PRISONS AS BIG BUSINESS

by

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ABSTRACT

Contemporary prison systems are faced with such overwhelming problems that they are argued to be in a crisis. Privatization of prisons is offered as the solution for the troubled penal system, both by private companies greedy to move in on this new expanding market, and by conservative governments eager to show they are "dealing" with crime but yet cutting costs. It is argued that by contracting out corrections to private firms, the quality of imprisonment can be improved, while money can be saved. This thesis explores whether privatization of prisons is the solution it is argued to be for the current penal crisis.

To establish whether privatization is a solution for the penal crisis it is important to define this alleged penal crisis. In this thesis I demonstrate that the term penal crisis is not sufficient as it suggests that all that is needed is a quick emergency solution. Privatization is offered as such a solution, but it does not deal with the high imprisonment rates and the over-representation of minorities in the prison system. It does not deal with the nature and inefficiency of imprisonment itself or with any of the systematic problems of the criminal justice system such as discrimination and the definition of what constitutes crime. Privatization also does not deal with any of the underlying causes of crime in society, such as inequality, poverty, unemployment and problems resulting from colonialism.

It is impossible to view privatization separately from these bigger issues in penality. Thus, my conclusion is that the problems in the prison system are so systematic and deep, and so engrained in the structure of society that privatization is not going to solve them.
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INTRODUCTION

Canon City may have been the first community in America to recognize incarceration as a growth industry. In 1868, after supporting Denver to become the state capital, Canon was offered the state prison or the state university. It took the prison.

Jonathan Franzen 1995

Contemporary prison systems are faced with such overwhelming problems that they are argued to be in a crisis.¹ These worrisome problems include, the soaring rates of imprisonment in most Western countries, the consequential prison overcrowding, shocking tales of abuses and cruelties, and the incredibly high expenses involved.

The newest buzz word in penal policy is privatization of the prison system. Privatization is being offered as the solution to the troubled penal system, both by companies greedy to move in on this new market and by conservative governments eager to show they are "dealing" with crime, but yet cutting costs. It is argued that by contracting out corrections to private firms, the quality of imprisonment can be improved, while money can be saved. Is privatization of prisons the solution it is argued to be for the current penal crisis?

To establish whether privatization is a solution for the current penal crisis it is important

to define this alleged penal crisis. It depends on the definition of the crisis what would be an appropriate reaction, or as Sparks argues: "... different agendas for penal change centre on differing depictions of the nature of the crisis".\textsuperscript{2}

The first three chapters research the problems that the penal system is faced with, to examine the extent of this alleged crisis and the reasons for the overwhelming problems. Chapter one examines the practical problems of the prison systems, namely overcrowding, prevalence of classism and racism, the frequent occurrence of abuses and cruelties, and the incredibly high expenses. These are the most obvious problems, that are immediately recognizable without looking much further into the matter.

The problems that the penal system is faced with gave rise to privatization as a possible solution. Chapters two and three examine to what extent we are part of creating these problems ourselves. Chapter two examines to what extent imprisonment itself is the problem. It addresses the issue of the shortcomings of imprisonment, namely its low success rate, ineffectiveness of its objectives and because of this, uncertainty over its direction. Chapter three deals with the politics behind imprisonment, and examines to what extent the criminal justice system and society themselves are the problem. It more closely examines the high imprisonment rates, the fact that the prison system affects the poor people far more than the rich, and the enormous over-representation of minorities.

The last three chapters research privatization of prisons in the light of the suggestion that it would be a solution to the current penal crisis. Privatization of prisons is highly

\textsuperscript{2} Sparks, \textit{supra} note 1 at 16.
controversial, because it is argued that the provision of laws, the delivery of punishment, and especially the operation of prisons are of such a nature that they should be provided by the state, and should not be contracted out to private companies.

Chapter 4 demonstrates how the idea to privatize prisons as a solution for the penal problems emerged. Trends in contemporary society that made the climate more susceptible to privatization are the emergence of international private security companies, the shift to 'law and order' politics by conservative governments, and the current managerial trend in crime control thinking.

Chapter five takes a closer look at what privatization of prisons entails and examines the shape it has taken so far, and chapter six deals with the issues that are raised by the privatization debate. The issues identified are: whether cost efficiency can only be achieved at the expense of humane treatment, issues of legality dealing with whether the state can delegate the operation of prisons to private companies, the problems of accountability dealing with issues of responsibility and monitoring the private firms' operation, and the issues that arise from the private businesses' focus on and expertise in technology.

Whether privatization of prisons is a solution to the penal crisis, depends on how you define the penal crisis. In the first three chapters I demonstrate that the term penal crisis is not sufficient, and that the penal problems are ongoing and systematic, and engrained both in the criminal justice system and in society. The term penal crisis is not sufficient, because it makes it seem as if all we need is a quick emergency solution.

The last three chapters demonstrate that although privatization is offered as a solution,
it only deals with matters of efficiency, cost cutting, security and cleanliness. It does not deal with the high imprisonment rates and the over-representation of minorities in the prison system. It does not deal with the nature and inefficiency of imprisonment itself. It does not deal with any of the systematic problems of the criminal justice system such as discrimination, and the definition of what constitutes crime. It does not deal with any of the underlying causes of crime problems in society, such as inequality, poverty, unemployment and problems resulting from colonialism.

It is impossible to view privatization separately from these bigger issues in penalty. Therefore my thesis is that the problems in the prison system are so systematic and deep, and so engrained in the structure of society that privatization is not going to solve them.

The countries that are my focus of research are the United States and Britain, because in these two countries the trend to privatize prisons has been most developed. Various other countries are experimenting with private prisons as well, most notably France and Australia,

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but to include all those would make the thesis too fragmented. Where relevant, especially in the first part that examines the penal crisis, comparisons have been made with the Canadian situation. On occasion examples from other countries are included, but only where their situation is significant in reference to the arguments made.

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Jails in the United States, the United Kingdom and Australia" (1994) 34 British Journal of Criminology 29-48.
CHAPTER 1  THE PENAL CRISIS

*Whoever called economics the dismal science must not have heard about criminology.*

Richard Lacayo 1996

1.1  Introduction

Imagine an institution of which even the most conservative proponents admit it is very inadequate in achieving its goals, ridiculously expensive, pervasive of classism and racism, and stained with cruelty and inhumanities. Imagine this institution exists in a society where public spending is scarce and the allocation of money over the various areas of need has to be considered carefully. Now imagine that this troubled institution is one of the few areas of public expenditure that does not face a cut back, but on the contrary is being intensively expanded. Wouldn’t that be astonishing?

The situation described above is exactly what is happening in Western societies: the institution in question is the prison. Even though prisons don’t work, are expensive, permeated of classism and racism, and notorious for incidents of brutality, they not only persist, but even more surprising the prison system is being expanded at an astonishing rate. This expansion of the prison capacity is drawing tax dollars from various other areas of public need, yet no one seems to object. David Rothman quotes an interesting estimate of The Edna McConnell Clark Foundation, the leading private funding organization of criminal justice reform programs:

... in 1992 the United States spend $25 billion dollars on its prison system, making it the second fastest growing item, after Medicaid, among state
government expenditures.\textsuperscript{5}

Irwin and Austin go even further, and claim that: "During this past decade, state spending in corrections was the fastest-growing category of all state spending categories."\textsuperscript{6} They show a 59 per cent increase in spending on corrections, next to a 33 per cent increase in Medicaid. This compared to a meagre 3 per cent increase on health spending and decreases in spending on elementary and secondary education (-2%), higher education (-3%), highways(-11%) and welfare (-27%).\textsuperscript{7} Last year the U.S. correctional budget had soared up even further to $30 billion dollars.\textsuperscript{8} For the situation in California Jerome Skolnick reports:

To pay for a fivefold increase in the corrections budget since 1980, Californians have had to sacrifice other services. In 1984, California devoted 14 percent of its state budget to higher education and 4 percent to prisons. In 1994, it gave 9 percent to both. Under "three strikes", the balance is expected to shift sharply in favour of prisons.\textsuperscript{9}

The same statement can be made for the crime control system in general: it does not realize its goals of reducing crime or protecting society, yet we keep increasing the already enormous amounts of money we pump into it. Irwin and Austin report for the situation in the


\textsuperscript{6} J. Irwin & J. Austin, It's about Time: America's Imprisonment Binge, (Belmont, California: Wadsworth, 1994) at 13.

\textsuperscript{7} Ibid. at 17.


U.S.: "As of 1990, we were spending approximately $74 billion each year to operate the nation's entire criminal justice system." Ericson observes the same for the Canadian situation:

In recent decades, crime control has been at or near the lead as a growth sector of Canadian government employment and expenditure. While the greatest proportionate growth has been in police personnel ... the correctional/punishment component of the system has also thrived as a growth industry.¹¹

Western societies spend unprecedented amounts of money on their prison systems, that are thus unavailable for other areas of need, yet this has no apparent effect on crime rates and fear of crime only seems to increase. Why do we continue to pump money into an area that is so troubled and ineffective without reorganizing it? First let's have a look at the problems that the penal system is faced with: prison overcrowding, classism and racism, a history of abuses and cruelties, and the high expenses. The next chapter will consider the ineffectiveness of the prison system, and look at what the purposes of imprisonment are, and what we are actually trying to achieve with imprisonment.

1.2 Prison Overcrowding

By far the most astonishing feature of contemporary prison systems is the unbelievably rapid growth in the number of people in prison. More people are ending up in prison than ever

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¹⁰ Irwin & Austin, supra note 6 at 13.

before. The 1993-94 average daily count of adults imprisoned in Canada was 32,803. The number of Canadians sentenced to jails, prisons or community supervision has jumped by 31 percent in the past five years. For juveniles the imprisonment rate is even more depressing. Over 1993-94 the rate of juvenile detention is an astonishing 219 per 100,000 youth population, compared to a rate of adult imprisonment of 151 per 100,000 of the total adult population in Canada.

Further to the south, the situation is even worse; the U.S. has the largest prison population in the world, with more than one million, one hundred thousand persons in prison. The total number of people incarcerated in prison or jail is one and three-quarter million. The U.S. prison population doubled from 1970 to 1980, and more than doubled again from 1981 to 1995. The demand for beds in the U.S. correctional system is growing at a rate of 1,000 per week. The prison population in California, the state with the highest

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12 Figure from: Basic Facts About Corrections in Canada 1994 ed. (Ottawa: Minister of Supply and Services, November 1995) at 2.

13 MacLean's, March 13 1995.

14 Figures from: Basic Facts About Corrections in Canada, supra note 12 at 3.


16 Ibid.

17 Ibid., at 236

number of prisoners, quadrupled between 1980 and 1990 from 24,569 to 97,309. The British average total prison population in 1995 was 51,000, marking a 4,100 increase since 1986. The future looks even more grim, as projections of the Home Office show an anticipated further increase of 8,900 by the year 2004 bringing the total number of prisoners up to 59,900.

The imprisonment rates of the three countries in the Western world with the highest proportionate prison populations, the United States (529.0 per 100,000 general population), Canada (129.6 per 100,000 general population), and Britain (92.1 per 100,000 general population), are spiralling out of control. Even though other countries' imprisonment rates may be lower, for example the imprisonment rate in France is 81 per 100,000 and in the Netherlands 40 per 100,000, most of them are increasing as well. Even the Netherlands, a country that has traditionally had a cautious approach to using imprisonment, is involved in a major prison expansion program. It doubled their capacity in the last six years, bringing the

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21 Ibid. at 1.


24 In the Netherlands expansion of the prison capacity directly increases the prison population, because cells are usually not double-bunked and the government operates with a system of turning people away when there are no available
total number of cells up to 12,000.\textsuperscript{25}

This enormous increase in prison population, which Nils Christie calls "the great confinement",\textsuperscript{26} is causing problems. Even though most western countries are involved in major prison expansion programs, and corrections is one of the fastest growing facets of the state budgets, it is impossible to keep up with the spiralling number of new convicted offenders that have to be placed in institutions each year. The prisons are becoming over full. According to Rothman in the U.S. on average federal prisons are 46 percent over capacity and state prisons 31 percent.\textsuperscript{27} The Canadian federal inmate population grew from 10,500 to 13,200 between 1986 and 1993, but penitentiary cell capacity increased only from 11,656 to 12,061.\textsuperscript{28} Although the Correctional Service of Canada's current five-year building plan involves spending $470 million, it is not expected that this increase will be sufficient for the escalating inmate population.\textsuperscript{29}

Prison overcrowding is the most pressing problem in corrections today, since it makes it virtually impossible to provide minimally decent living conditions, and it makes the prison hard to manage. Practical problems such as access to and sharing of sanitation, and sharing of space by smokers and non-smokers, are only exacerbated by overcrowding problems.

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\textsuperscript{26} After Foucault who used the term for medical institutionalization in France. Christie, supra note 23 at 80.
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\textsuperscript{27} Rothman, supra note 5 at 31.
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\textsuperscript{28} Marron, supra note 1 at 19-20.
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\textsuperscript{29} Ibid. at 21-22.
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Prison crowding usually means that cells which were meant for one person are now used by two or even more people, with the obvious consequences of loss of privacy and an increase in feelings of pressure. A prisoner in the maximum security Kent Institution in British Columbia described the experience of living in a double-bunked cell:

You’ve got two guys living in a toilet. It could be your best friend. After a while you want to kill him. Everybody’s entitled to some dignity, some privacy. You need a time for quiet on your own. When you’re double-bunked, there is no such thing as time out. The pressure keeps building.  

Spaces meant for recreation or education are often used to put additional beds in, turning them in to big communal dormitories. The opportunities for recreation, work and education stop to exist or are significantly limited, either because they have to be shared by an increasing amount of inmates, or because there is less money available, or simply because there is no space left to provide the facilities. The increasing amount of people in such close quarters combined with the decrease in things to do, leads to an increasingly tense atmosphere with higher occurrence of conflict and incidents. Prison staff gets disillusioned, because the situation is so destitute and because contact between staff and inmates deteriorates, resulting in a greater staff turnover. Prison overcrowding not only makes the sentence harsher for the inmates, but also makes the prison more difficult to manage.

1.3 The Rich get Richer and The Poor get Prison:

Classism and Racism in the Prison System

It is widely studied how certain people end up much more in prison then others. The

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criminal justice system, intended or not, in practice works out to be very discriminatory. The central contention of Barbara Hudson’s book on the connections between penal policy and social justice, is that even though different countries see different offenses as the ones that must be punished by imprisonment, and that whatever the differences in penal policy with respect to crimes, it is always the same groups of people that are penalized everywhere; the poor, the homeless, the mentally ill, the unemployed, the migrants and the minorities. As she says: "The rich stay at home and the poor go to jail." Or as Jeffrey Reiman argues in his book of the same title: "The rich get richer and the poor get prison."

One of the most shocking and worrisome features of the western prison systems is the incredible over-representation of minorities. In the US blacks make up nearly half of the prison population (48 per cent), even though they constitute only 12 per cent of the country’s population. This means they are four times more likely to be in prison than would be predicted from their percentage in the general population. Michael Tonry argues that this traditional way of looking at the black-white disproportion by comparing the proportion of blacks in prison and their proportion in the general population considerably understates that disproportion because it ignores the under-representation of whites. He suggests to make comparisons on the basis of the number of confined persons of a given racial group per 100,000 population of that

32 Ibid.
34 King & Maguire, supra note 19 at 7.
group. Thus measured the black incarceration rate in the US is 1860 and the white incarceration rate is 289. By this measurement the rate is six to seven times higher for blacks than for whites.

Tonry also notes that this situation maybe even worse in England and Wales but less noticeable because of the small number of blacks in the general population. He gives a new stunning angle to look at the imprisonment rates of England and Wales:

... if the proportion of blacks to whites in the general population of England and Wales were the same as it is in the United States -and vice versa- and yet each country continued to imprison at its own racially disaggregated rates, then the differences in the size of the prison populations in these jurisdictions would greatly diminish.35

In the last years the number of African-American men that is under some form of control of the criminal justice system has been widely studied. The findings are shocking; roughly one out of four African-American men between the ages of 20 and 29 is under some form of correctional control.36 Jerome Miller, the head of the National Center on Institutions and Alternatives, is even more pessimistic:

... 42 percent of black men in Washington D.C. between the ages of eighteen and thirty-five are either in prison or on probation or parole, out on bail, or being sought on an arrest warrant. For black men in Baltimore, the comparable figure is 57 percent.37


37 J.G. Miller, Search and Destroy: The Plight of African American Males in the Criminal Justice System (Alexandra, Virginia: National Center on Institutions and Alternatives,
The number of young African-American men under control of the criminal justice system (609,690) is greater than the total number of African-American men of all ages enrolled in college (436,000).\textsuperscript{38}

The over-representation of Aboriginal people in the Canadian Criminal Justice system was first documented in 1967 by the Canadian Corrections Association report, \textit{Indians and the Law}, and in 1974 by the Law Reform Commission of Canada in \textit{The Native Offender and the Law}. The 1996 Royal Commission on Aboriginal Peoples' report on Aboriginal People and criminal justice in Canada, \textit{Bridging the Cultural Divide}, shows matters are getting worse: "Reports and inquiries since then have not only confirmed the fact of over-representation but, most alarmingly, have demonstrated that the problem is getting worse, not better."\textsuperscript{39}

The report quotes the following 1988 findings from the Canadian Bar Association:

Government figures which reflect different definitions of 'Native' and which probably underestimate the number of prisoners who consider themselves Native show that almost 10 per cent of the federal penitentiary population is Native ... compared to about 2 per cent of the population nationally.\textsuperscript{40}

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\textsuperscript{39} Royal Commission on Aboriginal Peoples (RCAP), \textit{Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada}, (Ottawa: Supply and Services, 1996) at 28-29.

