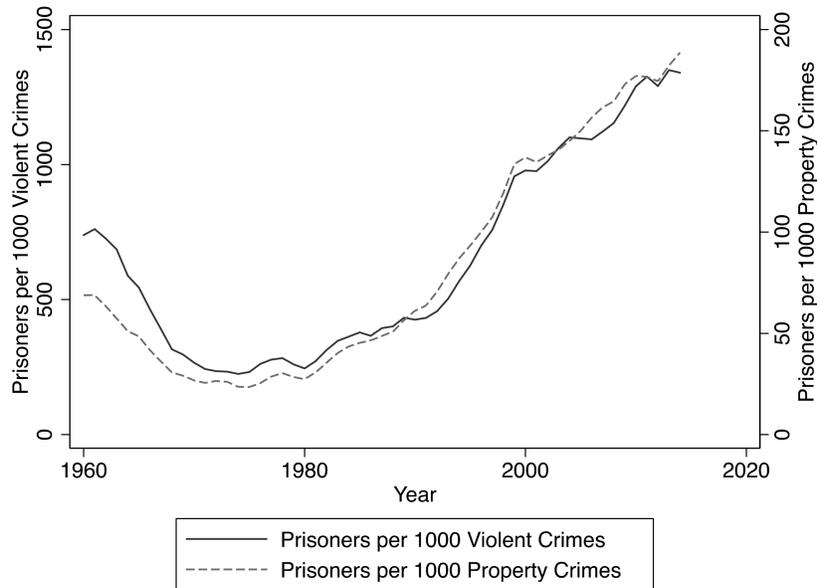
32. Data from FBI, UNIFORM CRIME REPORTING STATISTICS, <https://bjs.gov/ucrdata/> [<https://perma.cc/BQT7-5YXW>].

33. Since there are so many more property crimes than violent crimes, the results for violent and property crimes together look basically the same as those for property crimes.

34. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 252 (2011).

has fallen over the past twenty years, so too has the desire of the electorate to be tough on crime.³⁵

FIGURE 2B PRISONERS PER 1000 VIOLENT OR PROPERTY CRIMES, 1960–2014³⁶



And as the electorate has become less punitive, so too have politicians. The financial crisis thus allows conservative politicians the freedom to move away from a tough-on-crime position. As Enns notes elsewhere, “the fiscal environment of the Great Recession allowed political elites who had previously advocated tough-on-crime positions to align their rhetoric with emerging public opinion without suffering a political cost with their conservative constituents.”³⁷

But why do politicians need cover? If the electorate is becoming less punitive, why can’t politicians move with them? Part of the answer might just be the nature of politics. Politicians can only move so much without seeming untrustworthy. As districts shift from right to left or vice versa, an incumbent politician can only track that shift for so long, partly because he may not be willing to move too far, but also because at some point the electorate wants to choose someone more “principled.”³⁸ But it’s likely that

35. See Enns, *supra* note 30, at 869.

36. Data from FBI, *supra* note 32; *National Prisoner Statistics Program*, BUREAU JUST. STAT., <http://www.bjs.gov/index.cfm?ty=DCdetail&iid=269> [<https://perma.cc/G5GU-3SHZ>].

37. Peter Enns, *The Great Recession and State Criminal Justice Policy: Explaining the Unexpected*, RECEPTION TRENDS, <https://web.stanford.edu/group/recessiontrends/cgi-bin/web/resources/research-project/great-recession-and-state-criminal-justice-policy-explaining-unexpected> [<https://perma.cc/U5RM-D6MB>].

38. See, e.g., KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS 25 (1997).

tough-on-crime politicians have always also been at least nominally fiscally conservative, so the cost-cutting rhetoric allows them to move left (with the voter pool) without seeming to betray their principles.

Moreover, there is some intriguing and rarely cited evidence that politicians do not actually *want* to be tough on crime—or at least not as tough as we generally think—even when crime rates are high. Thomas Stucky and coauthors, for example, have generated results suggesting that while more conservative state legislatures tend to be more punitive, and while that effect has grown over time, a key mediating factor is electoral stability.³⁹ The more secure the conservative majority—when the majority is *better* able to indulge in its (allegedly punitive) policy preferences—the *less likely* it is to be punitive. Only when elections become tight and the majority is at risk do politicians become much more punitive. This suggests that punitiveness is more an electoral than a policy move.

Buttressing this idea are similar results produced by Rachel Barkow and Kathleen O’Neill, indicating that states are more likely to adopt sentencing commissions when, among other things, the legislative majority is more at risk.⁴⁰ According to Stucky and his coauthors, politicians are more likely to be tough on crime when electorally vulnerable, and according to Barkow and O’Neill, they are more likely to try to weaken their ability to act on the issue when—again—they are electorally vulnerable. Taken together, these results are consistent with the existence of legislators who, in general, would rather not be punitive if they can avoid it. The crisis, then, may be more useful in the way it gives politicians the *political* flexibility to push back against punitiveness.

In fact, one shortcoming of the political analysis in both of these books is that they portray the conservative prison-reform Right on Crime movement⁴¹ as one focused more or less exclusively on costs and tax cuts, an unfair stereotype that overlooks the wide array of attitudes it encompasses. Indubitably, some members of the Right on Crime movement, like tax opponent Grover Norquist, are focused primarily on reduced spending and tax cuts.⁴² But a recent paper points out other motives that currently drive conservatives to oppose the scope of American incarceration: a libertarian view that overenforcement, especially of drug laws and federal regulatory provisions, represents excessive government intervention; an evangelical perspective that puts great weight on individual redemption and mercy; and even a

39. Thomas D. Stucky et al., *Partisan Politics, Electoral Competition and Imprisonment: An Analysis of States Over Time*, 43 *CRIMINOLOGY* 211 (2005).

40. Rachel E. Barkow & Kathleen M. O’Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 *TEX. L. REV.* 1973 (2006).

41. Technically speaking, Right on Crime is a specific advocacy group associated with the Texas Public Policy Foundation, but I will use that name here as an umbrella term to encompass all the various reform-minded conservative groups. See *RIGHT ON CRIME*, <http://righton-crime.com> [<http://perma.cc/9CXB-YP4M>].

