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**PRISON PRIVATIZATION:
AN ANALYSIS OF PRIVATE ENTERPRISE, SOCIAL CONTROL
AND THE STATE**

By

Corinne Yvette Mason

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfillment of
the requirements for the degree of

Master of Arts
Department of Law

Carleton University
Ottawa, Ontario
April 3, 2000
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Submitted by **Corinne Yvette Mason**
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Chair

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May 1, 2000

Abstract

This thesis presents a broad historical, theoretical and contemporary analysis of prison privatization and private enterprise in relation to the state, punishment and social control. The framework of this analysis is an examination of two aspects of privatization. First, the potential effect prison privatization has on expanding and transforming an already significant private sector involvement in corrections, and as a result, strengthening the state's capacity to punish and to control. Second, the ability of private enterprise, in conjunction with the state, to extend its scale of operations into the commodified and profitable areas of control and punishment. Overall, we must remain skeptical of prison privatization as a viable "reform" for it serves only to strengthen incarceration as the dominant form of punishment. There exists a fundamental incompatibility in combining the profit-oriented interests of the prison industry with the objectives of punishment, rehabilitation and public safety.

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CHAPTER I

INTRODUCTION

This thesis is an examination of private prisons and the private sector in relation to the state and social control. Prison privatization has been carefully laid out in a plethora of studies which generally connect privatization to the limited and pragmatic contexts of prison overcrowding, conservative ideology and debates over cost-efficiency and management concerns. The aim of this thesis is to move beyond these concerns to a broad historical, theoretical and contemporary discussion of prison privatization, the private sector and the state. The prison privatization debate is briefly presented to highlight the pragmatic concerns of privatization's opponents and proponents before moving onto a discussion of the framework and scope of this thesis.

The Privatization Debate

Since the 1970's, there has been a renewed interest in the privatization of prisons. Privatization in general is defined as the systemic transfer of government services, functions and programs to one or more profit-oriented companies. Private prisons in particular are defined as "prisons and other institutions of confinement (jails, immigration and naturalization facilities, detention and remand centres and secured juvenile facilities) operated and managed by private corporations for profit".¹ The for-

¹ Shichor, D. (1995). *Punishment for Profit: Private Prisons/Public Concerns*. London: Sage at 2. Prison privatization, privatization and private prisons are used interchangeably throughout this thesis.

profit, private prison industry has also secured a highly profitable market in the design, construction and financing of public prisons and in the provision of correctional services.

This renewed private interest in corrections coincides with a sociopolitical climate of reducing the size and scope of government, increasing government expenditures on corrections, and law and order approaches to crime control through policies emphasizing incapacitation over rehabilitation. During the 1980's, these trends resulted in an increased state dependence on incarceration and contributed to rising incarceration rates and costs. As a response to prison overcrowding and rising correctional costs, the state launched an attempt to divest itself of the "expensive crime control functions by allowing private enterprise to process deviant populations for profit".² This brought forth a new market for private companies to infiltrate, beyond the private provision of medical, rehabilitative, food, vocational and educational services – the financing, design, construction and operation of entire institutions.

Currently, there are approximately 115 private prisons in the United States, Australia and the United Kingdom combined. Canada is on the verge of private contracting with the Ontario government's recent announcement to privatize three new super jails. It is fairly common among most industrialized countries to contract with the private sector for the provision of correctional services and in the design and construction of prisons. Yet it is the private, for-profit operation of prisons which has sparked the most controversy and debate and is the focus of this thesis. The reason is that the private management of new or existing government institutions calls for giving the profit-

² Cohen, S. (1985). *Visions of Social Control*. Cambridge: Polity Press at 63.

oriented, private sector enormous control over the lives of a captive human population. This brings forth a variety of questions concerning the impact of the profit motive on corrections and the propriety of contracting out a vital and symbolic public service.

The universal acclaim of privatization is economic and the debate as such revolves around issues of cost-efficiency in corrections. Privatization is presented as an efficient and effective means of reforming a failing system of delivering punishment. The for-profit, prison industry claims that the private design, construction, financing and operation of public institutions will result in substantial savings to the government, improved quality of service and increased flexibility. Privatization will reduce overcrowding in prisons and reduce rising incarceration costs because facilities will be built at a faster pace. The private sector claims it will bring more innovations into the correctional system because it is more flexible, responding better to correctional needs and rehabilitative programs, and all this would cost the government less than it does currently.³ As Logan asserts, "...private prisons should be allowed to compete (and cooperate) with government agencies so that we can discover how best to run prisons that are safe, secure, humane, efficient, and just."⁴

Proponents of privatization, using the philosophical model of free-market competition, claim that the private sector can punish better. A policy of privatization is a solution to address growing incarceration rates, prison overcrowding and rising costs faced by many industrialized countries.⁵ For example, private prison corporations claim

³ Logan, C. H. (1990). *Private Prisons: Cons and Pros*. New York: Oxford University Press.

⁴ Ibid. at 5.

⁵ Logan, *supra* note 3.

they can operate a public institution at a savings of 10-25% of the government's corrections budget.⁶ These savings are possible because the private sector is more flexible, is unencumbered by politics and bureaucracy and exists in a much more competitive market environment than the public sector. The private prison industry also claims that it will hire and effectively use better trained staff and administrators, most of whom have served in the public sector. Private prison corporations also claim that they can design, build and finance prisons much more quickly and more cheaply than the public sector.

Ideological arguments are often raised in support of private prisons. Such arguments focus on the ideal of the minimal state, that smaller government is better and that a more competitive corrections market, as found in the private sector, can manage prisons better than public monopolies. Many argue that to enter into a private correctional system is relatively risk-free because the private sector surely cannot do any worse than the public sector.⁷ For example, Logan claims that anything the state can do, the private sector can do better because many of the problems raised with respect to private prisons, are neither "unique nor insurmountable", and are the same problems faced in the public operation of prisons.⁸ As such, proponents argue that the move toward providing services under competitive free-market conditions and away from government monopoly conditions will be a substantial improvement.

⁶ Burright, D. K. (1990). The Privatization of Correctional Facilities: Fad or Future. *FBI Law Enforcement Bulletin*, 59, 1-4.

⁷ Anderson, P., Davoli, C.R., Moriarty, L.J. (1985). Private Corrections: Feast or Fiasco? *The Prison Journal*, 65, 32-39.

⁸ Logan, *loc. cit.*

This free-market philosophy shaped the conservative agenda of the late 1970's and 1980's in the United Kingdom, the United States and Canada to turn over as many government services as possible to the private sector. This political and ideological commitment to privatize corrections in the face of rising incarceration rates and costs has been fuelled by a \$60 billion dollar corrections industry. This industry consists of transnational private prison corporations whose profits depend on high incarceration rates, a steady flow of inmates and tough sentencing policies. Overall, the privatization of prisons conflicts with the aim of society to reduce prison populations and with the desire of private contractors to do just the opposite if greater prisoner numbers and longer sentences generate more profit.

The rhetorical arguments raised by the prison industry and government officials, claiming the superiority of private prisons over public prisons, have been challenged by evaluation studies. These studies indicate some short-term advantages, but none show significant long-term advantages. For example, Pratt and Maahs conducted a meta-analysis of 33 cost-effective evaluation studies and found that private prisons, when compared with public prisons, are no more cost-effective.⁹ "Although specific privatization policy alternatives may result in modest cost savings (e.g., private prison construction and private contracts for specific services, such as rehabilitation and medical programs), relinquishing the responsibility of managing prisons to the private sphere is unlikely to alleviate much of the financial burden on state correctional budgets."¹⁰

⁹ Pratt, T. C., Maahs, J. (1999). Are Private Prisons More Cost-Effective than Public Prisons? A Meta-Analysis of Evaluation Research Studies. *Crime and Delinquency*, 45, 358-371.

¹⁰ *Ibid.* at 368-69.

Recent studies comparing the quality of service between public and private facilities are not showing an overwhelming superiority of private prisons either.¹¹

Though private prison companies can construct facilities much more quickly and cheaply than the public sector, the actual savings achieved in the private operation of a prison is done through cutting back staff. As Sellers states, "Eighty percent of prison management costs are due to personnel. Therefore, if private companies cutback [sic] on guards, teachers, social workers and medical staff, they will be less economically burdened and be able to increase their profits."¹² According to Edwards, this generates another problem. "Private prisons may have the opportunity to select the less troublesome, less dangerous, or less sickly inmates which are less costly and therefore more profitable. This leaves the expensive inmates in the care of the state thereby raising per capita costs while allowing private prisons to increase their profitability."¹³ This is evident in the fact that private prison companies are most involved in the construction and financing of prisons or at the soft-end of corrections through the provision of services, and through the operation of juvenile detention centres and minimum security facilities.¹⁴ Very few private companies operate maximum security facilities due to the high costs associated with these facilities.

A related criticism is that some companies may "showcase" their facilities by creating an artificial institution in which they perform above expectations for the

¹¹ Lanza-Kaduce, L., Parker, K.F., and Thomas, C.W. (1999). A Comparative Recidivism Analysis of Releasees From Private and Public Prisons. *Crime and Delinquency*, 45, 28-47.

¹² Sellers, M. P. (1993). *The History and Politics of Private Prisons*. London: Associated University Press at 60-61.

¹³ Edwards, G. (1996). Public Crime, Private Punishment: Prison Privatization in Queensland. *International Journal of Social Economics*, 23, 391-408 at 395.

¹⁴ Lilly, R. J. (1998). Private Prisons in the U.S. *Prison Service Journal*, 120, 49-51.

purposes of gaining more business.¹⁵ As Shichor and Sechrest explain, the privately operated Silverdale Facility in Tennessee was the subject of several positive evaluations but little attention was paid to the inmate riots demanding better treatment, food, and medical services. The two leading prison companies, the Corrections Corporation of America and Wackenhut Corrections Corporation, often select the lowest bidder and reduce correctional services and products, staff and training requirements in order to remain ultimately accountable to their shareholders and profit margins rather than to inmates or public safety.

Legal and constitutional issues are often raised concerning the delegation of the state authority and power to punish over to a private company or private prison guards. This raises concern over who is ultimately liable, the state or the private company, for the actions of private officials and guards with regards to the treatment and confinement of inmates. Many argue that the state should not contract out its police powers or peace officer status because the state maintains full liability for the actions of private prison guards and private administrators. However, proponents of privatization make a distinction between the decision to punish and the administration of punishment. It is argued that the state should make the punishment decision but that it can delegate the administration of punishment to the private sector under government supervision.¹⁶ Many proponents often argue that a detailed contract with set performance standards,

¹⁵ Shichor, D., Sechrest, D.K. (1995). Quick Fixes in Corrections: Reconsidering Private and Public For-Profit Facilities. *The Prison Journal*, 75, 457-478.

¹⁶ Robbins, I. P. (1987). Privatization of Corrections: Defining the Issues. *Vanderbilt Law Review*, 40, 813-828.

along with the establishment of an on-site government monitor, will ensure the humane operation of a facility according to existing government objectives.¹⁷

Yet no matter where the lines are drawn there remains something fundamentally wrong with private prisons. There exists an inherent conflict of interest among private corporations who generate profits by cutting corners, no matter how well the contract is monitored. To generate and maximize profits, private prison companies distance themselves from the imperatives of rehabilitation and public safety. The economic performance of prison corporations depends upon a steady supply of inmates and prisons filled to capacity. Ensuring effective and improved rehabilitative outcomes results in decreasing the supply of “customers” and as a consequence, profits.

Though private prisons may show some short-term benefits in economic terms, many problems have the potential to arise such as compromising the rights and health of inmates, staff and society, and creating government dependence on private corporations for prison services. Other problems such as combining the profit-motive with public safety and rehabilitation, increased opportunities for conflict of interest and corruption, contract monitoring and legal and economic liabilities for the state outweigh and override any perceived or actual advantages.¹⁸ These possibilities also draw attention to the real problems of stability and continuity of private corporations in the corrections industry and also raise questions concerning the ethical principles and modus operandi of corporations that jump at the chance to profit from the “big business” of corrections.

¹⁷ See Logan, *supra* note 3; Thomas, C. W. (1996). Private Prisons Succeed. *The St. Croix Review*, 29, 25-28.

¹⁸ Shichor, D. (1995). *Punishment for Profit: Private Prisons/Public Concerns*. London: Sage.

Thesis Framework

The dominant privatization discourse is structured as a debate, examining the economic, pragmatic or operational concerns in comparing the efficiency and effectiveness of private prisons over public prisons. This discourse often diverts attention away from the more fundamental issues of the theoretical, moral and political arguments underlying and equally relevant to the privatization debate. Responding to limited research in this area, researchers are beginning to broaden the analysis of prison privatization to include the political context¹⁹, social and economic contexts²⁰ and theoretical issues.²¹ In addition, Lilly and Knepper present the theory that there exists an international corrections market labeled as a “corrections-commercial complex” – a set of bureaucratic, political and economic interests that encourage, at an international level, increased spending on imprisonment regardless of actual need.²² This thesis draws from

¹⁹ Palumbo, D. J. (1986). Privatization and Corrections Policy. *Policy Studies Review*, 5, 598-605; Ryan, M., Ward, T. (1989). Privatization and Penal Politics. In R. Matthews (Ed.), *Privatizing Criminal Justice*. London: Sage Publications. Sellers, *supra* note 11.

²⁰ See Ericson, R. V., McMahon, M.W., Evans, D.G. (1987). Punishing for Profit: Reflections in the Revival of Privatization in Corrections. *Canadian Journal of Criminology*, 29, 355-387; Matthews, R. (1989). Privatization in Perspective. In R. Matthews (Ed.), *Privatizing Criminal Justice*. London: Sage; Feeley, M. M. (1991). The Privatization of Prisons in Historical Perspective. *Criminal Justice Research Bulletin*, 6, 1-10.

²¹ See Ericson, McMahon, Evans, *loc. cit.*; Shichor, *supra* note 17; Feeley, M. M., Simon, J. (1992). The New Penology: Notes on the Emerging Strategy of Corrections and its Implications. *Criminology*, 30, 449-474; Garland, D. (1996). The Limits of the Sovereign State: Strategies for Crime Control in Contemporary Society. *British Journal of Criminology*, 36, 445-471; Weiss, R. P. (1989). Private Prisons and the State. In R. Matthews (Ed.), *Privatizing Criminal Justice*. London: Sage Publications; Sparks, R. (1994). Can Prisons be Legitimate? Penal Politics, Privatization, and the Timeliness of an Old Idea. *British Journal of Criminology*, 34, 14-28.

²² Lilly, R. J., and Knepper, P. (1993b). The Corrections-Commercial Complex. *Crime and Delinquency*, 39, 150-166; Lilly, R. J., and Knepper, P. (1992a). An International Perspective on the Privatization of Corrections. *The Howard Journal*, 37, 174-191. The corporate context of the prison industry has not been explored in great detail in the literature on privatization. Some research has emerged taking into consideration the fact that contemporary privatization is being done by large corporations. See Baldry, E. (1996). Prison Privateers: Neo-Colonialists in NSW. *The Howard Journal*, 35, 161-174; Borna, S. (1986). Free Enterprise Goes to Prison. *The British Journal of Criminology*, 26, 321-334; Ethridge, P. A., Marquart, J.W. (1993). Private Prisons in Texas: The New Penology for Profit. *Justice Quarterly*, 10, 30-48; Lilly, R. J., and Deflem, M. (1996). Profit and Penalty: An Analysis of the Corrections-Commercial

these new and emerging areas of research and attempts, wherever possible, to shed light on the Canadian approach to and contemplation of prison privatization.

The framework of this project situates criminal justice, and punishment in general, within its wider economic, global and political environment. The privatization of prisons is elevated to a broad, historical and theoretical analysis of privatization in relation to the role of the state, social control and prison reform. A contemporary discussion of privatization, the private sector and the corrections industry is also presented. Underlying these issues is an examination of two aspects of privatization. First, the potential effect privatization has on expanding and transforming an already significant private sector involvement in corrections, and as a result expanding the state's capacity to punish and control. Second, the ability of the private sector, in conjunction with the state, to extend their scale and sphere of operations into the commodified and profitable areas of control and punishment. Moral and corporate concerns surrounding the relationship between the private sector, punishment and the profit-motive are also discussed.

As such, this descriptive analysis presents privatization in the context of a state social control thesis putting into question privatization as an agency for reform. Social control in this sense is defined as any relevant grouping, the state or otherwise, that is able to employ punishment as part of its organization.²³ According to Spitzer, "any

Complex. *Crime and Delinquency*, 42, 3-20; Lilly, *supra* note 13; McMahon, M. (1998). Control as Enterprise: Some Recent Trends in Privatization and Criminal Justice. In S. T. Easton (Ed.), *Privatizing Correctional Services*. Vancouver: Fraser Institute; Schlosser, E. (1998). The Prison-Industrial Complex. *Atlantic Monthly*, 51-80; Shichor, D. (1993). The Corporate Context of Private Prisons. *Crime, Law, and Social Change*, 20, 113-138.

²³ Harding, C., Ireland, R.W. (1989). *Punishment: Rhetoric, Rule, and Practice*. London: Routledge.

theory of social control must not only understand the ways in which control is exercised through what is prevented or punished, but also through what is allowed.”²⁴ With the growing emergence of private prisons at a global level, I intend to argue that prison privatization is not an alternative to state control but in effect expands and transforms the capacity of the state to punish and to control. Generally, observing the legacy of past efforts at prison reform, I question whether the institution of punishment and prisons can allow for the development of real alternatives to existing practices or will they simply complement and inevitably expand state practices?

This thesis begins by examining the history of private prisons and punishment, generally between 1780 and 1850, in Canada, the United States and Great Britain. It is made clear that the involvement of private enterprise in corrections has played an important role in shaping the modern correctional system and the delivery of punishment. Policies of transportation, convict leasing and the contract system, along with the rise of the penitentiary, local jails and workhouses, were developed and maintained by private entrepreneurs, in conjunction with the state, to ensure self-sufficient and profitable systems of punishment. Used as a means to exploit inmate labour and as a means to both punish and reform at little or no public cost, these privatization programs, it is argued, strengthened and expanded the capacity of the state to control and to punish.²⁵

²⁴ Spitzer, S. (1987). Security and Control in Capitalist Societies: The Fetishism of Security and the Secret Thereof. In J. Lowman, Menzies, R.J., Palys, T.S. (Ed.), *Transcarceration: Essays in the Sociology of Social Control*. Aldershot: Gower at 57.

²⁵ Feeley, M. M. (1991). The Privatization of Prisons in Historical Perspective. *Criminal Justice Research Bulletin*, 6, 1-10.

Chapter two explores the theoretical, and more fundamental, concerns surrounding the nature of prison privatization and private enterprise in relation to the state, social control and the discourse of reform. The role and legitimacy of the state in delegating over to the private sector the authority to punish is examined. Also discussed is the impact prison privatization, and the broader punishment industry, has on expanding and transforming the delivery of punishment and methods of state control. The underlying moral issues concerning the propriety of contracting to the private sector and the compatibility of the profit-motive with corrections are discussed.

