## *Guilt and punishment: public policy in Britain*

Harrison, Paul

NAME: Paul Harrison

THESIS TITLE: Guilt and Punishment: Public Policy in Britain

DEGREE: Master of Arts

YEAR OF SUBMISSION: 1994

This research is concerned with public policy on guilt and punishment. The concepts of guilt and punishment are explored in terms of both theory and practice. The work examines the development of penal measures and the main theories of punishing. This provides an insight into the perceptions of policy makers and the influences which effect the shape and development of penal policy. The policies and ideas of the three main British political parties are then considered within the context of the criminal justice system, together with the observations of the Prison Inspectorate. There then follows an inquiry into the latest phenomenon to enter the penal realm - privatisation. The advantages and disadvantages of privatisation are considered before examining the practical, pragmatic, moral and political arguments surrounding the privatisation of punishment. Some reference is made to the American experience of privatising incarceration since penal privatisation in the U.S.A. preceded that in Britain and much is made of the American experience by those in favour of privatising British prisons. This is followed by a case study of Britain's first privatised prison, the Wolds Remand Centre at Humberside, with a view to assessing the performance and operational characteristics of a privately managed prison. Conclusions are then drawn as to the nature, adequacy and coherence of contemporary public policy on punishment.

# Guilt and Punishment: Public Policy in Britain



Paul Harrison

Master of Arts

University of Durham

Department of Politics

1994

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# 1. INTRODUCTION

Punishment is a word with many parasitic or secondary uses. Boxers can take punishment in the course of a fight; ears take punishment from excessively loud music; a car's suspension takes punishment when travelling over rough ground. But these are merely metaphors or images. In its primary or central sense, punishment has a far stricter character. Consequently, it is useful to consider briefly the following etymological analysis.

Professor Antony Flew offers a five-fold definition of punishment[1] in the primary sense, which has come to be accepted as a point of departure for much subsequent discussion:[2]

(i) It must be an evil, an unpleasantness, to the victim.

(ii) It must (at least be supposed to) be for an offence.

(iii) It must (at least be supposed to) be of the offender.

(iv) It must be the work of personal agencies.

(v) In a standard case punishment has to (be at least supposed to) be imposed by virtue of some special authority, conferred through or by the laws or rules against which the offence has been committed.

In Professor Flew's first element, he emphasizes the undesirable nature of punishment for the victim. By saying 'evil' - following Hobbes - or 'unpleasantness' not 'pain', the suggestion of floggings and other forms of physical torture is avoided. Perhaps this was once an essential part of the meaning of the word, but now its employment is less restricted. Professor Igor Primoratz argues that, even in its metaphorical sense, the pain element is simply too narrow.[3] For in our own time, the criminal-law systems of civilized countries as a rule provide for punishments which do not inflict pain or suffering of any kind (either physical or mental) on the convict but deprive him of a good he would want to keep: a fine deprives him of a certain sum of money, a prison term deprives him of liberty for a certain period of time, capital punishment deprives him of life. For this reason, it is better to define punishment as an evil inflicted on an offender, where the word evil is used in the formal sense to mean 'anything that people do not want to be inflicted on them'. In certain cases, it may be that the offender has offended because he wants to end up in prison for a period of time. It may even be possible for someone to commit a murder in order to be

executed (so that their misdeed is an indirect suicide of sorts). But such instances are exceptional. When punishment is defined as an evil inflicted on an offender, reference is made to a code of criminal law which determines the punishments which will be inflicted for various offences. When such a criminal code is compiled, each and every case of punishing an offender is not necessarily considered. Rather, use is made of conjectural conclusions about what people as a rule do not want to be inflicted on them. People as a rule do not want their money to be taken away from them, or to be put in prison and to be made to stay there for a period of time, or even to be hanged. Thus, to inflict any of these things on someone means, as a rule, to inflict an evil on them.

The second of Flew's components highlights the notion of action. The word offence sometimes implies the violation of a moral norm; but most often offences are transgressions of a codified set of rules. If a victim forgives an offender for an injury which was also an offence against some law or rule, this will not necessarily be allowed as relevant to questions about his punishment by the authority whose law or rule it is. Such punishment can operate independently of the moral law, since the offence committed can be in breach of any positive law, no matter whether that law is just or unjust, whether it is an expression of a condition of universal freedom or of a tyrant's

arbitrary will, whether or not it is morally legitimate.

Flew's third constituent of punishment emphasizes the necessary connection between guilt and harm. The parenthesized supposition is of crucial importance to the identity of punishment. There can be miscarriages of justice. A judge, for example, may sentence a defendant who actually has not committed the offence he is charged with. It does not follow from this that the definition of punishment as an evil inflicted on an offender, has to be forsaken. It merely insists that punishment is the infliction of harm on a person believed to be an offender by those who decide on it. Such belief ought to be true, but is sometimes found to be false (in which case the infliction of a penalty is only the pretence of punishment). But even if such adjudications were more often than not false, this would not discount the existence of punishment. It is belief and not merely a selection of facts which is a logical presupposition for punishment. Though merely an expression of usage, these first three elements are supported, as Flew suggests, by a straightforward appeal to the *Concise Oxford Dictionary*, which defines 'punish' as 'cause offender to suffer for offence'. Moreover:

> ...a *system* of inflicting unpleasantness on scapegoats - even if they are pretended to be

> offenders - could scarcely be called a system of punishment at all. Or rather - to put it more practically and more tolerantly - if the word punishment is used in this way, as it constantly is, especially by anthropologists and psychoanalysts, we and they should be alert to the fact that it is then used in a metaphorical, secondary, or non-standard sense: in which it necessarily has appropriately shifted logical syntax (that is: the word in this case carries different implications from those it carries in a standard case of its primary sense).[4]

Clearly, guilt is a logically necessary part of the penal process. If punishment is to be administered then guilt must be ascertained. But guilt is not prescribed simply by reference to a transgression contrary to the penal code. Guilt derives its significance from culpability, and it is this culpability, or level of responsibility, which determines an offender's liability for punishment. Moreover, as Chung Li Ten points out:

> It is an important feature of the practice of punishment that offenders are not punished simply because they have committed prohibited acts. The law recognizes various excuses like accident, duress, and reasonable mistake. Thus

> a person who deliberately kills is guilty of murder, but if the killing was purely accidental then the offender is not punished.[5]

Point four removes the inclusion of misfortunes. Evils occurring to people as the result of misbehaviour, but not by human agency, may be called penalties but not punishments. Thus, as Flew points out: 'unwanted children and venereal disease may be the (frequently avoided) penalties of, but not the punishments for, sexual promiscuity'.[6] Punishment is prescribed by human agencies.

The final element of Flew's definition necessarily removes vengeance from the meaning of punishment. Punishment must be imposed and administered by an authority constituted by a legal or regulatory system against which the offence is committed. As Flew says: 'direct action by an aggrieved person with no pretensions to special authority is not properly called punishment, but revenge'.[7]

In addition to these five elements of punishment in the primary sense, Flew adds the following:

> I *propose* negatively that we should not insist: *either* that it is confined to legal or moral offences, but instead allow the use of the word in connection with any system of rules or laws

> - State, school, moral, trades union, trade association, etc.; *or* that it cannot properly be applied to morally or legally questionable cases to which it would otherwise seem applicable, but instead allow that punishments, say, under retrospective or immoral laws may be called punishments, however improper or undesirable the proceedings may be in other respects.[8]

However, for the purposes of this research, punishment will be examined within the context of public policy. Hugh Heclo points out that there is minimal agreement that, at its core, policy is a course of action intended to accomplish some end.[9] But policy involves inaction as well as action. A policy, like a decision, can consist of what is not being done. Policy does not necessarily separate actions from intentions but addresses dynamics, be they operational or inspirational. Moreover, the differences between intentions, outputs and outcomes are the results of policy formulation or implementation with both phases being subject to events and vicissitudes. What would be, and what is, constitute the character and identity of a policy, and need not be commensurate with each other. While policy is purposive, a statement of purpose does not itself constitute the sum of a policy. The alternative is to espouse the view that

an intention produces a policy regardless of what occurs. As Heclo has it:

> ...while the purpose of the policy-maker is certainly one of the factors creating a policy, his intention may very often not coincide with the policy as it operates in the external world. The term policy needs to be able to embrace both what is intended and what occurs as a result of the intention; any policy which excluded unintended results...would surely be impoverished.[10]

For a policy to be a public policy, it must have been processed, even if only authorized or ratified, by public agencies. The policy may not have been significantly developed by government but it must at least have been partly developed within the framework of government. As Brian Hogwood and Lewis Gunn have it:

> For a policy to be regarded as a 'public policy' it must to some degree have been generated or at least processed within the framework of governmental procedures, influences and organizations.[11]

A public policy is a programme for action in the public sector, often chosen from a number of

alternatives and within the constraints of political circumstances and ideology, and accepted by those responsible for its implementation.[12] Accordingly, this inquiry is concerned with punishment by the state as imposed through the operation of the criminal law. Here there is a system of prohibitions and requirements whose violation leads eventually, after detection and apprehension, to some form of punishment.

The fact that the disciplinary boundaries for the study of public policy are quite fluid is convenient, since it allows the analyst to select some of the more salient, and perhaps contentious, issues for consideration. What is essential, however, is that this study will focus on actions intended or operational, pursued or intended to be pursued, under the authority of governments.

To this end, the thesis will encompass three principal sections. The first will explore the history and systems of penal thought. This involves a discussion of the uses and purposes of punishment from medieval times up to the twentieth century; the problems of punishment in terms of theory and practice; and the main philosophical theories of punishment which seek to provide a moral basis for the justification of punishment. The second section examines the criminal justice programmes of the main British political

parties emphasizing punishment in terms of assumptions and purpose, and including relevant state institutions. In the third section the position of contemporary punishment in Britain is considered together with an appraisal of the adequacy and coherence of proposals for privatisation in the penal system. The concern in this section is to examine the more important issues in the debate surrounding privatising prisons, to move behind the rhetoric and explore the reality of privatisation. To accomplish this, a host of ethical and political considerations are explored. These include the nature of the relationship between the state, the citizen and the limits of punishment; the issue of profit making and punishment; the connection between the interests of private capital and longer prison sentences, and the accountability of the private system in areas such as prison discipline.

The result is threefold. First, the study offers a description of punishment both as a concept and as an institution. Secondly, the research provides an insight into the theoretical debates concerning the justification or necessity of penal measures, and the political debates concerning the efficacy of penal policy. Thirdly, the work gives an exposition of the nature of privatisation, considering the impetus, direction and desirability of private sector involvement in the criminal justice system.

**Notes**

1. Professor Flew's analysis of the concept of punishment was first given in his article 'The Justification of Punishment', *Philosophy*, 1954, vol.29, no.111.

2. This is argued by Rudolph J. Gerber and Patrick D. McAnany (eds) in *Contemporary Punishment* (University of Notre Dame Press, London, 1972), p.31.

3. Professor Primoratz gives an exposition of his reasons for this in *Justifying Legal Punishment* (Humanities Press International, London, 1989), p.2.

4. A. Flew, *op. cit.*, pp.293-94.

5. C. L. Ten, *Crime, Guilt and Punishment* (Clarendon Press, Oxford, 1987), p.5.

6. A. Flew, *op. cit.*, p.294.

7. *Ibid.*

8. *Ibid.*, pp.294-95.

9. H. H. Heclo, 'Policy Analysis', *British Journal of Political Science*, 1972, vol.2, p.84.

10. *Ibid.*, p.85.

11. B. W. Hogwood and L. A. Gunn, *Policy Analysis for the Real World* (O.U.P., Oxford, 1984), p.24.

12. I am indebted to Professor Richard A. Chapman for this definition of Public Policy.

# 2. HISTORY AND SYSTEMS OF PENAL THOUGHT

From earliest recorded times to the middle of the eighteenth century, the social reaction to the offender or untolerated deviant was exclusively in terms of the welfare of the victim, whether this meant an absolute monarch or the individual, and the community. Whether the major emphasis was on deterrence, disablement, retaliation, or social defence, the attitude towards the offender was relatively undeviating: he was seen as a person who, by the act of offending, had forfeited his claim to social concern. This disregard for the offender remained unchallenged for centuries until the moral and intellectual upheaval of the Enlightenment[1], when it came under sustained attack. The Enlightenment, or Age of Reason, was the era characterised by the emergence, in eighteenth century France, of progressive and liberal ideas that led to revolution and remained influential in western philosophy. The Enlightenment included the ideas of a diversity of philosophers such as Rousseau and Montesquieu, Voltaire and Diderot. It aimed essentially to emancipate human reason from the thraldom of prejudice and superstition, and to apply it to the cause of social and political reform. Increasing scientific knowledge gave rise to the development of empiricist, naturalist, and materialist doctrines and strong opposition to

clericalism. Ignorance of nature was perceived as a source of unhappiness. Nature was taken to make men neither good nor evil but malleable by education and experience. Reason was understood as showing man's need of others and as the foundation of moral systems determined by what is useful to a society. Politics had to conform to the essence and aims of society, not to the passions of rulers. It was an age that saw the power of man over man as being justifiable only by utility; education and legislation can be effective only when men are convinced that their interests will be served thereby.

This was only the starting point. Penal thought was to reveal an unfolding identity with many variations, not all of which were commensurate with each other. The intention of this section is, therefore, to identify and appraise the more salient theories of how to punish as they have manifested themselves while paying attention to the political and intellectual milieu of their time. To this end, the exploration will begin with the medieval era (from the fifth to the sixteenth century) since this was the final epoch in a long tradition of punitive action against the individual, a tradition which was to bring punishment to the crossroads.

Richard Korn and Lloyd McCorkle point out that:

> With temporary and local exceptions, each succeeding century of the medieval period saw an increase in the severity of all forms of punishment.
>
> By the fourteenth century the most common penalty cited in continental records was death. As the number of crimes punishable by death increased, there was a corresponding increase in the ingenuity and variety of techniques of execution... Death by burning, suffocation, drowning, poisoning, impalement, fracture (breaking at the wheel), and burial alive was refined to the point where execution had become a profession combining many characteristics of an art, a science, and a public spectacle.[2]

They go on:

> Certain executioners achieved a wide reputation for a particular speciality and were numbered among the foremost public entertainers of the day. The city of Hanover developed a speciality in which death was inflicted by wasps. Later this method was refined to provide a slower death by ants and flies - an innovation that increased audience appeal by prolonging the length of

> entertainment. The ingenuity and technical skill of the executioners is suggested by the complexity of the instructions they were required to follow. Sometimes the victim had to be kept conscious for a considerable period, during which a detailed sequence of tortures and mutilations was carried out. In order to follow these instructions, the executioners were required to master the art of preserving life while they destroyed it. It was one of the age's ironies that the anatomical knowledge and sheer medical competence of the executioners often rivalled that of the doctors of the day.[3]

Second in frequency to the death penalty was the punishment of mutilation. Dismemberment, castration, disfigurement and blinding were the main divisions of a catalogue of atrocities. For lesser offences, public humiliation was a common penalty. This included exposure in the pillory and the enforced wearing of headgear and other distinguishing symbols of degradation. Corporal punishment was relatively infrequent during the medieval period: whipping and birching were chiefly restricted to children.

However, not all penalties involved direct bodily harm:

> The penalty of banishment was frequently pronounced against persistent minor offenders, beggars and local nuisances. Because of the small size of most medieval communities, this punishment was not as severe as it later became... Nevertheless, the banished offender suffered, as well, the confiscation of his property - which, in the case of the poor, who were the principal objects of this penalty, usually amounted to little. In any case, a punishment which spared life and limb during this period was to be looked on as a comparative act of clemency.[4]

As punishments in themselves, fines and confiscations were most often applied to merchants and landholders as a means of raising revenue for the king or the local overlord. They were also used as an instrument of bureaucratization, to enforce legal procedures in local courts. Prior to the eighteenth century, except for certain categories of heretics, imprisonment was not generally viewed as a punishment and was used chiefly as a method of detaining suspected offenders before trial.

Severe as they were, medieval punishments were both uncertain and capricious. Similar offences would receive widely different treatment, varying from extreme cruelty

to equally extreme leniency. From the late medieval period into the Renaissance[5], the main focus turned from the punishments themselves to procedure. As before, death, mutilation, humiliation, banishment, and fines remained the basic response of the political community towards its offenders.[6]

In 1764, the Italian Cesare Beccaria (Cesare Bonesana Marchese di Beccaria) published a treatise entitled *An Essay on Crimes and Punishments*. This book which has repeatedly been called the single most consequential work on criminal justice[7], created a sensation, its thrust being accepted by numerous European monarchs and liberal scholars alike. The vitality and resilience of Beccaria's proposed reforms had several sources. In the first place the reforms were not merely negative. Beccaria and his supporters had a positive philosophy complemented by administrative proposals to replace the barbarism and abuses they attacked. The kernel of this philosophy was a radically new conception of the relationship between man and the state, from which there followed a new conception of the role of law and the proper function of punishment.

This new formulation of the relationship between state and individual was based on the theory of social contract. This theory, elaborated earlier by Hobbes,

Locke and then later adapted by Rousseau and others, rejected the doctrine that man owed any absolute obedience to his government and insisted that the obligations between the two were both mutual and analogous to a contract voluntarily entered upon by free agents. It was the obligation of the state to protect the safety and to promote the happiness of its individual members. In return for these services it was the obligation of the individual to circumscribe his natural liberty in obedience to the valid laws of the state.

The purpose of punishment was to protect these laws and the social benefits they provided from abuse by individual members. To secure this end most effectively, the proper objective of punishment was not to exact vengeance but to deter the individual from committing crimes. This aim, in turn, could best be achieved by adjusting the degree of punishment to the crime in such a way that the threat and unattractiveness of the penalty would exceed the advantage and temptation of the offence in the mind of a rational and responsible being.

Beccaria accompanied his positive philosophy with a penal programme to carry it out. The method was to be imprisonment for a stated period of time, this system offering a less barbaric and more flexible approach to adjusting punishments to crimes. The instruments of this

programme - the gaols and houses of correction - were already at hand and under utilized at that time. This was the foundation of Beccaria's philosophy and signalled a watershed in the general use of imprisonment. Any form of punishment requires that the offender be detained in some manner until the execution of his sentence; where there were delays between trial and the execution of judgement, it was necessary to find some secure place to detain the offender. In such instances detention was prior to, but not part of punishment. Isolated instances of punitive incarceration did appear in the early middle ages. As early as 1275 the English Statute of Westminster punished the crime of rape with two years' imprisonment, but incarceration was the exception not the rule. Beccaria's philosophy revised this utility. Moving away from the tendency to use imprisonment as an administrative expedient, detention was to become a formalized punishment.

The enlightened approach to punishment had two significant effects, one technical, the other ideological. By the end of the eighteenth century there was a general consensus favouring penal incarceration as the humane and effective alternative to previous forms of punishment. To this technical solution was added the notion that penal measures, in addition to protecting the community, should also improve the offender. By the

first half of the nineteenth century the single method of imprisonment had become the principal form of punishment. However, many of the old forms of corporal punishment persisted, being re-defined as disciplinary techniques within penal establishments.