\textsuperscript{40} Jackson, M., \textit{Locking Up Natives in Canada}, Report of the Canadian Bar Association Committee on Imprisonment and Release (1988); as quoted in \textit{ibid.} at 29.
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In 1994 the official Aboriginal offender population in Canadian corrections was 1,668 \(^{41}\), (compared to a self-identified Aboriginal incarcerated offender population of 1,726 \(^{42}\)), which is 12.3 per cent of the total prison population.\(^{43}\)

In certain areas the over-representation of Native people in the prison system is even more dramatic, such as in the west and northern parts of Canada where there are relatively high concentrations of Native communities. In the Prairie region, Natives make up about 5 per cent of the region’s general population but 32 per cent of the penitentiary population.\(^{44}\) Even more worrisome is that the disparity is only growing. For example, in 1965 22 per cent of the prisoners in Stony Mountain Penitentiary were native, while in 1984 this number had increased to 33 per cent.\(^{45}\)

An example of the high coercive intrusion of criminal laws into the lives of Aboriginal people in some of the provincial correctional systems, is Saskatchewan. Between 1976-77 and 1992-93, the number of Aboriginals admitted to Saskatchewan correctional centres increased from 3,082 to 4,757. In 1992-93, Aboriginals constituted 69.1 per cent of the overall rates of admission to Saskatchewan correctional centres.\(^{46}\)

\[^{41}\] Basic facts About Corrections in Canada, supra note 12 at 19.

\[^{42}\] Ibid. at 18.

\[^{43}\] Ibid. at 19.

\[^{44}\] Bridging the Cultural Divide, supra note 39 at 29.

\[^{45}\] Ibid. at 29.

\[^{46}\] Ibid. at 31.
1.4 Cruel and Very Usual Punishment

The penal system itself is based on the cruel principle of infliction of harm. We treat someone badly and then we are surprised when it makes the situation worse. Kevin Marron describes his instinctive reaction to the alien climate of the prison:

During the course of my visits to several maximum security prisons, I never quite got used to seeing human beings caged, shackled and watched like wild animals ... the situation seemed to compromise the humanity of everyone present.47

Apart from the general harsh ideology on which imprisonment is based, the history of the prison is unfortunately also a history of abuses and incidents. As even established by government publications, such as the American National Institute of Justice:

The history of American prisons is replete with eruptions of violence, scandals and misery. Prisons have always suffered from crowding, violence, suicide, brutality, and poor medical and sanitary facilities.48

Life inside most prisons is hard, there is a lot of tension, violence, abuses, and fear of oppression or predatory sexual behaviour by other inmates.49 It is a very cold and tough climate in which feelings cannot be shown. This results in a high number of murders and suicides in prison.50

The methods that are used to keep the inmates under control are very harsh and punitive, such as solitary confinement, macing, and putting inmates in shackles. Only in 1968

47 Marron, supra note 1 at 37.
49 See e.g.: Marron, supra note 1 at c. 3.
was flogging of inmates outlawed in U.S. prisons.\textsuperscript{51} In 1993 Robert Gentles, a Kingston Penitentiary prisoner was suffocated when guards, armed with mace, removed him forcibly from his cell because he refused to turn his radio down during a collective prisoners' protest.\textsuperscript{52}

On April 2, 1996 the head of the Canadian federal prison system resigned, due to the outcome of an inquiry into a violent incident in the Kingston's penitentiary for women two years ago. The report of the inquiry says six women prisoners were subjected to "cruel, inhumane and degrading" treatment by an all-male Correctional Service of Canada riot squad when they were strip-searched, shackled and left nearly nude for more than twelve hours on the concrete floors of cold, bare, solitary confinement cells. The conclusion of the report, drawn up by Judge Arbour, is that the failings shown are systematic and institutional.\textsuperscript{53}

But as we gain we also lose again. Time magazine reported in May 1995, that Alabama has reintroduced the chain gang in its Limestone Correctional Facility. Alabama governor Fob James admits chain gangs are meant to be unpleasant and that this one is succeeding, but he decided to revive the habit because it fulfilled two of his dearest campaign promises: it saves money (the inmates require fewer guards) and it shows he is getting tough with criminals.\textsuperscript{54}

\textsuperscript{51} L.G. Forer, \textit{A Rage to Punish: The Unintended Consequences of Mandatory Sentencing} (New York: Nortor, 1994) at 25.

\textsuperscript{52} Marron, \textit{supra} note 1 at 42.


\textsuperscript{54} Time magazine, May 15, 1995.
The beating of Rodney King by Los Angeles police officers,\textsuperscript{55} received much media attention, but most abuses that happen in prisons are hidden from the public view, and therefore do not receive any attention let alone a public outcry.

1.5 Go to Jail or Go to Harvard? The Expenses of Imprisonment

Next to all the aforementioned problems of the penal system the prison system is also a very expensive way of "dealing" with the crime problem. As Rothman argues:

It was once commonplace to observe that a year in jail was as expensive as a year at Harvard, but by now jail costs in many cities are much higher. Maintaining one inmate for one year in New York City costs $58,000, more than twice the annual cost for students at private universities.\textsuperscript{56}

In Canada the average cost of building new cells is $200,000 per cell,\textsuperscript{57} and the average costs of incarcerating an offender in a federal institution is $45,753 per year.\textsuperscript{58} This last figure includes only those costs to keep the inmate in the institution such as salaries, programs, security, health care and cost associated with the maintenance of the facility. The figure does not include parole related costs, transfer payments, staff training and operational costs of headquarters and capital expenditures.

Furthermore it is an average number, the costs increase even more when dealing with maximum security ($65,371), prison for women ($78,221) or when dealing with prisoners who

\textsuperscript{55} Rothman, supra note 5 at 29.

\textsuperscript{56} Ibid. at 31.

\textsuperscript{57} J. Melnitzer, Maximum, Minimum, Medium: A Journey Through Canadian Prisons (Toronto: Key Porter Books, 1995) at 328.

\textsuperscript{58} Figure from: Basic Facts About Corrections in Canada, supra note 12 at 47.
have special needs such as prisoners who have an illness or who are HIV positive.\textsuperscript{59} As a comparison, the average annual cost for detention in a community correctional centre is $27,001 and for supervising an offender on parole is $8,527.\textsuperscript{60}

1.6 The Insufficiency of the Term Penal Crisis

All these problems that the penal system is faced with: overcrowding, pervasive classism and racism, inhumanities and cruelties, and the increasingly high burden that it places on public spending, are commonly referred to as "the penal crisis". Yet a crisis insinuates that the problems are sudden, climactic, a one time emergency situation, and not going to last.

The problems of the correctional system however are a lot more ongoing and systematic than this phrase lets on, and certainly are not going to disappear overnight. Richard Sparks argues: "It is by now quite generally recognized that the term 'crisis' is in key respects inadequate as a description of the depth and durability of penal problems."\textsuperscript{61} David Garland argues it is not a penal crisis that we are faced with but a "crisis of penological modernism".\textsuperscript{62}

Therefore it would be more accurate, instead of a penal crisis, to speak of penal problems. Let's consider how systematic the problems are. Could it even be that imprisonment itself is the problem? Or that our criminal justice system is the problem? When you pose the

\textsuperscript{59} Ibid. at 48.
\textsuperscript{60} Ibid. at 49.
\textsuperscript{61} R. Sparks, supra note 1 at 18.
\textsuperscript{62} Garland, supra note 1 at 7.
argument that problems such as overcrowding and increasing costs give rise to solutions like privatization, you assume it is a given that these penal problems will exist. But in how far do we create these problems ourselves? The next chapter will explore in how far imprisonment itself is the problem, and chapter three will examine what role the criminal justice system and society play.
CHAPTER 2   PRISONS DON'T WORK

We have an exaggerated belief in the efficacy of imprisonment .... We make life really terrible for some people and then blame them when they become dangerous.

Norval Morris 1992

2.1 The Low Success Rate of Prisons

There are few institutions which speak to the imagination the way the prison does. The prison has received an enormous amount of attention, despite its relatively short history of two centuries. Academics of various backgrounds have studied it, films have been made about it, books written, policy makers debate about when and how to use it, critics point to the high recidivism rate and the adverse effects, and prisoners themselves complain about the overcrowding and the bad conditions. The one thing everyone agrees on is that it has very dubious results. But what are we trying to achieve? What are the aims of imprisonment? How do we justify locking people up as punishment?

The main goal of crime control is to reduce or prevent crime in order to protect society. The Oxford History of the Prison shows the results are depressing:

63 See generally: Morris & Rothman, supra note 15 at xii; See for Canada: Bill C-36, the Corrections and Conditional Release Act 1992, c. 20, para. 3: "The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society ...." and para. 4: " ... that the protection of society be the paramount consideration in the corrections process."; CSC Mission Statement 1988: "CSC contributes to the protection of society ...."; Report of the Canadian Sentencing Commission, Sentencing Reform: A Canadian Approach (Ottawa: Canadian Government Publishing Centre, 1987) at 145: "The most frequently invoked purpose of sentencing is the protection of the public and/or society."
... research into the use of imprisonment over time and in different countries has failed to demonstrate any positive correlation between increasing the rate of imprisonment and reducing the rate of crime.64

The contemporary extraordinary increase in prison levels also seems to produce only counter-examples to the theory that imprisonment would lead to a reduction in crime. For example in the U.S. a quadrupling of the prison population in recent decades has had little impact on crime rates.65 The Canadian Sentencing Commission concluded in their report: "It is now generally agreed that the system cannot realistically be expected to eliminate or even significantly reduce crime."66 Home Office studies in Britain revealed that the high levels of imprisonment involved large expenditures with little demonstrable preventive benefits.67

2.2 What Are the Objectives of Imprisonment?

Crime control is very unsuccessful in its goal of reducing or preventing crime, but what are the arguments that a reduction in crime would be achieved by punishing with prison sentences? Conventionally, there are four purposes for imprisonment referred to in jurisprudence and criminal law theory: deterrence, retribution, rehabilitation and incapacitation.68

64 Morris & Rothman, supra note 15 at xii.
66 Report of the Canadian Sentencing Commission, supra note 63 at 144.
67 Von Hirsch, supra note 65 at 480.
68 See e.g.: M. Jackson, Justice Behind the Walls: A Report of the Canadian Bar Association Committee on Imprisonment and Release at 1; Report of the Canadian Sentencing Commission, supra note 63 at c.6; See generally: A. von Hirsch & A. Ashworth, eds., Principled Sentencing (Boston: Northeastern
Deterrence means that to discourage people from breaking the laws, there are sanctions placed upon people who do get involved in criminal behaviour. Deterrence works two ways; towards the general population and towards the individual offender. General deterrence is the exemplary function that when people see that a law breaker is punished, it is argued it will dishearten others from doing the same. Individual deterrence works in the sense that if the offender is punished for breaking the rules, he or she him/herself will think twice before doing so again.\(^{69}\)

Retribution simply means that the offender is punished for what he or she has done wrong. The wrong done by the offender is considered serious enough by society that retaliation takes place, and this is also to prevent people from taking the law in their own hands. In contemporary penal thinking there has been a renewed emphasis on retribution with the 'just desert' movement.\(^{70}\)

Rehabilitation is the idea to positively change prisoners so that when they are released from prison, they will not get involved with crime again. To achieve this correction all kinds of programs and services are offered ranging from counselling, personal development programs (such as substance abuse intervention, sex offender treatment and living skills programs), education, and job related skills training.\(^{71}\) Incapacitation, which has currently received much emphasis as a purpose of imprisonment, means that by locking the offender up, he or she is

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\(^{69}\) See e.g.: Report of the Canadian Sentencing Commission, supra note 63 at 135; See generally: von Hirsh & Ashworth, eds., supra note 68 at c. 2.

\(^{70}\) See generally: Ibid. at c. 4.

\(^{71}\) See generally: Ibid. at c. 1.
taken away from society and can therefore not engage in further crime.\textsuperscript{72}

2.3 The Genealogy of Imprisonment

Not all these four purposes have always had the same amount of emphasis. Let's have a look at the genealogy of the penitentiary, to get a better understanding of how the prison came about, and for what reasons imprisonment has been used.\textsuperscript{73}

*Early European Imprisonment*

In Roman times imprisonment was used as penalty for the slaves, and also the church used confinement in monasteries for religious crimes. They put people in a separate room to let them reflect about their behaviour. Both these examples already show confinement as a penalty, but they were not public but private sanctions.\textsuperscript{74} The origins of imprisonment as public punishment, can be traced back to the middle ages, when confinement was mainly used as pretrial detention or duress. It was also used as punishment, even though some authors

\textsuperscript{72} See generally: *Ibid.* at c. 3.


\textsuperscript{74} Beyens, Snacken & Eliaerts, *supra* note 3 at 15.
disagree, but mostly for a short period of time because it was hardly ever used as punishment in its own right, but mainly as part of a sentence. There were no special buildings, prisoners were housed in city gates and towers. The main punishments were corporal punishment, capital punishment and fines.

In the 16th and 17th centuries, two predecessors to modern imprisonment were developed. The first custom which resembles imprisonment, was to place people in institutions for forced labour. The punishment consisted of forcing people to provide labour, and to make sure they would do so they had to be confined. Thus the importance was not to imprison but the provision of labour. The second practice that corresponded to imprisonment was the idea, developed in these moralistic ages, to teach people without a job how to work so that they did not rely on charity, but could provide for themselves. This was not meant as a form of punishment, and the people confined were not considered criminals.

In England around 1550 the Bridewells arose, which from 1576 were called houses of correction. These were workhouses for beggars and vagrants to get them used to labour. In 1596 in Amsterdam the Rasphuis was established. Next to convicted criminals this place of correction also housed vagabonds and the unemployed. The goals of the Rasphuis were re-education and reformation. The Rasphuis was followed in 1627 by the Maison de Force in Gent and in 1704 by the Hospitum St. Michele in Rome. These places of correction had their

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own educational, medical and religious facilities and were quite humane and hygienic.\textsuperscript{77}

In the 18th century imprisonment was increasingly used, instead of corporal and capital punishment and deportation to the colonies. Imprisonment fitted in well with the ideas of the Enlightenment which viewed liberty as the most important right of a citizen. A specific amount of time could be set to correlate to each offence, depending on its seriousness. Certainty and proportionality of sanctions were supposed to steer people away from crime. The houses of correction however, deteriorated because of lack of funds and growing numbers of confined persons.\textsuperscript{78} A number of influential publications appeared by prison reformers who wrote on the miserable circumstances of confinement. In Italy in 1764 Beccaria’s \textit{Dei Delitti e delle Pene} appeared, which critiqued criminal law from the ideas of the enlightenment. In England in 1791 Jeremy Bentham designed a building plan for the ideal prison building, called the panopticon, and in 1777 John Howard’s \textit{State of the Prisons} described the misery in prisons.

\textit{Early American Prisons}

Following Howard’s ideas of separating prisoners, in the 19th century in the U.S. the cellular system emerged, in which there was an emphasis on solitary confinement and isolation of the prisoners.\textsuperscript{79} In 1790 the first modern big, cellular prison was founded on Walnut Street in Philadelphia by the Quakers.\textsuperscript{80} It was meant to be a humane, rehabilitative institution,

\textsuperscript{77} R. Rijksen, \textit{Achter Slot en Grendel} (Alphen aan de Rijn, 1980)

\textsuperscript{78} Ibid. at 18.

\textsuperscript{79} Ignatieff, \textit{supra} note 73 at 38.

\textsuperscript{80} Forer, \textit{supra} note 51 at 17.
based on the religious beliefs of the Quakers. For every inmate there was a separate cell so that there was no contact among the prisoners and no criminal infliction. The main objective was remorse, the inmates were left in their cells to think about their behaviour and read the bible.\textsuperscript{81}

However, this system was considered too cruel, because of its complete isolation, which could even lead to insanity. Also for economical reasons this system was not feasible, since the buildings were expensive and it was impossible to make prison labour profitable when all the inmates were in their own cell. Therefore a system emerged in which the inmates lived, worked and ate together, but to preserve the idea of the cellular system there was a silent rule, meaning that the prisoners were not allowed to talk to each other. This system is called the congregate prison system or the Auburn system, after Auburn, New York the first place, in 1823, where it was implemented.\textsuperscript{82} In this system, which soon became the model, there was more emphasis on work and less on inner enlightenment.