Based upon limited research in this area, the Canadian situation and approach towards privatization is examined. Canada's situation, similar to that of other industrialized countries, of rising incarceration rates and costs locates Canada as an attractive market for private prisons. Yet, the government has been reluctant to contract with the private sector beyond the provision of services and the construction of prisons. Recently though, the provinces of Ontario and Nova Scotia began fostering an uncharted relationship with the private sector for the operation of new and existing prisons.

An important theme running through this research paper is the reevaluation of imprisonment as a means for economic and political development rather than being connected to viable policy alternatives. This was most evident during the 19th century where entrepreneurs and government alike were not only stimulating new markets in the corrections industry, but with the emergence of the penitentiary, came a self-supporting and 'profitable' institution for both government and private industry. This is also evident, in Chapter three, through an examination of the modern corporate context of privatization and its effect on criminal justice policies worldwide.

Chapter three presents a contemporary analysis of the international corrections industry and recent privatization initiatives. Corrections is presented as a sophisticated industry, fuelled by a massive corporate infrastructure of power and politics. This industry is formed specifically for the purpose of offering a wide range of services and products for the control and confinement of a captive human population. The corrections industry is also a growing international market of vested interests, politics and profits forming a phenomenon described as the “corrections-commercial complex”. This complex illustrates the market-driven and commercial interests of the punishment industry. As such, policies of privatization not only expand methods of social control within our own national boundaries, but also expand the state’s ability to control and punish at a global level. Private corporations export private prison construction and management to new international markets to ultimately maximize profits and to reinforce incarceration as the dominant form of punishment.

In conclusion, we must remain skeptical of privatization as an agency for reform as it is often presented by government officials and the private sector. There exists a fundamental conflict of interest in combining the objectives of punishment and public safety with the profit-motive. We must question whose interests are being served – those of society and inmates or those of the private corporations and their shareholders having to maximize profits to survive. When the profit-oriented interests of a private entrepreneur are involved in an essential government function in the control over the delivery of punishment, this challenges the essence of government authority and legitimacy and should not be considered without proper hindsight and foresight. It is undeniable that crime is a problem in most industrialized countries and adequate

resources are needed to respond to it to ensure public safety. But, we should find ways to improve the efficiency and effectiveness of the public system first before turning the private sector. It is highly questionable whether increased methods of crime control through the private provision of more prisons are desirable responses in addressing a persistent problem.²⁶

²⁶ McMahon, supra note 21.

CHAPTER II

HISTORICAL REVIEW OF PRIVATE ENTERPRISE, PUNISHMENT AND THE STATE

Background

Private involvement in penal affairs has been a dominant feature in the development of systems of punishment and in the rise of the penitentiary.²⁷ Private entrepreneurs involved in corrections emerged with the advent of industrialization as local community control of deviance declined. The decline, Durham argues, “created seventeenth century economic opportunities and stimulated entrepreneurial interest in the assumption of responsibilities related to crime control. The control of deviance became a profitable, private undertaking”.²⁸ By end of the 19th century, with the rise of the modern welfare state, public funds and initiatives to deal with deviance began to emerge and, as a result, displaced private initiatives. By 1877, prisons and the delivery of punishment in Europe and North America were largely removed from the hands of private entrepreneurs and came mainly under state control.²⁹ As such, the notions of public money and public responsibility for the administration of justice are of recent origin.

²⁷ Private involvement refers to private entrepreneurs operating an institution, leasing or contracting out the labour of inmates or operating a prison industry for profit or financial motivations.

²⁸ Durham III, A. M. (1989). Origins of Interest in the Privatization of Punishment: The Nineteenth and Twentieth Century American Experience. *Criminology*, 27, 107-139 at 112.

²⁹ Ryan and Ward, *supra* note 18.

Since this time, imprisonment and the delivery of punishment have been established as intrinsically state functions. According to Ignatieff, the narrative of reform and progress that has characterized the history of the prison assumes that the state enjoys a monopoly over the legitimate means of punitive regulation.³⁰ Yet attachment to such an idea is not only “ahistorical” but also assumes a “fixed and unalterable” relationship between the state and the penal system.³¹ The historical reality is that the relationship between the state, the penal system and private enterprise has changed over time, particularly when it comes to methods of punishment. The delivery of punishment has often been a joint, political and economically-motivated enterprise between the state and private interests.

Introduction

This chapter is an historical analysis of private systems of punishment in Europe and North America, primarily between 1780 and 1850, and outlines the transformative nature of privatization initiatives and the role of the private entrepreneur. The aim is to place the relationship between private enterprise, the state and corrections in its proper economic, political and social context. The aim is also to examine the impact of the profit-motive on the changing nature of penal enterprise during this time period. While it is undeniable that the private sector has played a significant role, its “positive contribution” in providing greater efficiency and cost-effectiveness to corrections is highly questionable.

³⁰ Ignatieff, M. (1983). *State, Civil Society and Total Institutions: A Critique of Recent Social Histories of Punishment*. In S. Cohen, Scull, A. (Ed.), *Social Control and the State: Historical and Comparative Essays*. Oxford: Martin Roberston.

³¹ Ryan and Ward, supra note 18 at 64.

It is clear that the involvement of private enterprise in corrections has played an important role in shaping the modern correctional system and the delivery of punishment. For example, Sellers claims that the private sector has played a crucial and innovative role in operating prisons and has been the primary source of change in corrections. As Sellers remarks, “almost all departures in modern corrections, and historically, have originated outside the ‘official’ circle of the public sector.”³² As we shall see, the form of private enterprise in corrections has varied, from local jails and systems of transportation to “locating private businesses in public prisons, privately operating prisons, locating state-run businesses within the institutions, leasing convicts to private contractors, or using convicts on public works projects in lieu of contract labour”.³³

Proponents of privatization forward the ideological belief that privatization reduces the size and scope of the state. It is argued here, however, that policies of privatization do not reduce state control,³⁴ but in effect expand and extend the reach of the state to punish and to control. Thus, policies of privatization should be approached with great skepticism as a ‘viable’ alternative to existing penal practices. As Feeley claims, “the most significant consequence of privatization historically has been the generation of new and expanded sanctions and forms of social control.”³⁵ As such, the persistent penal problem of how to achieve the punishment of inmates with their reformation, most visible during a political climate of rising prison costs and offender

³² Sellers, *supra* note 11 at 48.

³³ Feeley, *supra* note 25 at 4.

³⁴ See for example: Logan, C. H., Rausch, S.P. (1985). Punish and Profit: The Emergence of Private Enterprise Prisons. *Justice Quarterly*, 2, 303-318; Logan, *supra* note 3.

³⁵ Feeley, *supra* note 25 at 2.

populations, has not been adequately addressed to date through the assumption of private or public responsibility for penal affairs. Throughout this history of prison reform, the persistence of policies of incapacitation over those of rehabilitation are strengthened by privatization programs and reinforce imprisonment as the dominant and profitable form of punishment. This serves to extend and legitimize the reach and capacity of the state to control and to punish more and more offenders at little or no public cost.

Throughout history in both Europe and North America, the delivery of private and public punishment fit into a system of production – a joint enterprise between the state and private enterprise. Prison labour was cheap, steady and non-unionized making it very attractive to private entrepreneurs and easily exploitable by state officials.³⁶ As such, Rusche and Kirchheimer's economic analysis is worth considering: "The transformation in penal systems cannot be explained only from changing of [sic] the war against crime, although this struggle does play a part. Every system of production tends to discover punishments which correspond to its productive relationships."³⁷ For this reason, the nature of the relationship between the state, private interests and the delivery of punishment is in part one of economics – exploiting inmate labour for profit and using the prison as a means for economic development. Yet this analysis does not remain confined to economic explanations, for this a history of diverse public and private

³⁶ The exploitation of inmate labour raises some important questions concerning the issues of race, class and gender in the development of the prison and privatization. Was there a form of entrepreneurial "advantage" of leasing certain inmates over others? This is most apparent in the Southern States, where after the abolition of slavery, prison and convict leasing were ways to control the black population. Was a male prison considered more economically useful than a female prison? Did sexism keep entrepreneurs away from female inmates?

³⁷ Rusche, G., Kirchheimer, O. (1939). *Punishment and Social Structure*. New York: Columbia University Press at 35.

motivations and is embedded in a broad political, social, legal and economic context of penal reform.

In general, the history and development of the modern criminal justice system in North America and Great Britain can be observed as a succession of piecemeal reforms brought about by pressures to expand the capacity and effectiveness of the criminal law to ensure social order and public safety.³⁸ Understood within the political and social context of prison reform, the law and the tools of punishment were reformed to expand the presence of state control and to increase the effectiveness of the criminal sanction. In describing this search for greater efficiency, historians often ignore the economic factors that shaped early prisons and have ignored one important group of reformers – private entrepreneurs.³⁹ According to Feeley, many of the reforms in punishment were initiated by private entrepreneurs who sought to accomplish what government could not, that is the development of an effective and efficient criminal sanction.⁴⁰ Entrepreneurs, motivated by the possibilities of generating profits from a stable and continuously expanding market, invented new solutions to respond to “rising crime and declining confidence in government” and, in turn, these innovations were incorporated into the fabric of an expanded and more effective criminal justice system.⁴¹

The relationship that developed between the state and private interests, Feeley claims, was mutually beneficial in an economic sense, but detrimental to the humanitarian objectives of the existing system. As such, a significant relationship exists

³⁸ Feeley, supra note 25.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

between the public and private sectors, who throughout history have both worked to relieve the state of the financial burden of punishing. As a result, the ideology of rehabilitation, under the auspices of economic, political and social conditions, has been subordinated to the priorities of containment and control during the 19th century penal strategy of the exploitation of inmate labour.⁴²

Private Involvement in Europe

The presence of private enterprise in the administration of punishment dates back at least as far as the Romans.⁴³ In England, during the Middle Ages, criminal prosecutions were often initiated by victims hiring private prosecutors.⁴⁴ These privately run prosecution societies were the precursor of the modern, state-funded system of prosecution. This practice was intended to limit the power of the Crown and was based upon the idea that justice is best sought privately.⁴⁵ The right of victims to initiate criminal proceedings privately remained in effect until the 19th century. In addition to these private prosecution initiatives, the modern police system also has origins in voluntary and private law enforcement schemes.⁴⁶ According to Feeley, English and American courts right up until the early 20th century depended upon a type of private probation system to monitor petty offenders.⁴⁷ In the area of corrections, before the rise of the penitentiary, private entrepreneurs, due to the sheer number of inmates and the

⁴² Hogg, R. (1980). *Imprisonment and Society Under Early British Capitalism*. In T. Platt, Takagi, P. (Ed.), *Punishment and Penal Discipline: Essays on the Prison and the Prisoners' Movement*. San Francisco: Crime and Social Justice Associates.

⁴³ Sellin, J. T. (1976). *Slavery and the Penal System*. New York: Elsevier.

⁴⁴ Feeley, *supra* note 25; Shichor, *supra* note 17.

⁴⁵ Shichor, *supra* note 17.

⁴⁶ *Ibid.*

⁴⁷ Feeley, *supra* note 25.

potential of profiting from an endless surplus of inmate labour, were involved in systems of transportation, local jail systems and in the operation of prison industry in Europe's workhouses. These are examined below.

Transportation

During the 17th century, England adopted a system of transportation for serious felons as a replacement for certain corporal and capital punishments.⁴⁸ Such a system remained in effect for 250 years and for half of that period it served as England's dominant form of punishment for serious felons. England used a variety of colonial locations, including the American colonies, to transport serious felons as a condition of pardon to be sold into servitude.⁴⁹ Moreover, private entrepreneurs transported the convicts and sold their human cargo to planters who would use the convicts as agricultural workers, shepherders and manual labourers. According to Feeley, over 50,000 convicts were shipped across the Atlantic and by the time transportation ended in 1868, over 100,000 convicts were shipped to Australia at little or no cost to the state.⁵⁰

Transportation was an enormous "success" and radically transformed the administration of criminal justice. Transportation was designed to reduce reliance on corporal and capital punishments. It was also designed to increase the likelihood of prosecution, conviction and punishment since victims were more willing to prosecute and juries more willing to convict knowing the offender would not be hanged.⁵¹ As Feeley claims, "the new alternative [transportation] swept up those who would have

⁴⁸ Durham III, *supra* note 28.

⁴⁹ Feeley, *supra* note 25.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

claimed benefit of clergy and escaped punishment altogether and those who otherwise would have received an unconditional pardon, a whipping, or a small fine.”⁵² Thus, transportation was designed as a sanction which would deter crime more efficiently than capital punishment, remove the criminal from society, require little to no public funds and above all generate revenue for the private entrepreneur and the state. Transportation was a lucrative business as indicated by the fact that after the 1718 *Transportation Act*, those holding contracts for the transportation of convicts were in sole possession of these contracts for 20 years or more.⁵³

This form of punishment was of course historically contingent, emerging from England’s colonial experience but was, despite its ideological and political motivations, a marriage of efficiency and effectiveness between the state and the private entrepreneur. As Feeley asserts, “what underlay the entire administrative and economic structure of transportation was reliance upon private enterprise to effect the public policy. More precisely, transportation was an innovation promoted by mercantile interests which was only reluctantly embraced by public officials as they slowly came to appreciate its cost-effectiveness.”⁵⁴ The policy of transportation expanded the state’s penal capacity, bringing in handsome profits for entrepreneurs who were guaranteed a steady supply of convicts while permitting the state to sanction thousands of felons at little or no public cost.

⁵² *Ibid.* at 4.

⁵³ Ericson, McMahon, Evans, *supra* note 19.

⁵⁴ Feeley, *supra* note 25 at 3.

Jails

The notion of public money is of relatively recent origin, and as such jails were among many institutions that were financed by user fees.⁵⁵ In England, the operation of a jail by a private entrepreneur dates back to the Middle Ages. In some places during the 13th century, the Crown wanted to relieve itself of the expenses incurred from jails. The Crown would require a subject to keep a jail in exchange for land or would bestow jailerships on royal servants as a substitute for pensioning them.⁵⁶ Thus, jailers were able to make their living from fees extracted from prisoners.

Before the 18th century, the idea of using a jail to reform or punish the offender was unknown. For the most part, jails were primarily holding places for pre-trial detention with defendants spending several months in custody before their cases were heard.⁵⁷ Private entrepreneurs, who used the fee system to generate revenues, often operated these jails. This system permitted the jailer to levy charges on the prisoner for a variety of services such as keeping the prisoner in the facility, admittance and discharge, locking and unlocking fetters (ankle chains), providing food, supplying extra bedding, procuring alcoholic beverages and many other services.⁵⁸ In fact, the private, profit-making nature of these jails was so clearly accepted that jailerships were traded as major investments and subject to purchase and sale.⁵⁹ Often, the administration of a jail was a family business over many generations.⁶⁰ Yet due to the lack of state control over jails

⁵⁵ McConville, S. (1995). Local Justice: The Jail. In N. Morris, Rothman, D.J. (Ed.), *The Oxford History of the Prison: The Practice of Punishment in Western Society*. New York: Oxford University Press.

⁵⁶ Shichor, *supra* note 17.

⁵⁷ *Ibid.*

⁵⁸ Durham III, *supra* note 28.

⁵⁹ McConville, *loc. cit.*; Shichor, *supra* note 17.

⁶⁰ Ericson, McMahon, Evans, *supra* note 19.

and their operators, many opportunities arose for the keeper to extract more and more fees which often varied from jail to jail. "The fact that he [keeper] exercised uncontrollable power over his prisoners gave him practically unlimited opportunity for extortion."⁶¹

The differential handling of defendants in order to generate a profit, along with the dismal condition of the jails, was a point of contention for the 18th century reformers like John Howard. Howard traveled to the continent in 1775 to observe the jails and workhouses. On his return, Howard, impressed by what he had seen of established classification schemes by age, gender, offence and reformatory work regimes made the recommendation to abolish all fees in jails and to pay the jailers a government salary.⁶² The local jail system was abolished toward the end of the 18th century.

Workhouses

Other European forerunners to the modern prison, besides the jail, were workhouses or houses of correction. After the break-up of the feudal system in 16th century England, those in rural areas migrated to cities for work. This migration brought vagrants, prostitutes and paupers to the cities and a perceived increase in crime and disorder and a decline in public safety.⁶³ According to more traditional accounts, in response to this rising social disorder, the city of London constructed Bridewell workhouse in 1557 to care for and discipline those who were considered dangerous to society. As Sellers explains, "a tradition of confinement at productive labour as a means

⁶¹ Shichor, *supra* note 17 at 20.

⁶² Durham III, *supra* note 28; Sellers, *supra* note 11.

⁶³ Shichor, *supra* note 17.

of checking vagrancy and other evils was established at these institutions.”⁶⁴ Sellin reports that like jails, workhouses were often operated by a private keeper, with fees extracted from prisoners, in countries whose government could not afford to build or operate them.⁶⁵

Yet Bridewell, unlike the local jails, was controlled by the justices of the peace and strict regulations were enforced through government inspections. According to McConville, “Bridewell was an attempt to entrust imprisonment with reformatory and punitive objectives, which were to be secured by a publicly-regulated regime.”⁶⁶ Though the government made great efforts to stay away from the profit-based system of the jails, private industry often leased or contracted for inmate labour to generate revenues. The Amsterdam Rasphouse (rasphuis), for example, relied on a contract system.⁶⁷ Under this system, the government was responsible for the administration of the prison and the inmates, but convict labour was leased to private entrepreneurs. The main work in the institution was the production of dyes by rasping wood. The product was then sold by the private entrepreneur and the proceeds from those sales offset institutional costs and “even provided income for inmates whose production exceeded the cost of their confinement”.⁶⁸

The Ghent prison in Belgium, constructed in 1773, evolved beyond the Rasphuis and other workhouses, by attempting to make prison labour economically profitable for

⁶⁴ Sellers, *supra* note 11 at 48.

⁶⁵ Sellin, *supra* note 43.

⁶⁶ McConville, *supra* note 58 at 305.

⁶⁷ See Durham III, *supra* note 28; Sellin, *supra* note 43; Shichor, *supra* note 17.

⁶⁸ Durham III, *supra* note 28 at 110.

the state.⁶⁹ Because of a large surplus of cheap, inmate labour, a work regime was developed, involving private industry, to reduce inmate idleness and at the same time relieve the state of the financial burden of punishing.⁷⁰ Gosselin adds that a prisoner's sentence was determined by the possibility of reformation and by the prisoner's economic usefulness.