42. Peter Ferrara, *Grover Norquist’s Taxation Liberation Movement*, *AM. SPECTATOR* (June 17, 2015), <http://spectator.org/articles/63121/grover-norquist’s-taxation-liberation-movement> [<http://perma.cc/87MK-538U>].

branch of formerly incarcerated Republican leaders whose prison experience led them to adopt more nuanced views on the nature and character of those who are in prison.⁴³ In many cases, a single person may adhere to many of these, like Chuck Colson, a former Nixon staffer who went to prison in the wake of Watergate and now runs the Prison Fellowship Ministry, which attempts to reform prisoners through Christianity.⁴⁴ Thus, there is no reason to assume that conservative support for prison reform will evaporate as soon as the economy improves or that it is entirely hampered by the small share of the state budget that goes to corrections. Tax policy matters, but it is not the sole factor for conservatives.

There is another reason why politicians may need to mask genuine desires for less-punitive sanctions behind fiscal-based rhetoric, one that yields both optimistic and pessimistic predictions about the future of reform. For voters, criminal justice is a low-information, high-salience (LIHS) issue, which just means that voters do not pay much attention to the day-to-day goings-on of the criminal justice system and respond only to highly shocking and highly idiosyncratic cases. Unfortunately, in criminal justice contexts, this creates a strong, rational bias on the part of officials to be quite tough on crime.

In fact, LIHS likely helps explain one of the more durable puzzles in penal policy, namely that politicians are consistently harsher and less rehabilitative than multiple polls show the electorate to be. Are they just ignorant, or are they willful—should we just educate them better about what “the people” want? Sometimes academics and other policymakers seem to adopt this attitude,⁴⁵ but this is not the right way to think about the issue. Politicians are not more severe than the electorate because they *do not* understand it, but because they *do*. Voters profess a desire for rehabilitation in surveys but not in the voting booth. And LIHS is likely a major reason why.

While voters say that they favor rehabilitation, they do not pay close attention to the sorts of rehabilitative or nonincarcerative policies legislators, prosecutors, judges, and parole boards adopt or their general effectiveness. Instead, they react with anger at the inevitable errors that will take place—the could-have-been-incarcerated-but-wasn’t defendant who goes on to commit a sufficiently awful subsequent crime that grabs the media’s attention. Thus policy actors bear most of the downside risk of leniency but get little of the upside benefit.

A similar risk does not apply to being punitive, however. Overincarceration is not punished to the same degree since it is much harder for voters to see it. It is easy to put a name and a face to both the preventable recidivist

43. Joycelyn Pollock et al., *Examining the Conservative Shift from Harsh Justice*, 2015 *Laws* 107, <http://www.mdpi.com/2075-471X/4/1/107> [<http://perma.cc/TBJ8-R37U>].

44. *Id.* at 114.

45. Thomas Baker, *Most Americans Support Rehabilitation Compared to ‘Tough on Crime’ Policies*, LONDON SCH. ECON. U.S. CENTRE (Aug. 25, 2015), <https://blogs.lse.ac.uk/usappblog/2015/08/25/most-americans-support-rehabilitation-compared-to-tough-on-crime-policies/> [<http://perma.cc/VDM2-VFLC>].

and his victim. It is much tougher to identify those who are locked up more than they need to be. Given this asymmetry in risks to the policymakers, it makes perfect sense that they would punish more than voters seem to desire.

What does all this have to do with the credit crunch? Alternatives to incarceration still carry the same risks of error as before, but the fiscal crisis provides policy actors with a better excuse for these risks when they inevitably happen. Rather than having to defend the diversion from prison on the grounds that it was “good policy,” they can now say it was “economically essential.” To the extent more punitive voters—the voters more likely to react negatively to a failed diversion—are more likely to be fiscally conservative, the “economically essential” excuse likely carries more weight. Thus, the current emphasis on fiscal restraint expands politicians’ ability to be less punitive, even if the actual impact of reduced incarceration on the budget is slight.

To a point. Invoking financial necessity is likely far more effective when dealing with diversion failures by inmates classified as “nonviolent” than by those classified as “violent.” And so it is not surprising to see that several years into the recession, almost no politicians were discussing changes to how we punish violent offenders, even though a majority of state inmates are classified as violent.⁴⁶ Whatever room the crisis has provided politicians to debate how to punish nonviolent offenders, it has had much less of an effect when it comes to the (much more important) “violent”⁴⁷ inmates.

Finally, even though fiscal tightness is often credited with driving current reform efforts, there’s reason to have at least some hope that reform—at least when it comes to nonviolent offenders—may continue even if the economy improves. And this despite the fact that increased state fiscal capacity has, in general, been seen as one of the primary engines of prison growth over the past four decades.⁴⁸ Whether out of legitimate need or as a voluntary policy choice exploiting the financial crisis, at least twenty-nine states have seen their prison populations fall between 2008 and 2013—and their

46. Pfaff, *War on Drugs*, *supra* note 12, at 181–82 tbl.1.

47. I use scare quotes here to emphasize that when we hear about the number of “violent offenders” in prison, the word “violent” is a legal, definitional term. The classic crimes of violence against a person—murder, assault, rape, robbery—are always classified as violent, but in some states crimes that do not put people at risk of physical harm can nonetheless be defined as “violent” crimes. In both New York (a liberal state) and Mississippi (a conservative one), for example, burglary of a residence—even if no one is home and the burglar is unarmed—is considered a “violent” crime. N.Y. PENAL LAW § 140.25(2) (McKinney 2010); Miss. CORR. & CRIMINAL JUSTICE TASK FORCE, PRACTITIONER GUIDE TO HB 585, at 4, <http://www.ospd.ms.gov/585%20Forms/Practitioner%20Guide%20to%20HB%20585.pdf> [https://perma.cc/D8MK-943A].

48. See William Spelman, *Crime, Cash, and Limited Options: Explaining the Prison Boom*, 8 CRIMINOLOGY & PUB. POL’Y 29 (2009); see also Pfaff, *Micro and Macro*, *supra* note 12, at 1329–30.

crime rates as well.⁴⁹ Now, these results do not necessarily mean that reducing prison populations *causally reduced* crime (though these results seem to often be cited in ways that at least *imply* this).⁵⁰ But for political purposes the correlation is likely sufficient to allow reformers, including conservative reformers, to claim that cutting prisons does not lead to increases in crime, which may provide them with the ability to push back against prison increases even as the economy recovers.

The story of fiscal crisis as political cover, however, also highlights a profound failure of the current reform efforts, one that again neither Aviram nor Gottschalk discusses. No reform proposal, either at the state or federal level, or even proposed by any of the myriad reformist groups, has attempted to address the *structural* problems LIHS voting raises. Reformers are simply trying to pass new laws without altering the system that produced the harsh laws in the first place. What is to keep that system from reverting at the next uptick in crime (as opposed to economic conditions)?