**Progressive Systems**

During the 19th century, next to these cellular systems, there was also a development of what later would be called progressive or reformatory systems\textsuperscript{83}, in which the transfer from prison back to freedom was gradual.\textsuperscript{84} There was a number of different systems but what they

\textsuperscript{81} Ignatieff, supra note 73 at 55.
\textsuperscript{82} Rothman, supra note 5 at 79.
\textsuperscript{83} Lilly & Knepper, supra note 75 at 185.
all had in common was that there was a progression that depended on the behaviour of the prisoner. Captain Alexander Maconochie, who was in charge of one of the prison camps in Australia, when England was still deporting convicted offenders to its colonies, in 1840 introduced the "mark system", in which the prisoners had to produce a certain amount of labour.\footnote{J. Hirst, "The Australian Experience: The Convict Colony," in Morris & Rothman, eds., supra note 15, 263-295 at 290-292.} The punishment was thus not defined by an amount of time spend in the camp but by an amount of labour to be produced, and when that certain amount of labour was produced the prisoner would gain freedom.

Other progressive systems consisted of different phases that had to be undergone before being released, thus making the transition from confinement to freedom more gradual. An example of this was the English penal servitude, in which the prisoners would consecutively go through a period of solitary confinement, a period of communal labour, followed by a conditional discharge.\footnote{S. McConville, "The Victorian Prison: England 1865-1965," in Morris & Rothman, eds., supra note 15, 131-167 at 135-138.} In Ireland Sir Walter Crofton introduced the "intermediate prison", a phase in between labour in prison and release back into society, in which there was a great reliance on own responsibility.\footnote{Rotman, supra note 84 at 173.}

In the U.S. a prison system was developed, starting in the Elmira, New York reformatory in 1876, based on classification of inmates in different grades.\footnote{Ibid, at 174.} Depending on the prisoners' behaviour they would be placed and go through the different grades, to be
released on parole only after reaching the highest grade. This classification system was copied in England in the so-called Borstal institutions for young offenders.\textsuperscript{89} Thus, from mid 18th to mid 19th century we see the progression of imprisonment from occasional punishment to sentence of first resort.\textsuperscript{90}

\textit{The Ascendancy of Rehabilitation}

Toward the end of the nineteenth century, imprisonment was increasingly criticised and gradually lost this position as dominant punishment.\textsuperscript{91} Many countries invented new, non-custodial punishments, such as the suspended sentence and parole.\textsuperscript{92}

A new phase in prison reform took place in the beginning decades of the twentieth century.\textsuperscript{93} The ideology of retribution and deterrence was gradually displaced by the idea that the prison ought to rehabilitate offenders.\textsuperscript{94} New professionals were introduced in the criminal justice system, such as psychiatrists, psychologists, and social workers.\textsuperscript{95}

\begin{flushleft}
\textsuperscript{89} McConville, \textit{supra} note 86 at 157-160.
\textsuperscript{91} Rotman, \textit{supra} note 84 at 179.
\textsuperscript{92} \textit{Ibid.} at 182.
\textsuperscript{93} Rothman, \textit{supra} note 5 at 30.
\textsuperscript{94} \textit{Report of the Canadian Sentencing Commission, supra} note 63 at 35; M.C. McMahon, \textit{The Persistent Prison? Rethinking Decarceration and Penal Reform} (Toronto: University of Toronto Press, 1992) at c. 2.
\end{flushleft}
sprang out of nineteenth-century positivist philosophy which viewed delinquency as a disease requiring treatment. This emphasis on treatment instead of punishment, introduced the use of indeterminate sentencing. The release of the offender depended upon the progress of being corrected. All 43 American states which embraced rehabilitation also adopted indeterminate sentencing practices. In Canada, the ideal of rehabilitation was accepted, but indeterminate sentencing was largely rejected.

**Contemporary Imprisonment**

Starting in the 1970s there was the growing conviction that rehabilitation is a failure. Furthermore rehabilitation was often more punitive than a frankly punitive model, because it made imprisonment seem legitimate and desirable, and thus justified long sentences. The decline of the rehabilitative ideal presented a return to proportionality in punishment, this time with the catch phrase "just deserts". Several countries have implemented penal policies that establish a return to proportionality. For example, one of the main aims of the British Criminal

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97 Skolnick, supra note 9 at 19; Rothman, supra note 5 at 30.


100 Rothman, supra note 5 at 32.
Justice Act 1991 was to make the punishment proportional to the seriousness of the current crime.\footnote{Hudson, supra note 31 at 3-4; Criminal Justice Act 1991, Part I; Crime, Justice and Protecting the Public, Cm.965 (London: HMSO, 1990).} In the U.S. the discrediting of the rehabilitative goal has also intensified the use of prisons as merely warehouses, because why would money be spend on programs when they do not work?\footnote{Rothman, supra note 5 at 34.}

In Canada the 1988 Correctional Service of Canada Mission Statement and the 1992 Corrections and Conditional Release act, both show a return to ideas of rehabilitation, in an attempt to redefine the goal of imprisonment.\footnote{Marron, supra note 1 at 150; Melnitzer, supra note 57 at 328.} With the increasing number of inmates, tight budgets, and more so the marked limitations of rehabilitation, it is doubtful how much impact this will have in practice.

In a reaction against arbitrariness in sentencing a trend towards fixed sentences has started. Most notably in the U.S. there has been a trend towards legislative influence on sentencing and reducing the discretion of judges and parole boards.\footnote{For the situation in Britain see: Criminal Justice Act 1991, Part II; Crime, Justice and Protecting the Public, supra note 101.} Measures such as sentencing tables, manuals, mandatory minimum rules and sentencing guidelines have been introduced.\footnote{Christie, supra note 23 at c. 8 and c. 10; Forer, supra note 51 at c. 3.} Even though the aim was to prevent disparity in sentences and discrimination on social characteristics of the offender, in practice it has had little impact on disparity in
sentences, increased the time served and promoted prison overcrowding.\textsuperscript{106} The restrictions on the judges influence have increased the power of the prosecutors, because in plea bargaining they can offer to indict offenses that have no statutory minimum in return for a guilty plea. This gives opportunity to discrimination, because the prosecutor decides who will get a favourable deal.

2.4 Nothing Works

Over time there has been a shift as to which of the objectives, deterrence, retribution, rehabilitation or incapacitation, has received more emphasis. Originally deterrence and retribution were the main goals of imprisonment. Later on rehabilitation became the main focus of imprisonment discourse, but a lot of its hopes were discredited again. Currently the atmosphere in penal discourse is one of "nothing works"\textsuperscript{107} and the focus is on purely incapacitating the offenders.

Throughout prison history research has demonstrated that wherever the emphasis lies, imprisonment has very dubious success in achieving its purposes. According to the Canadian Bar Association:

Over ... two centuries, evidence has accumulated that the prison may not in fact serve its assumed purposes and indeed may be counterproductive to the extent that it dehumanizes, degrades, and makes men and women worse in terms of their ability to live according to the requirements of ... society.\textsuperscript{108}

\textsuperscript{106} Rothman, \textit{supra} note 5 at 34.

\textsuperscript{107} The title of this paragraph refers to: Martinson, \textit{supra} note 99.

\textsuperscript{108} Jackson, \textit{supra} note 68 at 1.
Knowing that the majority of inmates in prisons have served prison sentences before, it is hard to maintain the argument of individual deterrence.\(^{109}\) The Canadian Sentencing Commission concluded: "Such factors as the rate of recidivism, the relative success of early release from custody and the "undeterrability" of certain groups of offenders have called into question the ... goal of individual deterrence."\(^{110}\) The argument of general deterrence is also controversial. In how far do people that do not commit crime, do so because of the existence of penal sanctions? Also a lot of people still commit crime regardless of the threat of sanctions. Deterrence seems to be a, relatively marginal, consequence of the existence of the penal system more so than a purpose for using the system itself.\(^{111}\) There are no convincing or comprehensive data that support the idea that imprisonment has a reasonable likelihood of rehabilitating offenders.\(^{112}\)

The instrumental objectives that in one way or another try to transform the offender have very little success in reducing crime, but even with incapacitation which makes no claims to improve offenders but only aims to protect society by locking them away, the meagre goals

\(^{109}\) In Canada 50.5 per cent of the incarcerated male offenders served previous terms of incarceration. From: Basic Facts about Corrections in Canada, supra note 12 at 29.

\(^{110}\) Report of the Canadian Sentencing Commission, supra note 63 at 135.

\(^{111}\) As supported by the following excerpts from the Report of the Canadian Sentencing Commission, supra note 63:
" ... taken together, legal sanctions have an overall deterrent effect which is difficult to evaluate precisely," at 136-137; " ... deterrence is a general and limited consequence of sentencing," at 138; " ... deterrence cannot be used to guide the imposition of sentences," at xxviii.

\(^{112}\) Ibid. at xxviii.
are often not achieved. The offender continues with crime in prison or his/her crime continues in society now carried out by someone else. Even if you argue that incapacitation does work,\textsuperscript{113} you can question whether you want a solution that means that a very significant percentage of the population is locked away, for example in the U.S. two per cent of the population. The Canadian Sentencing Commission drew the same conclusion:

Although it is a truism that offenders will not be able to commit the same offenses while imprisoned as they would if they were at large in the community, the extensive literature on incapacitation suggests that as a crime-control strategy the costs of imprisonment far outweigh the benefits achieved in reducing crime. The difficulty with incapacitation as a crime-control strategy is simple: too many people would have to be imprisoned unnecessarily in order for crime levels to decrease appreciably.\textsuperscript{114}

Retribution and theories of just deserts are more a reaction to previous behaviour than a goal to influence future behaviour. They are more a moral reason to justify imprisonment than an utilitarian goal. Therefore it is difficult to evaluate or measure their success. However, if you look at retribution as a sanction on criminal behaviour, it fails to a large extent, in the sense that only a small percentage of offenders is dealt with in the criminal justice system.\textsuperscript{115} Also you could question why punishment is chosen over forgiving.

Imprisonment has no influence on any of the problems that lead to or follow the


\textsuperscript{114} Report of the Canadian Sentencing Commission, supra note 63 at xxviii.

\textsuperscript{115} \textit{Ibid.} at 141-142.
offence, and thus has little influence on recidivism rates. The situation for released offenders will be worse then when they originally committed the crime, so why would they be better able to deal with the situation now? They are stigmatized by their criminal record, it is even more difficult to find a job, and they often lose contact with family, partners or friends. They often feel hard done by and turn away from society. It is understandable that the people that benefit least from society are least compelled to obey by its rules.

It is very difficult to change behaviour, especially when nothing is done about the underlying causes. Also there is the issue that the prison is the university of crime, offenders often learn more crime in prison from their fellow inmates.\textsuperscript{116} Furthermore decisions on release, parole or in which security level to be placed, are often based on participation in programs and not all prisoners want to take part in those. The inmates that play along with the rules are better off, while the ones that resist the system will often have a very hard time. Prison in general and programs in particular treat adults like children, everything is organized for them from decision making, housing, laundry, cooking, budgeting, to opening doors and turning of the lights. This does not make them better able to cope with life nor gives them greater respect for authority.

Initiatives which start out as humane efforts can end up being more cruel than simply punitive ones,\textsuperscript{117} as with the Quakers, or the indeterminate sentence. There is very little


agreement on what the purposes of imprisonment are or should be. The Canadian Sentencing Commission concluded: "At present we have in Canada no clear guidance for the consistent application of principles governing the imposition of legal sanctions on offenders."\(^{118}\) Hudson observes that in Britain different criminal justice agencies are working with different goals, some still have rehabilitation in mind, while others are now approaching the system from a just deserts perspective.\(^{119}\)

There are big disagreements on how intensely to use imprisonment and in which cases, but it is hard to debate those issues when it is not even clear what the intention of using imprisonment is. This confusion and disagreement on the objectives of imprisonment, and uncertainty over the direction in which the penal system should move, is a big part of the penal crisis. The 1977 Report of the Parliamentary Subcommittee on the Penitentiary System in Canada states:

This fundamental absence of purpose or direction creates a corrosive ambivalence that subverts from the outset the efforts, policies, plans and operations of these administrators of the Canadian penitentiary service, saps the confidence and seriously impairs the morale and sense of professional purpose of the correctional, classificational and program officers, and ensures, from the inmates' perspective, that imprisonment in Canada, where it is not simply inhumane, is the most individually destructive, psychologically crippling and socially alienating experience that could conceivably exist within the borders of the country.\(^{120}\)

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\(^{118}\) Report of the Canadian Sentencing Commission, supra note 63 at xxvii.

\(^{119}\) Hudson, supra note 31.

\(^{120}\) Report of the Parliamentary Subcommittee on the Penitentiary System in Canada (1977) at 156; as quoted by Jackson, supra note 68 at 28.
CHAPTER 3  THE POLITICS BEHIND IMPRISONMENT

ANOTHER LOOK AT THE PENAL PROBLEMS

They tell us the prisons are overcrowded. But what if the population is overimprisoned?

Michel Foucault

3.1 Introduction

To examine how systematic the penal problems are, and in how far we create these problems ourselves, we have in the previous chapter considered in how far imprisonment itself is the problem. This chapter will now examine in how far our criminal justice system or even society at large is at the cause of the penal problems.

The use of imprisonment reflects as King and Maguire argue, economic and political structures, and the mood and temper of society.\(^{121}\) The connection between crime rates and imprisonment rates is very complex. Imprisonment rates are not a logical consequential and proportional result of crime rates. Crime rates are in a big part made by the laws, and policies for enforcement and punishment. Nils Christie in his most recent book *Crime Control as Industry*, after heavily criticising the American way of approaching the crime problem, reminds us that we have a choice in all this. He argues that imprisonment rates are not destined, by crime rates, but we make them ourselves, we have a choice in this.\(^{122}\) The level of punishment in a society is not determined by the level of crime, but is a reflection of the values and standards of the particular society. It is thus a political issue. As Hulsman argues: "Crime

\(^{121}\) King & Maguire, *supra* note 19 at 1.

\(^{122}\) Christie, *supra* note 23.
is not the *object* but the *product* of criminal policy."\(^{123}\)

### 3.2 Why Are Prisons Overcrowding?

**The Relationship between Crime and Imprisonment Rates**

A crucial issue in the penal crisis is the enormous increase in prison population. Why are we witnessing such an amazing increase in prison population? In contemporary society crime is a big public issue. It is almost impossible not to get overwhelmed by the enormous amount of attention it is receiving, but the issue is not as simple as it is presented in most of the media. The rising imprisonment rates are not necessarily an issue of rising crime rates, as is often assumed.\(^{124}\) Prisons are not simply overcrowding because society is becoming more violent and crime rates are spinning out of control. The relation between crime and imprisonment is not straightforward and causal.

**Are Crime Rates Going Up?**

It is difficult to give a simple answer to the question whether crime rates are going up. There are a lot of different methods to measure crime, and the answer often depends on who you ask. In the U.S. official statistics, the Uniform Crime Statistics published by the Department of Justice are based on voluntarily supplied samples, whereas in Britain and Canada official crime figures consist of comprehensive, statistics from local law enforcement


agencies.\textsuperscript{125} Nevertheless a lot of crime goes undetected or unreported and thus never shows up in official crime statistics.\textsuperscript{126} This is why to try and more closely approach the real crime rate, there has been a growing reliance on victim surveys.\textsuperscript{127}

There is not a lot of consensus on the issue of whether crime rates are increasing or decreasing. As Rothman notes for the American situation:

By some measures (the FBI summary of police reports), violent crime in the nation has increased over the past decade, up 23 percent between 1980 and 1990; by other counts (the U.S. Census surveys of citizens), violent crimes have gone down 11 percent.\textsuperscript{128}

Morris citing the same period and almost the same sources notes no increase in crime in the U.S.:

... the early 1980s to the early 1990s, was marked overall by no increase in the rates of crime reported and recorded in the FBI's Uniform Crime Statistics or by any increase in imprisonable crime as measured by the victim surveys of the National Crime Survey. By all our measures, for the period 1980 to 1985, serious crime steadily declined and then, from 1985 to 1990, steadily increased, though never reaching its earlier high rates. Thereafter, through 1996, it remained either stable or slightly declining.\textsuperscript{129}

The conclusion to be drawn is that there is some general consensus that crime rates are stable, and certainly if they are rising nowhere near as steep as the imprisonment rates. There must be more going on than just rising crime to explain the current reliance on

\textsuperscript{126} Ericson, McMahon & Evans, supra note 11 at 357.  
\textsuperscript{127} Stenson, supra note 125 at 3.  
\textsuperscript{128} Rothman, supra note 5 at 36.  
\textsuperscript{129} Morris, supra note 15 at 236-237.
incarceration.\textsuperscript{130}

\textit{Demographics}

Partly the increase in imprisonment rates can be explained by demographics. The population growth associated with the postwar baby boom, lead from the mid 1960s to the mid 1980s to an increase of people in their twenties, the ages when persons are most likely to be sent to prison.\textsuperscript{131} However especially in the last decade there has been an incredible rise in incarceration, and this can no longer be explained by demographics.

\textit{Changes in Policy}

Rising rates of incarceration can be a direct result of changes in policy towards certain offences. An example of this is drug related crime; the number of people send to prison for drug offences has skyrocketed. In New York between 1983 and 1989 there was a 600 percent increase in offenders sentenced for possession or sale of drugs.\textsuperscript{132} According to the Washington-based Sentencing Project, in the U.S. nearly 60 percent of the inmates in federal prisons, and 22 percent of the inmates in state prisons are there for drug offences.\textsuperscript{133} Canada

\textsuperscript{130} Christie, supra note 23 at 92.


\textsuperscript{132} Rothman, supra note 5 at 37.