What is most significant about the Rasphuis, and other workhouses, is that it provided the historical link between the dominant theory of the 16th century, that of the spiritual, pedagogic transformation of the individual with the new "self-sufficient" penitentiary model which took shape in the second half of the 18th century.⁷¹ While private involvement in the workhouses was limited to contracting out inmate labour for industrial production, no great profits were made. Ignatieff states that though many of the entrepreneurs hardly made a profit due to the rapid turnover of inmates and low productivity, these entrepreneurs learned about the management of an extensive division of labour.⁷² In fact, Ignatieff claims that "in many respects, these state institutions were the earliest prototypes of the factory".⁷³

Overall, the reliance on private contractors in the workhouses facilitated the expansion of the existing criminal justice system at a time when public funds were non-existent. In this sense, the history of the penal system in relation to the state and private enterprise is one of self-sufficiency. These systems of punishment paid for themselves

⁶⁹ Ibid.

⁷⁰ Gosselin, L. (1982). *Prisons in Canada*. Montreal: Black Rose Books.

⁷¹ Ibid.

⁷² Ignatieff, M. (1978). *A Just Measure of Pain: The Penitentiary in the Industrial Revolution*. New York: Pantheon Books.

⁷³ Ibid. at 32.

while at the same time increasing the certainty and effectiveness of the criminal sanction outside the official public sector. The nature of the private enterprise was changing as well. Those involved in the prison business generated steady revenues and investments, and were able to expand their business to meet the steady supply of convicts. For example, Feeley notes that while arrangements for transportation were usually left to the offender, family, or the county, “as business developed, shippers were guaranteed a steady supply of convicts, built specially designed ships to pack their human cargo tightly, and agreed – for a price – to take women, children, and the aged, as well as able-bodied male convicts.”⁷⁴ While the private entrepreneur precedes the modern private corporation, and even state-controlled institutions, in the business of corrections the objective remains the same. The aim is to develop and maintain a self-sufficient and effective system of punishment that reforms, while expanding the state’s capacity to control and to punish.

Private Involvement in North America

In Europe, as in North America, many of the criminal justice functions were handled privately by victims, but for different reasons. Though English criminal justice procedure was usually followed, in the American colonies fierce individualism was paramount.⁷⁵ Americans feared the tyrannical rule of the English government, thus private prosecutions were the norm in order to minimize the scope of governmental control into the lives of its citizens.⁷⁶ Also, government officials, aware of the

⁷⁴ Feeley, *supra* note 25 at 3.

⁷⁵ Shichor, *supra* note 17.

⁷⁶ Durham III, *supra* note 28.

developments occurring in Europe at the time with the advent of public prosecutions, wanted to increase their authority in the criminal justice process.⁷⁷ In Europe, the responsibility for corrections and the delivery of punishment gradually evolved from a private system into a government-controlled system. Yet the United States has never completely abandoned its relationship with the private sector. In the United States, evident in historical and contemporary times, the private sector has maintained its involvement in criminal justice and is perpetually expanding into new markets. The aim has been to not only reinforce the nature and purpose of imprisonment as a profitable enterprise, but as a consequence, to deal with the persistent problem of rising correctional costs and growing offender populations.

Towards the end of the 18th century, a new type of institution, the penitentiary emerged designed not as a pre-trial detention facility, but as a place where incarceration itself became the punishment. The ultimate aim of the penitentiary, in addition to deterrence and public safety, was to reform convicts through repentance and expiation, assuming a change of behaviour would follow. Two models of the penitentiary were developed in 19th century America – the Auburn System and the Pennsylvania System. These two systems attempted to reconcile the punishment of offenders with their moral and religious rehabilitation through reliance on the ‘silent system’ and solitude. Yet the development of the penitentiary is also influenced by diverse economic and political motivations. Relying on a surplus of cheap, exploitable inmate labour to compensate for limited state resources, private involvement in the penitentiary was achieved through

⁷⁷ Shichor, supra note 17.

convict leasing and the contract system. The penitentiary developed into more than a place of confinement and punishment but most importantly, through private involvement, developed into a self-sufficient and 'profitable' institution.

Convict Lease System

During the 19th century, especially in the southern United States, the penal system thrived on its connection to private enterprise through the convict lease system. Under this arrangement, private contractors took over complete control of the institution, including the discipline of prisoners in exchange for their labour.⁷⁸ The contractor also received a fee from the state and a 'contract' lasting a number of years.⁷⁹ The southern states' natural resource - cheap labour - was an economic attraction for private enterprise, establishing the convict lease system as a "profitable" endeavor. Such a system is commonly referred to as 'penal slavery'. The state and private entrepreneurs, suffering from a shortage of cheap labour after the abolition of slavery, exploited the convicts' labour, who were former slaves, to minimize the costs of the penal system and to maximize profits.⁸⁰

The convict lease system emerged to fill gaps in the labour market. As explained by James et al., southern states were "paying off heavy war debts, reconstructing their economies, and adapting to the abolition of slavery whilst also maintaining growing prison populations, so that using otherwise expensive-to-maintain prisoner populations

⁷⁸ James, A. L., Bottomley, K., Liebling, A., Clare, E. (1997). *Privatizing Prisons: Rhetoric and Reality*. London: Sage Publications; Shichor, *supra* note 17.

⁷⁹ James, Bottomley, Liebling, and Clare, *loc. cit.*

⁸⁰ Sellin, *supra* note 43.

for hard work made good economic sense.”⁸¹ Inmates under this arrangement were not only slaves of the private entrepreneur but were also slaves of the state. Both the state and the private contractor made capital gains from exploiting inmate labour. The first state to rely on the private operation of a prison as a business was Kentucky in 1825.⁸² The state government, unable to maintain the costly and inefficient Frankfort state prison, leased the entire prison and its population to Joel Scott. Scott paid the state \$1,000 plus 50% of his net profits in exchange for the labour of inmates while assuming the operation of the prison.

Through the convict lease system, southern states were able to accommodate growing numbers of criminal offenders and rising associated costs. Yet rising crime rates or the need for social control among the southern states were not determinants of the size of the prison population. According to Ericson et al., offender populations were driven by the desire “to make crime pay” for both the state and the private entrepreneur.⁸³ With the abolition of slavery, the convict lease system also served the purpose of controlling the black population.⁸⁴ According to Feeley, this system was much more efficient and profitable than the northern contract systems. The southern states were able to incarcerate more offenders for longer periods of time at little or no cost to the state.⁸⁵ Thus, the convict lease system was integral in expanding the capacity of the state to punish and to control and was a cost-efficient solution for those states with limited

⁸¹ James, Bottomley, Liebling, Clare, loc. cit. at 3.

⁸² Feeley, supra note 25.

⁸³ Ericson, McMahon, Evans, supra note 19 at 32.

⁸⁴ Sellin, supra note 43.

⁸⁵ Feeley, supra note 25.

resources and growing offender populations. In fact, according to Feeley, the belief by entrepreneurs and state officials that such an arrangement was possible is perhaps “one of the reasons why officials selected imprisonment as the punishment of their choice”.⁸⁶

The Penitentiary and the Contract System

The penitentiary developed during a period of rapid industrial development and as such, allowed for private sector involvement through the establishment of prison industries.⁸⁷ Known as the contract system, and unlike the convict lease system which gave direct control of the institution and the inmates to the private sector, this arrangement assigned the responsibility for the operation of the prison and discipline of the inmates to the state. Most dominant in the northern and eastern states, under the contract system, the private contractor, for a small fee, leased or contracted the labour of inmates from the state for the production of goods on the free market.

In 1819, the Auburn penitentiary, known as the “silent system”, opened in Auburn, New York. Auburn abandoned the idea of solitary confinement and instead invoked a strict rule of silence to avoid contamination of the inmates’ minds to ensure constant repentance for their crimes.⁸⁸ Auburn became the leading model for reformers abroad and at home for not only did it emphasize the reformation of the individual but also illustrated how private, for-profit enterprise can be infused into the penal system through private industry. According to Shichor, “one of the major attractions of this system was that it lent itself to the introduction of modern industrial production into the

⁸⁶ *Ibid.* at 5.

⁸⁷ Durham III, *supra* note 28.

⁸⁸ *Ibid.*

prison.”⁸⁹ The Auburn system used private entrepreneurs from the very outset in organizing a system of production and distributing prison-made products on the free market (e.g., shoes, clothing, carpets, barrels, harnesses and furniture).⁹⁰ To ensure its own self-sufficiency, due to limited state resources, inmate labour was leased to private entrepreneurs. This contracting arrangement was justified by the belief in the reforming value of hard work while debiting inmates for the cost of their upkeep from their earned wages. The penitentiary began as a self-sufficient institution, relying on inmates to earn their keep.

In Canada, a contract system existed during the 19th century with the opening of Kingston penitentiary in 1835.⁹¹ Modeled after the Auburn system, inmates were subject to a strict work regime to achieve the goals of repentance, prevention of idleness, and above all to minimize incarceration costs. Prisoners were initially assigned to government projects until the number of inmates exceeded the amount of work available.⁹² Prison officials, aware of the surplus of cheap labour, leased out inmates to farmers or contracted out their labour to private employers. Thus, inmates in both the United States and Canada were viewed as a cheap and readily exploitable source of labour, who through the production of goods, helped contribute to the cost of their upkeep while being both rehabilitated and punished.⁹³ As Lightman remarks, “the general characteristics were everywhere the same: mass production of a very limited

⁸⁹ *Ibid.* at 28.

⁹⁰ *Ibid.*

⁹¹ Ericson, McMahon, Evans, *supra* note 19.

⁹² Gandy, J., Hurl, L. (1987). Private Sector Involvement in Prison Industries: Options and Issues. *Canadian Journal of Criminology*, 29, 185-204.

⁹³ Lightman, E. S. (1982). The Private Employer and the Prison Industry. *The British Journal of Criminology*, 22, 36-48.

range of articles, low labour costs, low or no rental for the 'factory', and direct competition with the free market in the sale of output."⁹⁴

In an economic and political context, the establishment of prison industries was a mutually "beneficial" enterprise for both the entrepreneur and the state. According to 19th century reports, "the Auburn penitentiary was not only self-supporting economically but was even producing surplus revenue for the government".⁹⁵ The element of hard labour attached to imprisonment achieved the purpose of putting the offenders to work in defraying the public cost of their crime and at the same time contributed to the prisoners' reformation.⁹⁶ Yet the combination of profits, self-sufficiency, punishment and reformation, as the foundation of the penitentiary system, were not compatible ideals.

The linking of work with reform, repentance and institutional discipline soon disappeared as a component of the penitentiary system. The prison industry became a central element of the penitentiary, not as a method of reform, but as a source of revenue for the government.⁹⁷ Soon production and profit were of central importance whereby "administrative procedures, physical structures, disciplinary measures, and institutional programming were all driven by the profit motive of state officials and businessmen who were eager to use inmate labour and to make a profit."⁹⁸ As Rothman points out, state officials and entrepreneurs were "simultaneously furthering financial and reformist goals" in order to establish a model penitentiary that is both self-supporting and profitable while rehabilitating the offender according to a schedule which 'maximized

⁹⁴ *Ibid.* at 37.

⁹⁵ Shichor, *supra* note 17 at 29.

⁹⁶ *Ibid.*

⁹⁷ Lightman, *supra* note 93; Shichor, *supra* note 1.

work'.⁹⁹

By the end of the 19th century, the private prison industry gradually began to disappear. The prison industry, the delivery of punishment and the administration of the prison were soon state responsibilities. The progressive era brought social reformers who leveled great criticism against the conduct of prison industries and at private sector involvement in particular, comparing the treatment of inmates to 'slave labour'.¹⁰⁰ The government-run prison industry soon emerged for the purposes of rehabilitation and vocational training. During this same time, the convict lease system also came to an end. The reformers contended that the lease system "exposed prisoners to the dangers of injustice: contractors would have a vested interest in lengthening the sentences of good workers and in neglecting their welfare".¹⁰¹ In addition, the emerging movement of organized labour viewed the prison industry as a direct threat to jobs, markets and profits.¹⁰²

According to Shichor, economic and humanitarian motivations were not the sole determinants in the decline of the private contract. Along political lines, the gradual phasing out of privately contracted industry and its replacement with state-run production was a reassertion of control over prisons by the state.¹⁰³ This reassertion of control is intimately linked with the rise of the modern welfare state which increased the capacity of governments to manage large-scale institutions.¹⁰⁴ During this wave of prison reform

⁹⁸ Shichor, *supra* note 17 at 30.

⁹⁹ Rothman, D. J. (1971). *Discovery of the Asylum*. Boston: Little Brown at 103-104.

¹⁰⁰ Borna, *supra* note 21; Gandy and Hurl, *supra* note 92; Lightman, *supra* note 93.

¹⁰¹ James, Bottomley, Liebling, Clare, *supra* note 78 at 3.

¹⁰² Lightman, *supra* note 93.

¹⁰³ Shichor, *supra* note 17.

¹⁰⁴ Garland, D. (1985). *Punishment and Welfare*. London: Gower.

in the early 20th century, European and most North American governments took back control of prisons, with a majority of states passing enabling legislation forbidding the private ownership of prisoners and prisons.¹⁰⁵ Federal legislation followed restricting the distribution of inmate-made products on the open market. In Canada, the passage of the 1906 *Penitentiary Act* restricted the use of prison labour to government projects only.¹⁰⁶

According to Rothman, the abandonment of the convict lease system in 1923 and other private initiatives, was a considerable victory for the reformers of the progressive era but created a financial problem for state governments. "The contractors had paid the states handsomely for inmate labour and at the same time spared them all administrative costs."¹⁰⁷ Yet while the state suffers financially, it ultimately "profits" from the use of crime control or 'law and order' as a vehicle for trafficking its preferred ideologies and reproducing its legitimacy.¹⁰⁸

Privatization, Punishment and the Reformers

Between the reform period of 1780 and 1850, the nature of punishment and penal discipline changed drastically with new categories of crime created and punished in new ways. Within this time, punishment was transformed from a public regime to impose terror to a more private regime which focused on imprisonment as the primary means of administering punishment.¹⁰⁹ The deprivation of liberty, as opposed to the physical infliction of pain, formed the basis for the system of punishment beginning to emerge.

¹⁰⁵ Borna, *supra* note 21.

¹⁰⁶ Gandy and Hurl, *supra* note 92.

¹⁰⁷ Rothman, D. J. (1980). *Conscience and Convenience: The Asylum and its Alternatives in Progressive America*. Boston: Little Brown at 139.

¹⁰⁸ Ericson, McMahon, Evans, *supra* note 19 at 33.

¹⁰⁹ Foucault, M. (1977). *Discipline and Punish: The Birth of the Prison*. New York: Vintage.

As Ignatieff argues, support for the emerging penitentiary system in the late 19th century rested upon a larger social, economic and political need. "It had appeal because the reformers succeeded in presenting it as a response, not merely to crime, but to the whole social crisis of a period, and as a part of a larger strategy of political, social, and legal reform designed to reestablish order on a new foundation."¹¹⁰ As illustrated in this analysis of punishment and privatization, the idea was not to make punishment more humane, but to change its purpose "in order to make punishment a more effective guarantor of social and political stability by making it less visible and more profitable".¹¹¹

Early 19th century reformers were quite optimistic that their good intentions would result in the actual reformation of prisoners and thus reduce the high crime levels. By the end of the 19th century, however, little of this optimism was to be found. Crime rates had yet to decline and the supply of offenders in prisons did not diminish. While there was willingness to resign from the ideals and possibilities of reform and rehabilitation, none was found to resign from the use of imprisonment. The objective was to redefine its use. According to Rothman, what was quite thinkable was to transform the penitentiary from a place of reform to a place of confinement and capture.¹¹² "The new wave of reformers attributed the failure of imprisonment to flaws in its execution and administration, not to an inherent defect in the concept of incarceration itself."¹¹³ The rise of the prison reflected a new strategy of order, yet the

¹¹⁰ Ignatieff, *supra* note 72 at 210.

¹¹¹ Gosselin, *supra* note 70 at 58.

¹¹² Rothman, *supra* note 99.

¹¹³ Durham III, *supra* note 28 at 115.

reformers and entrepreneurs of that period appealed to the prison's functional capacity to control crime, to reform offenders and to ultimately pay for itself through inmate labour when the state lacked the administrative capacity. Ultimately, private enterprise intending to relieve the state of the financial burden of punishing, strengthened the state's legitimacy and, as a result extended and expanded the state's capacity to control crime.

The idealism of the early reformers who pursued the rhetorical objective of a more humane and efficient system of punishment went hand-in-hand with the pragmatism and innovation of early entrepreneurs. Indeed, as Feeley argues, "the idealists and the entrepreneurs were often one and the same ... entrepreneurial reformers promised a modern form of punishment that was at once more humane and cost-effective. Private contractors could manage prisons and employ convicts in labour which would be both morally uplifting and rehabilitative as well as financially rewarding."¹¹⁴

In fact, Jeremy Bentham, was both a reformer and an entrepreneur in developing detailed plans for a private contractor to operate the Panopticon which would ultimately allow for "maximum surveillance at minimum cost".¹¹⁵ Hoping to obtain the contract for himself, this little known fact was apparently Bentham's obsession for almost 20 years. Although Bentham lost the contract, "his views and efforts led to the belief that public services can be provided more efficiently by private contractors than by government agents".¹¹⁶ Bentham's plans for a prison of efficient design were published and distributed such that throughout the 19th century in both France and the United States, his

¹¹⁴ Feeley, *supra* note 25 at 4.

¹¹⁵ *Ibid.* at 5.

¹¹⁶ *Ibid.* at 5.

ideas for delegating prison services to private contractors were put into effect. The economic viability of prisons was an important consideration for prison administrators who realized the need for a more efficient justice system, along with the need to offset a large share of the costs.

Systems of punishment involving private enterprise, from local jail systems financed by user fees, to workhouses and systems of transportation to the development of the penitentiary and leasing arrangements served as a means of exploiting inmate labour, while radically transforming the delivery of punishment. Yet an examination into these systems of punishment clearly demonstrates a deeper issue than entrepreneurs responding to a penal crisis of rising incarceration rates and costs. It is an illustration of the intricate relationship that exists between the state, the private entrepreneur and the penal system. Private entrepreneurs created a way for government to expand the criminal sanction while devoting few resources to its delivery, turn idle masses into surplus labour for their own “good”, and at the same time generate surplus revenues for all involved.