This is not idle speculation. In 1970, Congress abolished all mandatory minimum drug sentences when it passed the Comprehensive Drug Abuse Prevention and Control Act of 1970.⁵¹ Then-Texas Representative George H.W. Bush even stood up to speak in defense of their abolition.⁵² Then Congress passed a host of new drug mandatories during the 1980s and 1990s, while Bush was vice president and then president.⁵³ Now both houses of Congress are working on bills that would, to varying degrees, scale back or cut federal mandatory minimums.⁵⁴ What is to say they won't reintroduce

49. Pub. Safety Performance Project, *Most States Cut Imprisonment and Crime*, PEW CHARITABLE TR. (Nov. 10, 2014), <http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/imprisonment-and-crime> [<http://perma.cc/9P55-AN8H>].

50. Obviously, it is possible that crime would have declined *even more* had prison populations not fallen as well. The causal story requires us to look at a complicated, statistically challenging counterfactual, not just the simple correlation that the Pew study provides.

51. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970); *see also* U.S. SENTENCING COMM'N, *History of Mandatory Minimum Penalties and Statutory Relief Mechanisms*, in REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 22 (2011), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_02.pdf [<http://perma.cc/CS45-HBD4>].

52. MOLLY M. GILL, CORRECTING COURSE: LESSONS FROM THE 1970 REPEAL OF MANDATORY MINIMUMS, FAMS. AGAINST MANDATORY MINIMUMS, <http://famm.org/wp-content/uploads/2013/07/Correcting-Course-Final-version.pdf> [<http://perma.cc/HQ63-SZSM>].

53. *See Current Statutory Provisions Requiring Mandatory Minimum Terms of Imprisonment*, in U.S. SENTENCING COMM'N, *supra* note 51, http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Appendix_A.pdf [<http://perma.cc/67V7-72DN>] (listing current federal mandatory minimums, as of 2011, with date of adoption).

54. *See Federal Project*, FAMS. AGAINST MANDATORY MINIMUMS, <http://famm.org/projects/federal/> [<http://perma.cc/57AJ-KULY>] (summarizing the SAFE Justice Act, the Sentencing Reform and Corrections Act, the Smarter Sentencing Act, and the Justice Safety Valve Act).

mandatory minimums in 2025 if crime starts rising again?⁵⁵

State and local governments can certainly take steps to contain the risks posed by LIHS voting. Shifting from elected to appointed judges would help, for example, as could the use of fairly isolated sentencing commissions. Fleshing out exactly how to confront LIHS voting is beyond the scope of this Review, but it is worth noting that by failing to appreciate the pretextual use of the financial crisis by politicians, Aviram and Gottschalk tell stories that are at once too pessimistic (when they worry that corrections' share of the budget isn't enough to ensure real reform) and too optimistic (when they miss the more fundamental political-structural defects that persist, and which perhaps explain why politicians may have needed to exploit the crisis in the first place).

That said, in general, both books make the important point that the connection between fiscal crisis and prison reform is not as clear-cut as it is often made out to be, and that there are additional, underappreciated risks that arise from relying too heavily on external fiscal pressures to effect reform.⁵⁶ But both also tell a fiscal story that is in some ways too simple, and that misses the complicated politics of crime and how those politics interact with the Great Recession.

II. PRIVATE AND PUBLIC PRESSURE ON PRISON GROWTH

The second major economics-of-punishment issue that both Aviram and Gottschalk discuss at length is the impact of private prisons on prison growth. Over the past thirty years, companies such as Corrections Corporation of America (CCA) and the Geo Group have been managing, and at times even building, a growing number of prisons across the United States. A common plank of the standard story of prison growth is that their profit-driven desire for more and more prisoners to manage has led them to lobby for tougher and tougher sentencing laws, thus contributing in important ways to rising incarceration rates.⁵⁷ Although Aviram and Gottschalk tell slightly different accounts about the role of private prison firms, both of their takes generally agree with this conventional narrative. Unfortunately, that standard account suffers from significant defects that tend to overstate the importance of private firms and highlight the wrong reason why private

55. Call this Cylon Criminology: "All this has happened before, and all this will happen again."

56. At the same time, though she never uses this precise term, Aviram demonstrates how the fiscal crisis did often shape the minimum winning coalition need to effect reforms, at least when it came to the death penalty and marijuana laws, by bringing fiscal conservatives into the preexisting, more liberal reformist fold. These reforms, especially with respect to marijuana, are certainly important. Aviram, chs. 4, 5.

57. See JUSTICE POLICY INST., GAMING THE SYSTEM: HOW THE POLITICAL STRATEGIES OF PRIVATE PRISON COMPANIES PROMOTE INEFFECTIVE INCARCERATION POLICIES 21–25 (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf [<http://perma.cc/MQY4-Z8YK>].

prisons pose problems—with important consequences for reforming private *and* public prisons alike.

Aviram perhaps makes the more forceful case for the importance of private prisons, arguing that their expansion reflects a fundamental shift in U.S. penal policy:

The end of the twentieth century and first decade of the twenty-first saw a seismic shift in the privatization of state prisons across the United States. Unable to shoulder the burden placed on their taxpayers and treasuries, financially strapped states housing record numbers of prisoners have increasingly turned to privatizing their prison facilities as an ostensibly cost-saving measure. (Aviram, p. 99)

Yet the weakness of this claim is apparent in the very next sentence, when Aviram admits that “as of 2010, private prisons housed ‘128,195 of the 1.6 million state and federal prisoners in the United States’” (Aviram, p. 99). In other words, by the end of this “seismic shift,” only 8.4% of the prison population was in private prisons in 2014—and at the state level, only 6.8%, with over half of those in just five states.⁵⁸ Of course, private prisons may matter more than the number of prisoners they hold if we think their lobbying makes all sentences tougher (or makes reform harder), thus increasing public prison populations as well.

This latter argument is the one that Gottschalk basically makes. She points out, correctly, that incarceration was growing well before the private firms appeared, so they cannot be blamed for the onset of mass incarceration (Gottschalk, p. 66). But, she argues, their lobbying efforts now pose a serious impediment to reform. Admitting, like Aviram, that only a small fraction of inmates are in private prisons, she continues, “[t]he industry has targeted its lobbying efforts in certain key state capitals and in Washington, DC, in order to create powerful beachheads to push the privatization cause nationally” (Gottschalk, p. 67). She argues that the private prison companies actually viewed the Great Recession as an opportunity more than a risk, since they expected that state budget cuts would lead to capacity constraints and, eventually, the need for private prisons to mitigate the overcrowding (Gottschalk, pp. 68–69). As I will show below, however, whatever its theoretical potential, this concern appears to have not been realized.