\textsuperscript{133} Ibid. at 36.
is second only to the U.S. in the number of drug arrests per capita.\textsuperscript{134} This enormous increase however does not reflect a change in street behaviour but a change in enforcement and punishment policy, it is a result of the so-called War on Drugs.\textsuperscript{135}

It should be noted that this specific example of how changes in government policy towards certain offences influence imprisonment rates, in this case drug offences in the U.S., is not equally relevant in other countries. In Europe the focus in drugs law enforcement is more geared towards the trafficking than the consumers. For the Canadian situation, a relevant example of changes in criminal justice policy leading to higher rates of incarceration, is the increase in the number of offenders that are doing time for sex offences.\textsuperscript{136}

As we saw above, in the last decades there has been a return to proportionality in sentencing and the legislator has exercised an increasing influence on sentencing policies. Policies were introduced, that were not always necessarily intended to increase the length and occurrence of prison sentences but ended up exactly with this effect, such as for example sentencing guidelines and mandatory sentencing. This happened by far most notably in the U.S. where a whole variety of the notorious 'three strikes and you're out'-laws was implemented, sometimes with devastating consequences. In 1980 an offender in the U.S. was sentenced to life imprisonment because he committed three theft offenses, thereby fulfilling the requirements of the 'three strikes and you're out'-law. The total amount involved in the three crimes was

\textsuperscript{134} Maclean's, March 25, 1996, at 50.

\textsuperscript{135} Rothman supra note 5 at 36.

\textsuperscript{136} See generally: J.V. Roberts & R.M. Mohr, Confronting Sexual Assault in Canada: A Decade of Legal and Social Change (Toronto: University of Toronto Press, 1994); Criminal Justice Processing of Sexual Assault Cases, (Ottawa: Canadian Centre for Justice Statistics, 1994).
$230 dollars.\(^{137}\)

The use of sentencing guidelines makes it easy for politicians to increase the severity of sentences, because with one simple raise of the base amount the whole grid shifts to a higher level.\(^{138}\) In conclusion, policies of governments influence crime rates and imprisonment rates, and therefore are part of creating the penal crisis.

3.3 Public Opinion Influences Use of Imprisonment

Public opinion also has a major influence on the use of imprisonment. Changes in public tolerance for crime influence the crime rates, because the public is more willing to report crime\(^ {139}\) or because a fact is more seen as criminal, as for example has been happening with sexual harassment, drunk-driving, and environmental crimes since the 1980s. Over the last decade the importance of the participation of the public in fighting crime has been recognized, expressed in community policing and neighbourhood watch.\(^ {140}\)

In contemporary society there is such a large-scale fear of crime that it is identified as a problem in its own right.\(^ {141}\) This fear of crime is hyped by the media and fuelled by

\(^{137}\) Forer, supra note 51 at 85.


\(^{139}\) N. Lacey, "Government as Manager, Citizen as Consumer," (1994) 57 Modern Law Review 534.


politicians using it for their own propaganda. The media covers only the most severe crimes, and thus creates the incorrect stereotype that the average prisoner is violent and dangerous.\textsuperscript{142} The media is only catering to what seems to be an insatiable market. This obsession and fascination with crime, is shown by the enormous amount of books that appear after trials such as the O.J. Simpson and the Bernardo trial. In Britain, available to whoever wants to buy it, is the video "caught in the act", which shows criminal acts videotaped by private security companies,\textsuperscript{143} and Madam Tussauds in London now has a serial killer exhibit, to add to their Chamber of Horrors.\textsuperscript{144}

The new emphasis in crime control thinking on dangerousness, the career criminal, the psychopath, and on just warehousing offenders without any considerations for the causes of crime, distances the general public even further from offenders and fosters even less understanding. The Canadian Sentencing Commission concluded that generally, the public's knowledge of sentencing is poor and systematically biased. Canadians believe crime rates to be higher and sentences to be lighter than they are.\textsuperscript{145}

Public opinion drives public policy. This direct influence can be seen in the U.S., where


\textsuperscript{143} Time magazine, April 8, 1996 at 50.

\textsuperscript{144} Ibid.

\textsuperscript{145} Report of the Canadian Sentencing Commission, supra note 63 at 95.
the murder of a little girl, Polly Klaas, directly lead to the now pervasive 'three strikes'-laws. Or in Vancouver, where the father of the murdered Melanie Carpenter founded a group to appeal for stiffer sentences and has been receiving huge amounts of money through donations. Public concerns about offenders committing crimes while out on parole have also made the parole boards more cautious about releasing prisoners early, thus increasing the imprisonment rates by keeping offenders in prison longer.

Indirectly public anxiety for crime influences public policy, because for politicians being 'tough on crime' has become an election winning campaign issue. Politicians are falling over each other in their attempts to show they are 'tough on crime'. Democratic state Senator Tim Jennings replied on what to do about incorrigible criminals: "It is my personal belief that if they are not rehabilitated after 15 years, kill'em." Being soft on crime is considered political suicide. In the 1988 U.S. presidential election campaign, Bush's exploitation in the media of the Willie Horton case, of a released black offender who assaulted a white woman while out on parole, is seen as contributing to the loss of Dukakis. Clinton it is argued was able to defeat the republicans by presenting himself as a tough on crime democrat.

Policies to imprison more people are maybe not intended to achieve better crime control at all, but are implemented because of their political and symbolic value. It is shocking

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146 Marron, supra note 1 at 20.
147 Newsweek, 6 February 1995, at 15.
149 Ibid.
150 Von Hirsch, supra note 65 at 480.
how substantive criminal law values can be marginalised, as a small sacrifice for political gain. 151 In countries around the world, measures are implemented that are not guided by rational crime policy, that do not even make sense according to crime policy, but that are guided by political considerations, they are put into effect to appease the public. 152

Law and order politics, which feed on hostility towards criminals and increase the distance between public and prisoners, are often combined with measures against other unpopular groups such as single mothers and foreigners. Von Hirsch argues that: "... appeals to resentment can be the means for obtaining or maintaining political power," 153 but even more generally that:


152 For a recent example in Canada: Officials in the Federal Ministry of Justice, when asked about newly introduced federal initiatives to toughen provisions for dangerous offenders, admitted 'off the record' that they realize they make little sense but serve to soothe the public.

For a recent example in the U.S.: The U.S. Congress has repeatedly passed draconian mandatory minimum penalties for sales of small amounts of drugs. 'Off the record' interviews of some of those voting for such measures suggest that they themselves doubt the efficacy of the penalties, but believe that voting against tough drug policies seems potential political suicide. From: von Hirsch 1994, supra note 65 at 480.

For an example in Britain: Shortly after the CJA 1991 was adopted, which was designed to reduce imprisonment because Home Office studies had shown its little effect and high costs, the Home Secretary (Michael Howard, a member of the same governing party that proposed the 1991 legislation) announced that prison works and that he favoured a substantial rise in incarceration levels. Tough crime policies were thought to be a unifying theme for the on other issues deeply divided party, and as a possible rallying cry for future elections. From: von Hirsch 1994, supra note 65 at 480-481.

153 Von Hirsch, supra note 148 at 132.
Denouncing criminals may well be part of a broader strategy of evoking popular hostility towards deviants and outsiders [which] …, in turn, may help support a general shift to the right in social policy.\textsuperscript{154}

Often resentment policies and tough on crime policies go hand in hand. For example in California, where the 'three strikes'-law was implemented at the same time as policies denying illegal immigrants and their children education and medical treatment.\textsuperscript{155}

Politicians are clever at exploiting the issue, but it is the people that are voting for these candidates and their measures. When people stop voting for these candidates, the tactic collapses, as with anti-abortion appeals which are beginning to become unprofitable in American politics.\textsuperscript{156} Are voters supporting 'tough on crime' candidates because their fear of crime, or out of resentment? As long as public discourse will stay unfavourable to prisoners, imprisonment rates will continue to rise.

3.4 Why Is There Such An Over-Representation of Marginalized Groups In Prison?

One of the most shocking and worrisome features of the western prison systems is the incredible over-representation of minorities. As we saw in chapter one, the same groups of people are penalized everywhere; the blacks, the Aboriginal people, the poor, the unemployed, the homeless and the mentally ill. Whether these disparities (both rich-poor and white-minorities) point to actual behaviour or discrimination is debatable, probably both are true.\textsuperscript{157}

\begin{itemize}
\item \textsuperscript{154} von Hirsch, \textit{supra} note 65 at 481.
\item \textsuperscript{155} Von Hirsch, \textit{supra} note 148 at 132.
\item \textsuperscript{156} Von Hirsch, \textit{supra} note 65 at 481.
\item \textsuperscript{157} Rothman, \textit{supra} note 5 at 37.
\end{itemize}
This view is supported by the Royal Commission on Aboriginal Peoples, which commenting on the over-representation of Native people in Canadian prisons, states:

... either Aboriginal people are committing disproportionally more crimes or they are the victims of systematic discrimination. Recent justice studies and reports provide strong evidence that both phenomena operate in combination.¹⁵⁸

Greater Pressure to Commit Crime

A possible explanation for the statement that the poor (and thus a vast number of the minorities) would commit more crime is given by the 'strain theory',¹⁵⁹ which argues that the impulse to commit crime lies in the individual, but that it is more likely to arise when people become estranged from a society that promises them in principle what they are denied in reality. At the bottom of society this strain of blocked opportunities to cultural goals is greatest and thus there is more crime.¹⁶⁰ The link between unemployment or poverty, with the higher occurrence of crime is much debated. Even though it is a complex relation, it is obvious that there is some connection.¹⁶¹

¹⁵⁸ Bridging the Cultural Divide, supra note 39 at 33.

¹⁵⁹ Of course there are and have been throughout history, many other theories, of why the people on the lower steps of society's ladder commit more crime, such as rational choice theories, biological and psychological theories, social learning, social bonding and control theories, and social disorganization and conflict theories. See generally: R.L. Akers, Criminological Theories: Introduction and Evaluation (Los Angeles: Roxbury, 1994).


The paradox is however that governments are spending more money on crime control but less on education, health, and welfare, which will inevitably increase crime again. Governments are introducing all kinds of public policies that widen the gap between rich and poor, and thus increase criminal behaviour. In his book *The Politics of Rich and Poor*, Kevin Philips finds that the U.S. government’s economic policies of the past decade have lead to fundamental shifts in the distribution of wealth; they have improved the economic status of the rich at the expense of the lower and middle classes.\(^{162}\) In the U.S. between 1980 and 1988, the number of persons living in poverty increased from 26 million to 32 million (23 percent increase).\(^{163}\) There are 12.5 million children, or nearly one out of every five children, living in poverty. For minority children, the figures are even more desperate: one out of every two African-American children and one out of every three Hispanic children live in poverty.\(^{164}\)

Similarly in Canada, various studies have been done which conclude that there is a higher rate of crime among Aboriginal people, even though it varies between different communities. Aboriginal people commit more offenses than similar groups of non-Aboriginal people, and Indians living on-reserve commit more crime than Indians living off-reserve.\(^{165}\)

The task force report of the Indian Policing Policy Review concluded that:

The rate of on-reserve violent crimes per 1,000 is six times the national average, for property crimes the rate is two times the national average, and for


\(^{163}\) Irwin and Austin, *supra* note 6 at 10.


\(^{165}\) *Bridging the Cultural Divide*, *supra* note 39 at 34–35.
other criminal offenses the rate is four times the national average.\textsuperscript{166}

The 1996 Royal Commission Report on Aboriginal People in Canada identifies three theories to explain this higher occurrence of crime among Native people.\textsuperscript{167} One explanation is the cultural difference and conflict between Aboriginal people and other Canadians. The difficulty with this theory is that in practice it is often used in a sense that insinuates Aboriginal inferiority instead of differences between two equal groups.

A second theory to understand Aboriginal crime is the economic and social inequalities experienced by Aboriginal people. According to the Royal Commission:

... the argument is that Aboriginal people are disproportionally impoverished and belong to a social underclass, and that their overrepresentation in the criminal justice system is a particular example of the established correlation between social and economic deprivation and criminality.\textsuperscript{168}

The Commission concludes that:

Aboriginal people are at the bottom of ... educational levels, employment opportunities, housing conditions, per capita incomes .... There is no doubt in our minds that economic and social deprivation is a major underlying cause of disproportionately high rates of criminality among Aboriginal people.\textsuperscript{169}

The third theory moves beyond this casting of the high crime rate of Aboriginal people as a problem of social and economic marginality, and gives a broader historical and political analysis. The Royal Commission concludes: "... over-representation is linked directly to the

\begin{footnotesize}
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\item[\textsuperscript{166}] Indian Policing Policy Review, Task Force Report (Ottawa: Indian Affairs and Northern Development, 1990) at 3; as quoted in Bridging the Cultural Divide, supra note 39 at 34.
\item[\textsuperscript{167}] Bridging the Cultural Divide, supra note 39 at 39-53.
\item[\textsuperscript{168}] Ibid. at 42.
\item[\textsuperscript{169}] Ibid.
\end{enumerate}
\end{footnotesize}
... historical and political processes that have made Aboriginal people poor beyond poverty."\textsuperscript{170} To understand the contemporary problems of Aboriginal people we should see them in the broad context of colonization, which not only brought about loss of traditional lands but systematically shattered the foundations of the Native communities.

In New Zealand, Moana Jackson concludes the same for the high occurrence of Maori offending. He argues that, beyond the Maori’s socio-economic situation, historic and cultural forces provide a link to the high crime rates. The suppression of the Maori people not only resulted in the alienation of their land, but also the loss of the cohesive forces in Maori society.\textsuperscript{171}

The endemic problems of society at large, such as gross economic inequality, patriarchy and problems of marginalization of certain groups stemming from colonial heritage, are structural problems that are of great importance in the creation of crime. In order to control crime it is therefore necessary to examine the relationships between these problems and the occurrence of crime. In order to reduce crime and the high over-representation of certain groups within the criminal justice system we have to deal with the underlying structural problems in society that cause crime. Young and Matthews argue that in the control of crime we must prioritize social intervention over criminal justice intervention.\textsuperscript{172}

\textsuperscript{170} Ibid. at 46.

\textsuperscript{171} Jackson, M., \textit{The Maori and the Criminal Justice System, He Whaipaanga Hou, A New Perspective, part 2} (New Zealand Department of Justice, 1988); as quoted in Bridging the Cultural Divide, ibid. at 51-52.

Discrimination in the Criminal Justice System

Linked to the possibility that the poor and minorities actually commit more crime, is the suggestion that they are discriminated against by criminal justice institutions. As Reiman notes, official records of who commits crime, are really statistics on who gets arrested and convicted.\(^ {173}\) The Royal Commission on Aboriginal Peoples shows in its 1996 report that the Canadian criminal justice system discriminates against Aboriginal people at virtually every point.\(^ {174}\)

There are various phases in the criminal justice system where discrimination can and is happening. To begin with poor people and minorities are more checked and thus more detected.\(^ {175}\) An example of this is allowing the police to work with drug courier profiles.\(^ {176}\) Detection is more often followed by being arrested. For example, the American war on drugs is essentially a war on blacks, in New York 91% of arrests for drug possession are blacks/Hispanics.\(^ {177}\) Another example is that in Canada the police rarely arrest whites for being intoxicated in public, but Aboriginal people are often arrested simply for being intoxicated.\(^ {178}\) Again arrest is more likely to be followed by prosecution.

\(^ {173}\) Reiman, supra note 33 at 85.

\(^ {174}\) Bridging the Cultural divide, supra note 39 at 32.

\(^ {175}\) For a general analysis of on what characteristics the police build up a suspect population, see: M. McConville, A. Sanders & R. Leng, The Case for the Prosecution (London: Routledge, 1991).


\(^ {177}\) Rothman, supra note 5 at 37.

\(^ {178}\) Bridging the Cultural Divide, supra note 39 at 36.
Finally within the judicial procedure they are more likely to be found guilty, and with sentencing more likely to get imprisoned. Decisions on bail have an important impact on sentencing, because persons remanded in custody are more likely to get a custodial sentence. Homeless people usually do not get released in bail, but also Aboriginal people are more likely to be denied bail.\textsuperscript{179} Another important issue is legal representation, especially in plea bargaining. Poor people are more likely to have less qualified lawyers that have little time to deal with their case.\textsuperscript{180} The Royal Commission on Aboriginal Peoples found that lawyers spend less time with their Aboriginal clients than with non-Aboriginal clients.\textsuperscript{181}

When the rich do end up having to serve a prison sentence, they often get a special treatment, such as in England with the famous jockey Lester Piggott or the convicted offenders from the Guiness fraud scandal.\textsuperscript{182} There are now even special prisons created for the wealthier offenders, for example in Texas where a prison was built to accommodate persons convicted of white collar crime. This all leads Barbara Hudson to question whether our system is one of criminal \textit{Justice}, or \textit{Criminal justice}?\textsuperscript{183}

\begin{itemize}
\item \textsuperscript{179} Ibid. at 32.
\item \textsuperscript{181} Ibid.
\item \textsuperscript{183} Hudson, \textit{supra} note 31.
\end{itemize}
Their Crimes Are More Defined as Crimes

Another explanation of the fact that there is such an over-representation of minorities and marginalized groups in the criminal justice system, is that the crimes of the poor and the marginalized are more defined as crime, than the crimes of the rich and better-off. This goes back to Foucault’s contention that society constructs what is deviant behaviour.\textsuperscript{184}

Labelling theory, which emerged in the 1960s and 1970s, argues that for an action to be deviant, you need two activities. First, a group that acts in a certain way, and second, another group with different values must label the initial activity as deviant. This way the powerful groups within society enforce their values upon the less powerful, labelling those who infringe their rules with stereotypical tags, such as homosexual, prostitute, criminal and psychopath.\textsuperscript{185} Labelling theory stems from symbolic interactionism theory, which contends that an individual’s identity and self-concept are existing only in the context of society.\textsuperscript{186} The formation of the individual’s identity is a reflection of others’ definition of him or her, and individuals who are labelled or stigmatized are more likely to view themselves as deviant and behave that way.\textsuperscript{187}

The crimes of the rich are not defined as crimes, or when they are, the crimes are not sanctioned as harsh. For example corporate crime, environmental crime or the in feminist literature widely detailed misbehaviour of frat boys. The most blatant example is that in some

\textsuperscript{184} M. Foucault, supra note 73.
\textsuperscript{185} Young, supra note 160 at 286-294.
\textsuperscript{186} Akers, supra note 159 at 127.
\textsuperscript{187} See e.g.: Ibid. at 128.
countries, and in most states of the U.S., heroine and crack, which are mostly used by poor and black people, carry by law more severe sentences than cocaine, which is mostly used by wealthier and white people.\textsuperscript{188} Another good example is the difference in the reaction to tax evasion and social welfare fraud.