Similar developments occurred abroad and in Canada. Private entrepreneurs were responding to a labour surplus and a demand to reduce incarceration costs, reinforcing the common perception of the public sector as inefficient and inept and of the private sector as efficient and effective. As illustrated, the earlier experience with privatization in prisons reveals just how the history of the penitentiary and the delivery of punishment are bound up with the efforts of private entrepreneurs and the appeal of privatization.¹¹⁷ These private initiatives, from the local jail to the penitentiary, worked to expand and

¹¹⁷ Ibid.

extend penal policy. Such initiatives also worked to incorporate new ways to address problems of law and order, state legitimacy and the politics of control into the fabric of a more expanded and effective criminal justice system.¹¹⁸

Privatization programs reinforce and promote the ability of the state to “punish more” and “punish better” and, as a result, contribute to rising correctional costs and offender populations. Like a vicious cycle, a political and economic climate of depleted or non-existent state revenues and growing offender populations, coupled with the desire to “make crime pay”, created 18th and 19th century economic opportunities for the private entrepreneur. This recurring climate is again creating 20th century opportunities for private for-profit corporations to move into the private management of new and existing prisons. The problems intended to be addressed then are having to be addressed again, under the auspices of political, economic and social motivations to “improve” a failing system of punishment. As Sellers remarks, “advocates now argue that the private sector, through competitive motivation and concern for efficiency and innovation, can once again transform old prisons with idle masses of inmates into productive, cost-efficient operations.”¹¹⁹ The theoretical implications of this statement are examined in the next chapter.

¹¹⁸ Ibid.

¹¹⁹ Sellers, supra note 11 at 50.

CHAPTER III

THEORETICAL REVIEW OF PRIVATIZATION, SOCIAL CONTROL AND THE STATE

For most of the 20th century, prisons have been operated by government agencies, and as such, prisons and punishment are seen as an inherent state responsibility and a symbol of state authority. Imprisonment is a form of punishment and is an integral public function because it is imposed for the violation of the law and ultimately maintains the legitimacy of the state in the provision of legal order.¹²⁰ For these reasons, it is argued that the profit-oriented private sector should not be involved in the public and symbolic area of corrections. As such, the state should not and cannot delegate the authority to punish and to incapacitate over to private interests for it will only serve to strengthen existing punitive practices. On the other hand, it is argued that privatization initiatives serve to complement existing punishing practices and reduce state control. Thus, the private operation of prisons is a legitimate delegation of the public authority to punish, and as such, should be allowed. These normative issues of who should manage our penal institutions and by what authority have remained hidden in the privatization literature when various practical arguments are raised against privatization.¹²¹

¹²⁰ Shichor, *supra* note 17.

¹²¹ Porter, R. G. (1990). The Privatisation of Prisons in the United States: A Policy that Britain Should not Emulate. *The Howard Journal*, 29, 65-81.

This chapter examines the transfer of the penal authority to punish from the state to the private sector and its impact on the state, social control, punishment and reform. The theory of the state must be central to any analysis of social control and punishment in 20th century capitalist societies since the state has assumed direct responsibility for crime control and the delivery of punishment. Yet a substantial component of this analysis is concerned with how the state is divesting itself of this responsibility. Overall, this chapter illustrates the theoretical concerns surrounding the nature of privatization in relation to the state and social control. The role and function of the state, in relation to privatization and the private sector, is discussed. Also, the effect privatization, and the larger corrections industry, has on transforming and “commodifying” the delivery of punishment and state social control. Privatization, and its accompanying discourse, is also analyzed and is examined in relation to the “new penology” – a contemporary penal discourse emphasizing, like privatization, the low-cost management of offender populations.

Privatization will be presented from a neo-progressive perspective on social control putting into question privatization as an agency for reform or as an alternative to the delivery of punishment. It is argued here that policies of privatization serve to reinforce existing punitive policies and strengthen the state’s legitimate authority in the punishment of criminals and in the control of crime. More generally, this chapter will explore the question: Can the institution of punishment allow for the development of real alternatives to existing practices or will they simply supplement and inevitably expand state practices?

Privatization, Punishment and the State

A central issue concerning the privatization of prisons is the nature of the relationship between the modern state, the private sector and punishment. As Weiss explains, because imprisonment relates directly to the notion of state sovereignty, the private operation of prisons then raises questions concerning the role and meaning of the state.¹²² Cohen remarks that privatization hints at a diminished direct role of the state with large corporations taking over traditional public functions previously controlled by the state.¹²³ Of central concern, however, is the normative question as to whether the state, argued here to hold a legitimate claim over the imposition of punishment, can or even ought to delegate the coercive authority to punish and to control over to the private sector. The underlying symbolic issue is whether it is proper for the delivery of punishment to be placed in the hands of profit-making corporations. As Harding and Ireland remark, the transfer of penal authority from the state to the private sector, raising the fundamental question of “who punishes”, is one of the major themes in contemporary criminology.¹²⁴

It is generally agreed upon that North American and European governments have the constitutional and legal authority to delegate the administration of a prison, via the means of a contract, to the private sector.¹²⁵ At a more theoretical or symbolic level, the function and role of the state in delegating such coercive authority to punish over to

¹²² Weiss, *supra* note 20.

¹²³ Cohen, S. (1985). *Visions of Social Control*. Cambridge: Polity Press.

¹²⁴ Harding and Ireland, *supra* note 22.

¹²⁵ Van Duizend, A. (1998). Should Qualified Immunity be Privatized? The Effect of *Richardson v. McKnight* on Prison Privatization and the Applicability of Qualified Immunity under 42 U.S.C. 1983. *Connecticut Law Review*, 30, 1481-1513.

private, for-profit interests must be examined. To some researchers, using a libertarian interpretation of classical-liberal philosophy, the state holds no legitimate claim over the imposition and administration of punishment. As such, privatization schemes serve to complement or supplement existing state practices, and ultimately reduce state control. Yet to others, the delivery of punishment and the provision of social control is an inherent and symbolic state function which should not be divested. As such, privatization schemes serve to expand and strengthen the reach of the state to punish and to control, and reinforce existing punitive policies.

Classical thinkers and modern theorists alike have challenged this notion that the state holds a legitimate and legal monopoly over the delivery of punishment. Logan, a proponent of private prisons, raises theoretical arguments against this assumption using a libertarian interpretation of classical liberal philosophy. In the 17th century, the nature of the state and the concept of limited government became an important subject of analysis among social contract theorists such as Thomas Hobbes (1588–1679) and John Locke (1632-1704).¹²⁶ Both were concerned with the question as to whether there was a legitimate and secure principle of government. For Hobbes, human beings, based upon their own free will, transfer their rights to the sovereign who in return is authorized to provide internal order and external security. Locke also views the relationship between the state and its citizens in terms of a social contract and claims that a legitimate government requires the consent of its citizens. While individuals do transfer their “natural, political power” to the state to secure order, Locke claims that this power still

¹²⁶ Hobbes, T. (1651/1968). *Leviathan*. London: Penguin Books.; Locke, J. (1692/1955). *On Civil Government*. Chicago: Henry Reguery.

resides with the individual. If the state does not fulfill its task of protecting its citizens then society has the right to dissolve the state.

Thus, a major premise of classical-liberal thinking maintains that political power resides with the individual who delegates this power to those who govern.¹²⁷ Yet the state holds a legitimate monopoly over the enforcement of rules, including punishment, but only so far as protection and preservation. According to proponents of privatization, divesting public responsibility for corrections to the private sector limits the use of coercive power at the hands of the state to these narrow functions of protection and preservation. Ultimately, the source of the legitimate power to punish remains in the hands of society, and as such, "the state has no rights or legitimate powers, not originally held by individuals, and therefore no unique claim to the legitimate use of force."¹²⁸ In this sense, the authority to execute punishment can be delegated to private entities through a contract, just like society has delegated this responsibility to the criminal justice system.

It is through this philosophy that proponents advocate privatization as achieving the ideal of the minimal state. Proponents argue that programs of privatization question the principle of a centralized state monopoly over social order, punishment and control.¹²⁹ Privatization provides more options to the government to exercise its control while at the same time reducing the size and scope of government. For example, Logan argues that the promise of building prisons faster and cheaper and the opportunity to ease

¹²⁷ Held, D. (1984). The Idea of the Modern State. In G. McLennan, Held, D., Hall, S. (Ed.), *Central Perspectives on the Modern States*. England: Open University Press.

¹²⁸ Logan, *supra* note 3 at 239.

¹²⁹ Shichor, *supra* note 17.

overcrowding may enhance the overall functioning of the criminal justice system.¹³⁰ Also, divesting the responsibility of such an intrinsic and costly state function to the private sector will reduce the size and scope of state control. As a result, privatization will strengthen the state's ability to discharge its functions in the punishment of offenders and maximize public safety through incapacitation.¹³¹ According to Cohen, similar arguments are presented by liberals, anti-professionals and anarchists who argue that the once benevolent welfare state has overreached its capacity to control and therefore its power should be limited in order to maximize the autonomy and freedom of individuals.¹³²

Even with more recent strategies of crime control, "the perceived normality of high crime rates, together with the widely acknowledged limitations of criminal justice agencies, have begun to erode one of the foundational myths of modern societies: namely, the myth that the sovereign state is capable of providing security, law and order, and crime control within its territorial boundaries".¹³³ As Garland explains, rising incarceration rates and high crime rates bring forth a series of changes in official perceptions and reactions to crime and in criminological discourse itself.¹³⁴ One such change has been to turn to the private sector and to ultimately redefine the way governments govern. This change in governing is referred to as the "responsibilization strategy". The recurring discourse of this strategy is that the state can no longer be

¹³⁰ Logan, *supra* note 3.

¹³¹ *Ibid.*

¹³² Cohen, *supra* note 123.

¹³³ Garland, *supra* note 20 at 448.

¹³⁴ *Ibid.*

held responsible to effectively prevent or control crime on its own, and must reconsider what is considered a proper state function and what is not. This involves “the central government seeking to act upon crime not in a direct fashion through state agencies (police, courts, prisons, social work etc.) but instead by acting indirectly, seeking to activate action on the part of non-state agencies and organizations”.¹³⁵

This strategy provides a justification for the state to turn to the private sector in times of crisis. Some argue that if the state privatizes its responsibility for crime control then this achieves the concept of limited government and then allows for private involvement in corrections. But Garland argues, this governing strategy of divestment achieves the opposite. It leaves the state more powerful than before with an extended capacity for action and influence. As Garland explains, “the state does not diminish or become merely a nightwatchman. On the contrary, it retains all its traditional functions – the state agencies have actually increased their size and output during the same period – and, in addition, takes on a new set of coordinating and activating roles, which, in time, develop into new structures of support, funding, information exchange or co-operation.”¹³⁶

Garland is not advocating privatization as achieving the ideal of the minimal state. It is an issue of state sovereignty in the control of crime, according to Garland, which is being eroded with the introduction of the private sector, whether the state can divest such a responsibility or not. While the state’s monopoly over the imposition of punishment is diminishing, the ability of the state to punish and control, is not reduced as

¹³⁵ *Ibid.* at 452.

¹³⁶ *Ibid.* at 454.

some argue, but actually strengthened in the face of failure. The private sector challenge to state sovereignty is a fundamental point of contention for critics of privatization who maintain that privatization reinforces state punitive practices while eroding an inherent state function.

According to Ericson et al., privatization is a means of reducing penal expenditures while retaining the use of the penal system in the reproduction of state legitimacy.¹³⁷ The achievement of a “bigger” and “better” system of incarceration, whose legacy has shown little success through private sector involvement, is a risky venture. To many critics, the state simply cannot and should not delegate that kind of coercive authority to private, particularistic interests. As DiIulio asserts, “to continue to be legitimate and morally significant, the authority to govern those behind bars, to deprive citizens of their liberty, to coerce (and even kill) them, must remain in the hands of government authorities.”¹³⁸ Thus, the exercise of coercive power and the delivery of punishment are held to have profound social and symbolic implications which cannot be easily discharged to private interests. The state’s claim to legitimacy is achieved through its ability to punish and control which cannot be easily transferred to private, for-profit interests.

¹³⁷ Ericson, McMahon, and Evans, *supra* note 19. While privatization initiatives reflect a dominant conservative ideology, the reduction of welfare provision and extensive “American-Style” privatization, is not as prevalent in Canada and Britain. Both Canada and Britain, though adopting privatization policies, have maintained a substantial welfare infrastructure that differs from the United States.

¹³⁸ DiIulio, J. J. (1990). The Duty to Govern: A Critical Perspective on the Private Management of Prisons and Jails. In D. C. McDonald (Ed.), *Private Prisons and the Public Interest*. New Brunswick: Rutgers University Press at 173.

Hart's definition of punishment has some basic characteristics to support these claims raised by opponents: there must be a violation of a legal rule, it must be intentionally administered by people other than the offender, it must involve pain and "it must be imposed and administered by an authority constituted by a legal system against which the offence is committed."¹³⁹ This definition of legal punishment forwards the notion then that the provision of law, punishment and social control constitutes a privileged and unique realm of activity that should be provided by the state.¹⁴⁰ Though society does transfer the power to govern to the state, its function is much more than preservation and protection. The state acknowledges that it is solely responsible for the control and treatment of inmates and that it has become increasingly constitutionally and legally bound to that responsibility. According to Shichor, "the *raison d'être* of government is the provision of a legal order which involves the exercise of formal social control. Punishment, including imprisonment, is meted out by the criminal law that is fundamentally a 'governmental social control' and it is administered by a governmental apparatus – the criminal justice system that represents the state."¹⁴¹

Also, while the ideal of the minimal state is intriguing, according to Shichor, such an idea is diminishing due to the increasing complexity of societies.¹⁴² Many social and political realities exist surrounding the delivery of punishment which require state intervention and cannot be left to the imperatives of the free market. This point has been made in relation to the private, non-profit sector (e.g., John Howard Society) whose

¹³⁹ Hart, H. L. (1968). *Punishment and Responsibility*. Oxford: Clarendon at 11.

¹⁴⁰ Matthews, *supra* note 19.

¹⁴¹ Shichor, *supra* note 17 at 46.

¹⁴² *Ibid.*

flexibility and effectiveness derives to a significant degree from state provision necessary for its operation.¹⁴³ As such, punishment is an inherent government function and involves imposing moral and social judgements which simply cannot be removed from the public and symbolic area of corrections.

Yet according to Logan, the state, without totally abdicating its penal authority to private companies may delegate the power to administer punishment.¹⁴⁴ In support of this argument, a distinction is often raised between those who impose the punishment and those who administer it, with the ultimate legal responsibility for the private prison remaining in the hands of government. As Harding and Ireland state, a fundamental distinction must be made in the transfer of penal authority: "the state as a penal agency and the state as a supervisory agency of penal practice."¹⁴⁵ While this distinction has been made in contemporary times, with many countries enabling the private operation of their prisons but holding the state ultimately liable and responsible for a private corporation's actions, a question remains. Is corrections the appropriate place for the profit imperatives of the private sector? And, should the state even divest such an inherent and symbolic responsibility such as corrections? It is argued here that the private sector and the achievement of better prison conditions are fundamentally incompatible. The administration of justice should not be open to private involvement simply because such involvement erodes a core activity that should be carried out by government alone.¹⁴⁶

¹⁴³ Matthews, supra note 19.

¹⁴⁴ Logan, supra note 3.

¹⁴⁵ Harding and Ireland, supra note 22 at 49.

¹⁴⁶ Porter, supra note 121.

The issue of symbolism in criminal justice is also raised as an argument against privatization. As Porter argues, “justice is a condition, and not a service”.¹⁴⁷ An important condition of justice is the public acceptance of the law which will only continue while in the hands of the state. “Just as criminal trials are open to the public so that justice may be seen to be done, so symbolically, the state should be seen to punish those who break the law.”¹⁴⁸ Janus also raises the issue of symbolism, claiming it is of more importance than the substantive questions concerning the cost-effectiveness of private versus public prisons.¹⁴⁹ Privatization can affect symbolism in corrections by introducing “an important new political actor into fundamentally symbolic public decisions...”.¹⁵⁰ As Christie argues, private corporations are powerful political lobbyists whose business is to help expand North America’s already excessive levels of incarceration.¹⁵¹ Concern is often raised over the vested interests of these corporations in demanding tougher penalties and longer periods of incarceration for certain offences in order to increase their ‘client-base’ and thus maximize profits. The delegation of such coercive power to private interests may result in furthering private, for-profit interests rather than public interests in upholding the public good and public safety.

The state, however, should not be misrepresented as a passive pawn when it comes to “doing business” with the private sector. Private sector involvement in corrections provides a way for the state to extend its reach more legitimately and

¹⁴⁷ *Ibid.* at 78.

¹⁴⁸ *Ibid.* at 78.

¹⁴⁹ Janus, M. (1993). Bars on the Iron Triangle: Public Policy Issues in the Privatization of Corrections. In G. W. Bowman, Hakim, S., Seidenstat, P. (Ed.), *Privatizing Correctional Institutions*. New Brunswick: Transaction Publishers.

¹⁵⁰ *Ibid.* at 76.

¹⁵¹ Christie, N. (1994). *Crime Control as Industry: Towards GULAGS, Western Style*. London: Routledge.

reinforces its ability to “punish more” and “punish better”. The private sector has the financial ability and political motivation to expand the correctional system as long as the state is willing to invoke policies that maintain incarceration as the dominant form of punishment. Privatization, in theory, is advocated as reducing the size and scope of the state or reasserting the primacy of liberty and individual rights over that of state or society. While this is intriguing, a more fundamental issue is that of state sovereignty and the state’s inherent responsibility in the delivery of punishment and provision of social control. This raises important conceptual concerns in transferring penal authority and of the nature of the relationship between the state and the penal system which cannot be easily eroded or ignored.

According to proponents of privatization, the issue is no longer whether the private sector should be involved in corrections because it already is and has been for a long time. The question becomes just how much involvement should private enterprise have in corrections. As Logan claims, “the question here is not what function can be delegated, but how much of it.”¹⁵² While Logan claims that the profit-motive provides an incentive for the private sector to remain competitive and flexible, proponents such as Logan ignore more fundamental issues. The broader issues of legitimacy, symbolism and the profit-motive and their effect on punishment, the state, social control and corrections policy must be raised in any discussion of privatization. The question becomes not how far the private, for-profit sector should infiltrate a perpetually

¹⁵² Logan, supra note 3 at 59.

expanding corrections industry, but whether it even *ought* to be involved in handling the two most precious possessions of every citizen – their liberty and their life.¹⁵³

Privatization and Social Control

Since the 19th century transformation of the penal system, from a public infliction of pain to a more private exercise of control and discipline, new knowledge and professional interests have emerged concerning the punishment of offenders. These have ultimately served not to “change” the system but to widen and diversify the reach of the state.¹⁵⁴ As Rothman argues, policies enacted to respond to deviance and deviants over the course of penal history form one of two camps: those who depict such policies as progressive and reformist and those who “now present them as the triumph, in that key phrase, of ‘social control’ ”.¹⁵⁵

Similar distinctions can be made with policies of privatization. Proponents argue that a program of privatization is an efficient and effective means of reforming a failing system of punishment. Bringing corrections into a competitive, free market environment will bring about change and innovation, unencumbered by red tape and inefficiency. As Logan claims, “private prisons should be allowed to compete (and cooperate) with government agencies so that we can discover how best to run prisons that are safe, secure, humane, efficient, and just.”¹⁵⁶ For this reason, privatization initiatives are seen as a panacea for the many-fold problems experienced currently with regards to

¹⁵³ Shichor, *supra* note 17 at 54.