I make three broad points in this Part. First, it is hard to see much of a connection between private prison expansion and overall prison growth. Second, the lobbying power of private prison groups is often overstated. And third, what bothers people about private prisons is actually not the result of the profit motive but of bad contracts—bad contracting that plagues the public system as well. Thus focusing on profits actually leads reformers to miss important defects in the far-larger public system and how to better incentivize private prisons where they operate.

58. The five states are Texas (16%), Florida (14%), Georgia (9%), Oklahoma (8%), and Arizona (8%). See E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 248955, PRISONERS IN 2014 14 tbl.9 (2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf> [<http://perma.cc/93V8-MEWE>].

A. *Private Prisons and Prison Growth*

The first major problem that the private-prisons-as-engines-of-growth story faces is that it is simply hard to detect any significant effect in the data.⁵⁹ As both Aviram and Gottschalk admit up front, there simply are not that many prisoners in private prisons. As noted above, only about 8.4% of all inmates were in private prisons in 2014: 6.8% in the states and 19% in the federal system.⁶⁰ In terms of contribution to overall growth, between 1990 and 2008 (the peak year for the number of state prisoners in private prisons), the number of private prisoners rose by over 87,500, while the total number of state prisoners rose by almost 701,000⁶¹—so 12.5% of all additional prisoners were held in private prisons.

But that does *not* mean that privatization accounted for 12.5% of the growth in prison populations. Many, if not most, of those who ended up in private prisons during those years would have been placed in public prisons had the private option not existed, so it is unfair to say that the private prison option *caused* those incarcerations. If private prisons were substantially cheaper to run, one could argue that private prisons nonetheless expanded states' fiscal ability to incarcerate, but as Gottschalk points out, there is little to no evidence that private prisons cut costs; if anything, they may be *more* expensive, which would suggest that privatization could actually have *slowed* prison growth by raising costs (although, as noted in Part I, the overall impact of incarceration on budgets is sufficiently slight that any such effect is likely minor at most).

More likely, privatization reflected more of an ideological commitment to private contracting; that almost certainly explains the federal focus, where

59. In at least one place, Gottschalk dramatically overstates the centrality of private prisons. She claims that “[o]f the 153 new prisons and jails that opened between 2000 and 2005, only two were public facilities.” Gottschalk, p. 68. Here are the numbers: Between 2000 and 2005, the public sector built 78 new “confinement facilities” (from 1,107 to 1,185) while closing 76 “community-based facilities” such as halfway houses (from 297 to 221), where the BJS defines a “confinement facility” as an institution such as a prison (and, presumably, jail), prison farm, penitentiary, correction center, work camp, reformatory or other place where fewer than half of all inmates regularly leave the facility unaccompanied, and a “community-based facility” as an institution such as a halfway house, residential treatment center, restitution center or pre-release center where more than half of all inmates regularly leave unattended. During that same time, private firms built 6 new confinement facilities (from 101 to 107) and 145 new community-based facilities (from 163 to 308). So there was a *net* increase of 153 facilities, with a *net* increase of 2 for the state sector. But, more accurately, 84 new confinement facilities opened, of which 78, or almost 93%, were built by the states. Given how the BJS defines “confinement facilities,” when it comes to prisons and jails—the institutions that Gottschalk refers to—the correct statistic is that 78 of 86 were opened by the public sector during that time. See JAMES J. STEPHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PUB. NO. NCJ 222182, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2005 (2008), <http://www.bjs.gov/content/pub/pdf/csfcf05.pdf> [<http://perma.cc/5FDM-KLQC>].

60. *Supra* note 58 and accompanying text.

61. *Corrections Statistical Analysis Tool—Prisoners*, *supra* note 1.

costs are less of an issue.⁶² And it is likely that a political commitment to privatization is stronger in more conservative states—which are also likely to be more punitive. Thus even if we were to observe faster growth rates in more-privatized states, it would be hard to disentangle the effect of privatization from the ideological forces that led to *both* privatization *and* rising incarceration in the first place.

Furthermore, the basic numbers do not back up Gottschalk's claim that private prison groups successfully used the Great Recession as a growth opportunity. Between 2008 and 2014, the total number of state prisoners fell by 4.1%, while the number of private prisoners fell by 4.3%; the percent of state prisoners in private prisons thus didn't budge, holding steady at about 6.8%.⁶³ In other words, as the economy declined, private prison firms were unable to either increase the number of prisoners they held or even take on a greater share of states' declining prison populations.⁶⁴

National-level aggregates, however, always run the risk of masking important state-level variation, and a somewhat more disaggregated view does suggest that privatization may have mattered in some states, but still not necessarily to a significant degree. Table 1 breaks total prison growth into two periods: 1999 (the first year of consistent state-level private prison data) to 2008 (the peak year for state private prison populations), and then 2008 to 2014. In each part of the table, the first three columns look at the relationship between private prison growth and total prison growth for all states, and the second three columns look at that relationship just for states with at least 10% of their prisoners in private prisons—which should be the states where private firms matter most.⁶⁵ The rows provide the absolute and percent change in the *total* (public and private) number of prisoners for

62. It is true that the federal Bureau of Prisons consumed more than 25% of the Department of Justice's \$27 billion budget in 2012, but its \$6.6 billion budget represented just 0.2% of the overall federal budget and 0.6% of the discretionary budget; Congress obviously had the fiscal capacity to expand the DOJ's budget to offset BOP expenditures if it wanted to. Pfaff, *Federal Sentencing in the States*, *supra* note 12, at 1567–77.

63. See CARSON, *supra* note 58; WILLIAM J. SABOL ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 228417, PRISONERS IN 2008, at 39 app. tbl.19 (2010), <http://www.bjs.gov/content/pub/pdf/p08.pdf> [<https://perma.cc/SU8X-7ZYH>].

64. Of the five states with over half of all private prisoners, the number of inmates in private prisons grew in three (Florida by 35.3%, Oklahoma by 29%, and Georgia by 53.8%), and dropped in two (Arizona by 16.9% and Texas by 28.3%). E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NUMBER OF PRISONERS HELD IN PRIVATE PRISONS UNDER THE JURISDICTION OF STATE OR FEDERAL CORRECTIONAL AUTHORITIES, DECEMBER 31, 1999–2014 (2015), <http://www.bjs.gov/index.cfm?ty=nps> [<http://perma.cc/4ELA-YCK9>].