Prison was originally seen as a deterrent but as time wore on there developed a growing awareness that the prison was falling far short of achieving the universal effects envisaged at its inception. This rising criticism was given impetus by a new theory of criminality which attacked the heart of the doctrine on which the eighteenth century reformers (often referred to as the Classical school) had built their hopes. As Korn and McCorkle say:

> The heart of the Classical doctrine was the idea that crime is a deliberate act based on the criminal's rational estimate of gains against risks. By nicely calculating the length of imprisonment to be assessed against each offense (a longer period for graver offences, a shorter period for lesser), and by making sure that punishment was swift and certain, the eighteenth-century reformers felt they would achieve a maximum of deterrence and a minimum of injustice. Pointing to the undiminished recidivist rates,

> the new theorists (known as the "Positivists") advanced the doctrine that the criminal act is both non-rational and, at bottom, non-volitional as well, and that the criminal is actually suffering from some form of disease that prevents him from taking rational advantage of the careful calculations framed for him by the Classical School.[8]

On this account, crime is seen as a form of sickness. Hence, it cannot be expected to respond to punishment. Indeed, if it is accepted that criminal actions are neither rational nor volitional then the response to such behaviour can not be called punishment in the primary sense, and the whole idea of punishment is inappropriate to it. The only cure, it would seem, is some form of treatment - treatment based not on the character of the offence but on the condition of the offender.

This was to introduce a moral dilemma. By the end of the nineteenth century there were only two classes of those penally incarcerated: the hospitalized insane and the institutionalized criminal. The plight of hospitalized mental patients was improved by the liberalization of laws together with the growing professionalization of treatment. By contrast, there was little alleviation for the confined malefactor. The growing social awareness of

the problems and responsibilities of social welfare was offset by the persistence of the age-old attitude that the criminal deserved his suffering.

The basis of this traditional view was that the criminal was in full voluntary control of his behaviour. Even the criminal law exhibited this principle as the basis of criminal responsibility. From Beccaria to Bentham, none of the early reformers had mounted an assault on this assumption. Their indictment of earlier forms of punishment was founded on the idea that the infliction of suffering should be made more deliberate, more uniform, more scientific, and less personally degrading and physically destructive.

Towards the end of the eighteenth century this unitary doctrine of moral culpability was undermined by changes in attitudes towards criminals. By the second half of the nineteenth century such new perspectives, were spurred on by developments in psychiatry. In an important work published in 1874 Henry Maudsley suggested that:

> With a better knowledge of crime, we may not come to the practice of treating criminals as we now treat insane persons, but it is probable that we shall come to other and more tolerable

> sentiments, and that a less hostile feeling towards them, derived from a better knowledge of defective organisation, will beget an indulgence at any rate towards all doubtful cases inhabiting the borderland between insanity and crime; in like manner as within living memory the feelings of mankind with regard to the insane have been entirely revolutionized by an inductive method of study.[9]

Once the notion that the criminal may not be wholly responsible for his actions was accepted, the possibility arose that those who inflicted the pain rather than those who endured it were morally culpable.

By the beginning of the twentieth century this possibility had become a certainty for some. In his book, *The Crime of Imprisonment*, George Bernard Shaw suggested that:

> ...the thief who is in prison is not necessarily more dishonest than his fellows at large, but mostly only one who, through ignorance or stupidity, steals in a way that is not customary. He snatches a loaf from the baker's counter and is promptly run into gaol. Another man snatches bread from the tables of hundreds of widows and

> orphans and simple credulous souls who do not know the ways of company promoters; and, as likely as not, he is run into Parliament... Much of the difference between the bond and the free is a difference in circumstance only: if a man is not hungry, and his children are ailing only because they are too well fed, nobody can tell whether he would steal a loaf if his children were crying for bread and he himself had not tasted a mouthful for twenty-four hours.[10]

Shaw went on to suggest that imprisonment is a corrupting experience likely to turn a 'normal man' into 'the criminal type'. Shaw's refusal to admit any real difference between the criminal and the free man illustrated a major transformation in attitude among increasing numbers of influential people. The centuries-old notion that the criminal was basically different from other people was now substantially repudiated. One consequence of this analysis would be to render both the traditional factual and moral basis of punishment untenable. The moral indignation that had previously been mobilized against the deviant as an enemy of society now became, itself, an immoral attitude. In effect, the prisoner was now the victim, and those who punished him the true offenders.

## 2.1 THE POLARIZATION OF PENOLOGY

From the relative barbarity of medieval times to penological thought in the post-war era, two extreme theories have increasingly dominated public debate. These two theories, in addition to their over-simplifications of the problem, have effectively polarized social attitudes and simultaneously prevented an objective search for alternatives. One theory is either 'for' or 'against' the prisoner and correctional progress; one is either on the 'side of society' or on the side of the prisoner.

The 'progressive' school of thought would attribute high rates of recidivism to the fact that penal reform has lacked intensity both in its development and application. This position ascribes the increased levels of violent disturbances in modern prisons to the continued rigour and harshness of prison life. Recidivism is similarly explained: having been demoralized in prison, malefactors re-emerge into a society which continues to reject them and to deny them the essentials of a meaningful and law-abiding life.

Conversely, the traditional or 'reactionary' argument can be represented as follows:

> The criminal was violent and dangerous when he was on the street - long before he got into prison. The effect of the modern reforms has been to make prison life more and more like life on the street, where the criminal was at his worst. What, then, is more natural than for the criminal in prison to behave more and more as if he were outside? He was "bad" before he came in - largely because he had been spoilt and pampered. He will be "worse" when he comes out, after being spoilt and pampered even more. The essential thing to do is to stop spoiling him, to get tough with him, to "teach him his lesson," to show that "prison is no picnic," and that he "can't get away with pushing people around."[11]

Part of this conflict and polarization stems from a critical difference between the original enlightened reformers and the new movement spearheaded by the Positivists. The earlier reformers possessed not only a new theory but a new method by which to effect it: imprisonment. While the later reformers also presented a new theory, they were unable to formulate a sound and popular method for carrying it out. Whereas the Classical reformers had presented an acceptable alternative to the barbarities they attacked, the new

theorists were unable to offer a radical alternative to imprisonment. Despite internal adjustments and a number of name changes for old and new institutions, the major method for the treatment of offenders remains basically the same as the proposed reforms of the eighteenth century: mass incarceration.

Though punishment has become more civilized, it still cripples many people and destroys their lives, albeit metaphorically. Even though it is acknowledged that if crimes went unpunished the standards of civilization currently enjoyed could not be hoped for - an ambition for achievement would be replaced by an obsession with survival - this does not alter the fact that criminal punishment produces much misery. It is the truth expressed in Bentham's observation that 'all punishment is mischief: all punishment in itself is evil'.[12] Like any other necessary evil, criminal punishment needs to be justified.

## 2.2 THE NEED FOR JUSTIFICATION

If a practice needs justification it must be thought to have something wrong with it or at least has the potential to be wrong. To justify is to offer reasons for doing something accepted as valuable. It is

necessary, therefore, to at least specify the circumstances in which the execution of a given practice is right. Punishment in the primary sense is not in need of justification because justification is part of the definition of punishment. Punishment is the purposeful infliction by some authority upon an offender of a penalty for the breach of a rule or law constituted by that authority. However, it is the purported aims of punishing that is contentious. If a practice is taken to be wrong and not simply thought to have something wrong with it, it is not in need of justification. So if something requires justification it is first necessary to show that there is something right about it which has a redeeming tendency and that might, after due consideration, redeem it.

In a non-sadistic culture the deliberate infliction of death, pain or other harm is seen as requiring a very strong justification if it is not to be condemned. Dentists and surgeons, who knowingly cause pain, are tolerated only because they are believed to be conferring a benefit which outweighs the pain. If the benefit is doubtful or non-existent, toleration very quickly turns to censure. This is why the manner of delivering punishment requires justification.

A practice is justifiable in principle if it would be justifiable when carried on as intended with intended results. Whether there is success when actually engaged in is irrelevant to its justification *in principle*, for justification in principle is a purely hypothetical determination that does not concern itself with the facts. Punishment requires that an offender be liable but it is justification of the mode of punishment *as it is engaged in* that is called for. This is justification in practice, in contrast to justification in principle, and success or failure of the practice is then of crucial importance in deciding whether it is justifiable. When the practice engaged in is a useless one, then it is not justifiable.

Justifications of punishment all perceive some given necessity which makes it right in spite of the suffering and degradation it produces. Though there are different ideas of what that necessity is, all of the justificatory arguments are arguments from necessity. Any theory that would take punishment to be a good thing simply in its own right - like care for the sick - is not a justificatory theory at all, and purports to show that justification is not necessary, making the bizarre inference that an evil is, by nature, good. Certain retributivist theories are often charged as such, for they are non-consequentialist and hold that repaying

crime with punishment is simply doing justice and is a good in its own right. Such prescriptions typically involve an appeal to justice. However, to take such a view is to walk the thin line between vengeance and retribution, since retributivist justifications can be both subtle and abstract.

When measures taken by the state in a society that professes what might loosely be called liberal democratic ideals deprive citizens of their liberty and in other ways cause them to suffer, it is not enough simply that in themselves these measures are morally right. This is so because to claim a legitimate right to oblige others to do unnecessary harm to one another is to bring morality, and therefore, legitimacy, into contempt. Hence, the logic of the perceived necessity to punish is the key to the problem. It is, perhaps, useful at this stage to explore the idea of punishment together with some of the more salient rationales offered for its practice.

Punishment, to be kept distinct from vengeance, must be inflicted by an authority. Private vengeance is a source of injustice and inhumanity as well as a social disorder, since the wrong person may often be seized as the guilty party, and whoever is seized is likely to be treated according to the dictates of a vengeful passion instead

of in a way prescribed by rational and principled mandates of law. The very possibility that this might happen would have a profoundly anti-social effect in the community. Violence in response to acts of vengeance, or even in anticipation of them, may become as abundant as the acts of vengeance themselves. Thus, to the extent that publicly controlled retaliation is a more orderly and sophisticated response to crime than the private option, there is some direction towards justifying the social institution of punishment.

Punishment as a practice has a number of often cited justifications. It can be seen as an emphatic denunciation of anti-social practices, an instrument of moral metamorphosis - reforming the character of the offender, or a method of social protection. But these are only subsidiary justifications which may be appended to one of three competing theories. Though not wholly exclusive these theories have remained more or less distinct and will be appraised as such.

## 2.3 RETRIBUTION

This holds that the justification for inflicting a penalty is solely that the offender deserves it because he or she has committed an offence. The pure

retributivist also believes that the severity of the penalty should match the offender's culpability. Culpability varies according to the gravity of the harm done, intended or consciously risked, the offender's motives and any circumstances relevant enough to mitigate or aggravate it. The other important version of the retributive point of view can be called 'distributive'. It insists merely that a penalty should not be inflicted on a person who has not culpably broken a rule. It does not insist that the severity of the penalty should either match or be limited by culpability. Distributive retributivists are able to compromise with holders of non-retributive points of view. This is because their views imply some other, non-retributive justification for penalties, since all the theory offers are principles for restricting punishment, not reasons for imposing it. Only the pure retributivist, who argues that penalties should be imposed because they are deserved, is offering a justification of them.

In one respect retributive theories of punishment do not regard rehabilitative or utilitarian theories of punishment as being definite enough or absolute enough. Guilt becomes problematic in both cases. In the rehabilitative cases where rehabilitation is linked to a medical model, guilt becomes problematic just because of the view about the causation of criminal behaviour; in

certain instances of utilitarianism, guilt is not a necessary condition of punishment, though strictly speaking, without guilt there cannot be genuine punishment. In addition, the pure retributivist believes that basic types of punishment exhibit only a very shallow commitment to humanitarian concerns because they are both inherently manipulative.

In the case of the rehabilitative ideal the process of punishment can become particularly discretionary, and as a result of that professionalized, so that the way a prisoner is dealt with is not only determined by reference to empirical reality (past crimes) but also by hypothesis (predictions of future actions). Utilitarian theories are also inherently manipulative because the explicit rationale for punishment is that it will involve doing something to a person which will have as its explicit aim the good or the welfare of others, that is, the rest of society.

Both Kant and Hegel viewed the humanitarianism of the utilitarian approach as rather shallow. Inflicting pain or therapy as a form of social control infringes the right of the person to be treated as an end in himself and not solely as a means to the ends of others. Kant argues that:

> Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else... He must first of all be found to be deserving of punishment before any consideration is given of the utility of this punishment for himself or his fellow citizens.[13]

Desert for Kant is therefore a central moral notion in thinking about punishment, and desert implies agency and responsibility. One can only claim to deserve something on the basis of things for which one can claim at least some degree of responsibility. Thus, Kant places a very strong commitment to human responsibility at the centre of his theory of punishment. This is parallelled by Hegel who suggests that punishment is the right of the offender.[14] It is an affirmation of the person's status as a human being and not just something to be controlled.

For retributivists, therefore, punishment is justified on the grounds of desert alone, and should be meted out in the light of the gravity of the offence. The length of sentence should be based upon what the crime deserves and

not on the basis of whether the offender has reformed or not.

Kant is arguing that desert is not only a necessary condition of punishment but also a sufficient one. If a person is found guilty of a crime then not only does his guilt make it possible to punish him, it makes it necessary to do so. This necessary and absolute nexus of guilt and punishment has no hiatus, for if it did it would be in danger of lapsing into utilitarianism. To look beyond the committal of an offence for a rationale or justification is to turn to utilitarian grounds which defeat the Kantian principle of respect for persons since they inflict punishment in a manipulative way. Thus, either the principle the guilty ought to be punished has to be taken as a fundamental moral intuition, or else the rationale for accepting it must be, broadly speaking, utilitarian.

Kant's theory of political obligation is contractual, emphasizing the notion of reciprocity. The laws of a just state are laws which would have been chosen by any rational person to govern social relationships in a position of initial choice. Such laws would, in Kant's view, embody both a degree of self-restraint and benefit. Since no person could know in advance whether he or she would be able to benefit under a system without law it

would be in his or her interests to accept a system of rules which would secure benefits to all, though in certain contexts self-restraint will be the vehicle of necessity in the observance of such laws. Any individual derives and accepts the benefits which the existence of law brings, so the individual owes obedience to the law as a debt to his or her fellow citizens who equally, by their self-restraint, keep the laws. As in many contracts, there are penalty provisions, in this case the items of sanction to be found in the penal code. If an individual chooses not to pay his or her debt to civil society by adhering to the laws then, in Kant's view, he or she has opted to pay the debt in another way - by punishment. If the law is to remain just or impartial it is centrally important to guarantee to those who obey the law that those who disobey will not gain an unfair advantage over those who remain in obedience. On this account, punishment is a debt to be paid to the law-abiding members of the community, and once it has been paid it allows re-entry into the community of citizens on an equal footing.

This 'debt to society' version is seriously flawed. For in reality, after having been discharged, there is a continuing stigma and suspicion. A convicted person does not renew his credit and good name by paying his debt to society. On the contrary, he enhances his bad reputation

by having been in the company of undesirables. Moreover, though a practice may be just it may not be justifiable. The existence of a contract will suffice to make a *prima facie* case for the justice of enforcing the obligations it creates, yet enforcing the obligation may not be justifiable. If the contract is a useless one - when performed it does not gain for those intended to be benefited what it purports to obtain for them - that would be enough to make its enforcement unjustifiable on the grounds of uselessness because the practice of criminal punishment involves undesirable features. The purported purpose of paying a debt is not achieved, so on the basis of this theory, criminal liability is useless and therefore unjustifiable.

*2.3.1 AGENCY AND RESPONSIBILITY*

The essence of the view put forward by Hegel and Kant is that to respect someone as a person is to respect their capacity as a rational moral agent. This is exclusive of respect for character. The miscreant is respected as a person having in some degree a moral capacity for rational and autonomous conduct. There are many dangers in this sort of argument, the most obvious of which is the notion of will. The retributivist case is concerned with rationality and justice. The individual's desire not to be punished is dismissed in terms of a view about what the offender would really want in a state of

augmented rationality. The willing by the criminal of his own punishment hinges on an argument about hypothetical rational choice. It is here that the theory of retribution and the theory of rehabilitation collide. This is so because retributivism is critical of the rehabilitative model if only because punishment for the purposes of rehabilitation is administered substantially on the basis of conjecture. Conversely, retributivism can show empirical truth (i.e. the guilt of an offender) as the foundation of its punitive morality. However, such a defence comes unstuck when the fabric of this theory is recognized as being an ideal rationality to which many are unable or unwilling to accord. Consequently, when retributivism is illuminated in this way its empirical truth becomes lost in the midst of an abstract ideal.

### *2.3.2 EQUIPOISE AND INEVITABILITY*

Notwithstanding Kantian constructivism and Hegelian idealism, retribution remains part of the criminal law if only because penalties are administered in reply to some breach of the criminal code. However, a variety of objections to pure retributivism remain: some rational, some emotional. The emotional objections treat it as a dignified form of vindictiveness. But, as Nigel Walker suggests:

> It is true that in practice it is sometimes difficult to be sure whether a sentencer is being genuinely retributive or giving vent to his sympathy with the victim. In theory, however, there is a clear distinction between reacting to injury or outrage and punishing *for the breach of a rule.* Only when the latter is the reason is the penalty genuine retributive punishment.[15]

A more serious criticism is the difficulty which occurs in deciding what kind and what amount of punishment corresponds to the culpability of this or that offender. The decision involves two difficult estimations: the assessment of culpability, and the prediction of the amount of suffering which different punishments will impose on the criminal. It is easier to say that a person is or is not culpable than to determine exactly how culpable. The strengths of impulses, temptations and pressures which a person was, or may have been, subject to can only be a matter of conjecture. Similarly, the gauging of how much the offender will suffer from different modes or intensities of penalties is equally incalculable.

Consequently, contemporary retributivists aim not at commensurability but at proportionality, situating offences in a broad spectrum of punishments navigated by

mere estimates of culpability, and avoiding obvious inconsistencies (such as treating like cases unlike). It would seem, therefore, that modern retributivists have given up the hope of matching the quantum of punishment directly to the culpability of the offender.

*2.3.3 TOWARDS A RATIONALE FOR RETRIBUTION*

The most difficult question for the modern retributivist is the most basic: what is the purpose of inflicting a penalty? Many moral philosophers have wrestled with this question, and offered a variety of answers. As Nigel Walker has suggested,[16] most of the answers fall into one of four groups:

(i) Punishment purges the offender's guilt by making him suffer. This can be true as a psychological statement. Some people feel guilty about the things they do; and some of those who feel guilty feel less guilty if they undergo suffering (compulsorily, accidentally or voluntarily) which they can in some way link to the offence. There are also people who feel less censorious towards the offender who has been made to suffer for an offence. But these are only psychological truths and can not be applied to all offenders or all of those who condemn them. They do not alter the malefactor's culpability, nor do they satisfy those who want a non-psychological reason for retribution.