¹⁵⁴ Cohen, *supra* note 123.

¹⁵⁵ Rothman, D. J. (1983). Social Control: The Uses and Abuses of the Concept in the History of Incarceration. In S. Cohen, Scull, A. (Ed.), *Social Control and the State: Historical and Comparative Essays*. Oxford: Martin Robertson.

¹⁵⁶ Logan, *supra* note 3 at 5.

incarceration as a form of punishment. Yet opponents argue that privatization policies, driven by rhetorical claims of efficiency and effectiveness, are not as clear-cut and serve to expand the capacity of the system to deliver punishment. As a result, crime control has become a major industry reinforced by punitive policies that extend the primacy of incarceration as the only legitimate means of punishment.

The form of any penal measure adopted is a reflection of the political-ideological and economic forces prevalent at that time, with various punishment strategies more dominant at some points in time than others.¹⁵⁷ Privatization is one such measure which reflects certain ideological orientations, economic imperatives and predictable rhetorical claims. Privatization favours a political climate of government restraint and demands for more law and order, coupled with rising incarceration rates and costs. Policies such as privatization extend the legitimacy and authority of the state for they complement the willingness of the state to expand its carceral network during times of fiscal restraint. As observed in historical and contemporary times, in the face of rising incarceration rates and costs, the state maintains continued support for punitive penal policies while cutting back in other areas of public expenditure.

In general, advocates present privatization as a means to reform the existing system without reducing reliance on incarceration. Private prisons, it is argued, exist to supplement the functions of the state by providing more options to the government to exercise its control.¹⁵⁸ Through the promise of being able to build prisons more cheaply

¹⁵⁷ Chan, J. B. L., Ericson, R.V. (1981). *Decarceration and the Economy of Penal Reform*. Toronto: University of Toronto.

¹⁵⁸ Logan and Rausch, *supra* note 34; Logan, *supra* note 3.

and efficiently, proponents claim that this will result in an opportunity to ease overcrowding and enhance the overall functioning of the criminal justice system. As Logan argues, “private prisons and jails are not meant to be used in lieu of existing facilities, but to widen and diversify the prison system. One purpose of competition, in addition to cost containment, is to maximize choice.”¹⁵⁹

A common rhetorical claim of proponents of privatization within this framework is the notion of “supplement”, whereby private prisons are seen to be supplementary to the existing system. However, “supplementary”, as Sparks argues, is a “mechanism” whereby criminal justice institutions are most likely to expand their scale of operations.¹⁶⁰ Yet Logan argues that privatization will not lead to increased incarceration rates because private prisons will “anticipate both the nature and the level of real demand” which is determined by crime rates, largely beyond the control of the state.¹⁶¹ Yet the expanding private involvement in corrections is reinforced by the erroneous assumption that prison populations are influenced by external factors such as rising crime rates. Thus, the private operation and construction of prisons will meet this growing demand for more prison capacity while transforming the delivery of punishment into a more “efficient” and “effective” practice.

Yet it is a well-known fact that crime rates do not correlate with incarceration rates. Evidence of this is provided by observing North America’s crime control policies – as their crime rates slowly decrease their incarceration rates continue to rise to

¹⁵⁹ Logan, *supra* note 3 at 10.

¹⁶⁰ Sparks, *supra* note 20 at 25.

¹⁶¹ Logan, *supra* note 3 at 159-170.

unprecedented levels. As such, the state resorts to an over-reliance on incarceration as a crime control strategy while failing to acknowledge that imprisonment rates fluctuate independently of crime rates.¹⁶² Research has shown that levels of incarceration are a function of particular criminal justice policies and are not a direct response to crime rates.¹⁶³ Thus, policies of privatization encourage expansionism and provide a distraction away from more fundamental issues of penal policy – that of crime prevention, public safety and rehabilitation.

The demand for more law and order, coupled with the ideological appeal of privatization, continually opens up new markets for the private sector to infiltrate. Such markets range from the provision of correctional products and services including:

...food service design and management, consulting and personnel management, architecture and facilities design, vocational assessment, medical services, drug detection, and transportation. There are companies that sell protective vests for guards, closed circuit television systems, mechanical and electronic locks, perimeter security and motion detection systems, fencing, flame-retardant bedding, furniture, footwear, lighting, and linen along with shatter-proof plastic panels, tamper-proof fasteners, and clog-proof waste disposal systems.¹⁶⁴

There is a danger, Christie argues, in profiting from the unlimited resource of crime control because the “economic interests of the industry will all the time be on the side of oversupply”.¹⁶⁵ The crime control industry is expanding at an alarming rate creating an “expansive drive in a system already based on privatization”.¹⁶⁶ Christie argues that

¹⁶² Welch, M. (1998). Critical Criminology, Social Control, and an Alternative View of Corrections. In I. J. Ross (Ed.), *Cutting the Edge: Current Perspectives in Radical/Critical Criminology and Criminal Justice*. United States: Praeger Publishers.

¹⁶³ Snacken, S., Beyens, K. (1994). Sentencing and Prison Overcrowding. *European Journal of Criminal Justice and Research*, 2, 84-99.

¹⁶⁴ Lilly and Knepper (1993b), *supra* note 21 at 155.

¹⁶⁵ Christie, *supra* note 151 at 112.

¹⁶⁶ *Ibid.* at 111.

once the penal system is expanded, it perpetuates itself and continues to expand, incorporating new means to extend the state's capacity to punish and to control.¹⁶⁷ Usually if prisons are built, they will be filled up. Policies of privatization meet the demand to build more prisons while stimulating the demand for more punitive policies irregardless of their effectiveness.

For example, the historical analysis of private involvement in corrections, presented in the previous chapter, characterizes punishment as one where entrepreneurs willingly responded to the needs of the state in times of crisis and fiscal restraint. This resulted in extending and expanding the delivery of punishment at little or no cost to the state. As Feeley illustrates:

Merchants responded to the crisis of law and order in the eighteenth century by developing a market in convict labor and developed the system of transportation. When this policy faced problems, shrewd businessmen saw the value of putting surplus naval vessels to good use. As transportation waned and the United States grew, enterprising businessmen and planners responded to the crisis of law and order by exploiting convict labour in the American South and West.¹⁶⁸

Such policies of transportation, convict leasing and the contract system, though "beneficial" and "profitable" to both the state and the entrepreneur in a purely economic sense, were detrimental to the imperatives of rehabilitation and the reform of inmates. Though private involvement is different from that of the entrepreneurs of the 17th century, the impetus behind the movement remains unchanged. Privatization is attractive during times of fiscal crisis and growing offender populations. The state divests itself of

¹⁶⁷ Shichor, supra note 1 at 30.

¹⁶⁸ Feeley, supra note 25 at 6.

the responsibility for crime control to private interests, while strengthening its reach and ability to punish and to control.

The legacy of alternatives to incarceration and recent initiatives, from community control, intermediate sanctions, decarceration and electronic monitoring to prisons-for-profit, have similar intentions and expansionary consequences. Justified under the guise of humanness and efficiency, these alternatives have actually resulted in “the generation of new and expanded forms of social control”.¹⁶⁹ For example, privatization like many other alternatives, justified as an alternative to public sector operations, may be absorbed into the state apparatus to reinforce incarceration as the dominant and the only “efficient” system of delivering punishment. Support for this is seen with the introduction of non-institutional or community-based correctional strategies such as diversion, mandatory supervision and restitution policies. The state, in partnership with the private sector, not only expands its surveillance network, but such strategies serve to complement rather than replace incarceration.¹⁷⁰ Chan and Ericson’s analysis of decarceration in Canada during the 1960’s and 1970’s indicates that, “...decarceration has not turned out to be a cheaper form of punishment. If anything, it seems to have been accompanied by a substantial growth of the criminal control apparatus.”¹⁷¹

Similarly, Cohen argues that policies of decentralization, intended to increase the effectiveness and efficiency of the justice system and the delivery of punishment, have paradoxically contributed to increased state control. Even with privatization initiatives,

¹⁶⁹ *Ibid.* at 2.

¹⁷⁰ Ratner, R. S. (1986a). Capital, State, and Criminal Justice. In B. D. MacLean (Ed.), *The Political Economy of Crime: Readings for a Critical Criminology*. Scarborough: Prentice-Hall Canada, Inc.

¹⁷¹ Chan and Ericson, *supra* note 157.

especially if they prove to be successful, will be co-opted and absorbed into the state's correctional system. The expansionary effects of these alternatives contribute to a phenomenon known as net-widening, which expands the state's capacity to "punish better."¹⁷² The state's scale and sphere of operations is expanded, and as such, the initial reform is covertly viewed as a success for those who have a stake in the social control business.¹⁷³

Yet, unlike decarceration or other reform alternatives, which began with "good intentions" but produced unintended consequences, we cannot safely assume that the profit-oriented, private sector shares these "good intentions". That is, we cannot assume the corrections industry and the state are both unaware of the expansionary potential of privatization, for it is this potential which maximizes profits. Thus, attempts to reform the delivery of punishment, through privatization, cannot be isolated from the ideas of conservative officials and private administrators whose policies are explicitly aimed at extending the reach of the criminal sanction and strengthening policies of incarceration.¹⁷⁴

¹⁷² Cohen, *supra* note 123. Caution must be raised in discussion of Cohen's notion of net-widening for it is not about the omnipotent state forever seeking to extend its tentacle of control. As Garland (1996:457) explains, Cohen's net-widening theory is "not a story about expansionism but rather about a failed reductionism." Net-widening is the unintended result of attempts to scale-down or informalize penalty structures. See Garland, D. (1996). The Limits of the Sovereign State: Strategies for Crime Control in Contemporary Society. *British Journal of Criminology*, 36, 445-471.

¹⁷³ Cohen, *supra* note 123.

¹⁷⁴ *Ibid.*

The Commodification of Social Control – The Role of the Market

Prison privatization so far has been examined in relation to the state and its social control functions. Such an analysis must be developed even further to incorporate the growing corrections industry – turning the state crime control function into a commodity to be sold or traded on the free market. Privatization, in this sense, connotes the transference of power from the public sphere to the private sphere. Commodification, more broadly defined, suggests a process that “generates new forms of power and constitutes new subjects”.¹⁷⁵ In both historical and contemporary times, we have witnessed a “commodification of social control”. Corrections, viewed as a “drain on business”, is now valued as a new area to commodify with entrepreneurs turning large administrative costs into potentially large profits.¹⁷⁶

With the decline of the lone private entrepreneur involved in corrections to the emergence of large prison corporations, a new actor must be accounted for, other than the state, in the area of social control - the market.¹⁷⁷ Social control in this sense is defined as any relevant grouping, the state or otherwise, that is able to employ punishment as part of its organization.¹⁷⁸ This definition allows us to capture the notion that there are political actors, other than the state, involved in the crime control business. According to Lowman et al., the tendency has been to overestimate the role of the state and underestimate the role of the market in capitalist societies.

¹⁷⁵ Ewick, P. (1993). Corporate Cures: The Commodification of Social Control. *Studies in Law, Politics, and Society*, 13, 137-157 at 140.

¹⁷⁶ Weiss, *supra* note 20; Ewick, *supra* note 175.

¹⁷⁷ Lowman, J., Menzies, R.J., Palys, T.S. (1987). Introduction: Transcarceration and the Modern State of Penalty. In J. Lowman, Menzies, R.J., Palys, T.S. (Ed.), *Transcarceration: Essays in the Sociology of Social Control*. Aldershot: Gower.

¹⁷⁸ Harding and Ireland, *supra* note 22.

Cohen's analysis also identifies this erosion of state-centered perspectives on social control by that of the market as a new agent of control.¹⁷⁹ Formal social control systems are moving through a process of re-privatization, introducing the imperatives of the free market as a new agent of control and punishment. This new agent of control is seen with the massive growth of the private security industry, private involvement in corrections and among the "soft-end" or therapeutic side of the control apparatus. Growing at an alarming rate, these various forms of social control are being offered by private vendors. This implies that more and more relationships, human attributes and certain deviant populations are problematized and pathologized, and as a result, are considered commodities for the private sector to control.¹⁸⁰

The role of the market as an agent of control is related to the blurring of private and public spheres through what Cohen labels as the "privatization of social control".¹⁸¹ "The interpenetration between public and private is seen as going back full circle to the link between crime control and other forms of profit-making at the end of the seventeenth century."¹⁸² In this sense, the direct takeover of public control by the market is not the fundamental problem. According to Ericson et al., the real problem is "social control entrepreneurship" whereby "in all forms of capitalism there is a need to create new markets and expand perpetually."¹⁸³ Where there is a demand in the corrections market, the private sector will infiltrate, be it through prisons or through alternatives to

¹⁷⁹ Cohen, S. (1994). Social Control and the Politics of Reconstruction. In D. Nelken (Ed.), *The Futures of Criminology*. London: Sage Publication Ltd.

¹⁸⁰ Ewick, *supra* note 175.

¹⁸¹ Cohen, *supra* note 123.

¹⁸² *Ibid.* at 63.

¹⁸³ Ericson, R. V., McMahon, M.W., Evans, *supra* note 19 at 359.

incarceration. Each successive failure of the state provides yet another opportunity for the expansion of the corrections market. Through the involvement of private enterprise in the corrections industry, the profit-motive dominates, whether this is to make financial gains or to find punishing a “beneficial and useful enterprise”. “State and non-state agencies seem to be working together to foster and facilitate the very things they seek to control.”¹⁸⁴ Thus, the timeliness of an old idea such as privatization is apparent in modern penal policy, discourse and political ideology whose solution is and has been to commodify a system as a principal means of addressing its problems.

The privatization movement is much more than addressing rising incarceration rates and costs through the rubric of progress. Privatization is a means to extend the legitimacy and control of the state during periods of fiscal and penal crisis by delegating the power to punish and to control over to the private sector. As Ratner suggests, “the need for fiscal restraint runs contrary to the apparent requirement for more coercive modes of state control.”¹⁸⁵ Moreover, it is times of fiscal crisis which paradoxically contribute to the expansion of the state control apparatus. In this context, privatization serves to strengthen and expand the state’s ability to punish and control. In effect, by removing government from the delivery of punishment, the inevitable result is the achievement of more state control.

¹⁸⁴ *Ibid.* at 359.

¹⁸⁵ Ratner, R.S. (1986b). Specious Extensions of Social Control in the Canadian Penal System. In B.D. MacLean (Ed.), *The Political Economy of Crime: Readings for a Critical Criminology*. Scarborough: Prentice-Hall Canada Inc.

Privatization as an Agency for Reform

Both Rothman and Foucault argue that reform is integral to any system of criminal punishment, contrasting earlier systems of punishment which legitimated torture, public executions and long periods of incarceration to today's form of intermediate sanctions and discharges. Yet so often the introduction of reforms brings forth unintended consequences which result in, as discussed above, an expansion of the state apparatus in the control and punishment of deviance. As Ericson et al. remark, "ultimately the 'success' of the penal system and its carceral network does not depend on its 'success' through effectiveness research and a morally correct position. Rather, it thrives on a discourse of failure, an assertion that what went before is inefficient and wrong and can only be corrected and improved through progressive alternatives."¹⁸⁶

Over the past decade, the decarceration movement for example, designed to dismantle the centralized and formal apparatus of control to bring about a community-based system which would be less expensive, more effective and more humane resulted in expanding the state apparatus of control.¹⁸⁷ The privatization movement, advocating private prisons as more effective, efficient, flexible and innovative, thrives on a similar discourse of failure. Privatization, as an alternative, is prone to repeat the same cycle of other "progressive alternatives" in expanding the capacity of the state to punish and control through the provision of more prisons and tougher sentencing policies.

¹⁸⁶ Ericson, McMahon, Evans, supra note 19 at 361.

¹⁸⁷ Chan and Ericson, supra note 157; Cohen, supra note 123.

Of course, state officials and reformers claim that privatization does represent progress to a more humane and efficient system of punishment through a more flexible and resourceful private sector. We must, however, remain skeptical in characterizing privatization as an agency for reform which will radically transform the penal system and the delivery of punishment. A historical constant is the fact that the majority of crime and criminality has been handled with the involvement of both the state and the private sector. As a result, the systems of punishment that exist in Europe and North America have yet to be radically transformed. As Matthews argues, "the already extensive involvement of the private sector in the criminal justice system has provided relatively little in the way of innovative or progressive practices. Where the operations of the private sector have been substituted for those of the public sector they tend to look remarkably similar."¹⁸⁸

In fact, the emergence of private prisons during the 1970's and 1980's in the United States and Great Britain, designed to reduce incarceration rates and costs, resulted in these same costs and rates increasing at an unprecedented rate. This resulted in strengthening the state's ability to "punish more" and "better" and guaranteeing the private sector's ability to profit and to expand. As MacLean concludes, "a wider net of repressive social control is produced by expenditures on crime, not by crime itself."¹⁸⁹

¹⁸⁸ Matthews, *supra* note 19 at 15.

¹⁸⁹ MacLean, B. D. (1986). State Expenditures on Canadian Criminal Justice. In B. D. MacLean (Ed.), *The Political Economy of Crime: Readings for a Critical Criminology*. Scarborough: Prentice-Hall Canada Inc at 128.

The Discourse of Reform and the “New Penology”

To fully grasp the nature of reform and its unintended consequences, the introduction of alternatives such as privatization cannot be isolated from shifts in penal discourse. As Ericson et al. explain, “penal reform discourse has conventionally emphasized the ‘holy trinity’ of cost, effectiveness, and humaneness. In the discourse of privatization, however, the moral position of humaneness has been relegated to a marginal place under the dominant theme of efficiency (cost-effectiveness).”¹⁹⁰ One of the main justifications for the privatization of prisons is economic, that the private sector can operate and provide prison services more efficiently and effectively than the public sector. While there is a lack of available empirical support for this justification, the word “efficiency” must not be perceived in this context as a criminal justice objective but rather as an rational and rhetorical justification. As Sparks explains, the delegation of punishment to the private sector does not rest upon “moral evaluations of humaneness but rest [sic] upon actuarial techniques of correctional efficiency”.¹⁹¹

The rational mode of discourse that dominates discussions on privatization is closely related to what Feeley and Simon characterize as the “new penology.”¹⁹² This is a contemporary and administrative form of penal discourse dominating the agendas of many North American governments. The “new penology” assigns primacy to the management of aggregate populations as a penal objective over that of the rehabilitation of inmates. Like the privatization discourse, its prime objective is the low-cost

¹⁹⁰ Ericson, McMahon, Evans, *supra* note 19 at 364.

¹⁹¹ Sparks, *supra* note 20 at 24.