65. This is a fairly crude way to look at how private prison growth might matter, and the results here are—at best!—merely suggestive. The goal is simply to see if there is any correlation between having a growing private prison system and greater overall prison growth. The biases are such that any sort of apparent correlation will likely *overstate* any impact private prisons might have on the overall population.

states that gained, lost, or saw no change in private prisoners during that period, as well as the number of such states in each category.⁶⁶

TABLE 1A CHANGES IN TOTAL PRISON POPULATIONS, 1999–2008⁶⁷

| | All States | | | > 10% in Private Prisons | | |
|--------------|------------|-------|-------|--------------------------|-------|-------|
| | Number | % Chg | # Chg | Number | % Chg | # Chg |
| Gain | 24 | 21.5% | 134K | 14 | 15.1% | 48K |
| None | 14 | 2.5% | 5.5K | - | - | - |
| None (No NY) | 13 | 12.6% | 18.4K | - | - | - |
| Loss | 12 | 12.2% | 47K | 1 | 15.5% | 3.5K |

TABLE 1B CHANGES IN TOTAL PRISON POPULATIONS, 2008–2014

| | All States | | | >10% in Private Prison | | |
|--------------|------------|-------|--------|------------------------|--------|-------|
| | Number | % Chg | # Chg | Number | % Chg | # Chg |
| Gain | 15 | -1.2% | -5.7K | 9 | -0.04% | -108 |
| None | 16 | -1.4% | -3.8K | - | - | - |
| Loss | 19 | -7.2% | -48.6K | 7 | -1.9% | -2.3K |
| Loss (No CA) | 18 | -2.2% | -11.0K | 7 | -1.9% | -2.3K |

Start with 1999–2008. Looking at all states, those with growing private prison populations do appear to grow faster than other states, though a good portion of the gap between private prison and all-public states comes from New York’s decarceration during that time.⁶⁸ And, to be absolutely clear, endogeneity here is a monster: as already noted, it could very well be that more punitive states are more conservative and more willing to consider privatization on ideological grounds, so causation runs, at least in part, in the opposite direction. Moreover, the results of the more-than-10% states push back against the privates-as-engines theory even more. The rate of growth in those states (15%) is just slightly more than that in states with no private prisons (13%) or with declining private prison populations (12%).

66. New York—a state that has never had private prisons—was the only state to experience sustained prison population decline starting in 2000. Given the size of its prison population, it skewed the numbers for the no-private states, so I give the results with and without New York in Table 1A. Similarly, following its adoption of Realignment in 2011, California experienced a sharp decline in prison population, which similarly skewed the results for the declining-private prison states in Table 1B.

67. Data in Tables 1A and 1B are from various years of the Bureau of Justice Statistics’ annual *Prisoners* series. *Prisoners*, BUREAU JUST. STAT., <http://www.bjs.gov/index.cfm?ty=pbse&sid=40> [https://perma.cc/MC3Y-2BAN].

68. The states with growing private prison populations saw their overall prison populations grow by 21.5%, compared to barely 2% for states with no private prisons—but that rises to nearly 13% once New York is dropped.

Even the absolute changes are similar for the growing over-10% states and all shrinking states (48,000 vs. 47,000).

During the Great Recession, the heavy-using states with growing private prison populations do appear to experience less of a decline than all other types of states, basically holding steady while every other type of state declines. Note, though, that in the all-state sample, prison populations in growing private prison states shrink at roughly the same rate as all other states (-1.2%, vs. -1.4% and -2.2% when excluding California). Again, causation here is nearly impossible. Private prison groups may have worked hard to keep prison populations at least stable in states in which they are heavily invested, or they could be heavily invested in states that were disinclined to decarcerate. Again, this bias implies that the results above will overstate any such “protective” effect of private lobbying.

In general, these results suggest that there is no immediately clear effect of privatization on prison growth, or at least they caution against making that claim too quickly. Of course, a well-designed multivariate regression might have uncovered more or less of an effect of privatization than these simple correlations suggest, but such a model is beyond the scope of this short Review. But given the biases at play—that states likely to rely on private prisons are probably those likely to incarcerate more regardless—we should nonetheless expect simple correlations to overstate the true effect, not understate it.

B. *Private Prisons, Lobbying, and the Politics of Crime*

The numbers in the previous Section may suggest that private prison firms are not a major force behind prison growth, but they certainly do not prove that claim. So if there is convincing evidence that these firms are effective political actors, then we should be concerned that the problem is really with my numbers. And both books in fact make this claim, that these firms wield a fair amount of political power when it comes to state punishment practices. The basic thrust of the arguments is that these firms have thrown a lot of money at state legislatures, which results both in more beds being transferred to the private system as well as tougher sentencing laws in general, which are designed to keep inmates in for longer terms in public and private prisons alike. As Gottschalk argues:

Recently governors and other state officials have presented breathtaking plans to privatize their penal operations in the face of scant evidence that privatized facilities and operations offer major cost savings and alarming evidence that they are more likely to jeopardize the health and safety of inmates and staff. Many of these state officials have close ties to the prison industry, thanks to the revolving door between the private and public sectors and the huge investments that the corrections industry has made in lobbying and campaign contributions. . . .

[The small percent of inmates in private prisons] understates the large and growing influence of the private prison industry on penal policy and

American politics more broadly. The industry has targeted its lobbying efforts in certain key state capitals and in Washington, DC, in order to create powerful beachheads to push the privatization cause nationally. At the same time, it has forged tight linkages with pivotal conservative groups, most notably ALEC, whose neoliberal agenda is highly compatible with privatizing corrections. (Gottschalk, pp. 65, 67; footnotes omitted)

And she continues, arguing that “[m]ass incarceration created powerful new political players—notably the private-sector interests that build, manage, service, supply, and finance prisons and jails In the course of the prison boom, these new players amassed considerable lobbying resources, political influence, and political expertise” (Gottschalk, p. 217).

And Aviram:

CCA [the largest private prison firm] exerts political influence by making donations independently and through its multiple political action committees Between 2003 and 2012, CCA contributed \$2,161,004 to political campaigns and ballot measures. . . . The \$203,500 spent on ballot measures went to seven different ballot committees, including three in California. . . . CCA contributed to 239 separate lobbyists between 2003 and 2011, for a grand total of \$1,858,094. (Aviram, p. 105)

Viewed in isolation, Aviram’s numbers appear quite large. But their significance declines substantially when placed in broader context. Looking beyond just CCA, between 1986 and 2014 private prison groups spent slightly more than \$13 million lobbying.⁶⁹ During that same time, the total amount spent on lobbying at the state level by all groups ran to over \$36 billion. So private lobbying amounted to only 0.03% of all spending during that time—a drop in the bucket.