3.5 Conclusion: To Solve The Penal Problems We Must Change Society

As we saw the criminal justice system is not only a failure in reducing crime, but it is also a failure in providing justice. However, from Rusche & Kirchheimer and Durkheim, to contemporary social critics like Foucault, Mathiesen and Reiman it has been argued that the prison system is not a failure but a successful method for controlling large groups of people that have fallen outside other control mechanisms.\textsuperscript{189}

Another way of looking at the objectives of imprisonment as discussed in chapter two, is if you question the basic assumption that the main justification for imprisonment is the reduction of crime (or the provision of justice). There are policies which have been proven to reduce crime, yet they are not implemented. Also there are crimes taking place, which are not being punished.

The criminal justice system is, if not to say obviously discriminatory, at the least very particular in who it affects. The criminal justice system picks people out, labels them and then

\begin{itemize}
\item[\textsuperscript{188}] Rothman, \textit{supra} note 5 at 37.
\end{itemize}
removes them from society. To quote Jock Young:

The standard history of the prison, in the classicist tradition from Beccaria to Radzinowicz, was one of reform and its failure. Against this, a 'revisionist' reading of the history and development of the prison has grown, arguing that the real meaning of the prison, far from making humanitarian progress, was to create divisions with the working class.\(^{190}\)

As we saw in chapter two, the emergence of the prison system happened in a quite haphazard manner, out of a combination of "good" intentions (reform and rehabilitation), locking away unwanted persons (vagrants, beggars, unemployed), and blatant punitiveness. The main purpose of imprisonment has always been the segregation of groups of people away from society.\(^{191}\)

Even in this thesis, it is always about 'them'.

While this explains how the prison system came about, it however does not explain why the penal system continues to exist after it is widely proven that it does not reduce crime or provide justice. According to Marxist writers, there is an alternative purpose of imprisonment: to perpetuate capitalism. To segregate the workers from the non-workers, so that the unemployed who fall outside the control mechanisms of the workplace can be controlled.\(^{192}\)

In this view the prison is not a failure. The prisons are not there to succeed in terms of rehabilitation, they are there to segregate, to label and to stigmatize. The high recidivism rate

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\(^{190}\) Young, supra note 160 at 83.


\(^{192}\) For example: T. Mathiesen, The Politics of Abolition (Oxford: Martin Robertson, 1974); Melossi & Pavarini, supra note 73; Reiman, supra note 33. See generally: Young, supra note 160 at 294-305; A. Howe, Punish and Critique: Towards A Feminist Analysis of Penalty (London: Routledge, 1994).
is a success story.\textsuperscript{193} As we saw above, especially in the U.S., a whole layer of the population, that is unwanted, is being locked away.

The system firmly remains because it shapes the conception of what is wrong with society, as a problem of pervasive crime by the unruly lower classes. As Reiman argues, the discontent of the middle class is directed towards the lower classes instead of the higher. The current criminal justice system persists because it fails in a way that benefits those with power and costs those without power. It nudges the middle class towards a conservative defense of society and away from a progressive demand for equality and equitable distribution of wealth and power.\textsuperscript{194} Von Hirsch remarks that perhaps the prison 'works': "... not to control the lower classes but to attract the votes of the middle class."\textsuperscript{195}

Because the problems of society are defined and presented as a crime problem, instead of looking at crime as a result of the problems of our society, the problems remain unsolved, and again more of the "medicine" of being 'tough on crime' will be demanded. As shown in this chapter the problems of the criminal justice system are so systematic and engrained in society that to quote Jock Young: "If you want to change crime rates then you must profoundly change society."\textsuperscript{196}

\textsuperscript{193} Young \textit{supra} note 140 at 83-85.

\textsuperscript{194} Reiman, \textit{supra} note 33 at 119-120.

\textsuperscript{195} Von Hirsch, \textit{supra} note 65 at 481.

\textsuperscript{196} Young, \textit{supra} note 160.
CHAPTER 4  THE FORCES BEHIND PRIVATIZATION

Distrust all in whom the impulse to punish is powerful

Friedrich Wilhelm Nietzsche

4.1  Could Privatization Be the Solution to the Penal Crisis?

In the previous chapters we saw that the prison systems of most Western countries are overwhelmed by an enormous amount of problems. Despite all these problems the prison rates in most western countries are increasing at an astonishing rate and imprisonment is again more and more becoming the punishment of choice. How are the already bulging penitentiaries going to deal with an even greater amount of offenders that need to be placed? How is this penal crisis going to be solved?

There are a number of options being put forward, the most obvious one being to reduce the number of people in prison. This can be done by limiting the influx of offenders into the prisons, the so-called front-door approach, by sentencing less offenders to imprisonment. For example, in Germany, since the 1980s judges are not allowed to send people to prison for shorter than one month, and if the judges want to impose a suspended sentence of less than four months they have to justify why they prefer this over a fine.197 The problem with this measure is that judges and prosecutors increase the penalty for offenses that previously would get custody shorter than four months, to avoid the justification rule. Also, even when people are fined, they still might end up in prison when they cannot afford to, or choose not to, pay their fines.

197  Tinnemans, supra note 25.
Another option is the so-called back door approach, of releasing inmates before their term is up. Most countries have systems for early release. For example, in Belgium first time offenders standardly only serve one third of their sentence. In Canada first time non-violent federal offenders are presumptively entitled to release on parole at one third of their sentence. The problem with these measures is that judges start to allow for this in their judgement and thus impose higher sentences. These measures, to reduce the inmate population, are in this time of social anxiety about crime and getting tough on criminals not very popular.

Another option to reduce the prison population is a return to dangerousness assessment. In the U.S. and Canada popular as selective incapacitation, and known in Britain as bifurcation. This consists of a split in policy between tougher measures for the "dangerous" offenders, and a more lenient line towards the ordinary offender.

There are also possibilities to alleviate the penal crisis, which are not based on reducing the prison populations. The most obvious one is to expand prison capacity, but as we saw earlier most countries are already involved in massive prison expansion projects. Simply expanding capacity, apart from reducing overcrowding, does not solve any of the other penal problems, and it is a very expensive option.

The newest buzz word in penal policy is privatization of the prison system. Privatization is being offered as the solution to the troubled penal system, both by companies greedy to move in on this new market and by conservative governments eager to show they are "dealing"

198 Ibid.
200 Hudson, supra note 31 at 32-38.
with crime, but yet cutting costs. It is argued that by contracting out corrections to private firms, objectives can be realized which would be impossible in the public sector. Prisons can be build faster and cheaper, and they can be run more efficiently so that the quality of imprisonment can be increased while money can be saved.

What is the background against which this idea to privatize corrections emerged? How did this idea come about? What trends are there in contemporary society that made the climate more susceptible to privatization? How and why did privatization of prisons get such a strong and sudden influence in some countries?

There are three major areas of influence traceable to the concept of privatization of prisons: the role played by international private security companies, the 'law and order' politics of conservative governments, and managerial trends in crime control thinking.

4.2 The Role Played by Private Security Companies

Over the last decade a number of commercial companies have emerged that are making their business out of providing private security and criminal justice services. Growing feelings of fear have created an increasing demand for protective services. The private companies' involvement has been most noticeable with private policing, technological devices and the escort of prisoners, but they are also increasingly becoming involved in the management of penitentiaries.

As discussed above, the prison system is a growing industry. In many American states, corrections are the fastest growing part of the budget. The same goes for other countries.

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According to The Sunday Times, the massive size of the prison market in England in 1985, was estimated to be worth $10 billion. Prisons today are big business, and this has not gone unnoticed by the big companies. Private entrepreneurs are eager to move in on this rapidly expanding industry. They are offering to take over the highly troubled public prisons. In the U.S. there have been some spectacular bids put forward by private companies to different states, to both build and operate their prison system. The Corrections Corporation of America (C.C.A.) for example, put in a bid, which was not accepted, to run the entire Tennessee prison system.

In the U.S. there are 64 private companies in the prison management business. The biggest company is the C.C.A., which currently operates nine facilities, more than all its competitors combined. C.C.A. was established in 1983 by Tom Beasly, a former Tennessee lawyer involved in the Republican Party. C.C.A. is financed by Jack Massey's, Massey-Burch Investment Group, which owns companies such as Kentucky Fried Chicken and the Hospital Corporation of America. Another big company active in the prison management market is the United States Corrections Corporation, which started in 1986. Smaller companies include Behavioral Systems South West, R.C.A. Service Company, 

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203 DiIulio, supra note 201 at 1; McDonald, supra note 4 at 29.
205 Porter, supra note 142 at 68.
206 Lilly & Knepper, supra note 75 at 182.
Wackenhut Corrections Corporation and Buckingham Security. Logan estimated that in 1989 the value of contracts exceeded $250 million a year.\textsuperscript{207} James Stewart notes: "Nearly as much money is paid by governments to private security companies as is spent for public law enforcement by federal and state governments combined."\textsuperscript{208}

In Britain, where the Home Office awarded its first private contract for the management of the Wolds remand centre in 1991, about 40 companies submitted proposals for the creation of remand centres and open prisons.\textsuperscript{209} A lot of the firms do not just limit their operations to one country, for example Group 4 International Correction Services Inc, which received the Wolds' contract, in 1991 proposed to build a 300 inmate prison in Denver, Colorado.\textsuperscript{210} The companies which are running British private prisons Blakenhurst and Doncaster are partly owned by American companies, respectively C.C.A. and Wackenhut.\textsuperscript{211} Some of the companies in the different countries belong to the same conglomerate, for example one of the world's largest private security firms is the Netherlands-based Group 4 Securitas BV.\textsuperscript{212} The American C.C.A is backed up by money from British investors, and has recently joined a

\begin{footnotesize}
\begin{enumerate}
\item[209] Lilly & Knepper, \textit{supra} note 75 at 176.
\item[210] Ibid. at 182.
\item[212] Lilly & Knepper, \textit{supra} note 75 at 183.
\end{enumerate}
\end{footnotesize}
consortium with British private prison management firms.\(^{213}\)

When you leaf through an issue of Corrections Today, the official publication of the American Correctional Association, it is the advertisements that are most eye-catching. The range of services and gadgets on offer by private companies is amazing, and the language in which those are presented seems from out of another world. The June 1991 issue contains this blurb:

The TG Guard system, now installed in major prisons, is a strategic arrangement of tear gas dispensers installed at the ceiling level. These dispensers can be fired from a remote-control console by protected personnel. The firing can be in a chosen pattern and with various levels of concentration to force the inmates to evacuate an area in a route which you determine.\(^{214}\)

According to Lilly: "... by 1990 more than 160 different international, national and regional private firms advertised goods and services in the ... Annual Security Issue and Buyers Guide [of Corrections Today]."\(^{215}\)

Also remarkable is the open display of the relationship between the correctional establishment and the industrial interests.\(^{216}\) There are a lot of cross connections between the emerging private correctional industry and the public corrections sector. High ranked employees easily switch between the public and the private prison systems. The former Police Commissioner of New York, William Bratton, quit his job to run a division of a private security firm. As described by the chief of staff of New York's mayor: "... Bratton has

\(^{213}\) Porter, supra note 142 at 68.

\(^{214}\) Corrections Today, June 1991, as quoted by Christie, supra note 23 at 95.

\(^{215}\) Lilly & Knepper, supra note 75 at 177.

\(^{216}\) Christie, supra note 23 at 93-98.
intended ... to cash in on a million-dollar job in the private sector." Sir Edward Gardiner, who chaired a parliamentary select committee that was investigating the conditions and use of British prisons, and after that started a pro private prisons lobby, has since retired from parliament and chairs Contract Prisons P.L.C., a new company part owned by the U.S. corporation Pricor. A senior member of the unit which had been responsible for advising on the bids for the Wolds remand prison in Britain, which was awarded to Group 4, had subsequently left the Home Office to take up a job with Group 4.

These cross connections between the public correctional establishment and the private industries, are even more powerful because of the aforementioned global connections between the private firms, and the cross over of penal policies between the different countries' administrations. Lilly and Knepper even argue the emergence of a "corrections-commercial complex", comparable to the military industry, and argue that: "The future of private prisons ... will be determined by what these companies do more than by ... corrections policy." Cavadino and Dignan speak of an emerging transnational "commercial-corrections-complex". Christie warns that imprisonment has become a self-perpetuating

219 Richardson, supra note 211 at 158.
220 Lilly & Knepper, supra note 75.
221 Ibid. at 183.
and growth-oriented enterprise resembling the military/industrial complex, and that the private prison only makes this economic motivation more apparent.\textsuperscript{223}

Von Hirsch disagrees with these arguments. He argues the parallel with the military/industrial complex is not applicable, because unlike high officials in the military, prison governors do not directly benefit from increased capacity. He further argues that the prison enterprise is not self-sustaining, but has been sustained by fear of crime and resentment towards criminals, and is thus dependant on underlying popular sentiment.\textsuperscript{224}

However, in order to obtain contracts involving them in the prison business, many of the large corporations interested in the prison market have been investing heavily in lobbying. From 1985 to 1987, C.C.A. already spent over 1.5 million dollars on lobbying and other marketing strategies.\textsuperscript{225} How do we know these companies will not also lobby for more and longer sentences? This is especially dangerous, if it is true that the connections between the public correctional administration and the private security firms, are getting more closely interwoven. According to Cavadino and Dignan there have been suspicions that penal policy in a number of Western countries is already being influenced by the lobbying activities of the emerging transnational commercial corrections complex.\textsuperscript{226}

The private firms will have no incentive to reduce the number of inmates. The more inmates the more profit they make, since they are paid on a per head basis. This leads to the

\textsuperscript{223} Christie, supra note 23 at 109-111.

\textsuperscript{224} Von Hirsch, supra note 65 at 477.


\textsuperscript{226} Cavadino & Dignan, supra note 222.
paradox of what is a successfully-run private prison: one that is always full, or one that is attacking the recidivism rate? If it is the latter then success will mean that the company will always be striving to put itself out of business. If these private companies are powerful enough to lobby for the fast implementation of private prisons, will they also be a force in increasing imprisonment rates? This way the prison system does become, contrary to von Hirsch's arguments but as Christie argues, an industry with a great risk for unlimited expansion.

4.3 The 'Law and Order' Politics of Conservative Governments

In the last two decades in most western countries a move could be discerned to a more conservative approach to government. Especially during the Reagan-Thatcher years and continued during Bush and Major. The influence of conservative governments on prison privatization is twofold. Both in the way privatization fits in with their general idea of the role of the state, and in the way their 'law and order' policies influence the penal climate.

The Role of the State

The development of privatization of corrections is part of a wider, universal trend, emerged in the Reagan and Thatcher eras, to direct individuals towards the private sector instead of them relying on the state. Brakel argues that privatization is one of the key political-

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227 Porter, supra note 142 at 73.