¹⁹² Feeley and Simon, *supra* note 20.

management of inmates. For Christie, there is a danger in this form of actuarial discourse for it further reinforces the state's ability to control and to punish the "dangerous classes" by redefining individuals as management categories.¹⁹³

Under this new penal language, efficiency and effectiveness in the control of offender populations are primary objectives, while maintaining the system at minimum cost. As Feeley and Simon explain:

Under the new penology, recidivism rates continue to be important, but their significance has changed. The word itself seems to be used less often precisely because it carries a normative connotation that reintegrating offenders into the community is the major objective. High rates of parolees being returned to prison once indicated program failure; now they are offered as evidence of efficiency and effectiveness of parole as a control apparatus.¹⁹⁴

The management concerns of the new penology share a close affinity with the discourse surrounding the private management of prisons. Despite the persistent failure of incapacitation, both redefine and reinforce the use of imprisonment as the only cost-effective and efficient strategy in the control of crime and focus on managing growing offender populations at minimum cost.

The undeniable attractiveness of private prisons, from a policy perspective, is that they promise to provide secure custody in a more flexible format and at less cost than traditional correctional facilities.¹⁹⁵ But the concerns of opponents who argue that rehabilitative programs will be compromised through private, profit-motivated involvement in order to maximize efficiency are further reinforced. The new penology,

¹⁹³ Christie, *supra* note 151 at 167.

¹⁹⁴ Feeley and Simon, *supra* note 20 at 455.

¹⁹⁵ *Ibid.*

and its affinity with privatization policies, stresses the management and control of dangerous populations over the need for rehabilitation or personal transformation.

Moreover, this actuarial language creates new objectives in the face of failure and redefines prison as a “social management instrument rather than an institution for effecting the purported aims of the criminal process.”¹⁹⁶ This creates significant market opportunities for private prison corporations whose services provide what the government is seeking under this new penology. This actuarial language also serves to lower one’s expectations about the criminal sanction. The system’s objectives are more in line with those of the private sector and focus on aggregate control and management rather than individual success and failure.

Private prisons are valued as being more flexible and innovative, being able to provide both improved rehabilitative programs and the more effective management of offender populations. Yet, this new form of control is not anchored in aspirations to rehabilitate, reintegrate or retrain, but to generate profits through a cost-effective form of custody and control. As a result, the government, along with private sector, in the face of failure will simply redefine and realign their objectives and expectations with that of the prisons’ ability to incapacitate rather than produce rehabilitative outcomes. As Garland explains:

The promise to deliver ‘law and order’ and security for all citizens is now increasingly replaced by a promise to process complaints or apply punishments in a just, efficient, and cost-effective way. There is an emerging distinction between the *punishment* of crime, which remains the business of the state and the *control* of crime, which is increasingly deemed to be beyond the state in significant respects.¹⁹⁷

¹⁹⁶ *Ibid.* at 469.

¹⁹⁷ Garland, *supra* note 20 at 459.

The question now becomes why we need different justifications and new modes of discourse for a relatively constant practice.

CHAPTER IV

CONTEMPORARY REVIEW OF PRIVATE PRISONS AND THE CORRECTIONS INDUSTRY

As demonstrated in the previous chapter, presenting privatization in the context of a state social control thesis allows us to remain skeptical of privatization as an agency for reform. Such an analysis goes beyond the pragmatic concerns of the privatization debate and provides an important theoretical understanding of the relationship between the state, social control, punishment and the private sector.¹⁹⁸ In this context, policies of privatization serve to extend and strengthen, rather than reduce the capacity of the state to punish and to control. Chapter three extends this argument to the contemporary privatization movement, but does not remain confined to theories of crime control or the role of the state within a national framework.

By situating criminal justice, corrections and privatization, as established institutions, within a wider economic, global and political environment, it will be illustrated how corrections forms a growing international market. Very few researchers have explored this idea that corrections represents an international market forming what Lilly and Knepper refer to as a “corrections-commercial complex.”¹⁹⁹ This is identified as a set of overlapping bureaucratic, political, private and economic interests that encourage at an international level increased spending on imprisonment

¹⁹⁸ The privatization debate and associated issues and concerns is discussed in detail in Chapter 1.

¹⁹⁹ Lilly and Knepper (1993b), *supra* note 21.

regardless of actual need and which serve to shape and expand punitive policies worldwide benefiting big business, private industry and government alike.²⁰⁰

This chapter will discuss the extent of the contemporary privatization movement from a global perspective with a specific focus on the relationship between private, for-profit prison corporations, imprisonment, politics and corrections policy. The universal acclaim of privatization is economic and is viewed as an efficient and cost-effective means of reforming a failing system imprisonment. Yet, other motives and explanations shape policies of privatization. Corrections is a sophisticated industry, founded in a massive corporate infrastructure of private interests, financial incentives and politics. The corrections industry offers a wide range of services and products for the control and confinement of a captive human population. Evidence for this is provided through an examination of the international scene, the politics and corporate context of privatization and the corrections industry.

Though research is limited in this area, this chapter sheds light on the Canadian correctional situation and privatization initiatives which are often ignored in discussions on privatization. Underlying this discussion on privatization is concern over the growing emergence of profit-based, corporate responses towards a persistent penal problem of growing incarceration rates and costs. While it is undeniable that crime is a problem in most industrialized countries and adequate resources are needed to respond to it to ensure public safety, it is highly questionable whether increased methods of crime control, through the private provision of more prisons, are desirable responses.²⁰¹

²⁰⁰ Lilly and Knepper (1992a; 1993b), supra note 21.

²⁰¹ McMahon, supra note 21.

The International Scene

The international corrections market refers to Canada, United States, Australia and Great Britain. As of 1998, there were 132,346 beds in 186 facilities under contract or construction as private, secure, adult facilities in the United States, Great Britain and Australia operating with revenues in excess of \$500 million.²⁰² In Canada, the provinces of Nova Scotia and Ontario have established two for-profit private prisons with two more planned for Ontario.

It was not until the mid 1970's in the United States, and to a lesser extent in Europe, when the privatization movement gained momentum and the idea of for-profit, privately-managed prisons was introduced. Since this time, private involvement has expanded to the operation of adult facilities and in the private construction, financing and design of correctional institutions. Though private sector involvement in corrections varies between different countries, Canada, Great Britain, the United States and Australia share similar political climates and face pressures to expand their prisons as a result of prison overcrowding and rising incarceration rates and costs. Especially in Canada, the United States and Great Britain privatization has become an important issue on the agenda of their respective conservative governments.

While in recent years privatization has become a universal term, it has also come to mean different things to different countries and regions of the world, each one tailoring this initiative to suit particular needs and objectives. We can safely assume that the involvement of private enterprise in all aspects of corrections is linked to the

²⁰² Schlosser, *supra* note 21.

abandonment of the rehabilitative ideal and the growing emphasis on incapacitation as a justification for punishment.²⁰³ Yet the stimulus for expanding private involvement in corrections, though occurring independently on both sides of the Atlantic, has similar, yet reversed origins. In the United States and Australia, and to a lesser extent in Canada, the stimulus came from private entrepreneurs marketing their services to the government as to why government should co-exist with private industry.²⁰⁴ In Britain, the idea of private prisons originated with a conservative think-tank, the Adam Smith Institute. Privatization policies then soared on behalf of an extensive international lobbying effort by major prison companies looking for a slice of the control pie.

In addition, the justifications as to why these countries have shifted towards prison privatization vary. In the United States, the construction and financing of private prisons are justified in terms of rising incarceration rates and prison overcrowding. In Canada, justifications often center around the need for increased efficiency in the delivery of punishment in order to reduce costs and to effectively manage the growing offender population.²⁰⁵ In Australia and Great Britain, while facing dismal prison conditions and growing prison populations, the privatization movement is largely a result of a successful lobbying campaign by influential companies out of the United States.²⁰⁶

²⁰³ Beyens, K., Snacken, S. (1996). Prison Privatization: An International Perspective. In R. Matthews, Francis, P. (Ed.), *Prisons 2000: An International Perspective on the Current State and Future of Imprisonment*. London: MacMillan Press Ltd.

²⁰⁴ McDonald, D. C. (1994). Public Imprisonment by Private Means: The Re-Emergence of Private Prisons and Jails in the United States, the United Kingdom, and Australia. *The British Journal of Criminology*, 34, 29-45.

²⁰⁵ Solicitor General of Canada. (1996). *Corrections Population Growth: First Report on Progress*. Ottawa: Ministry of Supply and Services.

²⁰⁶ Matthews, R., Francis, P. (1996). Prisons 2000: An Introduction. In R. Matthews, Francis, P. (Ed.), *Prisons 2000: An International Perspective on the Current State and Future of Imprisonment*. London: MacMillan Press Ltd.

More specifically in Great Britain, the presumed positive effect of stimulating free-market competition was the main justification used by the Conservative government to foster support for privatization.²⁰⁷

At a pragmatic level, this renewed interest in correctional privatization can be viewed as a response to rising incarceration rates and costs being experienced on both sides of the Atlantic. Especially in the United States, overcrowding is at the heart of the matter. "Law and order lobbyists call for more and longer prison sentences and legislators and judiciaries seem to respond."²⁰⁸ Proponents maintain, from a politically-neutral standpoint, that it is simply about promoting a more "efficient" and "effective" government. Yet such a statement denies the complexity of privatization initiatives. Just like any form of punishment, privatization is intricately linked with a society's political-ideological culture. As Weiss points out, "privatization allows the simultaneous achievement of two cherished neo-conservative ideas which would ordinarily be contradictory: diminution of government and expansion of the repressive apparatus."²⁰⁹

The emerging privatization policies of the 1970's and 1980's were also accompanied by a shift in corrections policy. The rehabilitative ideal was on the decline spearheaded by Martinson's ideological argument that "nothing works."²¹⁰ This anti-rehabilitation trend was replaced with redefined objectives of public safety, incapacitation and deterrence. The outcome of these policies was an unprecedented

²⁰⁷ Beyens and Snacken, *loc. cit.*

²⁰⁸ Porter, *supra* note 121 at 69.

²⁰⁹ Weiss, *supra* note 20 at 273.

²¹⁰ Martinson, R. (1974). What Works: Questions and Answers about Prison Reform. *Public Interest*, 35, 22-54.

increase in imprisonment during the early 1980's and 1990's.²¹¹ This major shift in corrections policy was also in line with public opinion demanding harsher penalties for convicted criminals. The emerging retributive policies share a close affinity with policies of privatization. Both policies aim to reform the corrections system through the promise of increased efficiency and effectiveness in the delivery of punishment, while meeting the growing demand for more prisons. Overall, it is no coincidence that it is those countries with the highest incarceration rates, and the unwillingness to pursue other alternatives, who are turning more and more to the private sector for the private management of their prisons.

United States

The United States declares itself as the “world leader” in the privatization movement. The United States has approximately 102 private, for-profit adult facilities with the largest profits being made in the provision of correctional services, prison construction and financing schemes.²¹² Due to a high number of correctional facilities, growing offender populations and costs and excessive prison overcrowding the United States is the most attractive and accessible correctional market.²¹³ According to Lilly, the United State's federal corrections system is operating at approximately 125% capacity and state prisons at 108% capacity.²¹⁴

²¹¹ Palumbo, *supra* note 18.

²¹² Lilly, *supra* note 13.

²¹³ Lilly and Knepper (1992a; 1993b), *supra* note 21.

²¹⁴ Lilly, *supra* note 13.

While it is often indicated that private prisons incarcerate approximately 3% (50,000), or a small fraction of the total offender population, Bloomer reports that private prisons in the U.S. have grown four times the rate of public prisons and will continue to grow with revenues topping \$1 billion.²¹⁵ What is most ironic is that crime rates in the United States have remained stable over the past 20 years but the number of people behind bars has tripled to 1.63 million (600 per 100,000) which is more than double the 1985 rate of 759,000 (313 per 100,000).²¹⁶

According to Borna, the new era of private, for-profit prisons began in 1975 when R.C.A. Service Company, a subsidiary of R.C.S. Corporation, set up the Weaversville Unit in Pennsylvania for juvenile delinquents.²¹⁷ Limited profits were made on this contract, but R.C.A. stimulated the emergence of a steady and growing number of companies moving into the field of corrections. The most notable of private prison companies to emerge is the Corrections Corporation of America and Wackenhut Corrections Corporation, along with many smaller competitors, whose enthusiasm for the prison market is estimated to be worth approximately \$500 million. R.C.A.'s current involvement in privatization is fairly limited.

The impetus for the privatization movement can also be traced back to when the United States' Immigration and Naturalization Service (INS) entered into contracts with the Corrections Corporation of America (CCA) and Wackenhut for the private operation of INS detention centres. Realizing the private sector's ability to quickly construct new

²¹⁵ Bloomer, K. (1997). America's Newest Growth Industry. *In These Times*, 21, 14-18.

²¹⁶ Ibid.

²¹⁷ Borna, supra note 21.

facilities, along with claims of cost-efficiency and effectiveness over the public sector, corrections soon became a viable area for the private sector to infiltrate. Private industry flourished in the financing, construction and management of new and existing low-security facilities for juveniles and adults and in leasing privately-owned facilities to the government for direct government operation.²¹⁸ Though plagued with criticism over dismal prison conditions, corruption and riots these companies sought to maximize profits and minimize costs in order to remain accountable to their shareholders, not to inmates or public interest. Despite all this controversy, the private prison industry continued to grow and new facilities were opened, including major maximum-security prisons throughout the southern states.

Policies of privatization also ran in accord with the Reagan commitment, during the 1980's, to turn as many government functions as possible over to private industry.²¹⁹ According to Shichor, this ideological commitment was filled with many contradictions. "The Reagan administration emphasized withdrawal and cutting back of state participation from social programs such as health and welfare, but in crime control the conservative agenda was to extend, to expand, and to strengthen the reach of the law."²²⁰ As such, spending on corrections has increased faster than any other category of public spending, and an increasing proportion of this money is going to private companies.²²¹ Because the prison industry has itself become so big, creating a demand for its own services, it needs prisoners to keep it growing. Anderson notes that most often the

²¹⁸ McDonald, *supra* note 204.

²¹⁹ Ethridge and Marquart, *supra* note 21.

²²⁰ Shichor, *supra* note 17 at 59.

²²¹ Bloomer, *supra* note 215.

typical contract between a private corporation and a government agency includes the guarantee of a minimum number of inmates.²²² The United State's government is responding to this condition with its 'war on drugs', longer sentencing policies and a law and order approach to crime control.

Australia

By the late 20th century, Australia had become the second major country to turn to the private sector with renewed interest. Australia currently has three private facilities. Compared to the United States and Great Britain, Australia has the highest proportion (28%) of prisoners housed in private prisons with an average imprisonment rate of 81 per 100,000.²²³ In January 1990, Borallon, a medium security prison opened in Queensland, operated by the Corrections Corporation of Australia, a subsidiary company to the Corrections Corporation of America.²²⁴ In 1991, the Arthur Gorrie Correctional Centre in Brisbane was contracted to the private sector to operate as a remand and reception centre. This facility is under the operation of Australian Correctional Management which is owned by the United States Wackenhut Corporation and an Australian security company ADT. In March 1993, Junee, in New South Wales, the biggest private prison in Australia, was built and is operated by the same companies as Arthur Gorrie. A third state, Victoria, intends to invite tenders for the design, construction and financing of

²²² Anderson, *supra* note 7.

²²³ Beyens and Snacken, *supra* note 203.

²²⁴ Moyle, P. (1991). *Private Prison Research in Queensland, Australia: A Case Study of Borallon Correctional Centre*, 1991.

three new and three existing prisons. The government's objective is to house half of its prison population in privately-managed prisons.²²⁵

The reasons why Borallon in Queensland and Junee in New South Wales, for example, were contracted to the private sector sound familiar. Prisons in Queensland and New South Wales were considered archaic and were overcrowded with poor rehabilitative outcomes and rising incarceration costs.²²⁶ Jim Kennedy, commissioned in 1988 to investigate the Queensland prison system, made the recommendation to increase the participation of the private sector in corrections.²²⁷ Though Borallon emerged out of a larger reform process, Kennedy, a successful businessman, made this a recommendation because of his strong belief in the efficacy and efficiency of the private sector, especially during periods of fiscal restraint.²²⁸ According to Beyens & Snacken, "although the [Kennedy] report provided a justification for involving the private sector in the prison system, it did not deal with more fundamental criminal justice policy options".²²⁹ Often the search for viable alternatives do not become apparent when faced with a "quick-fix" reform such as privatization.

Great Britain

The idea of private prisons first arose in Great Britain in the mid 1980's even though the government had already been contracting for immigrant detention services since the late 1970's. The immigrant detention centre at Harmondsworth, in addition to a

²²⁵ James, Bottomley, Liebling, Clare, *supra* note 78.

²²⁶ Moyle, *loc. cit.*

²²⁷ McDonald, *supra* note 204.

²²⁸ Edwards, *supra* note 12.

²²⁹ Beyens and Snacken, *supra* note 203 at 244.

few others, held close to half of all detained immigrants.²³⁰ These centres were primarily operated by Securicor until 1989 when Group 4 Total Security won the contract. Group 4 is a subsidiary of a large Swedish firm, Securitas International, which has operations in approximately 16 different countries.

According to McDonald, the current developments in the privatization of prisons are not to be considered as an extension of the experience with immigrant detention centres, but resulted from separate initiatives.²³¹ Private prisons arose, in part, due to an extensive lobbying effort on behalf of the conservative members of Parliament, the Adam Smith Institute, along with the leading American private prison company, the Corrections Corporation of America. With the increased persistence of law and order movements and rising prison populations, in addition to the dominance of the conservative right during the 1980's, private prisons had a certain "ideological appeal." As Ryan explains, "to a conservative government which had sustained its initial privatization programme by selling off a whole range of state utilities such as telecommunications and gas, the idea of private prisons had an obvious ideological appeal."²³²

According to Garland, these developments in British penal policy were initiated in the absence of any substantial support from penal experts or practitioners and as such were "driven by a political dynamic rather than a penological one".²³³ What Ryan

²³⁰ McDonald, *supra* note 204.

²³¹ *Ibid.*

²³² Ryan, M. (1993). Evaluating and Responding to Private Prisons in the United Kingdom. *International Journal of the Sociology of Law*, 21, 319-333 at 319.

²³³ Garland, *supra* note 20 at 462.

describes as a timely and well-orchestrated international lobby resulted in placing the issue of private prisons onto the political agenda. This lobby, made-up primarily of American prison corporations, secured a legislative commitment to invite private contractors to tender for the management of a new remand prison, Wolds, in North Humberside.²³⁴ By 1988, the government had published a discussion document, (a Green Paper) which provided a legal basis for experimenting with private sector involvement. The Green Paper recommended issuing contracts to private firms for the construction and operation of new and existing remand centres.²³⁵

Wolds, in North Humberside, was Britain's first private remand prison. The government enacted enabling legislation to expand private involvement from the management of remand centres to the management of existing prisons for sentenced inmates.²³⁶ In 1992, Britain's second private prison, designed for both sentenced and unsentenced inmates, was opened in Blackenhurst. This contract was awarded to UK Detention Services, a consortium of the Corrections Corporation of America.²³⁷ A third prison, Doncaster, opened in April 1994 under the management of Premier Prisons, a consortium of the American firm Wackenhut.²³⁸ The only existing prison to go out for tender was Strangeways. Interestingly, because the Prison Service was precluded from bidding on contracts to manage new prisons, an "in-house bid team" representing the

²³⁴ Ryan, *supra* note 232.