That comparison is, however, a bit unfair. Private prison groups concentrated their spending in a handful of states: nearly 40% of all spending occurred just in Florida, 12% in California, and about 5 to 6% each in Georgia, New Jersey, and Tennessee. But even in those states the overall share of lobbying by private prison groups is slight: 0.3% in Florida, 0.03% in California, 0.1% in New Jersey, 0.1% in Georgia, and 0.2% in Tennessee. More than the national average, but still fairly minor amounts.

That said, I’m *still* being unfair. Successful lobbying isn’t just a game of who has the most dollars. A small amount of spending can go a long way if the opposition lacks the resources or inclination to push back. But neither Aviram nor Gottschalk really addresses this issue, and it is a complicated one. It’s true that until recently there was no group explicitly aligned against tough-on-crime positions (a role that smart-on-crime campaigns are now filling). But at the same time, state budgetary processes are much more zero-sum than at the federal level. All but one state, for example, has some sort of balanced-budget requirement, though the effectiveness of such provisions is

69. All lobbying data, unless otherwise specified, comes from NAT’L INST. ON MONEY ST. POL., www.followthemoney.org [<http://perma.cc/XRM6-VFFY>].

often debatable.⁷⁰ But even if such rules exert only weak influence over state budgeting, states cannot print money, and they borrow at rates less favorable than those faced by the national government; both these facts should constrain state spending. Tellingly, at least until the past few years, state spending moved in almost perfect lockstep with state revenue, suggesting that states were genuinely limited by what they were able to bring in.⁷¹

As a result of these constraints, we should expect those lobbying for tougher sentencing laws to face opposition not from explicitly soft-on-crime groups, but from *everyone* else, all of whom are seeking access to a fairly limited pool of money.⁷² So education and medical lobbies likely push back against efforts to expand punishment in general, and public sector lobbies should resist privatization (even if they may favor increased punitiveness more broadly). And many such groups exert far more power, at least in dollar terms, than private prison firms. During the time when private prison groups spent \$13 million on lobbying, educational groups spent over \$256 million, medical groups over \$360 million, and public employee lobbies over \$132 million. Even in Florida, where the private prison groups concentrated their lobbying the most, the private prison groups were outspent five-to-one by the medical lobbies and two-to-one by the educational lobbies (although they did outspend the public employee lobbies by almost 70%).

Yet, despite focusing its spending in Florida, in 2012 the private-prison lobby suffered a somewhat surprising defeat when the state senate voted down a bill to privatize twenty-seven prisons by a vote of twenty-one to twenty (in a chamber with only twelve Democratic senators).⁷³ Privatization would have resulted in 3,500 state guards losing their jobs, and the defeat of the bill was seen as an example of a public sector union defeating the private prison lobby. And this despite the private prison lobbies outspending the public employee ones by 30% that year, \$430,000 to \$330,000 (and, as pointed out above, by 70% over the years 1986 and 2014).

In fact, it is worth thinking about public sector lobbying a bit more. Both Gottschalk and Aviram note that private prison firms are frequently involved with other organizations such as the American Legislative Exchange Council (ALEC) that have sought to toughen state laws in general. Rising overall incarceration rates would help private prisons even if the *share* of

70. Some provisions, for example, simply require that the governor *submit* a balanced budget to the legislature, but impose no requirements that the legislature actually *pass* one. And even if the legislature is required to pass a balanced budget, states are creative at circumventing the spirit of such laws. Pfaff, *Federal Sentencing in the States*, *supra* note 12, at 1583 n.44.

71. *Id.* at 1586 fig.3A.

72. Gottschalk overreifies the private sector when she claims that “private sector has the will, resources, and organizational capacity to dominate politics,” Gottschalk, p. 61. The “private sector” is not a monolith, and private actors often have very divergent or mutually exclusive goals. (And, as we will shortly see, this also sells short the power of public lobbying groups.)

73. Abby Rapoport, *Private Prison Bill Dies in Florida*, AM. PROSPECT (Feb. 15, 2012), <http://prospect.org/article/private-prison-bill-dies-florida> [<http://perma.cc/Z2GM-J25Y>].

inmates in private prisons remained stable. Never mentioned in this analysis, however, is that plenty of public groups had a strong incentive to lobby for tougher laws as well, making it hard to estimate what is really the variable of interest, namely the *marginal* contribution of private prison lobbying to prison growth. That neither Aviram nor Gottschalk addresses this issue is a major oversight in each book's take on the importance of private prisons.

There are at least three reasons why public groups will lobby aggressively for expanding punishments (or against reducing them). The first is employment: prison guard unions, like private prisons, benefit from growing incarceration rates. Most notably, the California Correctional and Peace Officer Association (CCPOA) has lobbied hard for tougher sentencing laws and is thought to play a not unimportant role in California's punitiveness.⁷⁴ And while the CCPOA may be the most powerful and effective of such lobbies,⁷⁵ other state correctional officer associations surely matter as well; just note the success of guard unions in Florida in blocking privatization,⁷⁶ and the guard union in Tennessee was similarly successful in blocking privatization efforts there.⁷⁷

Second, more-rural legislators may fight for more prisoners in the name of jobs more generally. Despite evidence to the contrary,⁷⁸ many legislators believe that having prisons in their districts provides meaningful employment and economic growth to their constituents, even after the prison is built. Thus they resist efforts to close them. New York State, for example, struggled for years to close empty prisons in the face of fierce opposition from the districts where those prisons were located.⁷⁹ And these sorts of political pressures do not require any real lobbying expenditures. The legislators themselves are acutely aware of the feared, if empirically overstated,

74. Zach Weissmueller, *Crowded Prisons, Unions, and California Three Strikes: Why We Can't Just Build More Cages*, REASON.COM (Oct. 30, 2012), <https://reason.com/reasontv/2012/10/30/crowded-prisons-unions-and-three-strikes> [<https://perma.cc/F3YD-YTRK>].