(ii) Punishment induces repentance and other moral improvements in the offender. This is not to be confused with the reductive aim of reform: it relies on moral improvement, not better behaviour. If it is granted that this approach can be discredited only by showing that its aims can never be achieved then a justification can be assembled. A more searching question is whether a penalty inflicted on an offender who is known to be incapable of moral improvement (if such an assessment is possible) is justifiable punishment. In general, however, such a view does not seem to correspond to what is usually meant by retribution since retributivist arguments cannot look to any end apart from retribution.

(iii) Punishment is an effort to cancel the offence: to bring about a state of affairs in which it is as if the offence had never been committed. This is sometimes possible in a physical sense. A thief who has stolen property can sometimes be made to return it. A vandal can be made to pay for the restoration of damage caused. However, such situations are rare. Even if the loss or damage is of a kind which is capable of being put right the offender usually lacks the resources necessary to do so. State compensation is a more effective method of justice in rectification: but this is not punishing the offender. Notwithstanding the notion of physical

rectification, certain psychological damage may be sustained by the victims of such action (if only because their moral space has been transgressed) which can not be negated. In reality, a distinction is often made between penalty and restitution. This being the case there are only certain senses in which a fine or prison sentence may cancel the offence, and then it is in a non-literal sense. For example, the infliction of harm on a wrongdoer may be regarded as a symbol of the nullification that would be preferred to be real. If this is the case it is expressive not retributive. This is so because such symbolism could exist if people only believed the offender had been punished, whether or not he had in fact.

(iv) Punishment is deserved by the offender. Yet an immediate problem with this theory is found in the semantics of desert. Is desert to mean responsibility, culpability or simple liability? Hegel puts forward the idea that a desert is a right; but to have a right is to have a claim to certain interests and considerations, the importance of which warrants the subordination of conflicting values and ideals. A right is something one claims or not, as one wishes, and it is only in special circumstances that offenders claim the right to be punished (e.g. when they feel very guilty, or fear lynching, or are faced with some other unpleasant

alternative, such as indefinite detention in a mental hospital). More plausible is the idea that offenders have forfeited a right e.g. the right to one's liberty and property, or the right not to be deliberately made to suffer. However, the notion of a forfeited right cannot, in itself, provide the positive justification that the retributivist needs. The notion of desert appears to involve the belief that persons who have acted culpably should suffer for their actions, and that unpunished wrongdoing is somehow a greater evil than punished wrongdoing. After a lengthy discussion of such issues, Nigel Walker arrives at a satisfactory, though highly general, definition of retributivism accompanied by an account of its appeal to human passion:

> *...retributive punishment is a penalty imposed in fulfilment of a requirement in a rule that it should be imposed on those who have infringed a rule...*this is what distinguishes it from mere vengeance, which is inflicted for emotional reasons. It also distinguishes it from denunciation, which requires only the belief that the offender will suffer the penalty. It allows the penalty to be proportional rather than commensurate to culpability; for the rule need not insist on commensurability. It provides a psychological explanation of the feeling that an

> unpunished infringement is worse than a punished one. Man is a rule-making, rule-following animal, and most of his activities - linguistic, social recreational and sexual - are governed by rules or conventions. There is nothing like conforming with a rule for inducing a feeling of propriety or even righteousness. An unpunished infraction means two infractions.[17]

Professor Walker's delineation of retribution necessarily portrays the theory at the level of minimal agreement. This is so because multifarious strains of retributivism have evolved. Although true, however, this definition has the effect of making retribution part of any theory which aims punishment at the guilty. Retribution forbids the punishment of the innocent and so some views posit retribution as the justifying purpose of any system of punishment. This is distinct from those who appeal to some notion of retribution to set side-constraints on the pursuit of consequentialist ends. As a result, retribution can only be retribution when distinguished from forward-looking methods of punishment, for the strict version of this theory finds sufficiency in responding to an offence and, unlike its competitors, shows no concern for the future.

## 2.4 REHABILITATION

In essence, this is the notion that a preference for punishment and retribution should be replaced by an approach based upon the idea of seeking to rehabilitate the criminal. In its extreme form, it assimilates the question of punishment to treatment and seeks to displace a moralized view of punishment based upon justice and retribution.

The rehabilitative ideal is clearly influenced by assumptions about the nature of human behaviour - the idea that human behaviour is explicable in causal terms. In the case of criminal offenders their law-breaking behaviour is to be seen as the effect of causal factors, whether these be in the physical and psychological make-up of the individual, the environment within which the individual exists or, more plausibly, some combination of both of these.

Developments in psychiatry, from recognition and control, to understanding, have effectively shifted the emphasis away from such notions of responsibility and personal desert. If behaviour is taken to be the result of antecedent causes then it is at least plausible to suggest that the individual is not responsible for his actions and if this is so, it is not clear in what sense

punishment is deserved. Desert is allocated only on the basis of responsibility; and it is this responsibility that is missing if we accept that human behaviour has sufficient causal explanation. Indeed, responsibility is a constituent part of the identity of punishment, for without responsibility there cannot be punishment, at least not in the primary sense of the word.

This is all very well. Causes can be linked to effects and the period of incarceration used to reform the malefactor. A word of caution though. The predictive element in the explanation of criminal behaviour is often used as a basis for indeterminate sentences for those offenders whose prognosis is that they are likely to be of danger to society in the future. On this basis, individuals are punished for what it is predicted they would do as much as for what it has been found out they have done. Indeterminate sentencing facilitates the enactment of the therapeutic regime. Unlike the 'justice' approach to treat like cases alike, indeterminate sentencing is more appropriate since the causal factors which led one person to commit a crime may be very different from those which led another. Consequently, rehabilitative needs may differ.

There is also the notion that the rehabilitative approach is humanitarian. Treatment patterns are tailored to

individual needs and problems. Treatment is individualized. The theory is that instead of being subject to some form of impersonal procedure, the particular person is evaluated on the basis of his or her own needs, interests, desires and problems. Yet this is not always the case.

*2.4.1 NORMALITY, ACTUALITY AND THE PHILOSOPHY OF SCIENCE*

One could argue that faith in the predictive and explanatory power of social science is quite misplaced. Certainly the assumptions made by those who embrace rehabilitation are highly normative. The malefactor's conduct is regarded as a symptom of some pathological condition. Actions diverging from some conception of the norm are viewed as malfunctions or the result of disease. Alternatively, actions conforming to what is normal are assimilated to good health.

It is important to remember that both rehabilitation and deviance have to be defined against the norms of the society in question. This necessarily brings the notion of the neutral or universal nature of science into question, or rather it questions the efficacy of pairing-off objective laws against subjective meanings. However, it could be argued that the same is true of medicine - treatment and diagnosis take place against assumed standards of health and illness; yet this does not seem

to cast doubt on the role of medicine in our society. However, in the words of Raymond Plant:

> ...there is a much higher degree of consensus in society about the types of physical conditions which constitute health and disease, and there is a much higher degree of agreement that physical health and the absence of physical injury are valuable than is true of what might be called 'social health' and 'adequate social functioning'. In a pluralistic society there are bound to be disagreements about standards of behaviour and the extent to which we can define a norm for social health.[18]

The level of disagreement about standards of behaviour in society would be difficult, if not impossible to measure. However, given the possibility of a lack of consensus about the norms of society, a conception of rehabilitation defined in terms of certain norms rather than others loses its scientific neutrality. At the theoretical level, the rehabilitative process rests on normative assumptions, the questionability of which has been a major cause of its decline in terms of confidence.

*2.4.2 REHABILITATION AND THE INDIVIDUAL*

The principal moral objection to rehabilitation is that it appears manipulative and not to respect persons as persons. It is manipulative because 'punishment' or 'treatment' is administered not only on the basis of desert, but on the basis of how a person can be altered to meet society's expectations. It also seems manipulative in the sense that the period of incarceration (a punishment in itself) is linked to the notion of rehabilitation. Consequently, release will only come when the offender has satisfied a group of experts (who may all be of the same background, area, political persuasion, etc.) that he is rehabilitated - rehabilitation which is likely to be seen in terms of the moral consensus of society, or the experts' interpretation of the moral consensus of society. Such is the character of rehabilitation. Philip Bean provides a somewhat sinister illustration of this with the tragic case of George Jackson:

> In 1960 Jackson at the age of 18 was convicted of second degree robbery for driving a getaway car while a friend robbed a petrol station of seventy dollars. Under the Californian state law, which claims to have the most reformist penal code, Jackson and his accomplice were sentenced to a period of between one year and life imprisonment.

> After serving the first year the parole board determines when the prisoner should be released on parole. Under that system, parole is granted when the board thinks a prisoner has been sufficiently reformed to be let out. Jackson's accomplice was released in 1963. Jackson remained until 1970 and subsequently died in prison. He claimed that his political beliefs prevented him from being granted parole - he was a black revolutionary and as long as he expounded those beliefs he was not considered reformed.[19]

Here we come to a paradox. The notion of rehabilitation supposedly centres on the idea that treatment or reform is on the basis of the person. The reformist view shifts away from the crime emphasizing the character of the criminal and, as a consequence, the length of time spent in an institution becomes dependent on a parole board comprised of experts who claim to know when reform has been achieved. Thus, an offender has to act in a way consistent with the norms which define rehabilitation. Those norms represent the interests of society at large, and do not necessarily reflect the offender's own values. This is so because the offender's values are seen as deviant. Rehabilitation seeks to harmonize the offender's system of values with that of convention. In reality, therefore, the individualization of treatment

involves an emphasis not on the person, but on society as a whole.

A further problem manifests itself when it is remembered that the punishment is based upon a predictive estimate of the chances of the offender acting in a similar manner again in such a way as to be a danger to society. Here a person may be deprived of his liberty not because of what has been done, but because of what he is thought likely to do: this is not punishment at all but a prescribed treatment. As Plant has it:

> The fact that the deprivation of liberty is called therapy instead of punishment does nothing to disguise the substantive issues of personal liberty and due process of law which are being bypassed in this kind of procedure, a procedure which is clearly maintained as being in the interests of society. The moral principle of respect for persons involves the idea that a person should never be used solely for the purposes of others, but as an end in himself. Clearly to talk about therapy in these circumstances gives the impression that it is being done in the interests of the offender, but it seems clear with the introduction of the concept of 'dangerousness' that the interests of

> society are obviously at stake and restraints on the offender are largely undertaken in response to a predicted danger.[20]

At the same time rehabilitation does not seem to sit comfortably with the notion that it is inhumane. Clearly it is the rehabilitative ideal that led penology away from the idea of physical retribution. If being humanitarian means being concerned with physical pain inflicted upon human beings, then the reformist model has some claim to being humane. Surely punishment conceived in rehabilitative terms is likely to involve far less physical pain than would be the case with other models. Nevertheless, it is certainly plausible to suggest that the rehabilitative model is insensitive to certain other aspects of humanitarianism, particularly in the crucial importance of notions of agency, moral capacity and responsibility in our conception of ourselves.

## 2.5 DETERRENCE

This holds that the justification for penalizing offences is that it reduces their frequency. The notion of general deterrence flourished in the period of the classical enlightenment in penology at the turn of the eighteenth century. The emphasis placed upon deterrence

by the classical penal theorists was not grounded in the range of empirical findings available, but was based on a more subjective faith in the power of the law to influence human behaviour. It also displayed an underlying element of retributive appropriateness in the determination of the severity of specific sentences.

Most commentators are in agreement that there are certain circumstances in which the existence of law (and law enforcers) and the severity of penalties are likely to deter people from the commission of crime.[21] Among the commonly cited illustrations of this are the effects of the introduction or stiffening of penalties for drunken driving in Britain and Scandinavia; and the increase of certain kinds of crime in Copenhagen when occupying Nazi forces arrested the entire police force in 1944: within a short time the crime rate rose sharply, despite the fact that severe penalties were still provided for offenders who were caught. However, the incidence of less rational crimes, involving irresistible passions or fits of temper (i.e. murder and sexual offences), remained more or less stable. It is also easy to draw on common experience of 'regulatory legislation', whether in terms of traffic flow in city centres or the completion of income tax returns, to support a general belief in the deterrent effect of the law.[22] However, the extent to which such evidence provides a justification of general

deterrence as the major aim of penal policy must be brought into question.

*2.5.1 UTILITARIANISM AND THE RATIONALITY CALCULUS*

Many types of crime, including many of the most serious to life and property, are committed in such emotional circumstances or with such a degree of premeditation that considerations of deterrence are almost entirely irrelevant. The German occupation of Denmark provides evidence for this argument. When the German forces displaced the Danish police there was an immense rise in the number of robberies, thefts, frauds, etc. However, there was no comparable rise in murder or sexual crimes. While this shows that crime is reduced considerably by the prospect of detection and presumably punishment, it suggests that deterrent methods are of less value in reducing crimes in which strong passions or psychological problems are involved.[23] Yet it is in these more serious types of crime that the courts use deterrent arguments to justify severe penalties. Keith Bottomley argues that:

> The extent of accurate knowledge among the general public, about crime categories and normal levels of sentencing, falls short of the assumptions necessary to justify a sentencing policy that is sensitive to general deterrence. A consistent theme that runs through the history

> of penal reform, from the rhetorical outburst against the irrationality of capital punishment for more than two hundred offences at the beginning of the last century to the statistically sophisticated research of contemporary criminologists, is that certainty of detection is a more likely deterrent than the prospects of the most severe of punishments when (and if) caught.[24]

The variety of factors of a personal, social and purely situational or circumstantial kind associated with changes in the incidence of criminal behaviour is so incalculable that it seems most unlikely that even quite marked changes in the application of the criminal law and sentencing practices would have anything more than a marginal impact on the situation. The American Friends Service Committee sum up the problem:

> Effective deterrence is the result of the interaction of many variables: the type of crime, the extent of the knowledge that the conduct is a crime, the incentive to commit crime, the severity of the threatened punishment and the extent to which the penalty is known, and the likelihood that the offender will be caught and punished.[25]

Thus, there seems little grounds to consider general deterrence, at least in its purely instrumental capacity, as being a reliable penal measure.

It is important to distinguish between different types of offender when assessing the deterrent effect of punishment. Opportunities to commit many types of crime are neither randomly nor equally distributed among the general population. Moreover, the level of threatened penalties is only one element in general deterrence. For many middle-class persons the stigma and general social consequences of conviction (e.g. loss of status) are undoubtedly more important than the sentence of the court; but for many deprived or socially isolated persons this will not be true.

One of the interesting parts of the deterrence theory is that the guilty person is only one of the targets of punishment. Punishment is directed, above all, at others: at all the potentially guilty. It can be claimed, therefore, that deterrence is by nature utilitarian. This is so because like everything else in utilitarian theory, punishment has to be guided by welfare-maximizing considerations. Crime lowers welfare in that it deprives individuals of life, property or, in the case of assault or rape, physical integrity.

Equally, punishment, as the inflicting of pain and deprivation of various sorts, involves pain or diswelfare for the criminal. The justification of punishment for the utilitarian will lie in the trade-off to be made between the welfare which will accrue to society as the result of the assumed deterrent effect of punishment, and the diswelfare experienced by the malefactor. If punishment promotes social welfare as the result of its deterrent effect, through reforming criminals or by removing them from society, then it is justified if this degree of welfare outweighs the diswelfare of the punishment visited upon the criminal. Thus, the utilitarian views punishment as a calculus of harm where society is the beneficiary.

This kind of calculation can take two forms in utilitarianism. Under the first, the 'act utilitarian model', the issue of justification would be individualized so that for any individual criminal a judgement would have to be made, both in terms of the efficacy of inflicting punishment and of its intensity, apropos social welfare, taking the malefactor's interests equally with all other members of society. The problem with this approach, judging punishment by its effects and simultaneously viewing people as means not ends, is that it could appear to sanction the infliction of harm on the innocent for the purposes of utility maximization. If

the aim of punishment in a particular case is to maximize welfare by means of deterrence, then it is conceivable that a further commission of a particular sort of crime could be deterred by 'punishing' an innocent person. This could happen in a number of different ways. Recidivism could be discouraged by aiming the threat not at the criminal but at his family, or as Plant points out:

> In wartime...innocents could be killed in order to deter subsequent attempts to attack occupying forces after one such attack. This certainly happened in the Second World War in many cases, that of Lidice being perhaps the most harrowing. Alternatively the innocence of the person involved might be disguised from people at large and subsequently punishing this person might deter other people from committing these sorts of crimes.[26]

Normally, the innocent ought not or cannot be punished. However, this strain of utilitarianism, which places the maximization of society's welfare at the top of a hierarchy of values, displaces individual rights and absolute moral standards. Though it could be claimed that this facet of utilitarianism incorporates a respect for persons in the sense that the interests of each are

counted as equal in the calculation, the fact is that the interests of the innocent can be subordinated to an overall increase in social welfare.

Such considerations have led to the notion of 'rule utilitarianism'. This school of thought does not accept the view that each individual action has to be assessed in terms of its utility-producing consequences, but rather that general equations of actions and causality have to be assessed. In the case of punishment, the question would not be whether in any individual case the individual should be punished for committing a crime, but rather the rule that punishing crime in general maximizes welfare. If the justification of such a rule is its consequences, then particular cases falling under the rule are justified not by the particular circumstances of that case, but by the application of artificial norms - general rules formulated to enhance welfare to the utmost.

From this premise would follow the claim that such a paradigm which allowed the punishment of the innocent could not pass the utilitarian test. If the punishment of the innocent becomes the norm then the whole of society could suffer (e.g. from insecurity, anxiety, uncertainty or a general lack of confidence in the law). This would be the case because the test applies to a

rule, as opposed to a particular action. If all could be subject to punishment, irrespective of their actions, then this would undermine any deterrent effect the infliction of harm could have. A consequentialist evaluation would find such action repugnant. Moreover, the necessity for not punishing the innocent is not only moral but logical. To say 'punish' the innocent is to use 'punish' parasitically as a more or less elegant synonym for 'cause to suffer'. Only the guilty (or those believed to be so) can logically be punished.

*2.5.2 PRIMARY PUNISHMENT AND UNPRIMARY CONSIDERATIONS*

Here we return to the moral dilemma. If every moral judgement is conditional and provisional, then there is nothing absolutely wrong in harming the innocent. However, in contemporary society, punishing the innocent is logically impossible since punishment's claim to legitimacy is founded on guilt. Arguments about the justification of punishments are separate from those of the idea of punishment. It is possible to distinguish questions about the justification of actions within a practice from questions about the justification of the practice itself. The rule limiting punishment to the guilty is therefore definitive of the practice of punishment. This in turn would furnish a system of deterrent punishments with a claim to respect the autonomy of citizens. Punishment can be added to the

law's demands in order to give those who are not sufficiently impressed by the law's moral claims on them prudential reason to obey. The threatened punishment is imposed only in response to a breach of the law - the offender's conduct providing the justification for coercion.