228 S. Borna, "Free Enterprise Goes to Prison" (1986) 26 British Journal of Criminology no.4.
economic concepts of the 1980s and likely to continue throughout the 1990s.\textsuperscript{229}

During the last two decades ideas about the role of the state have undergone a significant change in several leading Western democracies.\textsuperscript{230} There has been pressure to reduce public expenses by investigating new and more efficient ways of running public services based on private business practices and delegating public functions to the private sector. Privatization has come to generally mean any process where the state no longer provides particular goods and services. The word privatization therefore includes the sale of public companies, contracting out and various forms of deregulation.\textsuperscript{231} The suggestion to privatize prisons therefore fits in well with the governments ideas to move society in the direction of a minimal government, and approach public services from a business management approach. This move towards judging public services by commercial standards, is exemplified in the current trend to express public tasks in 'performance indicators'.\textsuperscript{232}

In the U.S. both ex-President Reagan's Commission on Privatization and the National Institute of Justice solidly endorsed privatization of corrections.\textsuperscript{233} The federal political environment in Canada parallels that of the U.S. concerning support for the free market model and promotion of greater private sector involvement and thus reduced role and size of

\begin{itemize}
\item \textsuperscript{229} S.J. Brakel, "Private Corrections", in Bowman, Hakim & Seidenstat, eds., \textit{supra} note 18, 254-274 at 254.
\item \textsuperscript{230} Ryan & Ward, \textit{supra} note 218 at 1.
\item \textsuperscript{232} Lacey, \textit{supra} note 139 at 534; King & Maguire, \textit{supra} note 19 at 2.
\item \textsuperscript{233} Lilly & Knepper, \textit{supra} note 75 at 181.
\end{itemize}
government.\textsuperscript{234} Under Mulroney, privatization was a favourite means of the federal government to try and reduce the national deficit, as documented in the Neilsen reports on privatization initiatives within the Canadian government.\textsuperscript{235}

Britain is a perfect example of the strong influence of conservative governments on prison privatization. Privatization of corrections fitted in well with the privatization of other state-owned enterprises such as British Gas, British Telecom, British Airways, British Steel and National Oil.\textsuperscript{236} The privatization of corrections was first suggested by the Adam Smith Institute, a right-wing think-tank, in 1984.\textsuperscript{237} It was further investigated by a Home Affairs Committee that, in the course of examining the state and use of prisons, made a trip to the U.S. and included two establishments run by the C.C.A. in its visit. The committee returned to England deeply split over the privatization issue.\textsuperscript{238} Despite strong opposition, there was a quick and forceful implementation of privatizing prisons through the strong push of pro privatization conservatives such as the, in the previous paragraph mentioned, chair of the committee Sir Edward Gardiner.

After heated political discussion, the provision of private corrections was made possible by the implementation of the Criminal Justice Act 1991. Originally it was only supposed to

\textsuperscript{234} D. Hawe, H. Sapers & P. Doyle, "Privatization of Corrections: Two Canadian Perspectives", in Bowman, Hakim & Seidenstat, eds., supra note 18, 294-324 at 306.

\textsuperscript{235} Lilly & Knepper, supra note 75 at 181-182.

\textsuperscript{236} P. Scraton, J. Sim & P. Skidmore, "Foreword," in Ryan & Ward, supra note 218, vii-ix at vii; Porter, supra note 142 at 69.

\textsuperscript{237} Ryan & Ward, supra note 218 at 44-47.

\textsuperscript{238} Ibid. at 48-54.
affect future institutions and only remand centres. However, after some minor changes in the text of the section, it now includes both existing and future facilities, and both remand and sentenced prisoners.\textsuperscript{239}

Besides these common trends behind privatization there are also distinctive features in the different countries that have advanced privatization as a solution to the penal crisis. In America state and local governments have turned to the private sphere for solutions, because penal practices have been declared unconstitutional by the courts, and quick substantial changes had to be made. This approach is not possible in Britain because there are no similar constitutional safeguards or minimum standards enforceable by law.\textsuperscript{240} For most of the American prison history problems were shielded from the public view, but since mid 1960s

\textsuperscript{239} The Criminal Justice Act 1991, Section 84(1) states: The Secretary of State may enter into a contract with another person for the running by him of any prison which
(a) is established after the commencement of this section; and
(b) is for the confinement of remand prisoners ...

Section 84(3) which was controversially added at the report stage in the Commons, states:
The Secretary of State may by order made by statutory instrument provide that this section shall have effect as if there were omitted from subsections (1) above either
(a) paragraph a and the word 'and'; or
(b) paragraph b and the word 'and'; or
(c) all words from 'which' to the end of paragraph b.

This means the Secretary of State can change section 84(1) to three alternatives:
(a) all remand prisons (existing or future)
(b) all future prisons (remand or sentenced)
(c) all prisons (existing/future or remand/sentenced)

See: Cavadino & Dignan, supra note 222 at 250-253.

\textsuperscript{240} Although Europe might force the pace on this, see: Richardson, supra note 211 at 160.
the federal courts have become involved in prison matters.\textsuperscript{241} The federal courts were prepared to declare that conditions in prisons were in violation of the Eighth Amendment against cruel and unusual punishment.\textsuperscript{242} By 1993 the prison systems of over forty states were under some form of court order arising from allegations of cruel and unusual punishment.\textsuperscript{243}

An extra reason for the British government to favour private prisons, and also one of the major reasons for the Australian government to be interested in privatization,\textsuperscript{244} is to avoid the strong unions. The private companies can contract with the more conservative unions and can therefore restrict the power of the unions by contract, for example by including anti-strike clauses. The American prison guards are not as powerful or as well organized at national level as their British counterparts, the Prison Officers Association.\textsuperscript{245}

\textit{Law and Order policies}

Barbara Hudson notes that: "Political-ideological currents are drifting into a law and order society."\textsuperscript{246} As argued in chapter three, governments are part of "making" crime and

\begin{itemize}
    \item \textsuperscript{241} Jacobs, supra note 48 at 2.
    \item \textsuperscript{242} Richardson, supra note 211 at 165.
    \item \textsuperscript{243} See: Rothman, supra note 5 at 31; Richardson, supra note 211 at 165.
    \item \textsuperscript{244} Beyens, Snacken & Eliaerts, supra note 3 at 48.
    \item \textsuperscript{245} Ryan & Ward, supra note 218 at 5.
\end{itemize}
imprisonment rates. With the governments' conservative policies poverty, unemployment and hostility for marginalized groups will only increase.\textsuperscript{247} Conservative governments push the criminal justice system even further in the "tough on crime" direction, making the penal problems even worse. And it is very unlikely they would make any radical changes to society, which I argued, would be required to change the failing system. Therefore crime rates and imprisonment rates, will continue to rise explosively.

Conservative governments are a crucial force behind the privatization of prisons, because it fits in with their ideologies of the minimal, business style run state, and through their various social and criminal policies they are part of creating the growth industry of prisons.

4.4 Managerial Trends in Crime Control

Another influence behind the emergence of the idea to privatize corrections, is the general shift in the penal climate from criminal justice to managerialism.\textsuperscript{248} The state is not successful in realizing its goals of protecting society or reducing the recidivism rate. New trends in penal thinking and in the operation of the criminal justice system, look at crime as inevitable and no longer claim, or even aim, to be able to eliminate or reduce crime. Current penology does not only not "solve" the crime problem, but does not even provide the

\begin{footnotes}
\footnotetext[247]{\textsuperscript{247} Lacey, \textit{supra} note 139 at 33.}
\footnotetext[248]{\textit{Ibid.}}
\end{footnotes}
reassurance that something significant is being done. There is no longer interest in seeking out and dealing with crime's underlying causes or with transformation of the offenders themselves. Simon and Feeley call this trend: "the New Penology".249

Crime is seen more as a technical rather than a moral problem. With the currently prevailing greater emphasis of governments on efficiency, also the criminal justice system has moved to a more business like approach.250 This trend towards managerialism is even more clear in the current emphasis on risk assessment and actuarial techniques in crime control.

It is much argued that contemporary society is moving towards a risk society. As Beck argues, in his influential article on the impact of science and technology on, for example, the environment:

In the advanced modern period the social production of wealth goes hand in hand with the social production of risks. There is a change from the logic of the distribution of wealth to the logic of the distribution of risks.251

It is debatable whether modern life is more or less risky in an objective sense, but risk itself has received greater attention. Social practices that we are creating to deal with risks, such as forms of insurance, are changing society.252 We live in a society where security is provided through the management of various types of risks. Nancy Reichman argues that social control

250  See generally: Jones, supra note 246.
is changing and becoming more like an insurance model: "... an important trend in crime control: the use of insurance concepts and techniques to manage the uncertainties of losses due to crimes that have or might occur."\(^{253}\)

In contemporary criminal justice systems there is an ever increasing emphasis on the gathering of knowledge. The collection of information is central to risk management, and the police are becoming knowledge workers.\(^{254}\) With this information calculations on risk can be made. Regarding the (potential) offender this means that decisions on selection and exclusion can be made based on statistical probabilities.\(^{255}\) On the side of the (potential) victim this gathering of information means, analyses can be made on prediction and prevention of offenses. The knowledge can also be used to make classifications, on the basis of which people can be prevented from entering certain types of social relationships.

This move towards risk assessment fits in well with the return to dangerousness in current penal thinking, which considers past records and future threat just as important in imprisoning as the current offence.\(^{256}\) The danger of these risk based techniques to detect and manage social problems, is that they divide the population into statistical and behavioral

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\(^{256}\) Wilson, supra note 113.
categories, upon which decisions can be made.\textsuperscript{257} In the criminal justice system this could change the criteria justifying imposition of sanctions, and create a move from guilty offenders to categories of people who create opportunities for disorder. The prison then has a new legitimation as the last resort for the utterly uncontrollable.

The trend towards risk management is furthermore an influence behind privatization, because it increases the trend towards the involvement of other institutions in crime, law and policing. The direct tasks of risk assessment and security provisions are left to the community institutions. There is a decentralization of state security operations, and the police become 'knowledge brokers'\textsuperscript{258} in the center of this network of all kinds of security institutions.\textsuperscript{259} This allows a move towards more and more non-state forms of security such as community policing, neighbourhood watch, and private policing.\textsuperscript{260}

The trend towards managerialism is even visible in a variety of new names or ideas that are business or insurance based: such as prison market/industry, preventive detention, and target hardening. The prison system itself is also approached from a more business-like ideal. At the beginning of the 1970s the Canadian prison system changed from wardens, who stayed in the same prison for a long time and knew the prisoners, to directors, who move to a new

\begin{footnotes}
\item[259] Ibid. at 46.
\item[260] This ties in with what Cohen calls: the dispersal of social control" and Foucault: "The carceral society."
\end{footnotes}
position regularly, just as in business practice, and manage the system in a much more depersonalized and rational manner.

In Britain, this trend towards a more business like approach to the prison system is clear in the distinction between who is responsible for policy decisions (the Home Secretary) and who is responsible for operational decisions (the Chief Executive). Appointed for Chief Executive was Derek Lewis, a top executive from the trade and industry. Previously a Ford manager and head of the satellite television channel U.K. Gold, he had before his appointment never seen a prison from the inside.\(^\text{261}\) He did not hold the position for long though, because in December 1995 Mr. Lewis was fired because of a dispute over this division between policy and management. After arguments over a spectacular escape of three prisoners from Whitemore, Mr. Lewis felt the Home Secretary was infringing on his authority.\(^\text{262}\)

4.5 Conclusion: Is Crime Control Rather than Crime the Real Danger for the Future?

Trends that have made the current penal climate more susceptible to privatization of corrections can be traced to three major influences. First, the private firms eager to have a share in the growth market of prisons. Second, the conservative governments faced with the dilemma of wanting to be tough on crime, yet reducing the state’s reach and cutting costs. And finally, general trends in penal thinking that accept crime as a given and merely look at the


problems in the system as matters of quantities. In the U.S. the push for privatization of corrections has come mainly from the private firms and local administrators faced with acute penal problems. In Britain, however, the push for privatization of corrections has mainly come from the government.²⁶³

Conservative governments, through their various social and criminal policies, are part of creating the growth industry of prisons. Private companies could be a force in rising imprisonment rates, because they directly benefit from higher imprisonment rates and because of the lobby-ing activities of the emerging corrections-commercial-complex. Managerial trends in penal thinking that see crime as inevitable and thus have no reason to try to find out and solve its causes, will have certainly no inhibitive effect on the rising imprisonment rates. This provides enough reasons to take Nils Christie's warning serious: "Could it be crime control rather than crime itself that is the real danger for the future?" ²⁶⁴

²⁶³ McDonald, supra note 4 at 29.
²⁶⁴ Christie, supra note 23.
CHAPTER 5 PRIVATIZATION IN THE PRISON SYSTEM

We already have a considerable degree of privatization in the area of criminal justice - we call it crime.

Dennis Healey MP

5.1 Introduction

There is a range of examples, in several countries, where criminal justice services are provided by non-state agencies. For example the private police, neighbourhood watch, the transportation of prisoners and the increase of the voluntary non-profit sector, especially in juvenile projects. The most striking example is probably the explosive growth of the private police. Stewart writes for the American situation: "There are now approximately three times as many private security personnel as public police."\(^{265}\) So far a number of countries have proceeded along this trend to privatize criminal justice, and have in one way or another implemented privatization in their prison system.\(^{266}\) The ways in which privatization has been implemented in the various different countries varies. Even within the U.S. practices between the different states show significant differences. However, it is possible to discern some generalizations.

Privatization can take many forms in the prison system. Basically there are four

\(^{265}\) J.K. Stewart, \textit{supra} note 199 at ix.

\(^{266}\) Although the existence of private prisons is not new, see for example: A.M. Durham III, "Origins of Interest in Privatization of Punishment: the Nineteenth and Twentieth Century American Experience," (1989) 27 Criminology 107-139; DiIulio, \textit{supra} note 201 at 2; Forer, \textit{supra} note 51 at 25; Ericson et al., \textit{supra} note 11 at 357; McDonald, \textit{supra} note 4 at 29; Porter, \textit{supra} note 142 at 67.
possibilities. The most simple option is that certain services within the prison are contracted out to private companies, such as food, education, transport or medicine. The second option is for prison based industries to be set up by entrepreneurs or have prisoners contracted out to work for nearby companies. These first two categories are sometimes grouped together into one category of privatization of parts of the prison. A third option is that a private company builds a prison and then rents it to the government which then operates it in the usual way with its own staff. The last category is when a private company staffs and runs a prison. This is by far the most controversial form of privatization.

Some authors use different categories. For example Savas distinguishes five possible ways for private involvement in the prison market, by dividing the fourth category of private operation of facilities, into two separate ones, facilities for adults and for juveniles. Other ways to differentiate are, a division between privatization of secure and non-secure punishment, or a division between remand prisons and prisons for sentenced offenders. Guzek describes three types of privatization depending on who has the responsibility for ownership and operation of the assets. If both are with the private contractor it is a service contract, if the ownership is but not the operation it is a lease contract, and finally if the ownership is not but the operation is then, it is a operations and maintenance contract.

267 E.S. Savas, Privatization: The Key to Better Government (Chatham, N.J.: Chatham House, 1987), as cited in Lilly & Knepper, supra note 75 at 175.

268 Lilly & Knepper, supra note 75 at 176-177.

269 R.S. Guzek, "The Economics of Privatizing Criminal Justice Facilities", in Bowman, Hakim & Seidenstat, supra note 18, 290-293 at 290.
5.2 Contracting Out For Specific Services

Because governments are deeply concerned about the high costs of running the already existing prisons, certain services within the prison are contracted out to private companies. Advantages of contracting out services to large specialist organizations is that they claim to provide a better service at a cheaper rate. Other reasons to contract out certain tasks include the expertise of the private firm in a specific area and the companies already having the resources necessary to undertake the job, which the prison would otherwise have had to buy.

In many prisons private corporations are providing services, which are quite commonly contracted out, such as laundry, catering and cleaning. Although not a form of privatization which is exclusive to prisons, the provision of services to prisons is a big market for private businesses. For example in the U.S. according to Lilly and Knepper: "Prison food service alone is $1 billion a year enterprise that is growing between 10% and 15% a year." This leads them to say: "Public punishment is already big business for private companies [my emphasis]." In Canada the CSC is increasingly privatizing services. In 1985-86 they spent approximately $60 million in contracting out arrangements, and in 1986-87 this figure exceeded $81.5 million, a 35.8 per cent increase.

Although it is less common within the prison system corporations sometimes provide

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270 Ryan & Ward, supra note 218 at 23.
271 Lilly & Knepper, supra note 75 at 177.
272 Ibid. at 177.
273 Hawe, Sapers & Doyle, supra note 234 at 305.
tasks, such as education, staff training and even medical care. With this last group of specialized services, the risk exists that the businesses would over-prescribe the need for their services. Contracting out can also reduce the cost of services which are used more irregularly and unpredictably. One example of this is transport. In Britain, the transport of prisoners between prisons, courts and police stations, is partly privatized. This private "escort service" is however much joked about, because already in the first few weeks of operation it literally lost a remarkable amount of prisoners.

5.3 Prison Labour

As we saw in section three of chapter two (The Genealogy of Imprisonment), labour has almost always been an important part of imprisonment. The early European prison systems emerged as work houses, and over history "hard work and discipline" has been an important ideology behind imprisonment. Sometimes the emphasis was more on the labour provided than the time spent in prison. Only in some phases was there less emphasis on work, such as the early American systems which aimed at inner enlightenment, and in the 1950s and 1960s when rehabilitation dominated penal policy.

The rationale behind prison labour however, is not just from a perspective of improving the offenders or making them "pay back" to society, but another motivation is to make some profit for the prison. The American National Institute of Justice has explained why they feel

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275 Strabbing, supra note 262.
prison labour is important:

Rising rates of incarceration and shrinking State and Federal budgets in the past decade have renewed interest in putting imprisoned persons to work helping to defray the costs of their incarceration and reducing the potential for violence that results from enforced idleness in crowded cellblocks.276

Also in the American prison history, from the start there has been private exploitation of labour of convicted offenders.277 A private person agreed to house, feed and clothe the prisoners, prevent them from escaping and in return used their labour, or an outside contractor ran the prison workshops.278 Prison-made goods, however, met a lot of opposition from manufacturers who operated outside the prison, angered at the unfair competition.279 From the beginning of the 19th century on, restrictions were in place on commerce in prison-made goods, and therefore most prison industries just produced goods for their own use.280

Because of the increasing problems and costs in the correctional system, there has been a renewed interest in private involvement in prison labour. With the involvement of businesses more work opportunities would be available for prisoners. This way boredom is prevented (and therefore tension in the institution reduced), inmates learn job skills, earn their keep, thus it

278 See for examples: supra note 266.
279 Ryan & Ward, supra note 218 at 19-20.
is profitable for the institution. Entrepreneurs can set up industries based in the prison, or the inmates can be contracted out to work for nearby companies.