²³⁵ Beyens and Snacken, *supra* note 203; McDonald, *supra* note 204.

²³⁶ *Ibid.*

²³⁷ Ryan, *loc. cit.*

²³⁸ Beyens and Snacken, *supra* note 203.

Prison Service put in a bid to manage Strangeways in direct competition with the private sector and were successful in winning the contract.²³⁹

Great Britain's method of "market testing," turning existing prisons over to the private sector, is only the beginning. The government intends to enhance the role of the private sector by seeking contracts for a number of other prisons. The government's overall objective is to privatize approximately 10% (12 prisons) of all prisons in England and Wales.²⁴⁰ In addition to prisons, the government is also intent on privatizing the business of escorting convicted and unconvicted prisoners to and from the courts and in privatizing a wide range of prison services. McDonald argues that the privatization process will most likely develop more rapidly in England than in the United States because of England's more centralized authority over prisons which permits a more rapid implementation of the reform process.²⁴¹

Canada

The Canadian approach to privatization has been for some time similar to that of the European continent. In the Netherlands for example, the Dutch government, while turning to the for-profit private sector for the provision of services and in the design and construction of new prisons, held that the management of the prison system should remain a core function the state and should not be contracted out.²⁴² The Canadian federal government has also been resistant to the full-scale, for-profit private operation of prisons. Since the 1980's however, as a result of the Nielsen Report, the provision of

²³⁹ Ryan, *loc. cit.*

²⁴⁰ McDonald, *supra* note 204.

²⁴¹ *Ibid.*

²⁴² Beyens and Snacken, *supra* note 203.

food, rehabilitative and medical services and services concerned with the design and construction of new penitentiaries have been largely privatized.²⁴³

Yet unlike its European counterparts, Canada shares a similar socio-political climate with the United States, Great Britain and Australia of rising prison populations and increasing correctional costs. While crime rates have remained relatively stable, Canada currently holds the number two position of a combined incarceration rate of 130 youth and adult inmates per 100,000 for 1996/1997, an increase of 22% in the federal population and 12% in the provincial population since 1989/1990.²⁴⁴ Criminal justice expenditures are also on the rise, especially in the area of youth and adult corrections. Between 1990-91 and 1996-97, federal and provincial corrections spending has increased 9.4% - a total of \$1,969,000 being spent on corrections in 1997.

According to the Corrections Population Growth Report (1998), Canada's federal incarceration rates represent a fiscal and social crisis and if recent trends continue, the penitentiary population could increase by nearly 50% over the next ten years.²⁴⁵ As concluded in the 1977 MacGuigan report, Canada's penitentiary system is in 'crisis' and this crisis cannot be addressed without the immediate implementation of large-scale reforms.²⁴⁶ Back in the 1970's, reforms focused on improving rehabilitative outcomes through alternatives to incarceration. In more recent times, as evidenced in the

²⁴³ Earnshaw, L., Normandeau, A. (1987). Privatization in Corrections: The Canadian Situation. *Crimcare Journal*, 3, 21-31.

²⁴⁴ Solicitor General of Canada. (1998). *Corrections Population Growth: Second Progress Report*. Ottawa.

²⁴⁵ *Ibid.*

²⁴⁶ MacGuigan Report. (1977). *The Report of the Subcommittee on the Penitentiary System in Canada*. For a critical discussion of this report see Friedenberg, E.Z. (1980). The Punishment Industry in Canada, *Canadian Journal of Sociology*, 5(3):273-283. MacGuigan's report was greatly criticized as "an act of bad faith" because it reinforced the ideology that prisons do not work yet sets forth a series of recommendations for the continuation of penitentiaries.

Corrections Population Growth Report (1998), the system's objectives have been reinvented in the form of an actuarial language. This language avoids addressing the failure of the prison system, but reinforces incapacitation in a search for new ways to be more effective and efficient in the management of the growing offender population.²⁴⁷ Privatization, in this context, has a certain ideological affinity and shares a similar discourse. It is a convenient way to provide an immediate answer to a persistent penal problem which, proponents claims, can be solved by better and more efficient management of prisons and services.²⁴⁸

As such, Canada has become an attractive market for prison corporations who "boast" ways to reduce incarceration rates and costs and to improve the efficiency and effectiveness of the correctional system.²⁴⁹ The private prison industry continues to lobby in Canada, and as a result, the overall involvement of the private sector in the design, construction, financing and management of prisons is increasing. The federal government has up to this point no apparent intention of contracting out any new or existing prisons to the for-profit private sector. On the other hand, its provincial counterparts, in Ontario and Nova Scotia, are beginning to turn over the operation of new and existing prisons to the for-profit, private sector.

²⁴⁷ Solicitor General of Canada, *supra* note 244. See Feeley and Simon, *supra* note 20, for a more detailed discussion of the "new penology" in corrections. The new penology in relation to privatization and penal policy is discussed in Chapter 2.

²⁴⁸ Beyens and Snacken, *supra* note 203.

²⁴⁹ Canadian Broadcasting Corporation: The Magazine, "Cash for Convicts." Monday, February 21, 2000. I use the term "boast" to capture a statement made by the International Business Manager for the Wackenhut Corrections Corporation who is in charge of developing an international market for Wackenhut. When asked if he is keeping a watchful eye on Canada, he claimed to be watching Canada's "correctional situation" daily and was confident that Wackenhut has all the answers for Canada's prison woes.

During the 1980's, when countries like the United States and Great Britain were introducing prisons-for-profit, Canadian privatization initiatives during this time were focused on the for-profit and non-profit provision of correctional services (i.e., medical, rehabilitative, educational and vocational). The conservative Mulroney Government, as part of a commitment to reduce the deficit, adopted privatization as an election platform in 1984.²⁵⁰ As a result, the Nielsen Task Force was established to review all areas of government expenditure to determine where Mulroney's policy of fiscal restraint would best be implemented.²⁵¹ One area examined out of the 400 page report was corrections. The report was commissioned in 1986 during a time of growing incarceration rates and costs. The need for economic restraint was instrumental in the report's recommendation to divest partial or full responsibility for correctional services and programs over to the for-profit and non-profit private sectors.

Before 1986, at both the federal and provincial level, non-profit agencies were extensively involved in providing alternatives to incarceration through non-secure facilities such as halfway houses and community treatment centres. The Correctional Service of Canada (CSC) maintained contracts with 160, non-profit, yet privately-owned and operated halfway homes and Community Residential Centres (CRCs). According to Lilly & Knepper, these contracts resulted in a savings of \$19 million.²⁵² The Nielsen

²⁵⁰ Earnshaw and Normandeau, *loc. cit.*

²⁵¹ Nielsen Task Force on Program Review. (1986). *Improved Program Delivery - Justice System*. Ottawa: Ministry of Supply and Services. The Nielsen report is not a report on privatization but is a report on the justice system and recommends the need for community alternatives to reduce reliance on incarceration and does not go so far as to recommend private prisons. The Nielsen Report concerned itself with a comprehensive review of the justice system including not only corrections but parole, law enforcement, emergency planning and justice programs, together with an extensive examination of research funding within the justice system.

²⁵² Lilly and Knepper (1992a), *supra* note 21.

report recognized that savings in these areas were achieved largely from lower overhead costs, reduced salaries and limited programming and staffing. Ironically, the report recommended the further for-profit privatization of food, medical, health and educational services, in addition to expanding the role of prison industry and community-based services.

As a result, CSC currently contracts with the for-profit sector for the provision of medical treatment, education, rehabilitative programs, engineering and technical services, and with the non-profit sector for supervision of and residential services for offenders on conditional release.²⁵³ In terms of the establishment of private prisons, during this time, Canada was not faced with massive overcrowding in its prisons as in the United States. The Nielsen report recommended that Canada maintain a watchdog role and learn from the United State's experience with private prisons. Overall, the Nielsen report saw the private sector (non-profit and for-profit) as holding the best hope of creating needed specialized and diversified programs in community assessments and supervision, specialized treatment programs and community correctional centres.²⁵⁴

The Nielsen report was instrumental in identifying which functions and services the government can or should delegate to the private sector. The private, for-profit provision of correctional services is fairly common and widely supported and does not invoke much controversy or debate, though profits are still being made. Those who support this trend argue that, "the provision of a service is a policy decision and production of a service is an administrative action. That is, government can be

²⁵³ Solicitor General of Canada, *supra* note 244.

²⁵⁴ Earnshaw and Normandeau, *loc. cit.*

responsible for ensuring the ongoing existence of a service by creating laws for its control, maintenance and funding yet allow the service to be 'produced' in the private sector."²⁵⁵ Though services may be provided by an external source, the prison remains under government operation. As such, it is not the government's obligation to provide correctional services but to see that they are provided, and that unless government can provide a service cheaper, the service should be provided by the private sector.²⁵⁶

These arguments are exemplified through British Columbia's correctional privatization framework introduced in 1983. What Harrison and Goose refer to as a "program of restraint" had three objectives: to reduce costs; reduce the number of government employees; and, increase the efficiency and effectiveness of corrections by turning over to the private sector certain correctional services.²⁵⁷ Of course, contracting out with non-governmental agencies for the delivery of certain services was not new to British Columbia, nor to the rest of Canada. But, "the critical new element underlying the privatization strategy was the notion of contracting with profit-oriented companies and organizations to provide needed services."²⁵⁸

By 1987, the experience was summed up as "generally, though not universally positive." Positive because many contracts resulted in achieving the set objectives, and if it were not for privatization, many of these services or others would have been eliminated. Problems were experienced with staff acceptance of privatization, and

²⁵⁵ Sellers, *supra* note 11 at 16.

²⁵⁶ Gandy and Hurl, *supra* note 92.

²⁵⁷ Harrison, E. W., Gosse, M.G. (1987). Privatization: A Restraint Initiative. *Canadian Journal of Criminology*, 28, 185-193.

²⁵⁸ *Ibid.* at 186.

service providers withdrawing from contracts, in addition to a prison disturbance over the quality of food services provided.²⁵⁹

Not unlike their American counterparts throughout the 1980's, during the 1990's, Ontario too has turned to the private sector for the operation of young offender and adult facilities. Ontario currently has one private facility in Barrie, a youth "strict discipline" or "American-modeled" boot camp facility, labeled Project Turnaround. The provincial government intends to expand these privately-operated "strict discipline" young offender facilities by transforming existing youth jails or by building new ones in partnership with the private sector.

In 1998, the Ontario government also implemented a privatization plan to transfer facilities designed for phase 1 young offenders (12-15) to for-profit, private community operators.²⁶⁰ As part of an "alternative delivery process", 99 out of the 104 existing facilities in Hamilton and Ottawa have been successfully transferred with efforts currently underway to transfer the remaining five. Though the government will continue to own these facilities, the private operators are under contract to manage these facilities with a projected savings of 10% in operating costs for the government.

Ontario Corrections Minister Rob Sampson also recently announced his intention to further enhance the role of the private sector by inviting bidders for the operation of

²⁵⁹ Harrison and Gosse, *supra* note 257. See pages 188-192 for a more detailed discussion. In general, staff and union acceptance is a common barrier to programs of privatization who are often the first to protest private prisons. Private companies often cut-corners and reduce costs first by cutting back on staff, administration, and overhead costs. As such, working as a private prison guard brings less job security, poor work conditions, no union protection, and reduced salaries for the same work.

²⁶⁰ Ministry of Community and Social Services (2000). Ministry to Seek New Community Operators for the Last 5 of 104 Young Offender Facilities in Ontario: Communications and Marketing Branch: www.gov.on.ca/CCS/page/news/jan00.html.

three new adult “super jails”. With a projected savings of \$1.8 million for the government, each jail is designed to house 1200 prisoners and use automation and electronic monitoring to reduce costs and staff.²⁶¹ One “super jail” is already under construction in Penetanguishene.

Such moves to enhance private-public relationships in the area of corrections have received a great deal of criticism from opponents who use the United States’ experience with private prisons as an example of what can go wrong. According to some critics, many American institutions, run by the Corrections Corporation of America, have high levels of escapes and inmate violence due to attempts to cut overhead costs and staff in order to maximize profits.²⁶² As such, introducing the profit motive into corrections is of primary concern among critics. Many argue that the achievement of increased efficiency and savings with private prisons is undermined when considered in relation to the vested and profit-oriented interests of private prison corporations. Concerns are raised over public safety and a reduction in the quality of services, in addition to the risk of exploiting a population that is literally captive and virtually voiceless.²⁶³

A third province fostering relationships with the for-profit private sector is Nova Scotia. Nova Scotia’s custody configuration plan or what the government calls a “Co-operative Business Solutions Process” intends to privatize nine “aging” correctional institutions.²⁶⁴ One component of the project, the construction of a new adult facility co-

²⁶¹ Blackwell, T. (1999). “Ontario Asks Private Firms to Bid to Run Super Jail.” *Ottawa Citizen* November 19, 1999, pp. A7.

²⁶² Kenna, K. (1999). “‘You better be damned careful’: Tour of U.S. prisons suggests Ontario should think twice about private jails.” *Toronto Star* November 28, 1999, pp. 1-9.

²⁶³ *Ibid.*

²⁶⁴ Honsberger, F. (1998). Nova Scotia Custody Configuration Project. In S. T. Easton (Ed.), *Privatizing Correctional Services*. Vancouver: The Fraser Institute.

located with a new forensic institution, is currently under way in Metro Halifax. The private sector is most involved in the design and construction phase, in addition to providing medical and rehabilitative services. The Nova Scotia government indicates that it is open to the for-profit private management of an institution if necessary to achieve their objectives.

As such, the role of the private sector in Canadian corrections, especially at the provincial level, is shifting away from non-profit, "soft-end" activities to an uncharted relationship with the for-profit, private sector. Especially in Ontario, the closure of halfway houses and the implementation of electronic monitoring in the early 1990's "signals the government's move away from 'doing business' with non-profit community-based groups, which ran many of the houses, and toward the corporate, commercial and for-profit private sector".²⁶⁵ This is most evident with the increasing involvement of the for-profit private sector in the provision of technology-based systems of control (electronic monitoring), and in the design, construction, financing and operation of correctional facilities most visible at the provincial level in Ontario and Nova Scotia.²⁶⁶ Though other provinces may be turning to the private sector with renewed interest, this is difficult to determine due to the lack of available Canadian research and government publications on privatization initiatives.

²⁶⁵ McMahon, *supra* note 21 at 114.

²⁶⁶ For a more detailed discussion of the implementation of electronic monitoring systems in Ontario in relation to commercial and corporate agendas see McMahon, *supra* note 21.

Corporate Involvement in Privatization: Political and Global Concerns

Current developments in privatization, compared to the 18th and 19th century experience, have two distinct features.²⁶⁷ First, we are seeing the emergence of the private, for-profit management of prisons. Second, modern privatization is being done by corporations which have been formed specifically for this purpose. Another significant feature in the privatization of prisons and correctional services has been the changing nature of private interests. Today's private operators appear to be more sophisticated than their predecessors. Involvement in the prison business has evolved from the sole entrepreneur to the transnational corporation whose investments have been secured over time by the steady supply of convicts, and the willingness of the state to invoke policies which extend the criminal sanction and social control.

As evidenced in the first chapter, the private sector plays an active role in creating a demand for its own services. During the 1970's and 1980's in Canada, the United States and Great Britain, private enterprise was already providing a range of services to corrections such as food, medical and rehabilitative programs. Primarily in the United States and Great Britain, and to a lesser extent in Canada, the resurgence of conservatism and an official concern about expanding correctional populations and costs, private sector involvement focused upon three highly profitable areas: the construction, financing, and operation of correctional facilities.²⁶⁸ In the United States, according to Lilly and Knepper, the largest profits do not come from the private management of public prisons, but rather in the construction and finance of these prisons and in the supply of goods and

²⁶⁷ Shichor, supra note 21.

²⁶⁸ Logan, supra note 2.

services.²⁶⁹ The private sector has aggressively marketed their skill and speed in the construction of prisons. Consider, for example, an advertisement by Bell Construction in *Corrections Today*, a publication of the American Correctional Association:

The Pros and Cons

For more than 20 years we've been building. Building a reputation. Building a client list, and building correctional facilities. That's all we do, we build. And we do it well. Twenty-five correctional facilities worth \$300 million have given us the experience, and now our clients call us the "pros". Are you building or renovating a correctional facility? Are you interested in a design-built facility at a guaranteed price? If you're interested in finding out more about our experience, call....²⁷⁰

Beginning in the United States and Great Britain, and expanding into Australian and Canadian markets, private companies pursued contracts to design and build correctional facilities. These companies maintained they could construct a facility faster and at less cost than the state. Private companies in the United States also provided innovative financing schemes to relieve the constraints placed on state budgets. These schemes involved contracts and lease-purchase agreements which did not require voter approval for prison expansion in a bond referendum.²⁷¹ Christie voices concern over these innovative financing schemes which permit the government to not only meet the demand for more prison places by turning to the private sector, but to also bypass the taxpayer who will no longer be called upon to directly bear the capital cost of building new facilities.²⁷²

²⁶⁹ Lilly and Knepper (1992a; 1993b), *supra* note 21.

²⁷⁰ Christie, *supra* note 151 at 95.

²⁷¹ Ethridge and Marquart, *supra* note 21.

²⁷² Christie, *supra* note 151.

The most controversial area of privatization is the complete operation of a facility by a private company. Such an arrangement emerged during the 1980's in the United States and Great Britain when their respective governments employed private contractors to operate immigrant detention centres. Since then, private facilities have expanded into the areas of juvenile and adult corrections in Canada, Australia, Great Britain and the United States. As Ethridge and Marquart state, the number of adult inmates in privately operated facilities in the United States increased from zero in 1984 to more than 14,000 by 1989.²⁷³ Yet, in the United States, the private management of public prisons, while the most controversial aspect of privatization, is in fact the least significant area of private sector involvement and amounts to approximately 3% of the offender population who are confined to private facilities.²⁷⁴ It is Australia that has the highest proportion of inmates housed in private prisons.

The building and operating of correctional facilities, in addition to the provision of services and products to the private sector, is now a multi-billion dollar industry. The prison industry relies on the steady flow of inmates and the expansion of the prison system to keep up with the demand. Other money-oriented features are the renting out of vacant cells to other jurisdictions who are under court order to reduce their prison populations. For example, according to Schlosser, in 1991, Texas went on a massive prison building spree backed by investors such as Allstate, Merrill Lynch, Shearson Lehman and American Express.²⁷⁵ The result was a rapid oversupply of "bedspace".

²⁷³ Ethridge and Marquart, supra note 21.