One of the more obvious claims that deterrence theory can make in its favour is that it can operate without the infliction of harm. This can be thought of as the intimidation version of deterrence. It can be argued that a standing threat of punishment is proper, and that the threat would soon be perceived as empty if it were not made good when a crime is committed. But having an effective threat on the one hand and carrying it out on the other, gives rise to two different ideas of deterrence, one stressing the effect of the threat on those who are amenable to it, the other stressing the effect of punishment on those who are not.

The first version of deterrence theory regards the intimidation of those who are tempted to commit a crime as being a social necessity that justifies the intimidating threat, and views the need to keep the threat effective as the justification for carrying it out. Creating and imposing liability to punishment each

have separate grounds for justification in this theory, yet there are problems with both.

In order for the will to crime to be deterred by the threat of repercussions it is necessary for there to be an initial temptation. No doubt some crimes would be committed by persons who for a time are inclined to act criminally because of some attractive prospect, and in such cases, the thought of punishment may leave the person feeling disinclined when the risk makes it seem not worthwhile. But as Hyman Gross points out:

> In many cases there simply was no temptation and so no opportunity for thoughts of dire consequences to exert their countervailing influence. When we are single-mindedly caught up in our continuing effort without time for consideration, or when we are driven by feelings that leave no opportunity for us to see ourselves as we may be at a later and sorrier time, we do not then act from temptation and do not take a course that prospects of punishment might cause us to abandon...
>
> ...most murders...are not committed by people who are tempted and succumb to temptation, but by people ruled by strong emotions that remain sovereign over their actions at the time, even

> though in many cases they could have chosen to act differently either by controlling their emotions or by controlling themselves in spite of their emotions.[27]

Since in creating and imposing liability to punishment no distinction is made between those instances in which intimidation might work and the many in which it could not, intimidation does not serve to provide a general justification for punishment. Moreover, the law abiding are concerned with whether a course of action is against the law, not with the prospect of punishment. For those among the law abiding who will violate the legal code in spite of its restraining influence, the provision for punishment is useless; and for those who are law-abiding and do keep to the law, it is needless. Hence, punishment cannot be justified as a measure to keep the law-abiding from committing crimes.

A separate version of deterrence can be thought of as persuasion. This is concerned with making a threat effective in the future for the person whom it has failed to deter, and the way to do this, it is thought, is by bringing home the consequences to the criminal. On this account, those who have disregarded the threat of sanctions and broken the law are persons who need a more meaningful threat. This is provided when intimidation

changes to persuasion, and what was an abstract persuasion metamorphoses into a harsh reality for the malefactor to contemplate in the future. This theory, like the intimidation version, rests on the assumption that persons are, in general, mindful of the unpleasant consequences they may expect should they commit a crime and be apprehended. The circumstances of many crimes bring that assumption into question.

A more immediate query would be concerned with the logic of such an hypothesis. Punishment cannot be justified on the grounds that it deters law breakers if it fails to do that. The whole thrust of the persuasion version leaves untouched a quite realistic notion that there is a good chance of getting away with crime. Even more important, punishment has other effects which render its lesson insignificant. The miscreant is stigmatized in receiving punishment, particularly imprisonment, and because this stigma remains, the post-criminal citizen is therefore deprived of the full benefits of life in a law-abiding community:

> There is a profound loss of self-respect, which normally results in his being even less inclined than before to pursue whatever opportunities for a decent life are available to him within the law. In the prison community of criminals, the

> values, methods, and ambitions of those who live without respect for the law prevail, and only a minority who have real hope of redeeming themselves in spite of their shame and loss of status can be expected to resist these constraints towards a life of crime.[28]

These factors bring forward a new configuration of motives and goals developed in the very process of punishment that tends to weaken the influence of fear of punishment. Here the sad paradox of deterrent punishment is discovered, for on balance punishment in its total effect weakens, rather than strengthens, the deterrent force of the prospect of further punishment. Since punishment is not successful in what, on the persuasion theory, it purports to accomplish, and since the failure is attributable to inherent features of a practice which cannot be expected to change, punishment on this account is useless and cannot be justified as an attempt to make the threat of the law more credible.

## 2.6 SUMMARY

Punishments have, for centuries, been used as a method of control or coercion. Since the second half of the seventeen-hundreds imprisonment has become an

increasingly important instrument of criminal justice. Though the condition and management of prisons has improved, their purpose is still to punish. Such punishment may include treatment designed to improve the offender, provide a regime designed to deter potential recidivists, or be perceived simply as providing justice in response to an offence. However, it seems that the theory of punishment espoused by policy-makers has a significant effect on the shape and development of criminal justice programmes and the way in which justice is conceived. Consequently, when analysing public policy on punishment it is important to bear in mind the perceptions of policy-makers as well as the performance and intentions of their programmes.

## Notes

1. See N. Hampson, *The Enlightenment* (Penguin, Harmondsworth, 1968).

2. R. R. Korn and L. W. McCorkle, *Criminology and Penology* (Holt, Rinehart and Winston, London, 1965), p.395.

3. *Ibid.*, pp.395-396.

4. *Ibid.*, p.397.

5. The term Reformation was retrospectively applied to those movements for religious reform in the sixteenth century which began about 1520.

6. For a brief discussion of medieval punishments see Korn and McCorkle, *op. cit.*, pp.395-398.

7. This claim is made by Korn and McCorkle, *ibid.*, p.403.

8. *Ibid.*, pp.580-581.

9. H. Maudsley, *Responsibility in Mental Disease* (H. S. King & Co., London, 1874), p.35.

10. G. B. Shaw, *The Crime of Imprisonment* (Philosophical Library, New York, 1946), pp.69-74.

11. This account of reactionary mentality is given by Korn and McCorkle, *op. cit.*, pp.596-597.

12. J. Bentham, 1789, *An Introduction to the Principles of Morals and Legislation* (Hafner, New York, 1948), para 2, p.170. When Bentham says that punishment is an 'evil', what he means is simply that it is unpleasant or undesirable.

13. I. Kant, 1797, *The Metaphysical Elements of Justice*, trans. J. Ladd (Bobbs-Merrill, Indianapolis, 1965), para 331, p.100.

14. G. W. F. Hegel, 1821, *The Philosophy of Right*, trans. T. M. Knox (Clarendon Press, Oxford, 1952), paras 97-99, pp.69-70

15. N. Walker, *Punishment, Danger and Stigma: The Morality of Criminal Justice* (Blackwell, Oxford, 1980), p.37.

16. *Ibid.*, pp.38-40.

17. *Ibid.*, pp.41-42.

18. R. Plant, *Modern Political Thought* (Blackwell, Oxford, 1991), p.300.

19. P. Bean, *Rehabilitation and Deviance* (Routledge, London, 1976), p.10.

20. R. Plant, *op. cit.*, p.303.

21. These include the Victorian judge and historian of the Criminal Law, James Fitzjames Stephen; Professor H. L. A. Hart; and Professor Nigel Walker.

22. See T. Honderich, *Punishment*, (Polity, Cambridge, 1989), pp.56-57; or N. Walker, *op. cit.*, pp.77-78.

23. See T. Honderich, *ibid.*

24. A. K. Bottomley, *Criminology in Focus* (Martin Robertson, Oxford, 1979), p.136.

25. The American Friends Service Committee, *Struggle for Justice: A Report on Crime and Punishment in America* (Hill & Wang, New York, 1971), pp.56-57.

26. R. Plant, *op. cit.*, p.164.

27. H. Gross, *A Theory of Criminal Justice* (O.U.P., New York, 1979), p.395.

28. *Ibid.*, p.399.

# 3. CONTEMPORARY THOUGHT

Increasingly, governments and the public expect crime to be controlled through the use of penal measures as distinct from educational steps or economic reconstruction. In this chapter the concern is to examine the implications of these expectations and to assess the contemporary responses to such demands made by the three main political parties in Britain and the associated agencies and interest groups.

From the end of the eighteenth century, the prison has been used as the principal instrument of criminal justice. The growth of the use of imprisonment in the 1990s has lent both prominence and resilience to the prison inspectorate, which has a key role in analysing the management and functions of incarceration. Nevertheless, because of the constitutional position of the inspectorate, the extent to which it is able to offer criticism of government policy is very limited. However, not being in government, the Liberal Democrats and the Labour Party are able not only to criticize existing policy but to offer alternative programmes. An examination of their policies will be useful since it will not only vent the faults they perceive in existing penal policy but will also offer what they see as the

justification for their disapproval. The performance and shape of current criminal justice policies is the responsibility of the Conservative Government. It is important, therefore, to examine the rationale and purpose of the existing penal system before drawing conclusions as to the adequacy and coherence of public policy on punishment.

## 3.1 THE PRISON INSPECTORATE

In recent years the approach taken by the Chief Inspector of Prisons and others commissioned to investigate penal policy has been to emphasize the rehabilitative function that prisons should play within the penal system. Most recently, H.M. Chief Inspector of Prisons, Stephen Tumim, has highlighted the belief that prison has a constructive purpose beyond that of mere containment. Tumim saw the prison service as being demoralized and unclear of the role it should play:

> We believe that prisons and the work of those who staff them has suffered for nearly thirty years from a lack of purpose, a lack of belief that they have an important role to play, and a dearth of professional organisation and expectation.[1]

This is perhaps to be expected given that the increase in the size of the prison population has gone almost hand in hand with increased crime rates. However, the remedy he proposes is not to take preventive action, looking to the causes of crime and seeking their removal, but to revamp managerial structures within prison administration. Prisons are seen as being regime driven, where regime is taken to mean 'the impact of systems of administration on all those who live and work in penal establishments'.[2] The changes which have taken place have sought to enhance accountability and to improve policy co-ordination between headquarters and prison establishments. The efficacy of these changes would be dubious when set in the context of stated objectives, yet considerable advantages could accrue from such structural adjustments in the process of introducing private contractors into the prison service.

The Tumim report certainly displays the view that government has tripartite responsibilities in its operation of the penal system. The objectives of policy are to effectively contain those sent to prison by the courts, removing the offender from society while simultaneously giving force to some of the laws which effectively guarantee the state's existence. At the same time, some level of responsibility for the prisoner is shown (either directly or indirectly) in that it is felt

the prisoner should be afforded the opportunity to prepare for release. This responsibility to the incarcerated can be direct in the sense that it is the prisoner's own well-being that is at stake, or indirect because the prisoner's preparation for release is in some way instrumental in improving society. Certainly emphasis seems to be placed on rehabilitation.

The facilitation of this form of rehabilitation is seen as a management issue involving better co-ordination and a more thorough integration of penal institutions within the criminal justice system. Once again, structural change is seen as the motor of success and a way of producing efficiency gains.

A previous report by Tumim on suicide and self-harm in prisons[3] also laid the blame at the door of the regime taking a moralistic, almost theological approach. Such regimes were seen as 'corrupting', teaching inmates 'how to be idle' and being potentially destructive:

> We recognise that for many prison represents a "doss house", where some are content to spend long periods on a bunk, sheltered from the responsibilities of everyday life. This is no preparation for release and it is wrong to expect everything to be put right in the last few weeks

> before release. Those for whom idleness has become an acquired skill and those who cannot cope with inactivity need programmes which demand effort, commitment and the prospect of achievement.[4]

The Prison Board's statement of purpose is as follows:

> Her Majesty's Prison Service serves the public by keeping in custody those committed by the Courts. Our duty is to look after them with humanity and to help them lead law-abiding and useful lives in custody and after release.[5]

From this statement one can identify a mixture of two strains of penal thought. The first is the notion of social defence: the idea that society must be protected from wrongdoers. The second seeks to correct or rehabilitate the offender so that on release the person is no longer a threat.

One immediate difficulty raised by this approach is that the entire focus of the solution is retroactive. It looks to administrative responses after a crime has been committed. Such a strategy is unlikely to remove the manifestation of crime or ameliorate the frequency of criminal behaviour. This is so because the Government's

institutional response is dependent on the presence of criminal behaviour for the existence of its crime reduction policy. Crime is taken to be the antecedent of administrative dynamics within the penal system.

Alternatively, it might be desirable to see crime detection as the mere identification of those in need of rehabilitative treatment, thus facilitating a form of pro-activity in the second instance. On this interpretation, the initial offence is merely a fact-finding exercise and a source of information, the pain of which must be borne temporarily, while the will of crime is terminally eroded.

The problem with this account is that it is not positive. In one sense it is abstract and incoherent, for it takes little account of the fact crime is on the increase, existing independently of government institutions. Penal institutions can have the dysfunctional effect of strengthening the resilience and motivation for crime. The house of correction becomes a meeting place, a conference on crime. Offenders may share their experiences, identifying the errors, not of their ways, but of their methods.[6] They establish new contacts and networks. The criminals themselves may produce responses to changes in government institutions making themselves more aware, more sophisticated and less detectable. This

is where the management approach to prisons falls down, for without the detection and identification of the offender incarceration becomes redundant or at best ineffective.

In addition to the incentives supplied by the sophistication of the criminal fraternity a disincentive comes into the reckoning: that of unemployment. Just as Tumim lays the blame for moral corruption in prisons at the door of inactivity, so too must the responsibility for social deviance be placed in the midst of unemployment. Unemployment precedes many crimes and can provide a rational basis for criminal activity.[7] With little or no hope of employment following release, a person may look to crime for material enhancement.

The acceptance of this premise would make the contemporary approach to punishment appear circular. If incarceration is to transform the character of the criminal a succeeding transfer into economic deprivation will reverse this effect or at least initiate the same cycle once more. If crime precedes punishment, and unemployment more or less precedes rational crime, then the re-introduction of undesirable economic determinants after release can only perpetuate this plight. On these grounds imprisonment would seem to alter the will of the criminal rather than perform a reformation of character.

Thus, what has the appearance and justification of rehabilitation is nothing more than masked deterrence.

## 3.2 THE LABOUR PARTY - THE POLITICS OF RECONSTRUCTION

Howard Elcock identifies the foundations of Labour Party penal thought:

> Socialist penology rests on the premise that crime is the product of social and economic inequality and deprivation as well as individual psychology.[8]

Implicit in this statement is the idea that the offender is not necessarily culpable, or at least is not wholly culpable. To identify antecedents within the criminal's own environment is to shift some, if not all, of the blame away from the criminal and on to society. This suggests a more active approach to crime since the necessity is perceived not only to respond to crime but to take a more pro-active stance and undermine its very foundations. This will operate in two ways: both at a psychological and at a practical level.

The practical level involves the dissipation of what is seen as the root causes of crime, that is to say, a

reconstruction of the social and economic fabric of contemporary society. The Labour Party cites inner-city decay and unemployment as particular sources of crime.[9] The second strategic level, that of psychology, operates in terms of deterrence. This mode of deterrence includes a stronger police force operating at the community level in an effort to increase the chances of crime detection. Only when the malefactor believes he will be caught can the thought of punishment enter into the criminal calculus and have a preventive effect. A second psychological component would be that of deterrence by denial. This encompasses certain preventive measures including better street lighting; the introduction of properly funded security packages for council estates, local council buildings and facilities; and providing more youth facilities (nearly 50% of those found guilty of criminal offences are under 21).[10] Presumably, the potential miscreant will then either be 'geographically incapacitated' in a youth centre, or will be dissuaded from crime due to a belief that the planned activity is unlikely to succeed. Hence, crime prevention is the kernel of Labour's strategy to reduce crime.

This is not to say that Labour does not espouse a theory of punishment. For those who do commit offences there will be punishment. However, the party does exhibit a lack of confidence in the present penal system

emphasizing recidivism as the expression of failure, and rehabilitation as the vehicle of change:

> If punishment is to be effective it must protect the community against crime being committed again. Chronic overcrowding in our prisons and too few prison officers means that increasingly there is no time for rehabilitation to take place in prison. Prison merely becomes a place where the habit of crime is reinforced. This is reflected in the growing percentage of criminals who re-offend.[11]

Within the Labour Party's theory of punishment there is a clear indication that some degree of rationality can be assumed on the criminal's part. The notion that crime can be prevented, by reducing the chances of executing the intended act or detecting the person responsible through more comprehensive policing, implies that such measures can have a psychological effect on the potential miscreant. Though social reconstruction may revise the criminals attitude it can leave untouched a person's aptitude. This too is taken account of. The party is quite aware that not all people have the ability to overcome the passions and emotions which can arise in given circumstances and which can facilitate a transgression from legal to illegal behaviour. This

principle is embraced by the Labour Party's resolution (in response to the House of Lords Select Committee Report on murder and life imprisonment) to abolish the mandatory life sentence for murder:

> Murders vary greatly from calculated killings for material gain or political ends to those committed under great emotional stress. Judges should be able to reflect these variations in their sentences, as they currently do for manslaughter, reserving life imprisonment for only the most heinous cases.[12]

Such assertions lead one to wonder which theory of punishment the Labour Party's penal thought accords with. Both retributive and utilitarian theories of punishment make one central assumption: that the offender is to be regarded as responsible for his or her actions and must therefore accept their consequences as well as mending his or her ways. But this is not the substance of Labour Party penal thought. Assumptions of certain social and economic antecedents reduce an offender's responsibility. For Labour, the offender may only be held accountable for the extent to which crime was actuated by free will in addition to external determinants. Punishment is employed only as a complement to measures aimed at

reducing these exterior motivations to criminal behaviour.

Custodial sentences are used reluctantly, and mainly for the subsidiary purpose of social defence:

> Labour believes that people should be punished for the crimes that they commit. Serious and violent crimes deserve severe sentences. But we believe for other offences prison is not the most appropriate form of punishment.[13]

Since the rationale offered for punishment is the reduction or elimination of recidivism, Labour penology tends toward that of rehabilitation. To this end, the Labour Party's White Paper on criminal justice is critical of the operation of the *Rehabilitation of Offenders Act (1974)*:

> There is concern that the current lengths of rehabilitation periods and the threshold for eligibility act to deter past offenders from "going straight". The whole area of exceptions under the Act needs re-examination. The Labour Party will undertake a review of the Act since without effective rehabilitation and resettlement

of ex-offenders the problem of re-offending is exacerbated, thus fuelling rising crime.[14]

Here we come to the crux of Labour's penal thought. The confidence in social and economic reconstruction as the foundations of moral behaviour together with the dubiety attached to incarceration amalgamate in the simple manifesto assertion that: 'Prison must offer training for employment, not for crime'.[15]

It would seem, therefore, that the Labour Party intend to tackle crime from both sides, or in both tenses: before and after the crime. This sandwich solution will serve to remove the social evils that act as the determinants of crime, and for those who still fall foul of the law a process of (not necessarily custodial) rehabilitation will be embarked upon. Consequently, crime will be sandwiched between two complementary remedies which intend to smother criminal behaviour both in terms of motivation and manifestation.