In 1981, then-Chief Justice of the U.S. Warren E. Burger proposed a system of privatization of prisons, known as "factories within fences".

The question I raise is this: are we going to build more 'warehouses' or should we change our thinking and build factories with fences around them, where we will first train inmates and then have them engage in useful production?

In the hope to renew the interest of the private sector in setting up industries in prisons, the restrictions on prison goods were removed, in the 1984 Justice Assistance Act.

There are a lot of different ways in which the private sector can be included in the prison industries. Gandy and Hurl describe nine different variations. Perhaps the most limited, but the most common form, is that of a private sector advisory board to a state-run prison industry. A second option is the use of private vendors. States such as Maine and North-Dakota use private wholesalers in the marketing of their prison goods. Another option is inmate enterprise; Maine and Arizona have experimented with industries in which the inmates themselves are entrepreneurs. Programs in both states experienced difficulties due to the exploitation of labour and the development of excessively powerful inmate entrepreneurs.

281 Bronson et al., supra note 277 at 325-326.
282 Forer, supra note 51 at 91.
284 Miller, Sexton & Jacobsen supra note 276 at 1.
285 Gandy & Hurl, supra note 280.
A fourth possibility is private management of state-owned industries. A promising model is that of franchise. The industry is officially owned and operated by the state, but the product is sold through the franchiser and contains the franchiser's label. It appears to offer the advantages of low capital costs, avoidance of the stigma on prison goods and links between prison industries and free world enterprise, including post-release inmate work opportunities. A state where one uses the franchise system is Connecticut. Another arrangement is that private employers contract with corrections administrators for inmates to work inside the prison on materials and equipment supplied by the private employers. For example, Mississippi is working with a contract like this. The seventh option is privately owned and operated industries located within prisons. Private employers lease space inside prisons and use inmate labour to work on materials and equipment supplied by the employers. Industries of this type are found in states like Minnesota, Kansas and Washington. Similar programs are operating in Canadian institutions at Guelph, Cowansville and Springhill.

In 1984 PRIDE (Prison Rehabilitative Industries and Diversified Enterprises), a non-profit corporation took over all of Florida's prison industries. However, the money it does make goes straight back into the business. Finally, privately owned and operated industries can also be located off prison grounds. Inmate workers leave the prison each day to function as employees in a free world industry. Examples of this model can be found in Washington and Kansas. For many prisoners, the opportunity to work together with free citizens in a

286 Ryan & Ward, supra note 218 at 22.
287 Ibid.
288 Ibid.
nearby company may be a valuable way to reintegrate into society.

Overall private interest in prison industries is fairly modest. The private sector is not eager to operate their businesses within prisons. There are a number of problems, such as the clash between the security routines of the prison (for example a lock-down) and the practices of industrial production, the constantly changing workforce (because prisoners are frequently transferred or released) and prisons are often situated away from cities where prison goods are likely to be sold. Also there are a number of ethical issues which provide an obstacle for the operation of prison based industries, such as the potential of exploitation of inmates, whether a captive population can be coerced to work, unfair competition and the arguable disadvantages for the 'honest' non-offending population.289

5.4 Construction and Financing of Buildings

In the previous chapters we saw that most countries of the Western world are expanding their correctional systems at an astonishing rate. Increasingly governments are turning to the private sector for assistance in providing new buildings. While the construction of prisons is usually contracted out to private companies, the difference now is that private builders have full responsibility of the management of the construction enterprise, including the selection of sites, materials, architectural design and possibly even the financing of the projects.290 This is often in the form of a lease deal, which entails that private corporations finance and construct a prison building and then rent it to the government. After a period of years, the

289 Bronson et al, supra note 277 at 326; Ryan & Ward, supra note 218 at 22.
290 Brakel, supra note 229 at 254.
ownership of the prison might pass to the prison authorities, depending on the lease negotiated. By leasing prisons, the costs are spread out over many years, and the prisons can be built faster because plans do not need to be passed through the state bureaucracy. 291

Lease deals originated in the U.S., where local governments were looking for ways to build prisons without having to possess all the money it takes to build a whole new prison at once. In the U.S. the state prisons and the local jails are funded from their own income, unlike the federal prisons which are funded from taxation at federal level. Therefore, the decision to build a new prison or jail has direct financial consequences for a local authority or state. 292 Large capital projects like building new prisons are normally funded by raising money on the market by bond issues. These general obligation bonds are popular because they spread the burden of spending capital over a number of years, but they are not always an option because they require voter approval. 293 Therefore, to spread the money over a few years and to not have to go through voter approval, the leasing of prisons is very attractive for local governments in the U.S.. 294 One of the earliest and best known lease agreements was negotiated by Jefferson County, Colorado, in 1983. Most of the money for new prisons, however, is still raised in the traditional way of long-term borrowing on the market. 295

One of the first countries to follow the American example of involving the private

291 Moerings, supra note 131 at 16.
292 Ryan & Ward, supra note 218 at 5.
293 DiIulio, supra note 201 at 3; Porter, supra note 142 at 71.
294 DiIulio, supra note 201.
295 DiIulio, supra note 201.
sector in the building of prisons was France. Like most other countries France is afflicted with severe prison overcrowding. In 1986 the then minister of Justice, Albin Chalandon, started an enormous prison construction program with the cooperation of the private sector. This plan started out rather large scaled and far-reaching. In the first version of the program the state would contract out the financing, design, construction and the running of 25,000 to 30,000 new prison places to the private sector. In course of time this plan was toned down, especially due to criticism by the parliament and the Penitentiary Administration.

With the help of the private sector the French government has been able to expand their prison capacity enormously in a remarkably short period of time. Private sector involvement has grown substantial, the private sector fulfils a number of practical functions in the management of the prisons, but the government is still responsible for the core of the penal execution. What is striking, however, is that the problem of prison overcrowding has not been solved. The expansion of the capacity has led to more severe punishments and an increase in the prison population. The French government has used the participation of the private sector mainly to pursue an expansionist criminal policy.

Construction of prisons through lease arrangements is a developing situation into which investment institutions are moving, but this is by no means everywhere or in the same intensity. In Canada the services concerned with the design and construction of prisons are already largely privatized, according to Earnshaw and Normandeau, but it involves

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296 Beyens, Snacken & Eliaerts, supra note 3 at 61-66.
297 Ibid. at 72-73.
services such as architecture and construction which are usually contracted out when a public authority needs building, more so than lease arrangements. Britain has not considered leasing of prison buildings, but seems to favour deals in which the private company takes over the management of the prison as well.

5.5 Privately Owned and Operated Prisons

The term private prisons is usually not meant to refer to deals where the private businesses are just involved in the building of prisons, but only to those deals where the private contractors staff and run them. According to Matthews' definition, it is essential for this category that the facilities are administered and managed by non-governmental organizations.\textsuperscript{299} Or as Lilly and Knepper define it: "... some form of ownership or management of prisons by private corporations."\textsuperscript{300} However, it is not unique that non-government institutions are involved in the delivery of punishment, but it is unusual that they do so on a large scale with the intent and expectation to make money. The more recent initiatives place the emphasis more on commercialization than privatization.

The modern penal system is a complex one with many different institutions for the delivery of punishment. Private groups have been involved in the running of a number of these institutions, such as community-based projects, halfway houses, immigrant detention centres, and institutions for juveniles. For example, in 1988 two-thirds of America’s low security,

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{299}]
\item Matthews, supra note 231.
\item Lilly & Knepper, supra note 75 at 177.
\item Lilly & Knepper, supra note 75 at 175.
\end{enumerate}
\end{footnotesize}
juvenile correctional institutions were in private hands.\textsuperscript{301} Another example is, in the U.S. at least five immigrant detention centres are provided by the private sector.\textsuperscript{302} It is easier for the state to give up its authority here, since the immigration law violators are not a criminal population. The centres just have to be holding spaces, most illegal immigrants are only jailed for relatively short periods before they are deported, and the institutions are minimum security facilities.\textsuperscript{303} Overall, the number of aliens being held in private sector facilities appears small, although you would not say this from the high media profile.\textsuperscript{304}

However, most of these private providers involved in the wider correctional system have traditionally been non-profit agencies. Although running penal institutions for profit is not unusual in this part of the system, the recent push for privatization, as a solution to overcrowding and rising costs, is not concerned with this "soft" part of the penal system, but is aiming to relieve the problems in the secure, adult corrections. To what extent has privatization been implemented there?

For the situation in the U.S. Logan estimated in 1990 that over forty sizeable correctional facilities were completely managed by private contractors.\textsuperscript{305} A year later he


\textsuperscript{303} Porter, supra note 142 at 68.

\textsuperscript{304} Ryan & Ward, supra note 218 at 14.

\textsuperscript{305} Logan, supra note 207.
estimated approximately 60 secure adult facilities to be operated by private management firms. Brakel states, in 1992, that there are some 35 to 40 sizable correctional facilities managed by private companies. However, most of these facilities are very low security, and often the institutions are more aimed at release back in society rather than pure custody. Florida's Beckham Hall correctional center, in Miami is classified "minimum security" but has neither guards nor bars and operates an unsupervised work release program. So far, out of the adult facilities, the Marion Adjustment Center in Kentucky comes closest to a "private prison". It is seen as a milestone because it was the first state contract for the private ownership and management of an adult correctional facility.

In Britain, as described above, after much political discussion, the provision of private corrections was made possible by the implementation of the Criminal Justice Act 1991. Originally, it was only supposed to affect future institutions and only remand centres. On April 6th 1992 Britain's first private correctional facility opened; the Wolds Low Security Remand Prison at Brough near Hull, housing 320 inmates. However, after some changes the Act included both existing and future facilities, and both remand and sentenced prisoners. The Wolds was followed in May 1993 by the opening of the H.M.P. Blakenhurst, a mixed remand/sentenced prison (650 places). The two latest additions are Doncaster (670 places) and Strangeways in Manchester (970 places), which was partly destroyed after a riot, caused by

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306 Brakel, supra note 229 at 254.


308 Beyens, Snacken & Eliaerts, supra note 3 at 34.
poor conditions and overcrowding, that lead to a rooftop occupation and a fire.\textsuperscript{309} Contrary to the other private prisons, which were newly build, the Strangeways prison was a public prison which is now taken over by private management.

In Canada, like in most other countries, there is a large scale involvement of non-state agencies, mostly voluntary based and non-profit, in juvenile and adult non-secure facilities.\textsuperscript{310} Furthermore, the CSC has for many years contracted with voluntary based organizations to assist in overt social control activities, such as parole, mandatory supervision and community assessments.\textsuperscript{311} There are so far no private secure prisons for convicted offenders, but there is interest in privatizing remand centres, most notably in the province of Alberta where private remand centres are already operating.\textsuperscript{312}

Where private corporations have not been able to both build and run prisons, they have settled for deals which only involve them in management. The ownership remains public but those running the program are private staff. Examples in the U.S., are the Weaversville intensive treatment unit in Pennsylvania and the Silverdale Detention Centre in Tennessee.\textsuperscript{313}

5.6 Conclusion

To what extent has the private market entered the penal system? It is difficult to make

\begin{itemize}
  \item \textsuperscript{309} G. Richardson, \textit{supra} note 211 at 151.
  \item \textsuperscript{310} Lilly & Knepper, \textit{supra} note 75 at 177.
  \item \textsuperscript{311} Hawe, Sapers & Doyle, \textit{supra} note 234 at 307.
  \item \textsuperscript{312} Davis Su Perk, "Prison Construction Reaches $6.8 billion: Rate of Increase Down," (1991) 16 Corrections Compendium at 9.
\end{itemize}
generalizations, because it varies between the different countries. And in the U.S. it even
varies widely between states, and between individual institutions because of the decentralization
of prison authority. Furthermore, it is more common in the juvenile sector than in adult
corrections, and it is more and easier applied for contracting out services than for ownership
or management of prisons.

Though the recent trend to push privatization as a solution for the penal problems has
received much attention, it is still relatively limited. Even in the U.S., where it started, the
private sector has had only a modest impact on the American penal system as a whole. In
1991, after more than a decade of the privatization movement, the number of inmates who
were housed in institutions operated by the private sector had been estimated at about 20,000,
which was less than three per cent of the U.S. prisoner population at that time.\footnote{314} Given the
size of the United States prison population this is hardly a significant contribution to relieve
pressure on the system. Nonetheless, 20,000 inmates means a large number of people that is
affected, compared to for example the total prison population of Canada which is little over
32,000.\footnote{315}

In Britain the numbers so far are low too, but unlike the American system which is split
amongst the fifty states and over three thousand counties, the British prison system has a very
centralized nature. With the wide reach of section 84 in the Criminal Justice Act, this means
that there could be fast overall implementation in the entire system, especially in light of the
enthusiastic proposals regularly put forward by government officials. For example, in 1991
\footnote{314} Lilly & Knepper, supra note 75 at 176.
\footnote{315} Basic Facts About Corrections in Canada, supra note 12 at 2.
Home Office Secretary, Kenneth Clarke said: "Companies could be contracted to run up to half of Britain's 125 prisons if the Tories stay in power ...." 316 In 1993 the Home Secretary announced he plans to hand over the management of 25 to 30 prisons to private firms. 317 If all these plans follow through it will as Lilly and Knepper note: " ... make Britain the largest market of privatised prisons in the world." 318

They also note though that because of the enormous absolute number of prisons in the U.S. it remains the market with the most potential:

... had Corrections Corporation of America been successful in the buyout of California's prison system ... , this company would have controlled around 90,000 prisoners. Or about as many prisoners as in [the public and private prisons of] the U.K. and Canada combined. 319

With the rapidly rising imprisonment rates and the current penal climate, prison overcrowding will continue and the prison system will remain an interesting market for corporate firms, and thus the movement to make money out of punishment will continue to develop.

316 Lilly & Knepper, supra note 75 at 176.
317 H. Jippes, supra note 261.
318 Lilly & Knepper, supra note 75 at 176.
319 Ibid. at 179.
CHAPTER 6    THE ISSUES AT STAKE

Of course we keep the peace in ... our own interest, but what does all this law and order business boil down to? More banks and more prisons - that's all it means ... we should chuck it quickly enough if it didn't pay.

George Orwell 1934

6.1 Introduction

Many issues and controversies are raised by the privatization debate. Are the private companies claims that they can do a better job and that they can do it cheaper true? What are the arguments in favour of privatization, strikingly called "the Pros on Cons" by the private firm Bell Construction?\(^\text{320}\) What are the reasons to oppose this trend? Is the delivery of punishment an appropriate market for economic enterprise? Is the privatization of prisons a solution to the penal problems? As Sparks calls it: " ... marketization of the system as a principal means of addressing its problems."\(^\text{321}\) It must be acknowledged that there are many different ways of looking at these issues, depending on the stance of the authors.

Proposals to privatize parts of the criminal justice system are generally regarded as controversial. It is widely assumed that the provision of laws, punishment and crime control are unique and should be provided by the state. Especially when privatization of prisons came on the political agenda, there has been much debate, since prisons are seen as the core of the penal system.

\(^{320}\) Christie, supra note 23 at 93.

\(^{321}\) Sparks, supra note 1 at 14.
6.2 Cost-Effectiveness vs Reduction in Humanity

As we saw in the previous chapter, the most frequent and crucial reasons to get involved with privatization are the claims that it will be cheaper and better. The commercial companies claim that they can do a better job of running a prison and that they can do it cheaper. The alleged abilities of the private sector are strikingly illustrated by a video of the American National Institute of Justice. First we see images of a highly overcrowded, dirty, public prison with inmates hanging around idly. Then the camera zooms in on a Holiday-Inn like private prison with happy looking productive inmates.322

Proponents of privatization say that involvement of the private sector in the penal system will bring down the enormous amounts of money spend in prisons today, because they can operate cheaper and work more efficiently. The main difference is that the private sector will bring in the competitive element in the prison system. The private companies claim to be able to save costs, because they will work at competitive prices, they can avoid bureaucracy, they are to a degree, not bound to costly union contracts, they are part of large organizations and they can experiment with technical innovations, which will reduce labour costs.323 Public bureaucracies are not rewarded for efficiency, and thus it is argued they have no incentive to reduce costs.324


323 McDonald, supra note 4 at 36ff; Brakel, supra note 229 at 256; Beyens, Snacken & Eliaerts, supra note 3.

324 A problem arises when the market is fully privatized, because the potential exists that a private monopoly would develop and thus the competitive element would dissapear which would diminish the reasons for the private sector to
So far no satisfactory empirical evidence has been produced to prove that it is cheaper.\textsuperscript{325} Logan showed that comparisons could be used both to favour and condemn privatization.\textsuperscript{326} Critics of privatization claim several points are ignored in the cost comparisons. There are many hidden costs; both short-term and long-term. A profit margin has to be added onto the costs, the private prisons have to be regulated and monitored, which will cost money and increases bureaucracy.\textsuperscript{327} Furthermore the comparison of pro capita costs compares the government costs which is an average costs and covers maximum and minimum security establishments, the former being more expensive, and the corporations operate only minimum security prisons. The higher the custody level, the more difficult prisons are to run and the more money has to be spent on personnel. Private companies opt for new or recently renovated facilities, which makes it easy for them to be more successful than their old-fashioned predecessors, and the lowest security level.\textsuperscript{328} Porter calls this practice perform well and cheap.