²⁷⁴ Lilly, supra note 13.

²⁷⁵ Schlosser, supra note 21.

The solution was to turn to “bed brokers” to recruit prisoners from out-of-state. Thousands of inmates from all over the United States were transported from overcrowded prisons to “rent-a-cell” facilities in small rural Texas towns. For Schlosser, “the distances involved in this huge migration at times made it reminiscent of the eighteenth-century transport schemes that shipped British convicts and debtors to Australia.”²⁷⁶ On a much larger scale, private developers often “cut deals” with impoverished or economically depressed areas to provide the capital to build brand-new jails, offering to run them and share the profits with the government in order to stimulate the economy.²⁷⁷ In fact, many local counties fiercely compete with each other to have a prison built in their community.

The two dominant companies in the corrections industry, Corrections Corporation of America (CCA) and Wackenhut Corrections Corporation, account for 75% of the global market share with operations set up in Great Britain, Puerto Rico, Australia and with powerful lobbying efforts now occurring in Canada.²⁷⁸ As Shichor remarks, this monopolizing corporate trend in private corrections is problematic because a few dominant corporations may influence the standards for the evolving industry.²⁷⁹ Another unique feature of these corporations, that differs from their predecessors, is that their

²⁷⁶ *Ibid.* at 65.

²⁷⁷ Anderson, *supra* note 7.

²⁷⁸ Thomas, C. W., Bolinger, D. (1996). The Big Business of Private Prisons. *The CQ Researcher*, 6, 710. Charles Thomas is a devout proponent of privatization but many critics warn that the views of Thomas must be considered with extreme caution. See Lilly, R.J. (1998) Private Prisons in the U.S., *Prison Service Journal*. Issue 120. Professor Thomas of Florida has been labeled the “dean of punditry” and accused of conflicts of interest for his claims on the one hand for being an independent proponent of the prisons for-profit, while helping funnel more than \$400,000 in contributions from prison corporations to fund The Private Prison Project which he heads. There is an unequivocal connection between Thomas and the prison industry.

²⁷⁹ Shichor, *supra* note 17.

stocks are publicly traded and are one of the fastest growing stocks on the market. Thus, because the corporation's economic performance is under constant supervision by their stockholders, corporate involvement brings forth an array of new motives and vested interests into the field of corrections. As Robbins points out, "privatization is not a panacea; the private sector is more interested in doing well than in doing good."²⁸⁰

Concerns are often raised regarding the political influence of corporations moving into the prison business. To ensure market stability and profit maximization for their stockholders, prison companies have inevitably become powerful political lobbyists in the area of corrections. Prison corporations make large political contributions, contract for top lobbyists and form alliances with powerful law and order advocates such as the National Rifle Association (NRA) in the fight for stiffer sentences and more prison spending.²⁸¹ An illustration of an effective prison lobby was seen in the mid 1980's when the Corrections Corporation of America lobbied hard to persuade the Tennessee Legislature to allow it to assume operation of the entire state prison system on a 99-year lease.²⁸² According to Shichor and Sechrest, though the offer was rejected, the lobby was effective enough for the proposal to be seriously considered.

The Corrections-Commercial Complex

Developments in privatization occurring on both sides of the Atlantic are driven by what Lilly and Knepper refer to as the "corrections-commercial complex" - a network of vested commercial and capital interests which maintain and thrive off the punishment

²⁸⁰ Robbins, *supra* note 15 at 542.

²⁸¹ Bloomer, *supra* note 215.

²⁸² Shichor and Sechrest, *supra* note 14.

industry.²⁸³ Lilly and Knepper assign the United States a role in the globalization of imprisonment - internationalizing and exporting incarceration as the chief legal sanction. Its relationship to other industrialized countries is characterized as one of "correctional policy imperialism".²⁸⁴ For example, the American correctional system has served as a model for Australia and consequently, American firms are involved in the operation of all three of private prisons in Australia. According to James et al., "the extent of direct American involvement in Australian developments has been considerable, including not only the formation of American-linked consortia, but also the appointment of Americans to key management posts in several of the new private prisons."²⁸⁵

The expansion or, to some, invasion of private prison corporations into Australia is described by Baldry as "neo-colonialist".²⁸⁶ Baldry parallels the export of private prisons with the export of nuclear power and toxic chemicals by transnational corporations in the 60's and 70's. In both instances, the motives of these corporations were fuelled by economic imperatives which took precedence over social concerns, individual rights and public well-being. According to Baldry, the expansion of US-based for-profit prison corporations into Australia has been achieved by "concealing vital information and evidence from the receiving country, and has been accompanied by extravagant claims concerning the benefits of the commodity being 'sold'".²⁸⁷ In Australia, the only corporations operating private prisons are foreign owned and,

²⁸³ Lilly and Knepper (1992a; 1993b), *supra* note 21.

²⁸⁴ Lilly and Knepper (1992a), *supra* note 21.

²⁸⁵ James, Bottomley, Liebling, Clare, *supra* note 78 at 12.

²⁸⁶ Baldry, *supra* note 21.

²⁸⁷ *Ibid.* at 161.

according to Baldry, represent an exercise in “entrepreneurial profit-making and colonisation” not one of “social wisdom.”²⁸⁸

These developments must be understood in relation to the expanding international prison market which Lilly and Knepper refer to as the “corrections-commercial complex”.²⁸⁹ This is defined as an alliance between private enterprise and government made-up of overlapping political, economic and business interests that function as a “sub-government” responsible for corrections policy. The key participants in this complex are private, for-profit prison corporations (e.g., Corrections Corporation of America, Wackenhut), government agencies responsible for criminal justice policy (e.g., National Institute of Justice), and professional organizations (e.g., American Bar Association, American Correctional Association).²⁹⁰ As Sparks explains, this complex has a strong political influence over correctional policy. “Many of the companies most keenly interested in prison privatization are defence contractors experiencing a “negative peace dividend,” whose lobbying skills and ties to government are already strong and whom governments may experience a strong political pressure to assist.”²⁹¹

Functioning as a sub-government, corrections policy is developed within this complex due to the influence of for-profit prison corporations from Great Britain and the United States. These corporations join forces to market, and ultimately export, correctional services and incarceration to other countries. Potential “profitable” markets

²⁸⁸ *Ibid.* at 162.

²⁸⁹ Lilly and Knepper (1992a;1993b), *supra* note 21.

²⁹⁰ To many, the close connection between the ACA and the private correctional industry does raise questions regarding the influence on this industry on prison standards. See Shichor, *supra* note 17 at 240-241.

²⁹¹ Sparks, *supra* note 20 at 25.

are countries, like Australia and Canada, with favourable political climates of high incarceration rates and costs and a government willing to devote the necessary resources to sustain policies of incapacitation. As Lilly and Knepper explain, "this [global] relationship is not based on the transfer of correctional policy so much as it is on the joint ownership of corporations that profit from marketing correction's products and services."²⁹²

Often, the operation of a private prison is a joint venture between many corporations. In Great Britain, for example, Beyens and Snacken provide details of the intertwining political and commercial activities of Mowlem and McAlpine, two companies involved in a consortium with UK Detention Services for the Blackenhurst prison contract.²⁹³ As a means to win the contract, both companies made significant political contributions to the Conservative party and McAlpine is a former Conservative party treasurer. Further evidence of a corrections complex comes out of Great Britain again where it has been reported that U.S. firms are involved in certain criminal justice reforms. According to Lilly and Deflem, a US-based firm, already involved in Great Britain's prison privatization and reorganization program, has plans to electronically monitor offenders in their homes in Great Britain from companies located in the United States.²⁹⁴

²⁹² Lilly and Knepper (1992a), *supra* note 21 at 182.

²⁹³ Beyens, K., Snacken, *supra* note 203.

²⁹⁴ Lilly and Deflem, *supra* note 21.

This “complex” of vested interests, financial motivations and political affiliations needs to expand continuously to survive, using their political influence and power to extend social control policies and the use of incarceration. As Lilly and Deflem explain:

The punishment industry contributes to the growth of corrections by introducing new technologies such as electronic monitoring, thus creating consumption desires among corrections officials. In turn, as company profits become increasingly contingent on corrections as a major growth industry in the United States for the foreseeable future, there is a strong economic interest in keeping corrections, especially imprisonment, large.²⁹⁵

The end result is that overcrowding and rising costs will not be the sole pressure on governments to consider private prisons. The international privatization movement subscribes to the idea that incarceration, and policies of retribution over rehabilitation and prevention, can win the “war against crime”.²⁹⁶

Exporting private incarceration as the only viable solution extends the net of social control and reinforces the problem it is intended to solve. Profits can only be generated and maximized by ensuring a steady and increasing supply of “customers”. At the same time, the corrections industry will continue to flourish and expand if governments continue to rely on incarceration. It is the imperatives of public safety, crime prevention and rehabilitation which fade away with the ‘privatization promise’ to deliver more law and order in an efficient and cost-effective manner. As a consequence, both the punishment and control of crime, an inherent and symbolic state function, move

²⁹⁵ *Ibid.* at 15.

²⁹⁶ Shichor, *supra* note 17.

beyond the contours of the state over to the financial and politically-motivated agendas of big business and government alike.

CHAPTER V

CONCLUSION

Privatization, Profits and Corrections Policy

The privatization of prisons and correctional services can only be realized in particular economic and ideological conditions, just as the rise of the penitentiary was accompanied with the emergence of modern capitalism.²⁹⁷ Historically and in contemporary times, it seems that when there is widespread public concern about rising crime rates and increasing offender populations and costs, the search for alternatives to improve the efficiency and effectiveness of corrections becomes paramount.²⁹⁸

Over the course of penal history, one attractive and “quick-fix” solution to address this persistent crisis has been to extend the delivery of punishment into the hands of private enterprise. Yet the problems which continually arise are the same today as they were in the past – problems of corruption, rising incarceration rates and costs, and strong political and financial influences of private enterprise over prison affairs. These problems persist because of the private need to generate and maximize profits at all costs which often supercedes the rehabilitation and basic rights of inmates.

²⁹⁷ Hogg, supra note 42.

²⁹⁸ Shichor, supra note 17.

Punishment, defined by Hart, as the imposition of pain for the violation of a legal rule imposed and administered by an authority constituted by the legal system, is a moral and symbolic concept, not solely a pragmatic or utilitarian one.²⁹⁹ Punishment involves imposing judgements and values concerning what is right and wrong, and is a reflection of a society's ideological orientation.³⁰⁰ It is for this reason that the contemplation and implementation of privatization programs should not only raise alarms amongst academics, but also amongst members of society. Privatization may bring forth a variety of economic and political concerns, but it also undermines the ethical, symbolic and moral responsibility of what prisons and punishment should do for society.

In general, there is nothing inherently wrong with privatization. In Ontario, for example, the collection of waste is done by a private waste management company. The benefits are a more reliable and cost-effective waste collection system. The only consequence is that perhaps one's waste will not get collected. Yet, the privatization of a vital and symbolic public service such as prisons has contradictory benefits and risky consequences. Private, for-profit prisons have the potential to undermine the rehabilitation of inmates and ultimately, public safety.

In fact, many researchers argue that corrections simply should not be privatized because of its ideological significance for society.³⁰¹ Punishment is a symbolic and moral concept and represents the authority and legitimacy of the state and the criminal justice system. The state ultimately acknowledges that it is solely responsible for the

²⁹⁹ Hart, *supra* note 139.

³⁰⁰ Shichor, *supra* note 17.

³⁰¹ DiIulio, *supra* note 138; Ericson, McMahon, Evans, *supra* note 19.

control and treatment of inmates and that it has become increasingly constitutionally and legally bound to that responsibility. The delivery of punishment, argued here to be a state function par excellence, when placed in the hands of private entities raises important concerns surrounding the profit-motive and the public good.

A basic argument is that when private contractors assume the multiple and competing goals involved in corrections, the generation and maximization of profit supercedes the welfare of those incarcerated, the quality and quantity of trained staff and programming and undermines the public goals of the criminal justice system. As Edwards argues, the very nature of the system makes inmates vulnerable to abuse, which is particularly true for individuals who have limited political rights and are deprived of freedom of movement and liberty.³⁰² Often a discussion of privatization ignores one of the more fundamental questions: Should private, for-profit corporations, their administrators, line employees and shareholders profit from the delivery of punishment towards a literally captive and virtually voiceless human population? And, should they be allowed to go so far as to handle the two most precious possessions of every citizen – their liberty and their life?

An interesting perspective on this relationship between the profit motive, the private sector and corrections is offered by Ogle. Ogle examines the problems of prison privatization, the prison industry and profits from an organizational behaviour perspective.³⁰³ The public corrections sector and the private sector are active entities who exist within their own environments. Each face different requirements to ensure

³⁰² Edwards, *supra* note 12.

³⁰³ Ogle, R. S. (1999). Prison Privatization: An Environmental Catch-22. *Justice Quarterly*, 16, 579-600.

their own organizational survival. Public corrections exists within an institutional environment of social, legal and political beliefs whose own survival is ensured by its claim to legitimacy. Correctional organizations have achieved long-term stability and survival by obtaining and maintaining legitimacy over time whether or not offenders were reformed or crime was reduced.

On the other hand, private prison companies are plagued by an “environmental catch-22”. The private sector interacts with two different environments: the institutional environment of corrections and the competitive market environment of business. This creates a significant conflict since the private sector must comply with the requirements of each environment to ensure its own survival. Ogle describes this conflict as “damned if they do and damned if they don’t: financially damned if they conform to the institutional environment, and ideologically damned – socially, legally, and politically – if they do not conform”.³⁰⁴ Private prison companies cannot obtain legitimacy in these environments, so their own market survival is determined by the generation and maximization of profits. But this profit-making method conflicts with the institutionalized environment and belief system of corrections which employs methods to maintain legitimacy, essential to organizational survival. This is the environmental catch-22.

The historical analysis of private enterprise and corrections presented in the first chapter exemplifies Ogle’s description of the incompatibility that exists between prisons and profits and the potential abuses which may arise. Our penal history began as a joint

³⁰⁴ Ibid. at 586.

enterprise between the state and private entrepreneurs, using inmates and prisons as a means for economic development. Yet the problems which emerged around the incompatibility of prisons and profits led to divesting all or the majority of the responsibility for corrections to the state in the 19th and 20th centuries in Great Britain, Canada and the United States.

Private involvement began due to aggressive entrepreneurs creating a demand for their own services through systems of transportation and convict leasing.³⁰⁵ As Ogle demonstrates, private companies were not “passive pawns” in their own environment but employed aggressive methods to generate growth and profit.³⁰⁶ But by the end of the 19th century, private enterprise had disappeared and the state assumed much of the responsibility for corrections. The reasons this occurred, explains Ogle, were that these private entrepreneurs ignored the imperatives of the institutional environment, for the sake of growth and profit essential to their own survival in the market environment, but detrimental to their long-term survival in the field of corrections.

As such, a system of state responsibility for all areas of community protection has steadily evolved throughout history. Are we doomed to repeat the same cycle? The 1980's and 1990's have seen the return of private enterprise in a new market of private prisons and prison construction. This process of re-privatization is a risky business with motives that differ from the humane and public safety objectives of the criminal justice system. This process also has the potential, as observed from history, to foster corrupt practices and to expand correctional policies. According to Ethridge and Marquart, the

³⁰⁵ Feeley, *supra* note 25.

³⁰⁶ Ogle, *supra* note 303.

reasons for prison privatization are the same today as in the 19th century: increasing prison populations and rising costs.³⁰⁷ As such, the goals of privatization are the same in both periods and so are the problems.

Yet there are important differences between the two periods. Ogle's analysis of privatization and organizational theory points out that today's private corporations do not ignore the institutional environment which led to their predecessors' demise. These corporations attempt to "manipulate politics and our institutionalized beliefs and values in order to justify their contractual inadequacies and to survive in the competitive market".³⁰⁸ The inherent danger is that these corporations need to expand continuously to survive and do so by using their political influence to increase and expand social control policies.³⁰⁹

Surprisingly little attention is paid to the failure of criminal justice policies of the 1980's and 1990's. Many point to the monstrous failure of the 18th century penitentiary and the rehabilitative ideal. Yet, few point out that this failure has persisted and has been redefined as a success in justifying both the warehousing of inmates and extending crime control policies.³¹⁰ As Shichor succinctly explains:

The privatization policy continues to promote the failed crime control approach of the preceding years. It subscribes to the idea that incarceration can win the "war" against crime and that the major task is to make this policy cheaper and more flexible. As seen, this policy helps to expand the net of social control and to increase the number of people under direct surveillance. It continues to deal with the symptoms and not

³⁰⁷ Ethridge and Marquart, *supra* note 21.

³⁰⁸ Ogle, *loc. cit.* at 590.

³⁰⁹ Christie, *supra* note 151.

³¹⁰ For those who have, see: Chan and Ericson, *supra* note 157; Cohen, *supra* note 123; Foucault, *supra* note 109; Ignatieff, *supra* note 72; Ignatieff, *supra* note 30; Rothman, *supra* note 99; Rothman, *supra* note 107; Rothman, *supra* note 155; Scull, A. T. (1987). *Decarceration Reconsidered*. In J. Lowman, Menzies, R.J., Palys, T.S. (Ed.), *Transcarceration: Essays in the Sociology of Social Control*. Aldershot: Gower.

the causes of crime. And it impedes the development of alternatives to the prevailing punishment policies.³¹¹

Also of great concern is the changing field of corrections. Corrections has become a growing international industry powered by massive transnational corporations who sell incarceration as the only efficient and effective solution to rising prison populations and costs. Even through the development of alternatives to incarceration, the private sector will infiltrate any area where there are profits to be made, depending on the societal mood and political climate of the day. The current climate is one of rising incarceration rates and costs which serve to justify the need to build more prisons at less cost to the government.

The solution is found in improving the public operation of prisons rather than to privatize them, to allow for the development of a better public prison service. A more efficient and effective public service may be able to develop, without the influence of big business and private interests, viable alternatives to incarceration, reserving prisons only for the most serious offenders. It is policy decisions, not crime rates, which most influence incarceration rates and it is in the area of policy development where private sector companies have the most influence. As such, the profit motive and big business should be kept away from corrections and policy development to ensure that private greed does not contaminate or conflict with the public good, and to ensure that corrections remains a public service not a private business.

³¹¹ Shichor, supra note 17 at 248-249.

Unfortunately, many countries have succumbed to the influence of big business and the need to reduce costs in a vital public service and have implemented programs of privatization without any foresight or hindsight. There is, however, still time for the Canadian government and its provincial counterparts to learn from other countries and realize that the disadvantages of prison privatization far outweigh the perceived advantages. The contemplation or implementation of privatization programs in many countries demonstrates that the state has lost sight of what prisons should do. This is a form of moral bankruptcy which serves to increase the capacity of the system and extend social control policies rather than realign the goals of rehabilitation and public safety with an improved and efficient public sector.

VI

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