## 3.3 THE LIBERAL DEMOCRATS - RE-INSTITUTING CITIZENSHIP

According to Stephen Ingle, the liberal vision of human behaviour suggests that:

> Being bound by a common rationality, men will tend to act reasonably in a just society, or, to be more accurate, in a society they deem to be just. Good order, then, would be the normal condition of a liberal society and the law would exist chiefly to punish and if possible rehabilitate criminals; such punishment would need to be humane though that is not to say lenient.[16]

This would imply that government has certain responsibilities in the maintenance of law and order beyond that of mere incarceration for social protection, extending to the manipulation of social fabric. This is not to say that the Liberal Democrats do not recognize the need to protect the public from danger. As they state:

> We accept...that prison is regrettably necessary for the protection of the public from certain kinds of serious violent and sexual offenders. However, for the majority of offenders who do not represent a menace but whose behaviour constitutes a nuisance and an unacceptable challenge to society's values, we are convinced there are better answers, and that prison is an ineffective and profoundly damaging experience.[17]

This mistrust of incarceration as the vehicle of rectitude stems from the theory of reformation which they espouse. This is somewhat ironic since the foundations of liberalism display a belief in human rationality, agency and responsibility which, together with the traditionally associated penal theories of retribution and deterrence, give reformative theory a somewhat anomalous complexion. This is so because inherent in the theory of reform is the notion that the malefactor is not wholly responsible for the impugned action, in the sense that a rational and responsible calculus has not been undertaken prior to criminal activity. Thus, a manipulation not of the will, but of the character of the wrongdoer is necessary.

The infliction of imprisonment is seen as an ineffective and unsatisfactory method of achieving such ends:

> A sentence of imprisonment is extremely expensive; it inflicts suffering and hardship on the prisoner's family; it removes the responsibility of the prisoner making effective reparation to the victim; it is mostly ineffective as a reform measure; it reduces the offender's employment prospects; and it increases the chances of recidivism.[18]

Here, a number of elements are illuminated. Prison sentences, which are in principle the responsibility of society, are costly and so government should seek to reduce this substantially unnecessary financial burden. Punishment is embraced in the primary sense: the offender's relatives, should not suffer for something they have not done. The need for restorative justice is highlighted, suggesting that the state's response to crime should be meaningful and purposeful, being beyond mere retribution. Economic determinants in criminal activity are broadly implied by the need for a person to find employment following punishment. Recidivism is identified as abhorrent, and so weight is given to reformation.

In the Liberal Democratic system of penal thought there is a clear vein of humanitarianism. They see a significant proportion of deviant behaviour as being a response to environmental stimuli:

> ...the current state of prisons in England and Wales represents a massive social evil and an affront to civilised standards. Prisons do not work: they do not reduce the amount of crime but rather contribute towards its increase. Urgent steps must be taken, therefore, to reduce the

> prison population and to improve conditions so as to bring them up to something approaching civilised standards... We believe that the effect of some of the reforms which we propose will lead to a considerable reduction in the total numbers of the prison population.[19]

This humanitarianism extends to administrative arrangements in penal institutions. In their last election manifesto[20] the Liberal Democrats placed emphasis on improving prison conditions including prison officers' morale; extending the rights and responsibilities of prisoners along the lines recommended by the Woolf report; and creating the post of Prison Ombudsman.

Though the party has put forward the need for national planning, there is still some faith in the ability of human beings to understand and manipulate their environment for a common good. The substance of Liberal Democratic crime control strategies rests on the community. Local authorities are seen as the unit of action where these measures are deployed. This includes giving local councils powers to develop comprehensive community crime prevention programmes, improving services to victims, and encouraging Neighbourhood Watch and Safe City programmes. Police presence in local communities

will be increased with decentralized budgetary control to police subdivisions.[21]

In its final analysis, the Liberal Democrats' assault on crime would come from above and below. It would be a dual system of pro-activity. Potential malefactors would be given a new vision within their own social context. Conventional behaviour would then be adhered to for positive reasons, not merely because of a threatened mischief. The conditions which effectively incubate crime - the alienation of the individual in an unjust and disintegrating community - would be replaced by a system of citizenship and belonging, augmented by the instrument of participation. This course of action would prevent crime from taking root. The second strand of pro-activity serves to prevent the recurrence of crime. This occurs when a system of repression, not of the person but of the malfeasant capacity which pollutes the individual, equips the offender for a return to full citizenship and the good order. Consequently, penal foresight from the state and community will provide the individual with a new vision, a vision which provides, not a disincentive to deviance but an incentive for compliance.

## 3.4 THE CONSERVATIVE PARTY - MORE OF THE SAME

To understand the direction of Conservative Party policy on law and order it is necessary to comprehend the broader ideological thrust of the Tory movement. Conservatives reject the idea that society is some sort of machine that can be broken up and reassembled at will. Society, they insist, is much more like a living organism. It is infinitely complex and interconnected, so that changing one part of it effects every other part and may do so in a number of unforeseen ways, probably most of them bad. Sudden or radical change is therefore bound to lead to disaster and chaos because its consequences cannot be controlled. Conservatives are therefore suspicious of change, while at the same time recognizing that changing things is from time to time necessary. To illuminate the Conservative vision of society it is necessary to trace the inertia of history. From the Conservative perspective, a stable and well organized society is the work of centuries. It is built out of institutions - such as the family, the church, private property, etc. - and sustained by custom, tradition and long-held values in established patterns of living.

On this account, the Thatcher years were something of an enigma. While Margaret Thatcher retained certain

elements of traditional Conservatism, such as patriotism and strong government, she attached herself to the intellectual tradition of neo-Liberalism. At the centre of these ideas is a passionate belief in free market capitalism and reducing the role of the state. Though the current prime minister has attempted to reassert traditional Conservatism, emphasizing traditional values and institutions, the Government's policies remain substantially on the neo-Liberal track.

This intellectual milieu has lent direction and impetus to Conservative penology. At this stage, it is worth considering the following description of Conservative penal thought:

> To the Conservative, the concept of punishment is related to liberty within an established order. Each individual is conceived to be a free and responsible agent and so aware of the nature of his actions and their repercussions. When the law is consciously broken, what is deemed to have occurred is a moral outrage and that constitutes a virtual denial of the civil order to which the individual belongs. It is the individual who is responsible. To blame society or environmental conditions or anything other than the individual is to condone rather than to condemn, so creating

> a vacuum where no real and valid criteria of judgement can exist. Government policy may be designed to change particular aspects of social organisation, but justice demands that the law must punish acts according to the conscience of the community because of what it is. Its judgement must not flounder on the abstract possibilities of what society might be like. To maintain civility, the law must protect those who act civilly from those who do not. The purpose of punishment is not to create reformed characters from guilty men but to preserve order through force. It is not the transformation of society with which the force of law is directly concerned.[22]

On this account, the emphasis is on punishment and the rights of the victim. Stress is placed upon the guilt of the law-breaker while society is free of blame. Where crime or disorder manifests itself, Conservatism looks not to the social and economic fabric of society for antecedents but to the responsibility of the malefactor. Whatever the purported reasons for deviance, punishment is taken to be an imperative. Such an approach was inherent in the Conservative response to the inner-city disturbances of 1981 and was to find expression in the report on the disturbances by Lord Scarman:

> The social conditions in Brixton...do not provide an excuse for disorder. They cannot justify attacks on the police in the streets, arson, or riot. All those who in the course of the disorders in Brixton and elsewhere engaged in violence against the police were guilty of grave criminal offences which society, if it is to survive, cannot condone. Sympathy for, and understanding of, the plight of young black people...are no reason for releasing young people from the responsibilities for public order which they share with the rest of us - and with the police.[23]

So Conservatism places the whole blame at the door of the malefactor who, by engaging in criminal behaviour, becomes liable for punishment. In terms of crime, Conservatism is an ideology which will ignore the cause but not the symptoms. To engage in a programme of social reconstruction for the purposes of alleviating the incidence of criminal behaviour would be to reconstruct Conservatism. This is the case because Tory penal policy has a reaffirmatory nature - an espousal of individual rationality and agency regardless of cause or consequence.

Social change can be expensive and, to some, tumultuous and even threatening. The alternative is to use punishment as an instrument of control. This is not just a predictable measure but also a frequently popular one. Rising crime is not only more tangible than the somewhat vague socio-economic factors surrounding human conduct, it is electorally more important. Getting tough with criminals may appeal to irrational human desires for vengeance. Moreover, the deceptive simplicity of retributive and utilitarian responses to criminal conduct may bolster public approbation. As Arthur Aughey and Philip Norton point out: 'The traditional response of heavier penalties for offenders has often been an ace in the Conservative pack'.[24]

However, inherent in the Conservative approach is a problem. The emphasis on the organic nature of society is insufficient to explain deep-seated and recurrent problems. To stress social and environmental factors in seeking the genesis of malfeasance is not only to condone but to attribute fault to society itself - a society of which the Conservative Party see themselves as living exponents.

Given this preamble, Conservatives are under a self-imposed obligation to stress the need to punish the wrongdoer, emphasizing stiffer penalties as part of their

programme. Their response to a spiralling crime rate is largely more of the same. Little or no faith is placed in reformation, since it is assumed that the criminal acts on the basis of a calculus. However, Conservatism does embrace a theory of deterrence, particularly at the community level. On this view, the criminal can be deterred by a vigilant community and by the courts through a policy of deterrent sentencing. Increasing the powers available to the courts in sentencing those convicted of serious crimes has been a feature of this Conservative Government as of previous Conservative Governments.[25]

In his speech to the 110th Conservative Party Conference on October 6 1993, Michael Howard, the Home Secretary, boasted to an enthusiastic audience that in his first four months in office he had extended police powers, increased certain penalties (which in some cases involved the doubling of maximum penalties), instituted stiffer sentences for recidivists, and generally extended the scope of prison sentences.[26] A further indication of Tory faith in deterrence as a complement to social protection can be found in this extract from Howard's speech:

> We shall no longer judge the success of our system by a fall in our prison population... Let

> us be clear. Prison works. It ensures that we are protected from murderers, muggers and rapists - and it makes many who are tempted to commit crime think twice... We shall build six new prisons. They will be built and managed by the private sector. And I can tell you one thing - Butlins won't be bidding for the contract. A rumour got out over the summer that I don't think prison should be a picnic. Well I'll let you into a secret. I don't. That is why I am determined to ensure that conditions are decent, but austere.[27]

This followed on from some of the pledges made in the 1992 Conservative manifesto.[28] Prison sentences were to be extended, new criminal offences created, and the courts and police given more powers. However, in the words of Aughey and Norton:

> Implementing such reforms, or more especially promising them, is electorally popular. But if such reforms fail to have the desired effect, Conservatives have difficulty in knowing where to turn next. Even a policy of more of the same generates demands on resources which can no longer be fully met.[29]

This, then, is the dilemma faced by the current administration. The Conservative Party is capable of responding to rising crime rates by advocating and implementing a strengthened police force and stiffer penalties for serious offences. It is able to maintain a party line on how the legal order should correspond to the moral consciousness of the nation. Yet its programmes are stagnant, or at best incremental, while crime becomes increasingly buoyant. This difficulty is indigenous to the Conservative Party, and is inherent in its perception of the problem. When the response to a perplexing and dynamic problem is merely instinctive, the solution may become lost in a labyrinth of history and myth.

## 3.5 SUMMARY

It appears that the current penal system suffers criticism both from within and without. The prison inspectorate find fault with imprisonment in terms of organization and management. The Labour and Liberal Democrat parties are critical of the Government's criminal justice policies in terms not only of economy and effectiveness but also in terms of the underlying assumptions on which the policies are based. However, the Conservative Government espouse a theory of

punishment which pays no attention to environmental influences and perceives the criminal to be a rational, hedonistic being. Accordingly, penal policy remains on the same tack with an increase in the intensity of existing punishments being seen as the answer. However, an increase in punishment and incarceration requires an increase in the facilities required to achieve this. An increase in facilities requires an increase in investment and running costs. The solution to this dilemma is seen as coming from private sector operators who are perceived by the Government to be naturally more economical and efficient. Consequently, privatisation now embraces imprisonment.

## Notes

1. S. Tumim, *Doing Time or Using Time: Report of a Review by H.M. Chief Inspector of Prisons for England and Wales of Regimes in Prison Service Establishments in England and Wales*, Cm 2128 (HMSO, London, 1993), p.86.

2. *Ibid.*, p.2.

3. S. Tumim, *Report of a Review by H.M. Chief Inspector of Prisons for England and Wales of Suicide and Self-Harm in Prison Service Establishments in England and Wales*, Cm 1383 (HMSO, London, 1990).

4. *Ibid.*, p.19.

5. See S. Tumim, *Doing Time or Using Time*, *op cit.*, p.1.

6. In 1991 86% of convicted prisoners agreed that going to prison taught someone more about crime. Such statements were formulated so that they referred to people in general rather than to the prisoners' specific experiences, see T. Dodd and P. Hunter, *National Prisons Survey 1991* (HMSO, London, 1992), p.90.

7. The National Prisons Survey 1991 asked prisoners to select from a wide list of possible causes the reason or reasons they thought contributed to their first criminal offence. The figures given in brackets are percentage responses, the sum of which may exceed 100% since more than one answer could be given. Economic motivations such as 'having no money'(62%) or 'having no job'(40%) were by far the most common outweighing environmental factors such as 'family problems'(36%). Though 'Mixing with the wrong crowd'(57%) was also a frequent reply, see *ibid.*, p.88.

8. H. Elcock, 'Law, Order and the Labour Party', in P. Norton (ed), *Law, Order and British Politics* (Gower, Aldershot, 1984), p.149.

9. The Labour Party, *Policy Briefing Handbook* (The Labour Party, London, 1992), 23.3.

10. *Ibid.*, 23.2.

11. *Ibid.*

12. The Labour Party's White Paper on Criminal Justice, *A Safer Britain* (The Labour Party, London, 1990), p.15.

13. *Policy Briefing Handbook, op. cit.*, 23.2.

14. *A Safer Britain, op. cit.*, p.27.

15. Labour's Election Manifesto 1992, *It's Time to get Britain Working Again* (The Labour Party, London, 1992), p.20.

16. S. J. Ingle, 'Alliance Attitudes to Law and Order', in P. Norton, *op. cit.*, p.169.

17. The Liberal Democrats, *Justice and Security in the Community* (Liberal Democrat Publications, Dorset, 1991), p.21.

18. *Ibid.*

19. *Ibid.*

20. The Liberal Democrat Manifesto 1992, *Changing Britain for Good* (Liberal Democrat Publications, Dorset, 1992).

21. See *ibid.*, p.36.

22. A. Aughey and P. Norton, 'A Settled Polity: The Conservative View of Law and Order', in P. Norton (ed), *Law and Order and British Politics*, p.145.

23. *The Brixton Disorders: 10-12 April 1981.* Report of an Inquiry by the Rt Hon Lord Scarman, Cmnd 8427 (HMSO, London, 1981), para 2.32, p.14.

24. A. Aughey and P. Norton, *ibid.*, p.144.

25. This was the case with the passage of *The Criminal Justice Act (1982)* and the same Act of 1993.

26. M. Howard, Home Secretary, *Speech to the 110th Conservative Party Conference*, at the Wintergardens, Blackpool, 6.10.93.

27. *Ibid.*, p.12.

28. Conservative Manifesto 1992, *The Best Future for Britain* (Conservative Central Office, London, 1992).

29. A. Aughey and P. Norton, *op. cit.*, p.147.

# 4. PRIVATISATION AND PRISONS

## 4.1 OVERVIEW

Privatisation has emerged as the process by which the production of goods and services is transferred from the public to the private sector. This examination will begin by taking a brief overview of the arguments for and against privatisation before considering the issue in the criminal justice context.

Privatisation expresses the aspirations and operates within the assumptions of a long-established view of the world. Central to that view is the conviction that the price mechanism and market relationships usually provide the most efficient ways of allocating resources and managing affairs. Thus, it is assumed that the public sector is wasteful, inefficient and unproductive. Julian Le Grand and Ray Robinson detail the 'inefficiency' argument:

> State services are supposedly inefficient because services are not supplied at minimum cost. Individuals in state organisations pursue their own interests in the same way as individuals in private ones do; they all want jobs that are

> rewarding (in terms of money, status and power), satisfying and secure as possible. However, in their pursuit of these ends, public employees are not faced with the same constraints as private ones; in particular, their 'firms' cannot be driven out of business or be taken over, even if they provide an inefficient service. Hence, they will engage in practices that serve their own ends at the expense of their clients. Hours of work will be reduced, work practices will be inefficient, wages will be too high, other elements of remuneration such as pensions will be too generous, and so on.[1]

Accordingly, proponents of privatisation claim that private sector operations out-perform their public counterparts. They are subject to economic disciplines not present in the state sector, and they are more responsive to choices made by consumers. At the core of this theory is the notion that the public sector cannot be changed by actions of government or, at least, that the regulation which the market imposes on economic activity is superior to any regulation which rulers can devise and operate.

In large measure, privatisation might be seen as an ideological response to the perceived damaging tendency

of universal public services: the introduction of mechanisms of allocation and distribution that challenge market principles and militate against self-interest and consumerism.

The case against privatisation starts from the assumption that collective provision is potentially more egalitarian, socially responsible and democratic than similar services provided by the private market.[2] The full-blown collectivists' case for public services is based in large measure on a critique of the free market as individualistic, undemocratic, unfair, inefficient and the source of social divisions and inequalities.

The advantages seen in the public provision of social services, by contrast, are, first, that they promote social purpose rather than individual self-interest, and social integration rather than individualistic differentiation. Secondly, collective control of social services, through a democratically elected government, militates against the exploitation of those in need of services by suppliers seeking to maximize their profit rather than the social good. Because the state operates to some extent to protect citizens from such exploitation, government provided services also entail a partial redistribution of power. Thirdly, collective services can distribute resources according to need, that

is, according to 'social' as opposed to narrow 'economic' priorities. Fourthly, public control facilitates the provision of regulated, standardized and efficient services. As Le Grand has it:

> Because of the inherent contradiction between the profit motive and meeting need, public regulation of private services is not sufficient to ensure that services operate in the interests of those they are supposed to serve.[3]

Finally, public social services can counteract the natural tendency of capitalist enterprise to increase inequalities in the distribution of status and resources.[4]

In summary, there are moral and political arguments on both sides of the privatisation fence. Privatisation is not merely a method of controlling public services but an approach to the tasks of government. It is an approach which sees no substitute for the market, and which seeks to have done in the private sector huge sections of what has hitherto been done by the state. In 1988, the President of the Adam Smith Institute, Madsen Pirie, claimed that:

> Privatization may look from afar like the straightforward sale of state assets. From close in it can be seen as an array of complex policies, each one tailor-made for an individual term of state activity, and each designed to achieve transfer to the private sector in a way which is politically rewarding as well as economically successful.[5]

To appraise Pirie's hypothesis it is useful to explore privatisation in the penological setting.