\textsuperscript{326} Logan, supra note 207.

\textsuperscript{327} Porter, supra note 142 at 73.

\textsuperscript{328} Contra: Brakel, supra note 229 at 267.
"creaming". 329

Opponents to privatization strongly question whether there will be any real "savings" by contracting out the operation of prisons. The concern is that cost cutting can only be achieved at the expense of human treatment, quality and quantity of services, or security measures. There are functions like rehabilitation or fair treatment, which are hard to quantify or measure. Neil Postman argues the fallacy of this contemporary belief that technical calculation is superior to human judgement and that what cannot be measured is of no value. 330 Since private prisons will have no profit interest in investing in prisoners they will be likely to cut costs on rehabilitation, education and even material services. Also the fear exists that the staff will be ill-trained and unprofessional. The majority of operating costs consist of the personnel; if you reduce this it will either jeopardize the inmate care or the security of the facility. It is argued that imprisonment by the state is the best guarantee for uniform standards for prisoners and prison staff.

Defenders of privatization argue that the situation in traditional prisons is far from ideal either, and that private prisons can actually improve the living conditions in prisons because they operate more efficiently. They also argue they could not perform poorly because they will be continually held accountable by the government at the risk of losing their contract, and legal actions could be taken against them on the basis of breach of contract. 331

329 Porter, supra note 142 at 74-75.


331 See for the practice of accrediting in the U.S. prisons: Dilulio, supra note 201 at 3.
Another promise of the private sector may lie in its flexibility. The private companies claim they can achieve objectives which may be difficult or impossible in the public sector. Its flexibility may lie in the ability to quickly mobilize facilities and manpower to meet pressing needs or to rapidly adapt services to changing market needs and circumstances. Critics of contracting however argue that: it is impossible to write a contract that is as broad and flexible as would be necessary, and that contractors may be unwilling to go beyond the provisions of their contracts.

6.3 Legality

One of the most important arguments against privatization is that the government should not delegate the authority for such a traditional and important governmental function as the deprivation of freedom to private citizens. This issue of legality ties in with issues that become more obvious in a practical situation, such as the use of force, and the issue of accountability which is discussed in the next paragraph.

Can the government legitimately hand over the deprivation of liberty to businessmen? It should be considered whether there are any constitutional or legal provisions that interfere with the contracting out of prison management to a private company. In the U.S. there has been a discussion on the constitutional implications of delegating correctional authority to private parties. The contracting out of prisons could be in breach of Article 1 of the Constitution which provides that: "All legislative Powers herein granted shall be vested in a Congress of the United States."\(^{332}\) Strictly interpreted, this prohibits Congress from

\(^{332}\) U.S. Constitution, art. 1, para. 1.
delegating its legislative powers to any other institution or party.\textsuperscript{333} Genevra Richardson concludes on the discussion in the U.S. whether the contracting out of prisons could be in breach of Article 1 of the Constitution:

"The majority view seems to be that no breach will occur provided sufficient care is taken to ensure that any rule making power remains ultimately with the public agency.\textsuperscript{334}

As we saw above, in Britain the legislative structure for the privatization of prisons was provided in the Criminal Justice Act 1991.

Are the provisions of laws, punishment and crime control exclusively the area of the government? As we saw above, throughout history, there have always been private involvements in the delivery of punishment. There is already a significant degree of privatization within the criminal justice system; non-state agencies have emerged without impairing the legitimacy of the state. Also there is an important difference between the allocation and the delivery of punishment. It is argued that as long as the state remains in control over the allocation of sanctions, the delivery of these sanctions can, under clear agreements, be contracted out to private agencies. However, in the modern prison system a number of issues arise, for example, decisions to grant remission and parole are dependant on the behaviour of the prisoner as reported by the staff. This means in a private prison the decision whether or not to grant a person freedom would be taken partly on the basis of the information provided by private citizens, whose financial interest will be directly served by


\textsuperscript{334} Richardson, supra note 211 at 155.
denying remission and parole. Such a situation is open to abuse.

A comparison could be drawn of private prisons with private schools and private hospitals, since in all situations tasks previously thought of as government responsibilities are contracted out. However when you put someone in prison that has a major impact on the person and his/her life, which is a responsibility incomparable to the situation in schools and hospitals. The Canadian Sentencing Commission urged on taking issues regarding sanctioning serious because: "Criminal sanctions provide the potential for the most serious intrusions of the state into the lives of individuals."335 

A comparison could be made between private prisons and private police, since they both involve coercion and private security may as well involve deprivation of liberty. But there are also important differences here too, namely that prisons are much more hidden from public view than private policing, and that the relation between the people involved is much more lengthy in prison than in private security.

The issue of the deprivation of liberty becomes more concrete when it is put into the context of daily routine; can a private person have the right to use force against another citizen? Do private organizations have the right to threaten with or use deadly force against a prisoner who tries to escape? Is a private person entitled to use disciplinary measures? One of the essential characteristics of the state is its claim to exercise a monopoly over the use of legitimate force. Although also here there are exceptions, a lot of these issues could be solved under the general law of self-defence, and a number of legitimate ways of using force by private persons already exists, such as special security agencies which have emerged next to

335 Report of the Canadian Sentencing Commission, supra note 63 at 52.
the traditional police, and disciplinary measures in private mental institutions.

6.4 Accountability

Contracting out the running of a prison to a private company raises problems of accountability. The regulations on what and how should be performed have to be formulated. The compliance with these regulations has to be monitored, which is what Brakel calls intermediate responsibility. Finally, problems arise of liability, of who is ultimately responsible when something goes wrong.

Correctional policy is often made in subgovernments, hidden from public view and parliamentary process, and the attention on the formulation of the contract regulations in the privatization debate could serve to open up the debate on the purposes of imprisonment. In Britain the opposite has happened, since due to commercial confidentiality the contract is secret.

The compliance with the terms set out in the contract is important both in the public interest and for the prisoners involved. This accountability can be controlled by various mechanisms, such as a public inspector, the prison ombudsman or the board of visitors.

336 Brakel, supra note 229 at 267.
337 DiIulio, supra note 201 at 3.
339 Richardson, supra note 211 at 160.
Also penalties could be imposed if standards are not met.\textsuperscript{340} For the prisoners it is especially important that they have some form of judicial redress. This can be either through private law or public law.

Regarding contract law there is an important difference between the U.S. and Britain. In the U.S. third party beneficiaries can sue for breach of contract, but in Britain it is a matter between the parties alone.\textsuperscript{341} This means in the U.S. prisoners are able to sue private contractors who break their contracts with the governments whereas in Britain only the Home Office is able to enforce the contracts. However, if the Secretary of State fails to take enforcement action against a contractor who does not comply with the contract, that failure could be susceptible to judicial review.\textsuperscript{342}

In the U.S. prison operators are liable for any violation of the constitutional rights of inmates, in particular the Eighth Amendment, through a civil rights suit.\textsuperscript{343} It makes no difference that the prisoner is held in a private facility instead of a public one.\textsuperscript{344} In Britain there are no similar constitutional safe guards.

Private prisoners in the U.S. have better abilities to challenge the conditions of their imprisonment than their British counterparts.\textsuperscript{345} More parliamentary involvement in the

\textsuperscript{341} Richardson, supra note 211 at 160-161 and 164.
\textsuperscript{342} Ibid. at 162.
\textsuperscript{343} Ibid. at 164-166.
\textsuperscript{344} Ibid. at 165.
\textsuperscript{345} Ibid. at 169.
formulation of the contractual terms is needed, and more and better mechanisms to monitor the private operators are needed in the democratic interest and the interest of the prisoners.

6.5 Technical Expertise

A number of issues arise from the private businesses' focus on and expertise in technology. Proponents of privatization argue that private firms will be a source of technical experimentation. A lot of the private companies that are interested in prisons stem either from the military industry or the private security market, and thus have a great expertise in electronic technologies and devices.\textsuperscript{346} Even though this provides an ironical link of prisons, with warfare and the pervasive television monitoring in shopping malls, it is a very frightening trend.

The technical innovations and building design, as used in the private sector, will reduce the personal contact between prisoners and staff, will make the atmosphere more cold and clinical, and reduce the privacy of the inmates. Lower staffing levels due to electronic surveillance may lead to more riots. This focus on pervasive electronic control and security devices is also prevalent in the emergence in public penal systems of supermaxes. The U.S., where 25 states now operate them, known as an Administrative maximum facility (ADX or Admax) is once again trend setter. Other countries are experimenting with this development as well. In the Netherlands, the development of such an extreme high security level prison, in the former extermination camp Vught\textsuperscript{347}, provides an interesting case for Christie's argument

\textsuperscript{346} Lilly & Knepper, supra note 75 at 184.

\textsuperscript{347} M. van den Eerenbeemt, "Vluchten kan niet meer", The [Dutch] Volkskrant (6 April 1996).
that the prison systems of modern nations are comparable to extermination camps.\textsuperscript{348}

Both the supermaxes and the private prisons are often used as showcases, and its visitors are often impressed with the security, cleanliness and professionalism of the facilities. This focus on efficiency, security and control can however be just as inhumane as the dirty overcrowded old-fashioned prisons, only in different less obvious ways. Franzen describes the "sensory deprivation" due to the total control of circumstances in the Florence, Colorado ADX:

Not until I get back in my baking car ... will I realize that the temperature in ADX has been perfect. Same deal with ADX's smell of which there is a complete absence. ... ADX lighting is ideal: never harsh, easy to read by. The sounds: no clanking, no distant shouts, no barking intercom. ... I find myself thinking that this would be an excellent place to read and write. However, I am suspicious enough of large systems of control to believe that is exactly what [the administrator] would like me to feel.\textsuperscript{349}

This passage together with the descriptions of how little contact there is between the prisoners\textsuperscript{350}, brings back memories of the early American prison systems, which as we saw were considered too cruel and argued to lead to insanity.

Furthermore, this trend in totalitarian building design and the idea to technically monitor the prisoners' every move, of both the private prisons and the supermaxes, signifies a return to Bentham's idea of the panopticon. Bentham could in many ways be considered a forefather of the current penal trends. Comparable to the current trends toward managerialism and emphasis on cost-efficiency, Bentham hoped to impose within his new penal regime a very

\textsuperscript{348} Christie, \textit{supra} note 23 at c. 11, specifically at 163.

\textsuperscript{349} J. Franzen, "Lock it Down", Details (1995) 64-81 and 197, at 68.

\textsuperscript{350} Ibid. at 70.
strict criterion of efficiency and cost-accounting. Similar to the contemporary move towards privatization, Bentham was in favour of prisons which paid, but of regular public inspection as well.

6.6 Privatization and the Penal Problems

Problems in the penal system have created an opportunity for private sector involvement in the delivery of punishment, but is privatization the wonder solution it is promised to be? Whether privatization of prisons is a solution to the penal crisis depends on how you define the penal problems and what privatization thus is supposed to solve.

Privatization gives the execution of punishment an instrumental approach and gives the illusion that the problems of the penal system can be solved by efficiency, cost cutting, technical innovations and business style management, as if one no longer deals with people but with commodities. In the private prisons contractors’ view improvements of the quality of imprisonment are achieved through a focus on the physical plant, its upkeep and cleanliness, and its safety and security, as if all prisons need to be in order to be considered 'successful', is cheap, secure, and clean. Even though those issues are very important they do not deal with the underlying penal problems.

These new buildings that are clinically clean, smell like hospitals, with staff in pristine outfits, and all the euphemisms that are used in the language, only conceal the punitive and coercive character of imprisonment and give it a new justification. Lacey observes that the

351 Young 1981, supra note 160 at 262.
352 Ibid.
concern with efficiency moves us away from what constitutes value in a particular area, and leads to ideological impoverishment. She rightly reminds us that efficiency is not a value in itself.333

It is important to think about what we want to achieve with correctional facilities. In contemporary penal thinking there is no attention to the objectives of imprisonment. It is important to consider what we want to achieve with imprisonment, to be able to assess the appropriateness of privatization. To know if private firms can perform better, it has to be established what needs to be achieved. If really all we want to achieve is to lock away a whole group of the population than it does not really matter who executes this, but if we want to achieve anything more than that questions on who should deliver it and in what ways, become more important.

Privatization might help to reduce the overcrowding, and make prisons more efficient, but as long as we keep up the current imprisonment rate the problems will be ongoing. Since most of the penal problems stem from the high prison populations a more logical solution would be to reduce the use of imprisonment. The fundamental issue of whether expansion of the prison capacity is desirable seems to be ignored in the privatization debate. With the debate’s focus on costs and efficiency, on public sector versus private sector, the question whether we want more prisons is passed over. As shown above, western countries are involved in ambitious prison building plans, and privatization seems to fit in well with this expansionist policy. But why expand something that is not considered successful? Instead of being tempted by the wonder solution of privatization, which is all about expanding the prison system, we

333 Lacey, supra note 139.
should rather focus on keeping offenders out of prison all together.

As we saw above, it could be argued that the use of private prisons will even increase the prison population. The high prison population is a crucial factor in the development of the penal crisis, and since privatization will rather increase than decrease this population, there is reason to believe it will exaggerate the problems instead of solve them.

Even if prisons would solve the overcrowding, be cheaper, and perform better meaning that there are less incidences of abuse, it would not solve other penal problems, such as over-representation of marginalized groups, the nature of imprisonment, and the systematic problems in the criminal justice system and society.

Although in the short term some forms of privatization might look attractive, for example the provision of services. I believe that a distinction should be drawn between services which directly affect a prisoner's life and those which do not. The former such as prison labour, medicine and rehabilitation should remain public. Whereas the latter such as cleaning, catering and laundry can be safely contracted out.

The leasing of buildings seems a good solution, because it will relieve the problems of overcrowding, but in the long run it will only mean more prison places and at the current rate of incarceration the overcrowding will not be alleviated for long. There are institutions at the shallow end of the penal system (juvenile sector, half-way houses, community based projects) which are very useful, but these have the aim of providing an alternative to incarceration.

For the already existing prisons, which will be unlikely to disappear overnight, I still think privatization is wrong. As long as prisons persist, at least the key principles of incarceration should be resocialization and minimization of the adverse effects of incarceration,
and because of the seriousness and problems involved this should be handled with the strongest possible care. This is not better achieved by the private sector.
CONCLUSION

*Just as economics observe that there is no free lunch, sociologists warn that there is no costless social neglect.*

Jerome H. Skolnick 1995

Whether privatization of prisons is a solution to the penal crisis, depends on how you define the penal crisis. I argue that the term penal crisis is not sufficient, because it makes it seem as if all we need is a quick emergency solution. Privatization is offered as such a solution, but it only deals with matters of efficiency, cost cutting, security, and cleanliness.

It does not deal with the high imprisonment rates and the over-representation of minorities in the prison system. It does not deal with the nature and inefficiency of imprisonment itself. It does not deal with any of the systematic problems of the criminal justice system such as discrimination, and the definition of what constitutes crime. It does not deal with any of the underlying causes of crime problems in society, such as inequality, poverty, unemployment and problems resulting from colonialism.

Criminal acts of extreme nature are happening in countries all over the world. Shocking examples are the abduction and murder of the two year old James Bulger by two other children in Britain, and the horrendous abuse and murder of two school girls by Paul Bernardo in Canada. The occurrence of crimes of an astonishing extent are also crossing borders, for example in Vernon, British Columbia where a man killed his entire family, in Tasmania, Australia where a young man went on a random killing spree, and in Dunblane, Scotland where a man walked into a school and killed or wounded 31 little children.
We seem stuck in the way of how we are responding to crime. We should reconsider all the assumptions that have become absolute truths, such as the belief that high rates of imprisonment show that crime is increasing, the definition of a whole variety of different problems in society as crime, and the assumption that criminal law is the appropriate or even only way to deal with these problems.\textsuperscript{354}

Even though there is massive documentation of the failings of the prison system, we keep trying to deal with crime by imprisonment, as if other options are unthinkable. Imprisonment continues to be the response to crime, and horrible examples, such as the ones mentioned, only lead to reacting with panic and demanding more of the same. When people are confronted with the statement that imprisonment is not an appropriate way of dealing with crime, the emotional reaction is often: "What else do you want to do?" Even though this is a very valid question, and it is easier to critique something than to come up with a new solution, it shows how engrained the use of imprisonment is in society. David Garland argues that this deep attachment to the prison, its centrality in our culture, and its entrenched cultural and emotional presence, have made the prison self-legitimating.\textsuperscript{355}

It is impossible to view privatization separately from these bigger issues in penalty.


\textsuperscript{355} Garland, supra note 1.
Therefore my conclusion is: the problems in the prison system are so systematic and deep, and so engrained in the structure of society that privatization is not going to solve them.
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