75. See *supra* note 22 and accompanying text.

76. See *supra* note 73 and accompanying text.

77. Alex Friedmann, *Tennessee Prison Privatization Bill Fails to Pass*, PRISON LEGAL NEWS (Sept. 15, 1998), <https://www.prisonlegalnews.org/news/1998/sep/15/tennessee-prison-privatization-bill-fails-to-pass/> [<http://perma.cc/T24A-U6BK>]. Gottschalk mentions CCA's failure to privatize the prison system in Tennessee, its home state, but she does not point to the central importance of the prison guard union in reversing a bill with bipartisan support. Gottschalk, p. 66.

78. E.g., Amy K. Glasmeier & Tracey Farrigan, *The Economic Impacts of the Prison Development Boom on Persistently Poor Rural Places*, 30 INT'L REGIONAL SCI. REV. 274 (2007), <http://dusp.mit.edu/sites/dusp.mit.edu/files/attachments/project/International%20Regional%20Science%20Review-2007-Glasmeier-274-99.pdf> [<http://perma.cc/LW5A-C9JY>]; Gregory Hooks et al., *The Prison Industry: Carceral Expansion and Employment in U.S. Counties, 1969–1994*, 85 Soc. Sci. Q. 37 (2004), http://privateci.org/private_pics/HooksStudy.pdf [<http://perma.cc/DV5V-5JEB>].

79. Zach Bergson, *As Cuomo's Prison Closings Become Reality Some Question the Specifics*, GOTHAM GAZETTE (2011), <http://www.gothamgazette.com/index.php/archives/784-as-cuomos-prison-closings-become-reality-some-question-the-specifics> [<http://perma.cc/E33H-KQZY>].

employment impact (thus eliminating the informational need for lobbying), and they are well incentivized to resist such closures (thus eliminating the incentivizing role of lobbying).

Third—and Gottschalk discusses this issue in some depth—in all but four states, legislators in districts with prisons have a strong reason to resist reform and push for expansion: their power grows with their prisons (Gottschalk, pp. 254–56). Outside of California (come 2020), Delaware (come 2020), Maryland (now), and New York (now), for purposes of state districting, prisoners count as residents of the areas in which they are *incarcerated*, not where they come from.⁸⁰ Since prisoners are disproportionately urban, and prisons are disproportionately rural, this policy effectively transfers power from cities to rural areas.⁸¹ Rural voters in counties with prisons thus exert undue influence in state legislatures, and they receive millions of additional dollars in population-based state and federal aid, despite that the prisoners often are not eligible to benefit from these funds.⁸² A state senator at risk of losing aid dollars—or perhaps even his seat to redistricting due to declining rural populations—does not need any assistance from the private prison lobby to advocate for tougher sentencing laws.⁸³

A final problem with both books' takes on the impact of private prison lobbying is that both rely too heavily on the conventionally accepted claim that prison growth is driven in large part by inmates serving longer sentences. Were this claim generally correct, then successfully lobbying for longer sentences would almost mechanistically lead to more prisoners, public and private alike. But my work has shown that time served has not actually grown that much, and certainly not enough to explain the magnitude of growth we have witnessed. At least since the mid-1990s, it appears that the main engine of prison growth has been a rise in *admissions*, not *time served*, with the latter remaining fairly flat.⁸⁴

80. *Prison Gerrymandering Project*, *supra* note 23.

81. TRACY HULING, BUILDING A PRISON ECONOMY IN RURAL AMERICA, *from* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002), http://www.prisonpolicy.org/scans/huling_chapter.pdf [<http://perma.cc/96BC-J7JS>].

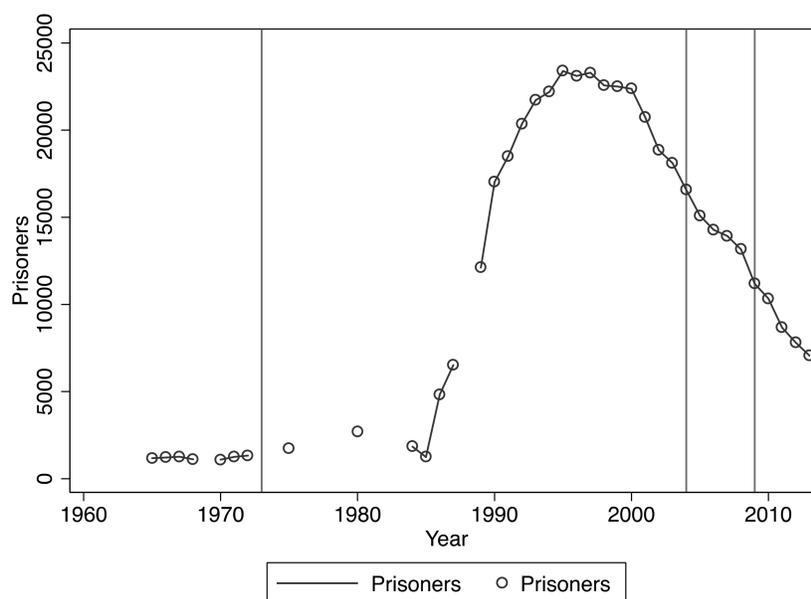
82. See PETER WAGNER ET AL., WHY THE CENSUS BUREAU CAN AND MUST START COLLECTING THE HOME ADDRESSES OF INCARCERATED PEOPLE 4–8 (2006), <http://www.prisonpolicy.org/homeaddresses/report.html> [<http://perma.cc/QN7J-3REK>].

83. See Rebecca U. Thorpe, *Perverse Politics: The Persistence of Mass Imprisonment in the Twenty-First Century*, 13 PERSP. ON POL. 618, 622–23 (2015) (providing further evidence of this effect).

84. Not surprisingly, some disagree with these claims. See Pfaff, *Correctional Severity*, *supra* note 12; Pfaff, *Durability*, *supra* note 12; Pfaff, *Micro and Macro*, *supra* note 12, at 1241–55; Pfaff, *War on Drugs*, *supra* note 12; Pfaff, *Causes of Admissions*, *supra* note 12. Some of the criticisms merit serious attention, but I believe the core qualitative claim that admissions drive growth survives them. Properly engaging with those critiques, however, is beyond the scope of this Review. See, e.g., THE PEW CTR. ON THE STATES, TIME SERVED (2012), http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/prisontimeservedpdf.pdf [<http://perma.cc/Q696-NJEY>]; Derek Neal & Armin Rick, *The Prison Boom and the Lack of Black Progress After Smith and Welch* (Nat'l Bureau of Econ.