## 4.2 PRIVATISATION AND PENOLOGY

The privatisation of prisons has, for a number of years, been the subject both of popular concern in the media, and of academic debate in the United States.[6] Following from the American experience Britain is now transferring areas of criminal justice administration into private hands. Such initiatives have triggered a lively debate in Britain; the Conservative Government is clearly in favour of the policy, while prison reformers and prison governors remain adamantly against it. David Saunders-Wilson, Assistant Governor of Her Majesty's Youth Custody Centre Hunterscombe, concludes:

> It can only be hoped that in the case of private prisons [*sic*] all who are involved in the prison service exert their utmost influence to resist this latest American phenomenon.[7]

Alternatively, some see private prisons as a form of panacea for the many-fold problems currently experienced with regard to incarceration as a form of punishment. That competitive commercial contracts will achieve better results in prisons is almost taken for granted, and the benefits of privatisation are perceived to be far more extensive:

> The real advantage of determined privatisation of prisons is the satisfactory results that could be achieved in redeeming and re-educating the prisoners.[8]

Throughout this analysis a two-fold argument is put forward. First it is urged that prolonged private enterprise and the improvement of prison conditions are fundamentally incompatible. Though private firms may have the ability to bring about a higher standard of prison conditions, this is unlikely to persist in the future due to a perpetual tendency towards cost reduction. A second and more fundamental argument can be put forward that this area of the administration of

justice is not suited for private involvement, and that such involvement erodes a kernel of activity that should be exclusive to government alone.

The private management of British prisons is nothing new. In medieval times, there was not what today would be called a national prison system (a group of prisons financed and administered directly by a central government). Theoretically, all the prisons in the country (county gaols, municipal prisons or prisons held by ecclesiastical and secular lords) belonged to the King, however no grants were made from the national exchequer towards their running expenses, and so prisons were expected to be self-supporting. Gaol keepers, who were usually appointed by the sheriffs, took on so dangerous a job not out of a sense of duty but in order to make a profit. A fee system evolved whereby prisoners had to pay both for their admission and release. During their period of incarceration prisoners were expected to pay, to the best of their financial abilities, for food, bedding and other daily necessities.[9]

However, the medieval system bears little or no resemblance to the involvement of the private sector in criminal justice in Britain. This form of privatisation can be traced back to the proposals of Jeremy Bentham in *Panopticon* (1791). The 'Panopticon' centres on an

architectural plan for prisons, being a circular building in which inmates perceive that they are under constant surveillance. According to the Bentham proposal:

> ...he was to be paid an annual allowance for one thousand prisoners; that allowance would be maintained, even if inmate numbers fell. Additionally, he was to receive three-quarters of the profits from the prisoners' labour (the remainder going to the prisoners themselves). In return he undertook to feed and clothe the prisoners, provide beds and bedding, maintain a warm and sanitary building and employ staff (including a clergyman, a surgeon, and a number of school-masters).[10]

Bentham's proposals were rejected, but he calculated in 1813 that, had the Government gone ahead with the original contract, he would then have accumulated profits of £689,062 10s.[11] After a period of two centuries of near unquestioned acceptance of the superiority of penal administration by local and central state officials[12] the concept of administering prisons along these lines has re-emerged. The latter day emergence of private prisons is traced by Shaheen Borna to the U.S.A. in 1975 when the Radio Corporation of America (R.C.A.) Service Company set up the Weaversville Unit, Pennsylvania, housing about

twenty juvenile delinquent inmates. She contends that the limited profits made on this contract should cause it to be characterised as a philanthropic, or public relations move by the company.[13] Since then, the scope of private prison management has snowballed. Though the exact scope of private prison management is not altogether clear[14] it would seem that there are under fifty correctional institutions under private operation or ownership.[15] There are ten Federal contracts, predominantly between the Immigration and Naturalization Service (I.N.S.) and management companies. The remaining contracts are at state and county level, predominantly for the detention of juveniles, though there are some minimum and medium-security adult facilities.[16] By far the most notable of the private companies is the Corrections Corporation of America (C.C.A.). As Robert Porter has it:

> C.C.A. seems to see the area of prison management as a potentially lucrative one; it has bid albeit unsuccessfully, for the management of the entire Tennessee State prison system... Others have been inspired by the company's success. A number of competitors have appeared such as Wachenhut and Behavioural Systems (South-West). Furthermore investors seem to be impressed, C.C.A.'s founder Thomas Beasley has found backing

for the issue of ten million dollars worth of new shares in C.C.A. in Britain.[17]

The reason for this enthusiasm is the size of the prison market, estimated to be worth ten billion dollars.[18] It is no surprise therefore that C.C.A. has joined a consortium also including Sir Robert McAlpine and Sons, and John Mowlem and Company, which is submitting proposals to Britain to build and manage prisons.[19]

In Britain, private involvement was initially thought to be quite impossible. However, in a short space of time it has gained widespread support. In just eighteen months the former Home Secretary, Douglas Hurd, moved from dismissing the idea as unacceptable to announcing that there is no objection in principle to a private company running a remand centre.

Given this preamble, the question arises as to why federal and state governments in the United States over the past decade or so, and now the Government in Britain, have departed from the wisdom of two centuries and taken so rapidly to the idea of private contractors running their prisons? Ideally the prime motivation would be compelling evidence that better prisons would result from private management. There has certainly been a marked trend towards privatisation generally in both countries.

In Britain this has often taken the form of denationalization, the sale of British Telecom and British Gas being two of the most obvious examples. In the U.S. privatisation has been used to delegate functions traditionally executed by government alone, for example refuse collection.[20] However, as Porter claims, the 'privatisation of prisons is the first instance of Britain delegating such a fundamental Government function'.[21] He goes on:

> The movement towards privatisation in all circumstances can really be seen as a response to the appalling crises in corrections being experienced on both sides of the Atlantic. 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.[22]

Mick Ryan and Tony Ward illuminate the American plight:

> In the USA the prison system was already under severe strain in the early 1980s. As a consequence, medical, sanitary and other essential services could not be guaranteed, while other less essential services such as educational classes were severely curtailed. A Bureau of

> Justice Statistics *Bulletin* reported that at local level 22 per cent (134) of America's largest jails (those with a capacity of over 100) were under court order in 1984 to expand capacity or reduce the number of inmates held and 24 per cent (150) were under court order to improve one or more of their conditions of confinement. Three years later a research brief from the Bureau also reported that 60 per cent of all states were under court order to reduce prison overcrowding. In an attempt to alleviate this chronic overcrowding and to comply with court orders the 1980s witnessed one of the biggest prison building programmes in American history; at one time more than a hundred new facilities were planned at an estimated cost of 3.5 billion dollars. The impact of this planned investment has yet to materialize.[23]

The Director of the US Department of Justice painted a desperate picture, arguing that the penal crisis has structural roots:

> The crisis in our streets has become the crisis in our prisons. Fear of crime and increased vulnerability have hardened public attitudes and led to higher penalties for criminals. The

> number of criminals in prison passed the half million mark last year, an increase of 50 per cent in five years. Struggling to keep pace with the prison explosion [some] States are currently under court order to reduce the overcrowding or run the risk of releasing hardened criminals before the end of their prison term.[24]

While British prisons are protected from similar legal challenges, its problems are not dissimilar. The prison population has reached record levels and there is severe overcrowding. In an attempt to relieve this overcrowding the Prison Service (which became a 'Next Steps' Executive Agency from April 1 1993) launched its biggest prison building programme this century. A total of twenty-six new prisons is planned, of which six are already built and in use. An extensive programme of refurbishment has also been undertaken in an effort to bring existing prison stock up to standard.[25] Thus, as Ryan and Ward point out:

> The expansion of the prison system on both sides of the Atlantic is using valuable financial resources, resources which the British and American governments would prefer to leave in the tax-payer's pocket. It is mainly because of this that there is talk of private sector involvement

> in the delivery of punishment, which it is hoped will help to reduce what governments will have to spend on their respective prison systems. Moreover, expanding the prison system is taking far longer than both governments would like or can afford, so an additional attraction of private sector involvement is the claim that its involvement will speed up the provision of additional prison places.[26]

According to the Council of Europe, on February 1st 1990 there were more people in prison in the United Kingdom, both in absolute numbers and relative to its overall population, than any other West European member state of the Council.[27] The U.K. prison population was 53,182. Porter also points to the development of this problem stating that in August 1985 the prison population for England and Wales was 48,100, whereas resource planning and management was for a population not exceeding 45,000.[28] The National Association for the Care and Resettlement of Offenders (N.A.C.R.O.) concluded at the time that the overcrowding problem, coupled with escalating costs, had generated a situation in which prison conditions were worse than they were ten years previously.[29]

The British penal system is in a state of crisis. This is parallelled by the problems experienced in American prisons, and, in Porter's words:

> It can hardly be viewed as coincidental that as the concept of privatisation came into vogue the national prison population was in the process of nearly doubling (1973-83)... It is easy to conclude that there is an attitude prevalent on both sides of the Atlantic that anything would be an improvement with regard to the state of prisons.[30]

From this premise it would be possible to suggest that privatisation is being used as what Ira Robbins describes as a 'quick fix'.[31] Moreover, it is a possible solution to the existing penal crisis in a form which appeals to the basic political instincts of both Anglo and American governments about limiting the role of the state. The fourth report of the House of Commons Home Affairs Committee on the contract provision of prisons describes three principal advantages of contract provision of penal establishments. They are that it:

(1) relieves the tax payer of the immediate burden of having to pay for their initial capital costs;

(2) dramatically accelerates their building; and

(3) produces greatly enhanced architectural efficiency and excellence.[32]

The Home Affairs Committee report itself is only one facet of a two sided coin. The Prison Officers' Association (P.O.A.) also provided a testimony, since they too had seen private prisons at first hand. Since they had visited different private prisons, there is little basis to question their veracity. Though the P.O.A. has a vested interest in this matter, its evidence does highlight the possibility that the Committee's findings might not be applicable to all private prisons.

Certain politicians and pressure groups have used the American experience, at least in the context of prison privatisation, as a precedent for change. It was the Adam Smith Institute (A.S.I.)[33] that first put the question of prison privatisation on the political agenda. In 1984 the American private prison business was still at an embryonic stage, and the A.S.I.'s *Omega Report* does not conceal this fact. In 1987 the A.S.I.'s former head of research, Peter Young (who did most of the institute's work on private prisons) published *The Prison Cell*,[34] a study based on the American experience. Young feels able

to sum up his 'comprehensive review of private prison experience' as follows:

> Whereas most comment to date has been theoretical speculation about what might result from prison privatization, such a review of the evidence can provide some hard conclusions based on the facts of what actually has happened.
>
> Perhaps the most surprising facts revealed by the report are the *greatly improved conditions for prisoners* in all the U.S. private jails. These improved conditions have been hailed by the prisoners themselves and by disinterested observers such as local media and clergy. That *costs can be cut* is not very surprising, given the general record of privatisation, but that private firms can *both* cut costs and improve standards is certainly worth noting. Perhaps the most compelling argument for prison privatization is therefore the humanitarian one.[35]

Young's survey includes four case studies of jails which have passed from public to private management. As Ryan and Ward propound:

> One of these in Santa Fe, New Mexico, had been run by the Corrections Corporation of America for

> only a few months and the favourable comments which Young quotes from local newspaper reports date from the transitional period before the hand over was completed. Of the remaining three we must place a question mark against one - Silverdale, the CCA establishment at Chatanooga - in view of the damaging evidence from the Prison Officers' Association... That leaves two: Bay County Jail, Florida, which is a long way from our idea of a model prison, but is generally regarded as an improvement on the old regime; and Butler County Prison, Pennsylvania, on which we could find little information, apart from the fact that county officials claim that costs have *risen* under the new management. There was evidently a great deal of room for improvement in both these institutions, and the ability of the private sector to run (at a loss, in CCA's case) one or two show-places should come as no great surprise.[36]

Not only does Young portray a glossy picture of private sector operations, he is pessimistic about the public sector. Ryan and Ward claim:

> His stereotype of the public sector as 'costly, insensitive and resistant to innovation' ignores

> the innovative record of the Federal Bureau of Prisons, particularly in pioneering 'new generation' prison design...[37]

Among the more peculiar of Young's selectivities are his statements that the 'day when the private sector starts to operate maximum security prisons is generally considered not to be far off',[38] and that: 'Most observers believe that prison privatisation is set to expand in the US.'[39] However, the 'observers' quoted by Young turn out to be a C.C.A. executive, a state congressman from Texas and the representatives of two firms involved in prison finance.

The rationale for involving the private sector in the delivery of punishment appears to be both ideological and pragmatic. However, the real issues promoted by the question of privatising prisons are whether an essential core of government activity has been unacceptably eroded, and whether prisons really are, by their very nature, suited to the process of privatisation.

## 4.3 THE PRIVATISATION ISSUE

The issues involved in the penal privatisation debate can be divided into two parts. On the one hand there are the

practical and pragmatic questions, and on the other the political and moral arguments that are presented.

*4.3.1 THE PRACTICAL AND PRAGMATIC ISSUES*

Proponents see privatisation as a way of alleviating the problem of overcrowding.[40] The assertion is a simplistic one: any form of new prison building will increase capacity so that the augmenting numbers of people that British and American societies send to prison can be better accommodated. Conversely, Shaheen Borna puts forward a counter-argument describing what she calls 'Parkinson's law for prisons':

> Opponents of construction believe, in general, that additional prison capacity will generate an increased number of prisoners. This is, perhaps, an allusion to Parkinson's law, which states that work expands to fill the time available for its completion. Accordingly, prison populations expand to fill the available buildings. Critics point out that judges who were reluctant to commit convicts, because of the conditions of the old prisons, will send a large number to the "sparkling new" prisons. Harold Confer, a member of the Friends' Committee on National Legislation, claims that "just as the availability of guns facilitates armed robbery,

> the construction of new prisons tends to strengthen policies of incarceration." He also sees political pressure as well: "The tax-payers are going to say...why have you spent so many millions in constructing new facilities if you do not really intend to use them?"[41]

The arguments in favour of privatisation attack a basic assumption: that it is only the state that can run a humane prison.[42] This assumption is misconceived. There is nothing to suggest that there is anything unique about state control that tends towards the promotion of humane conditions. The private sector has just the same human and physical resources at its disposal as the state.

One rationale for the fact that private prisons have taken off in the United States is offered by Porter[43] and draws no parallel with the British experience. This is that private prisons are easier for local governments to finance than the usual state run prison, particularly with regard to construction. Traditionally, governments have financed construction with taxes and through issuing general obligation bonds:

> The problem has been, however, that construction costs have exceeded liquid cash reserves. Furthermore, these bond issues are subject to

> voter approval by referendum. Recently this approval has not been forthcoming from electorates, and so the Government is forced into finding other methods of financing. Private prisons are most often financed by lease-back agreements with total packages of private financing, construction and leasing of a prison. Accordingly governments can get prisons built and avoid debt ceilings. The arrangements would therefore seem to be popular with governments and tax-payers alike. This approach to financing is highly pragmatic and is criticised by some as a violation of the democratic process. In Britain there is no such need for express voter approval of government expenditure so this latter argument has no force.[44]

Ease of financing therefore is an attractive, but limited argument in favour of privatisation in the U.S.A. which has no relevance to Britain.

Proponents of privatisation lay much emphasis upon the greater efficiency achieved by private construction and management. Whereas private prison company officials assert that savings can be brought about by operating free of political considerations,[45] savings are most notably brought about by private companies being able to

hire non-unionized employees.[46] Such employees need not be paid the higher salaries of prison guards in the state-run institutions. Though, potentially, very substantial savings can be made this is an undesirable practice. It is within the unionized workforce that all the skills needed for the day-to-day running of a prison are concentrated. Already there have been controversies involving the private staff of Group 4, not least of which where a prisoner subject to a private court escort died after inhaling his own vomit.[47]

At the heart of privatisation is the existence of competition. Competition, it is argued, will ensure that not only will private companies compete with each other to provide better quality prisons, but the state-run services will have to improve their standards to avoid extinction. This type of argument rests on the fundamental premise that the prisons in both the public and private sectors would be highly visible and open to scrutiny. It is unlikely that either sector would wish to have such openness, if not simply for the reason that it would hinder management.

In terms of British proponents of penal privatisation, it seems that the very existence of private prisons in the U.S. is equated with their being successful. In the case of building it is assumed that, when in private hands,

the costs will automatically be lower. This is not always true:

> In 1984 a private contractor in Hamilton County, Tennessee ran 200,000 dollars over budget due to the occurrence of unanticipated costs. Two years previously a private company taking over the running of the Okeechobee reform school, Florida discovered that it had to spend more money to meet contractual requirements than the state previously had spent.[48]

Cost is a recurring theme when considering private sector involvement in the penal system. It provides a focus for what Porter has referred to as 'the paradox of what is success in this area.'[49] Since profits may depend on the existence and expansion of the prison population, a private security firm will have a financial interest in the existence and expansion of the prison population.[50] This brings into consideration the fundamental rationale of imprisonment. Is a successfully run private prison one that is always full, or is it one attacking the problem of recidivism? Here the paradox is found, for if it is the latter then success will mean that the company will always be striving to put itself out of business. Unfortunately, the converse is the more compelling: that

is, as Ira Robbins has it, private firms are 'more interested in doing well than doing good.'[51]

The re-introduction of the profit motive into the penal system demonstrates how duty and interest may pull the private entrepreneur in opposite directions. As Porter claims:

> The most worrisome aspect of this is that wherever the entrepreneur decides to cut costs it seems most likely that it will be the interests of the individual inmate that will be harmed. Prison inmates are without doubt a relatively powerless group of people at present, and their situation under private management could potentially degenerate further. This degeneration might be anticipated as a result of prisons enjoying less visibility and public scrutiny when in private hands, a concern highlighted by the N.I.J. Prisons are at present not always readily accessible to the public. State operators are often not overly keen to have their facilities scrutinised for fear of criticism. The private operators may verbalise a commitment to openness, but it would seem probable that they too would succumb to the pressures currently experienced by state

> operators. Furthermore, commercial confidentiality would also seem to be incompatible with the protection of inmate rights.[52]

The salaries of prison warders are the greatest cost to any prison operator.[53] Consequently, this area is the most appealing one in terms of cost reduction. Potentially the private sector could employ the best people and provide the highest levels of training in order to ensure the best possible service. Hiring good employees and providing training programmes is, however, expensive.

The British Prison Officers' Association (P.O.A.) submitted a memorandum to the Home Affairs Select Committee of the House of Commons on February 11 1987. The memorandum detailed anecdotal evidence of what the P.O.A. delegation observed when visiting private prisons in the United States. On the subject of staffing at C.C.A.'s facility in Houston, Texas, the memorandum states:

> Clearly, her [the warden's] visits to the accommodation units were a rarity, she was bombarded with complaints by inmates which she

quickly disregarded. The few officers that we saw were scruffy and thug-like in appearance.[54] [My brackets]

Cost-cutting at the expense of providing good conditions can occur in a number of instances. Though staff provision is the most obvious, there are a number of potential savings for the entrepreneur; paying less for heating, providing fewer blankets, providing less and poorer quality food. Savings of this type reduce marginal costs, increase profits and are extremely difficult to observe and monitor. Moreover, as Porter claims: 'Those best placed to notice inadequacies and deficiencies, the inmates, are too often ignored.'[55]

As already demonstrated, one of the causal factors in the penal crisis is the 'hardening' of approaches and attitudes towards criminals which may appeal to primitive human desires for revenge and disdain. But even if large sections of the general public are indifferent (or even hostile) to the notion of prisoners' rights, there is still reason for concern about the cost-saving financial bias of private companies. This is so because another area in which costs may, at least potentially, be saved is the area of security. Transferring the running of prisons to companies that might be willing to compromise

security levels would be potentially harmful to the public that is supposed to be protected from the inmates.

The issue of security also raises another possible objection. There is a possibility that the private sector will be interested in running only lower-security facilities as these are cheaper. In terms of the American experience this worry seems to be borne out. At Eclectic Communications Inc.'s Hidden Valley Ranch facility, for example, officials have the capacity to reject any inmate that they consider to be 'undesirable'.[56] This would provide the appearance, at least in statistical terms, of private facilities having lower operating costs than those provided by the state. The private facility would not have to bear the expense of high security institutions, while the average running cost of state establishments would augment since there would be a concentration of high-security responsibilities.

The incompatibility of private contractor's interests and duties is not limited simply to the financial sphere. If a private contractor is to run a profitable concern then the facility should be full. Making favourable parole recommendations might be considered to be diametrically opposed to this. Thus, a situation could arise in which the private manager is pulled in one direction by his

duty to the company, and in another by his responsibilities towards the individual prisoner and the criminal justice system at large. This conflict of interests is particularly alarming when considered against the backdrop of considerable discretion afforded to prison administrators. Analysing the American experience David Wecht argues for closer judicial scrutiny of the administration of private prisons.[57] Given the parallel British arrangements, a case can be made for similar provisions in British private prisons.

Another potential abuse by private operators is the possibility of their using political lobbying to further their commercial concerns. Speaking of the American experience Porter points out that:

> The possibility of private companies joining the hard-core law and order lobby is not at all hard to envisage, albeit a fundamentally disturbing notion that people's liberty should be potentially affected in this manner in pursuance of the profit motive. This sort of worry is equally relevant to Britain where the organisation of parliamentary lobbying is just as susceptible to identical abuse.[58]

Inherent in much of the discussion in favour of penal privatisation seems to be an implicit assumption that the private contractors involved will employ good management and show a profit. In the event of a contractor going bankrupt the Government concerned would find itself in an embarrassing situation. Porter identifies one feasible issue:

> ...the question may reasonably be asked as to whether a private prison operator need ever go bankrupt? The sensitivity of the task that is being performed is such that should financial difficulties arise the government concerned might find it politically easier simply to provide pecuniary assistance, as the continuity of service provision in the prison context is of such primary importance.[59]

The P.O.A. delegation to study private prisons in the United States produced an alarming conclusion in its report to the Home Affairs Select Committee:

> Private companies are not, at the present time, making profits from privatisation in the United States of America. Clearly, they are in a "loss-leader" situation and this is borne out by independently audited reports. The object

> appears to be to establish the respective State's dependence on the private sector and then substantially increase charges.[60]

The P.O.A. is not an entirely disinterested commentator. Its opposition to private sector involvement in the Prison Service is well known. However, the situation that it anticipates is an alarming one and would be wholly unacceptable, even for those in favour of privatisation, who would surely find the absence of cost saving repugnant.

A further objection to privatisation could occur if the private operation of prisons became concentrated in the hands of a few companies. This has been the case in the privatisation of public utilities in Britain such as water. Already Group 4 seem to be heading in this direction in the area of British correctional privatisation. The benefits of competition could be lost through monopolistic contracting.

Much of the debate of privatisation stems from the fact that prisons are overcrowded. Porter[61] has argued that the discussion about privatisation can be seen as an irrelevance since it is a distraction from what he thinks should be the main focus of reform in the British and American criminal justice systems. This focus, he

believes, should be to seek alternatives to incarceration as a form of punishment. Certainly, it has been argued that increased capacity may be a discouragement to finding alternatives to incarceration. Moreover, as financial concerns seem to be of primary importance, it is ironic that those seeking to expand prisons are expanding by far the most expensive sentencing option.[62]

*4.3.2 MORAL AND POLITICAL ARGUMENTS*

The demur concerning privatisation goes beyond mere objections to one private individual profiting from the misery of another, extending to what Robbins calls the 'symbolic question'.[63] This asks whether it is fair and equitable for the provision of prisons to be placed in private hands. Punishment is by nature a political act. It can be argued that the provision of prisons is so fundamentally a part of the action of governments that delegation should not be permitted. It is the Government, through the legislature, that designates certain acts contrary to the criminal law. It is then the Government, through the judiciary, that tries and punishes transgressors. Prison is an integral part of the on-going process of punishment, so it would seem deeply inappropriate for this fundamental function to be delegated to the private sector.

On these grounds, it can be argued that the deprivation of a person's liberty is a core function of the state which ought under no circumstances to be devolved to private organisations. Indeed an examination of the rationale for the state holding a monopoly on force would reveal that it is morally objectionable to sell such rights. As Sir Leon Radzinowicz, former Director of the Cambridge Institute of Criminology, has argued with particular reference to remand centres:

> In a democracy grounded on the rule of law and public accountability the enforcement of penal legislation, which includes prisoners deprived of their liberty while awaiting trial, should be the undiluted responsibility of the state. It is one thing for private companies to provide services to the state system, it is an altogether different matter for bodies whose motivation is primarily commercial to have coercive powers over prisoners.[64]

Crime is a social phenomenon dealt with by the state. The state does this by inflicting some type of penalty on the malefactor in the name of its citizens. From this premise, one could argue on moral grounds that the cost of crime and imprisonment ought to be a social cost borne by the whole of society. Private prisons create

commercial interests that profit from full prisons, an expanding prison population and, consequently, crime in general. Thus, the aspirations of society and the aims of business are, in this context, incommensurate. Private organizations are being sold a legitimate right to profit from crime as much as, if not more than, the criminal. It is also a matter of concern that the employees of private operators will play a major role in inmate disciplinary inquiries. Although it is a public 'Controller' who ultimately imposes penalties on prisoners in privately managed prisons, private employees, primarily responsible to their employer and not to the state, will influence the nature of penalties handed out to prisoners.[65] This process will inevitably lead, in some disciplinary cases, to the withdrawal of prospective remission and extend the length of time served by prisoners. For a Government so keen to talk of incentives, the dangers of these arrangements should become apparent. The operation of the disciplinary system within privately managed prisons will impact upon profit margins. Whilst the extension of a prison sentence has cost implications, it could mean cost benefits to the operators of a private prison.

## 4.4 BORN IN THE U.S.A.

Much has been made of the experience of American privatised 'correctional' services and the companies that run them. The so-called American success was one of the foundations of the present Government's policy of contracting out the management of prisons to the private sector.[66] In 1987 the Adam Smith Institute, a think-tank influential in the formulation of contemporary government policy, argued for privatisation in Britain on the grounds that in America it had been 'sufficiently positive'.[67] In the following year the Government published a Green Paper which argued:

> Some of the practical matters and issues of principle which must be addressed in considering private sector involvement within our prison system *have* been overcome in the United States: contracts specifying detailed monitoring procedures, and a wide range of standards to be met, can be attractive to private companies; and ways have been found to monitor the standards specified.[68]

However, evidence from America does not vindicate the private management of prisons. The proportion of American prisoners residing in private institutions is

minuscule. According to the Criminology Department at the University of Florida, of over 5,000 correctional institutions in America just 43 secure adult prisons are privately run. There are over 1.25 million people in penal establishments in America: by the end of 1991 just 20,000 of those were held in private places.[69]

There is also evidence of malpractice at some American private prisons. In 1989, the State of Texas opened four minimum security prisons, two run by Corrections Corporation of America (C.C.A.) and two by Wachenhut. A 1990 audit found that the companies had failed to implement promised educational and job training programmes. Only one of seven specified vocational courses was running. Work programmes were insufficient and there was minimum participation in substance abuse treatment programmes. The audit also found that staff posts had been kept vacant, saving $280,000 (£165,000) in budgeted for salaries. The audit concluded that the four privately run prisons 'have failed miserably' and were simply warehousing inmates.[70] Both Wachenhut and C.C.A. are involved in tendering to run British prisons.

In December 1990 a contract was withdrawn from the privately run Ron Carr Detention Centre in Zavala County, Texas, following a series of escapes and fights. Now the prison is empty, the revenue bonds issued to finance the

building are in default and the county's fund is in deficit. All the employees were laid off.[71]

Perhaps the following quote from the *Wall Street Journal* puts the American experience into perspective:

> Once hailed as a quick fix for the nation's over-crowded prisons, privatisation is turning to quicksand for the companies and communities involved.[72]

## 4.5 PRIVATE SECURITY MANAGEMENT

The British Government is looking to the private security industry as well as American led consortia to run prisons. In a consultants' study commissioned by the Government, the experience of potential contractors in related activities is presented to advance their claims to run prisons. The related activities included managing the immigration detainee centre at Harmondsworth and the provision of security at Ministry of Defence (M.o.D.) sites.[73]

Whilst such activities are not directly relevant to the task of running a prison, there is evidence to suggest that the security firms involved at Harmondsworth and at

M.o.D. sites have failed to deliver adequate and publicly accountable services. Independent research into immigration detention centres judged Harmondsworth to be shrouded in excessive secrecy, devoid of proper complaints procedures, and its staff were considered to be poorly trained. The report said:

> One of the more disturbing features of the private security management of immigration detention centres was the total lack of public accountability that surrounds both its operational activities and Group 4's relationship with the immigration service.[74]

Group 4 is the company that won the contract to run the Wolds remand prison. Prison Unions have complained of the same 'shroud of secrecy' surrounding the contractual arrangements struck between Group 4 and the Home Office for the running of the Wolds.

Another matter for serious concern is the incidence of commercial bidders 'head hunting' from the Prison Service. As the Penal Affairs Consortium point out:

> Group 4 has already recruited the former Governor of Strangeways in support of its bid to win the contract to run the prison. In a separate case

> the Cabinet Office is investigating the intended switch to Group 4 of a senior Prison Service official who until recently worked in the Home Office unit responsible for contracting out prisons.[75]

It is disturbing that in spite of concerns about insufficient levels of staffing in prisons, firms interested in running prisons told the consultants upon whose report the Government's plans are based, that they would run prisons with fewer staff than would be provided in the state sector to drive costs down.[76] The introduction of privately managed prisons will surely increase the pressure upon the Prison Service to make staff cuts throughout the prison system. Yet the prison service has already made 24% efficiency savings in the past five years, largely by reducing the number of staff on duty at any one time.[77] Further staff cuts without a proportionate cut in prisoner numbers could threaten prison regimes and stability, preventing the development of meaningful and constructive relationships between staff and inmates.

Lord Justice Woolf advanced the view in his report on the 1990 prison riots that cost savings made by the Prison Service in recent years had prevented the expansion of prison regimes:

> Since 24% efficiencies were required to be achieved across the board over a five year period, mostly by reductions in staffing levels, it is clear that little, if any, improvement in regime would be likely to result from the "Fresh Start" package.[78]

Woolf went on to recommend that the Prison Service *increase* staffing levels, in particular at weekends. However, the Government seems prepared to allow even lower staffing levels in private prisons than now exist in state prisons. Speaking of Judge Tumim's Report on the Wolds remand centre, then Director General of the Prison Service, Derek Lewis, appears to be in general agreement with this:

> Although numbers of reported assaults at the Wolds are high and levels of staff are described as lean, the Chief Inspector concluded that prisoners in the Wolds were no more at risk than in any other comparable prisons.[79]

The reduction of staff levels is greatly disturbing when considered with the general thrust of Home Secretary Michael Howard's speech at the 110th Conservative Party conference.[80] The Home Secretary seems predisposed to

enlarging police powers, creating new offences, and reducing the likelihood of bail while extending the remit and duration of prison sentences. This, together with his announcement to build six new prisons which will be managed by the private sector, gives serious cause for concern.

## 4.6 AN EXPANDING UNIVERSE?

The Government began a formal consultation process about prison privatisation in 1988. Practitioners were asked to confine their submissions to private involvement in the remand system. The Green Paper of the same year, *Private Sector Involvement in the Remand System*, expressed serious doubts about the efficacy and appropriateness of extending private involvement to sentenced prisoners. It said:

> Because of the different purpose of remand, as opposed to the sentence of imprisonment, and the character of the remand regime, the running of a remand centre by a private company would raise fewer difficult operational questions or issues of principle... An important feature of the system for sentenced prisoners, which does not apply to remand prisoners, is that the length of

> time for which a sentenced prisoner occupies a place in the prison is, in the case of those eligible for parole, influenced by the reports and assessments of staff. The length of time in prison may also be affected by decisions in disciplinary proceedings, leading to loss of remission. There is understandable unease that such decisions should be taken with the involvement of private contractors and their staff... Such questions either do not arise, or are at least less significant, in dealing with remand prisoners. Remand prisoners remain subject to the authority of the courts, and are brought before the court for interim hearings and for trial. This relationship with the courts ensures that the time spent on remand is reliant on decisions of the courts in which the prison authorities have no role.[81]

Thus, the Government's announcement on December 1 1991[82] that it planned to privatise Blakenhurst, a brand new local prison which will hold convicted as well as unconvicted prisoners, is very worrying. No formal consultation presaged the Government's change of heart on the principle of handing over convicted prisoners to the private sector. As the Penal Affairs Consortium suggest:

> ...the Government should have sought the views of practitioners on this matter. The vast majority of prison workers, trade unions and prison reform groups would have advanced informed and compelling submissions which might have kept the Government to its original plan of confining private management to the remand sector.[83]

## 4.7 A TWIN-TRACK SYSTEM

In the history of British penology it took until the nineteenth century to rid the nation of a prison system where like cases were treated unlike and equity was insignificant. The prison system was unified but not uniform.[84] There is a danger that such practices may return.

The contract specification document struck between Group 4 and the Home Office ensures that prisoners experience conditions governed by clear minimum standards. Prisoners are guaranteed a daily shower, a daily change of underwear, and that they can spend the best part of their day in meaningful activity. Each prisoner has the opportunity to have his own cell and there is no overcrowding.

The standards that the Government is paying Group 4 to provide at the Wolds are those which it has consistently denied the state run Prison Service, despite the decade-long campaign of prison unions and reform groups for binding minimum standards for all prisons. Whilst the remand prisoners at the Wolds currently enjoy decent conditions and the privacy of single cell accommodation, the same cannot be said for the nine thousand other remand prisoners in the prison system. The Government is operating what Home Office Minister Angela Rumbold calls 'twin-track' provision.[85] Approximately eight hundred of those share a single cell between three and the majority of the rest between two. On average, local prisons, where remand prisoners are held, are overcrowded by twenty-five per cent. Some prisons such as Leicester (66%) and Wormwood Scrubs (72%) exceed this figure.[86]

Unless the standards at the Wolds are applied to the rest of the prison system, strong credence may be given to the view that the Government is intent on creating a two-tier system fixed in favour of the private sector. As Lord Justice Woolf said in his report:

> There is no reason why the standards required of the private sector for remand establishments should be any different from those required of the prison service.[87]

## 4.8 PRIVATE ECONOMICS AND PUBLIC COST

One of the main reasons originally expressed for contracting out prisons was to reduce costs.[88] However, there is little evidence from America or Britain to suggest that private management will mean a more cost effective service. Deloitte, Haskins and Sells are tentative. They say:

> Information supplied (by potential contractors) indicates a reasonable prospect of improvements in cost effectiveness through private involvement in remand contracts.[89]

However, their report goes on:

> Contractors have not, however, been able to provide detailed quantified justification for all the efficiency gains claimed.[90]

One could argue that the broad thrust of the Government's declared commitment to improving 'cost-effectiveness' merely involves reducing inputs. But this view would leave the improvement drive in privately run penal establishments looking like something of an anomaly. The resources made available for the construction and

maintenance of such institutions must be sizeable. As the Penal Affairs Consortium have it:

> The Home Office has been extremely coy in revealing the cost Group 4 is charging to operate the Wolds. There is no evidence to suggest that it is running 'like for like', a cheaper service than the state sector. Trade Unions requesting information regarding costs at the Wolds have been rebuffed on the grounds of 'commercial confidentiality'.[91]

They go on:

> Group 4 has been similarly secretive in concealing the costs of its operations at Harmondsworth detention centre. However a parliamentary answer in 1987 revealed that it was then three times as expensive to hold a detainee at Harmondsworth than at an equivalent Prison Service establishment.[92]

Such instances raise doubts about the Government's commitment to cost effectiveness. The present state of affairs appears to involve a national Government transferring public resources to private interests under a veil of secrecy. The expense of building these new

private establishments begs the question is public money being invested in a party ideology for private gain? Once in place these new privately managed institutions will seemingly overshadow existing public provision, if only because of the increased availability of resources and facilities - all provided by public money. In turn, this will give the impression that the private management of public goods *is* cost effective since the transition from public to private has gone hand in hand with the expansion of facilities and an improvement in conditions. On this account, a cynic could infer that party ideology has led to the Government seeking to discredit public service in the interests of private gain.

Private sector organizations are essentially profit-seeking bodies. One of the prevalent methods of increasing profits is to decrease inputs. It is true that the introduction of new technology and changes in working practices can contribute to increased returns, but because of the nature of the task involved (maintaining captivity, protecting the public, implementing contractually specified programmes, etc.) the scope for implementing new profit-enhancing practices is substantially limited. Moreover, increasing market share in the interests of augmenting returns is of little worth since contracts are awarded on the basis of tenders. The principal remit of a profit-seeking

organization in the penal system will be to cut staff and reduce salary levels.

A separate argument concerns the functional aspect of incarceration. As Porter claims:

> Altogether too easily may the government be thought to be washing its hands of responsibility. It has been suggested that the contemplation of privatisation demonstrates the moral bankruptcy of what prisons now do, having lost sight of the goals of reformation and rehabilitation. It would be better to realign these goals rather than increase the capacity of the system. In the final analysis we should remain aware that justice is a condition, and not a service.[93]

Joseph Field bases a highly pervasive argument upon Rousseau's theory of the social contract:

> Under our system, we agree to accept the laws of society and the power of the state to enforce these laws. When we violate these laws, we agree to let the state punish us... We accept the law because while it punishes us, it also protects us.[94]

He goes on to argue that acceptance of the law will only continue while it is enforced by agents of the state. Once law-making and law-enforcement is put in the hands of the state (in this case private prison managers) then the social contract has been violated. 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 criminal law.