None of this is to say that rising admissions and longer sentences are not related, since prosecutors may use those tougher sanctions to extract pleas more efficiently. But these results do mean that the impact of any change in sentencing law, whether the product of private or public lobbying, will be mediated by what locally elected, relatively independent, county-level prosecutors choose to do. And there is at least some evidence that they are willing to ignore tougher laws when convenient to do so. Figure 3 plots the number of inmates in New York State prisons serving time for drug offenses, and the first vertical line marks 1972, the year the state adopted its draconian Rockefeller Drug Laws. Strikingly, there is almost no change whatsoever in the number of drug inmates following the laws' adoption: tougher laws, no change. Of course, prosecutors do appear to take advantage of the laws in the 1980s, though they also stop using them long before any of the subsequent reforms weakening the laws are passed (the second and third vertical lines). So the simple more-private-prison-money-leads-to-longer-sentences story overlooks the surprisingly tricky question of how longer sentences necessarily lead to more prisoners.

FIGURE 3 DRUG PRISONERS IN NEW YORK STATE PRISONS, 1965–2013⁸⁵



Research, Working Paper No. 20283, 2014), <http://www.nber.org/papers/w20283.pdf> [<http://perma.cc/PRG5-VEPR>].

85. See Pfaff, *War on Drugs*, *supra* note 12, at 215–17.

C. *The Problem Isn't Privatization, It's Contracts*

The final major flaw with both Aviram's and Gottschalk's accounts is that in attacking the evils of private prisons they are really looking at the wrong thing. Gottschalk in particular points out that the dangers posed by private prisons extend beyond their desire to maximize the number of beds filled each day: their guards are more poorly trained, they are less likely to provide rehabilitation programs, inmates are more likely to be exposed to violence than in public prisons and so forth. (Gottschalk, pp. 70–71). And there is evidence that tougher prison conditions increase the risk of subsequent recidivism,⁸⁶ which is perhaps good for private firms' bottom lines, but bad social policy. The concerns Gottschalk raises are all completely valid. Yet, perhaps surprisingly, none of them necessarily argues against private prisons. They just argue in favor of better contracts.

To see why, consider the following story. A state pays the wardens of its prisons a per diem rate, and that rate is more than the cost of housing the prisoner (or the wardens at least cut costs down to make that the case). The wardens use the additional revenue to fund services outside the prison, and they do not focus much on rehabilitation, and in fact fight against early release policies and work hard to ensure their prisons are full so their profits are higher. This is, in a nutshell, the conventional private-firm, profit-motive horror story.

But what I've just described is not a private prison system at all. It is the way that the state of Louisiana contracts with local *public* sheriffs to confine state inmates in *public* county facilities.⁸⁷ The sheriffs then use the extra savings to buy material for their deputies, even those working outside the jails. In other words, this "private firm problem" can occur entirely within the public sector, because the problem has *very little to do with privatization*, at least not directly. It is all about contract incentives.

In other words, private prisons focus on warehousing inmates as cheaply as possible because they have negotiated contracts that reward them for doing so. Write a contract that pays based on recidivism rates, not occupancy, and private prisons will focus more on training and programming and less on capacity. This is not an idle thought experiment. Though the idea of incentivizing contracts for private prisons has received fairly little

86. See, e.g., M. Keith Chen & Jesse M. Shapiro, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach*, 9 AM. L. & ECON. REV. 1 (2007).

87. See Cindy Chang, *Louisiana is the World's Prison Capital*, TIMES-PICAYUNE (May 29, 2012, 11:23 AM), http://www.nola.com/crime/index.ssf/2012/05/louisiana_is_the_worlds_prison.html [<http://perma.cc/Z7TF-Y3BN>].

academic interest,⁸⁸ it is already being implemented in the field. Pennsylvania recently imposed recidivism-linked incentive contracts on the private firms that operate its halfway houses.⁸⁹ If a company pushes recidivism rates sufficiently far below the historic average, it receives a bonus, while if rates drift too high for two years in a row then it loses the contract. Interestingly, the nation's largest private prison firm, CCA, recently bought four of the halfway houses operating under these contracts, suggesting that CCA thinks it can successfully manage and improve on parolee recidivism rates.⁹⁰

Obviously, crafting such contracts is easier said than done, so I do not want to be seen as just glibly saying “write better contracts.”⁹¹ Designing contracts that properly align incentives will be tricky, and states should think carefully about what goals they want to measure and if recidivism is the only relevant one. And we also face the common concern that private actors are more knowledgeable and more skilled at negotiating than their public counterparts, so we cannot always assume that public-private contracts are negotiated and written on equal footing. But none of these undermine the basic point, namely that the ills identified by Aviram and Gottschalk, to the extent that they exist, do not reflect the problem of privatization *per se*, but rather of bad publicly written contracts.⁹²

Taken together, these arguments suggest that the emphasis Aviram and Gottschalk place on private prisons as driving prison growth and fighting reform, respectively, is misplaced. It is likely that private prisons are not *irrelevant*, but other factors—most if not all of them located in the public sphere—are substantially more important.

CONCLUSION

It is impossible to predict the future of current decarceration efforts in the United States without a clear understanding of the fiscal pressures that both promote and thwart them. And while it is clear that I do not always

88. As far as I can tell, Alexander Volokh is one of the only people to really address this issue in any depth. See generally Alexander Volokh, *Prison Accountability and Performance Measures*, 63 EMORY L.J. 339 (2013).

89. Charles Chieppo, *The Pay-for-Performance Approach to Reducing Recidivism*, COUNCIL OF ST. GOV'TS (Sept. 10, 2015), <https://csgjusticecenter.org/reentry/media-clips/the-pay-for-performance-approach-to-reducing-recidivism/> [http://perma.cc/4BXY-MH67].

90. *CCA Announces Acquisition of Four Residential Re-Entry Facilities*, REUTERS (Aug. 31, 2015, 8:00 AM), <http://www.reuters.com/article/2015/08/31/idUSnMKW7Zpl7a+1d0+MKW20150831> [http://perma.cc/PZ8U-FSLR].

91. See Volokh, *supra* note 88, at 393–415.

92. Of course, even if I am right, at least one plausible argument against privatization would be that the political economy of negotiating these contracts is such that we should assume “good” contracts will always be almost impossible to produce. In other words, whatever their theoretical viability, in practice they will always disappoint. Perhaps. But I would point to Pennsylvania as a cautionary tale against being too immediately cynical on this front.

agree with the accounts of that relationship that Aviram and Gottschalk provide, both of their books do a good job of highlighting the often-underappreciated limits of, and challenges raised by, fiscal-based decarceration.