The report to the Home Office by Deloitte, Haskins and Sells[95] is fairly cautious. However, as Porter points out, there are a number of fairly unsatisfactory aspects to this report:

> It is concluded that through privatisation improvements in cost-effectiveness could be achieved. Even if one is sceptical about this there still remains a fundamental problem in that the expenditure discussed is always done so with reference to the current government expenditure. There is little attention paid to the fact that for British prisons to be improved, increased expenditure may be necessary. All too easily the former level of expenditure may be allowed to represent an upper level beyond which the government may not go.[96]

He continues:

> The report talks at considerable length about the appointment of a monitor to oversee the private operation of prisons. Though on the face of it this is an innovative and helpful idea, in practice it may cause difficulties. Oversight by its nature would tend to undermine private involvement. Accordingly the benefits of greater flexibility will be lost. If the government were to watch the private operators as closely as really they should then managerial discretion would be seriously impaired. Prospective private operators claim to welcome government oversight, when this starts to impair profitability it is unlikely that their attitude will be so friendly.[97]

The report seems implicitly to assume that the American experience of penal privatisation has been entirely satisfactory. However, the Prison Officers' Association formed an opinion of the establishments they visited very different from the opinions and claims of their operators. If the American experience is the catalyst for the privatisation of prisons in Britain then any

balanced appraisal would first need to clarify exactly what the U.S. experience is.

## 4.9 THE WOLDS REMAND CENTRE

Britain's first privately managed prison this century, the Wolds in Humberside, opened in April 1992. Built under the auspices of the Government, the 320 bed remand prison was handed to Group 4 who won the contract to run the prison for five years. The £5.9 million a year all inclusive contract was awarded to Group 4 in November 1991.[98] The Government has also privatised prisoner escorting arrangements in the Humberside and East Midlands regions.

The following section considers the report of H.M. Chief Inspector of Prisons of the inspection of Wolds Remand Prison which took place from 17 to 26 May 1993 after the establishment's first year of operation. The Wolds is a new prison designed and built in one phase for the Prison Service specifically to contain those held on remand. It is situated in East Yorkshire and was opened on 6 April 1992. As indicated, the operation and maintenance of the prison was let to Group 4, a private company, who occupy the property under licence.

The contract (known as the 'Agreement') covers an initial period of five years from April 1992. A Home Office representative known as the 'Controller' is appointed to the prison to monitor the agreement and the contractor's performance under the Agreement. This post together with those of Personal Secretary and Deputy Controller, are part of the Prison Service Custodial Contracts Unit (C.C.U.), formerly the Remands Contract Unit.

The prison Inspectorate uncovered a variety of problems. A copy of the current agreement, as amended was not held at the Wolds:

> We were shown the original document in the Controller's office together with a variety of papers, some more formal than others, referring to agreed changes. For example, we were unable to establish the validity of a memo raised locally by a locum controller a month before the inspection, sanctioning an unlock time of one hour later than before. This established a daily routine from 7.30am to 10pm which could not meet the 15 hours per day 'out of cell' specified in the agreement.[99]

This provides cause for concern since it gives the impression that the stringent standards to which it is

claimed the private sector can accord are already being relaxed. This is detrimental to the state since its prisoners are not receiving the quality of treatment initially envisaged. It is also detrimental to the tax-paying public because output is at a lower level than paid for.

The value for money issue does not stop there. There is uncertainty about the respective obligations of the contracting parties. There appeared to be an anomaly surrounding the charges for utility services: gas, electricity and water being paid for by the Home Office. The contractual agreement also fails to clarify which party pays for the effects of vandalism. A total of 119 damage reports had been submitted by the contractor over a three month period at an estimated cost of £15,000 per quarter excluding labour charges. Also, there was doubt as to whether or not maintenance charges were currently covered: the maintenance contract appeared to have expired in December 1992. In addition, it appears that the Home Office and not the contractor pays the pocket money of the inmates.[100]

There were further questions concerning issues of accountability and management. The offices of Director and Controller are particularly ambiguous. The Director is the contractor's representative, a former senior

Governor from the Prison Service. The Controller is the Home Secretary's representative. She is a Crown Servant and her duties under the *Criminal Justice Act 1991* include reporting to the Home Secretary about the running of the prison by the Director, and taking charge of disciplinary matters, which in other prisons would be the duty of the Governor. The report describes the uncertainty:

> The Director is far senior to the Controller in Prison Service status and background. In what detail is the Controller to report about him to the Home Secretary, bearing in mind that the Home Secretary remains the ultimate guardian of the fate of the inmates? It is the Home Secretary who appoints the Controller and approves the Director of each custody officer.[101]

One possible strategy would be to add clarity and detail to the relative job descriptions, and therefore responsibilities, of the Controller. H.M. Chief Inspector of Prisons implies that the Controller's job description is couched in terms so general that they become meaningless, suggesting that:

> More work could be done to satisfy the first standard function on the Controller's job

description, ie "To monitor and report at appropriate intervals on all aspects of the running of the prison."[102]

The Controller's first annual report[103] refers to three specific areas where the contractor did not meet requirements of the Agreement in 1992: the library service; a bail information scheme; and the prison visitors scheme. Further investigation on behalf of the Home Office apparently concluded that it was not necessary to take default action at that time.[104]

This does produce the worry that the Secretary of State is being 'soft' on the private sector organization that is supposed to be subject to the rigour and disciplines of the market, and simultaneously responsive to contractual enforcement. Moreover, Judge Tumim, the Chief Inspector, draws attention to the fact that comparative costings were receiving minimal attention. It appeared that a financial report by the contractor covering April to December 1992, available in March 1993, had not been seen by C.C.U. staff.[105] Tumim concludes that 'a service was being paid for at the Wolds which, at the time of the inspection, was being monitored only superficially.'[106]

Group 4 Remand Services Limited recruited the Director, Head of Custody and Head of Inmate Services from the Prison Service soon after the contract was awarded in November 1991.[107] The senior management team had four months to recruit, select and train staff, finalize the design for the operation of the prison, and prepare the establishment to receive inmates.[108] Dramatic as this may sound, Group 4 had to produce plans and estimates in the process of tendering for the contract so that this process was not as rash, and the firm not as dynamic, as the report may suggest. All staff, with the exception of five that had been recruited from the Prison Service, were certified after training as Prison Custody Officers[109] by the Remands Contract Unit (now C.C.U.) at the Home Office. The training of staff took place in the prison. The report records that:

> Inspectors were told that the high staff morale which had preceded the formal opening was followed by an inevitable dip as inexperienced personnel began to learn about dealing with inmates.[110]

This raises a problem. If staff are inexperienced and are 'thrown in at the deep end' there is scope for a situation to develop where the gap between induction training and harsh prison reality could lead to security

risks. The escape of prisoners from Group 4's Court Escort Services pays homage to this argument.

A more general problem arose due to the management structure of the institution and the fragmentation that the removal of incarceral establishments from state operation can cause. The Director of Wolds Remand Prison was accountable to the Managing Director of Group 4 (U.K.) who reported to the owner of the company. The Controller was accountable to the Head of the Custodial Contracts Unit, an Assistant Secretary. Until the creation of the Prison Service Agency in April 1993, the then Remands Contract Unit had operated within the Home Office but outside the Prison Service. As the report states:

> At the time of the inspection the CCU had not been incorporated fully into the Prison Service management structure. Antipathy towards the CCU was apparently at many levels in the Prison Service. The resultant lack of co-operation hindered the work of the Wolds by preventing the transfer of some prisoners and by inhibiting the exchange of ideas and experience between the contracted prison and establishments in the public service. The Wolds was not bound by Prison Service Circular Instructions and Standing

> Orders. Decisions as to which of these should apply were taken by CCU. Although the contents of particular Circular Instructions were drawn to the attention of the Director by the Controller, the management of Wolds should be given copies of all relevant Circular Instructions and Notices to enable them to keep abreast of developments in the public service. There is a need to integrate the work of the Wolds and the Prison Service so that the needs of inmates can be better met by a mutual exchange of ideas and staff training opportunities.[111]

Implicit in this statement is the notion that public sector Prison Service staff have skills and experience superior to that of their Group 4 counterparts. At the same time the idea is put forward that the public and private sectors can learn from each other. The fragmentary nature of current administrative arrangements is not suited to this purpose. Moreover, such disintegrative arrangements are not in keeping with the recommendations of the Woolf report.[112]

Conversely, the Wolds' internal management structure had more positive connotations. There were four tiers of staff: senior managers, managers, Prison Custody

Supervisors and Prison Custody Officers.[113] As the report indicates:

> The flat management structure had the advantage of enabling senior managers to tackle issues affecting the day to day lives of prisoners unfettered by the bureaucracy of a large organisation such as the Prison Service. Managers at the Wolds had greater flexibility than their counterparts in the Prison Service to respond to problems. It was relatively easy for the Director to obtain authority for decisions which, if unsuccessful, could be altered in light of experience. Several changes of organisation and regime had already taken place and more were to follow. This contrasted favourably with the Prison Service where change often takes longer to organise and to implement.[114]

However, flat hierarchies are nothing new. The organization and structure of certain public sector establishments merely reflects the demands put upon them. There is nothing in the nature of prison work which renders the adoption of such structures impossible. State prison officers have the knowledge and experience to deal with particular vicissitudes in the same way as their private sector counterparts. If emancipated from

'bureaucracy from above', as the private sector contractors have been, then state prisons would be free to adopt similar organizational structures.[115] Perhaps the need to accommodate policy changes and initiatives while producing statistics and information has perpetuated this state of affairs. The stability provided by a fixed five-year contract certainly puts Group 4 in a better position to devolve decision-making responsibilities.

Staff working with prisoners in the Wolds felt that the Director and his colleagues did not tour the establishment sufficiently to allow them full knowledge of the work being done. It could be the case that this was a result of high work-loads, probably due to optimistic calculations of work-loads and work-rates in the tendering process:

> Strain on the existing senior management team had been acknowledged by the decision to recruit a Head of Residence. Prisoner Custody Supervisors in units rarely saw other staff and felt themselves to be isolated with inmates: so much so that in some cases there was a hint of collusion between supervisors and inmates against managers. Thus the Director's intention to give managers more responsibility for working with and

> managing programmes for inmates is strongly supported. Unit supervisors were under stress and opportunities should be built in to provide support for colleagues. Counselling arrangements for individual staff which had been provided when the prison opened appeared to have been discontinued.[116]

A further source of worry concerns the position of Controller. Attention has already been drawn to the very general language in which the Controller's remit is couched. Prison Rules 1964 as amended (1993) provide some of the Controller's powers and confer on the Controller the authority to order a refractory or violent prisoner to be confined temporarily in a special cell and to order that a prisoner might be put under restraint when necessary to prevent him from injuring himself or others, damaging property or creating a disturbance. The Controller was also required to enquire into charges laid against prisoners by staff under the Code of Discipline and, where charges were proved, to award appropriate punishments.[117] At the time of the inspection the designated Controller had been absent on sick leave for several months and three different Governors from C.C.U. had filled in for her on separate tours of detachment.[118] The Deputy Controller had been directed to other duties

and it was reported that this arrangement appeared to have weakened the Controller position.[119]

The Controller was responsible for reporting all major incidents to the Tactical Management and Planning Unit of the Prison Service and for monitoring the use of approved methods of control and restraint. The movement of inmates to the Segregation Unit under Prison Rule 43 was also the responsibility of the Controller. Given the conflict of interest arguments which are employed against private sector involvement - that it is in the interests of prison entrepreneurs to have full prisons and the longest possible periods of incarceration - it is important to have a strong and assertive Controller. However, the prison inspectorate identify yet another potential problem:

> Although we found no evidence that the current postholder had experienced difficulties with the Director, we felt that there was a potential problem over the status of the Controller. The Controller was significantly less experienced than either of the Directors who had been in post yet was expected to monitor and report on the Director's work. The Controller must have adequate experience and be supported effectively within the management structure of the Prison

> Service to enable him or her, if necessary, to maintain a position that runs counter to the views of the Director. In the prolonged absence of the Controller, a replacement should be appointed with knowledge of the workings of the Wolds. The post of Governor 5 Deputy Controller was unconvincing. A more effective way of substituting for the Controller should be found, particularly in the duty of adjudicating on charges laid against prisoners.[120]

Some of the arrangements in terms of performance measurement raised further questions:

> The monitoring and treatment of prisoners is probably easier than monitoring the financial details of the Agreement. The role of Controller replicates some of the responsibilities of a governor in a Prison Service establishment and some of the duties performed by a Board of Visitors. If the public are to be confident that inmates are properly treated and that value for money is being achieved, it is important that it is done well. At the Wolds, while the treatment of prisoners was effectively supervised, there was an absence of suitable systems for the Controller to monitor financial aspects.[121]

Poor industrial relations have troubled the state Prison Service in recent times and it was envisaged that the private sector would not incur such problems. However, there are misgivings. The General Municipal and Boilermakers' Union (G.M.B.) was the only union represented in the Wolds, with a membership of some forty per cent of the Prison Custody Officers and Supervisors. G.M.B. is recognized by Group 4. The Chief Staff Representative (C.S.R.) of the G.M.B. described the morale of his members as generally good, having improved recently from a low point largely generated by the negative press aimed at Group 4 in general, and the staff of the Wolds in particular. The C.S.R. stated that amongst matters which gave rise to some feelings of resentment was the fact that Prison Custody Officers were not paid for the first three days of sick leave. He understood the need to discourage the misuse of *ad hoc* sickness absence but felt that it implied a lack of trust in his members.[122] The report subsequently indicates that sick leave per member of staff was remarkably low and that the contractor's policy not to pay for the first three days sick leave was probably a significant factor in the low rate but was resented by staff.[123]

The C.S.R. claimed that his members were probably better trained than Prison Officers in some aspects of their

work. They felt that their salaries should reflect this. Parity with Prison Service pay was his aim. The shift systems that had been introduced without consultation with staff was another potential source of conflict. The C.S.R. felt that though individual relationships with members of management were good his members were too often presented with a *fait accompli*.[124]

Individual counselling of members of staff under stress had been carried out at one time by members of senior management. However, the inspectorate reported that: 'Recently there did not seem to have been time for this. The C.S.R. felt that a formal system of stress counselling should be introduced.'[125] In general, the C.S.R. felt that the emphasis had been placed on care for prisoners, to the detriment of that provided for staff.

The delineation of employees' responsibilities was somewhat ambiguous and the management of staff rotas questionable:

> There seemed little distinction between the work of Prison Custody Supervisors and that of Prison Custody Officers. The responsibilities of managers were unclear. Some staff seemed doubtful about what they were responsible for and

to whom they were accountable. No one to whom we spoke had a personal copy of his or her job description. High amounts of time were owed to staff and annual leave was behind target. These might represent future problems over staff deployment.

Senior managers pointed out that some of the time owed to staff had been accrued in attending incidents and some was due to bank holiday attendance. If as they suggested, staff were given additional leave instead of time off in lieu, leave schedules would fall further behind. This in turn would lead to a further increase in time owed to staff required to work to cover those on leave.[126]

In terms of staff recruitment, it was reported that: 'There was no evidence that the establishment was having more difficulty than when it opened in attracting good quality people.'[127] This is not surprising given the harsh employment milieu of the 1990s. The inspectorate formed the view that the overall quality of Prisoner Custody Officers and Prison Custody Supervisors was at least as high as equivalent Prison Service employees. One fifth of operational staff were female, and the prison had six staff from ethnic minority backgrounds. Vetting procedures for new recruits explored the work

records of candidates as far back as twenty years, and eight conditional recruits had failed this vetting process.

Staff training was a topical issue, if only because it had been made so by the press.[128] The prison inspectorate were particularly critical of the quality and quantity of development training:

> The training needs of individual members of staff had yet to be identified and we saw little sign that managers were ensuring that their staff had the appropriate knowledge and skills for their work. In the first four months of 1993, only 158 days of training had been achieved, less than one day for each member of staff. The main difficulty appeared to be finding time for staff to be trained. It had been agreed with CCU that every operational member of staff should receive four days training in first aid. It was unclear how this was to be achieved without using rest days. The establishment was nowhere near its target of providing every Prison Custody Officer with five days refresher training in direct supervision each year. There was a lack of training in security, race relations, drug awareness, fire prevention and working with sex

> offenders. Of equal concern was the absence of training and support for Supervisors, a problem which should be addressed without delay.[129]

Staff levels were a further cause for concern in the context of security. The report records that:

> The quality of basic amenities and services for prisoners was of a high standard but there was evidence of bullying and taxing, and in one or two units a sense that inmates were in control.[130]

During the inspection there were several minor incidents which the inspectorate felt might have been challenged by staff in a Prison Service establishment. This included inmates damaging a pool table in the presence of a unit Supervisor without immediate action being taken. Moreover, one Supervisor was responsible for maintaining control in a unit of fifty prisoners. The quality of supervision he or she could give to such a large number of prisoners in a spacious environment was limited. The inspectors indicate that while some Supervisors were clearly comfortable in this position, others had difficulties. There was insufficient challenging of unacceptable behaviour.[131]

At the time of the inspection, staff at the Wolds had successfully contained acts of violence and indiscipline without recourse to outside help. Between 1 April 1992 and 31 March 1993 there had been twenty-nine recorded inmate assaults on staff, twenty-one inmate assaults on one another, two incidents of food refusal, three roof-top incidents and nine concerted acts of indiscipline. However, the report states: 'The relevance of such statistics as a comparison with other prisons is questionable because of differences in regimes and in the reliability of the systems of reporting incidents.'[132] The only escape from the prison had been that of a man who had dressed himself in female clothing and walked out with outgoing visitors. There had, in addition, been one escape from a hospital escort. As the inspectors assert:

> Both escapes from the Wolds were replicated in other establishments containing similar populations. We did not draw from them, or from our observations, any adverse conclusions about the standard of vigilance maintained by staff.[133]

Some of the inmates who were subject to the 'restricted regime' for disciplinary purposes complained bitterly, about the restrictions placed upon them. They particularly disliked the 'closed visits'. Some complained that they were effectively being punished

twice for the same disciplinary offence since they are placed initially in a segregation unit before eventual subjection to the restricted regime. Others also alleged that they had not received the prescribed warnings required before subjection to the regime. When inmate records were checked it was found that in two cases formal warnings had not been entered.[134] Inmates other than those on the restricted regime were generally ambivalent about its introduction. Though many could understand the need for special arrangements to deal with disruptive inmates, there was concern that the setting up of the unit indicated a desire by management to cut back on the general regime.

Two points apply here. First, increasing the use of the restricted regime would be a rational policy for management to pursue since it would ameliorate pressures on staff and decrease prisoner-warder ratios. Secondly, if, as it was suggested to the prison inspectorate,[135] the responsibility for adjudications was shifted from the Controller to the Director (as part of his responsibility for controlling inmate behaviour), a clear conflict of interests would be created where financial and operational pressures would give a strong motivation to augment the use of the disciplinary regime.

The operational characteristics of security provision was merely one aspect. The calibre of security management was brought into question:

> Security was managed by one dedicated manager, having hitherto been the province of the duty manager. Though this is an improvement the manager in question had had no formal training in security in prisons. We found that he was unfamiliar with the Prison Service Manual on Security, though a copy existed in the establishment. We recommend that staff at the Wolds engaged in security work be provided with the training that is available to Prison Service security officers.
>
> Two, similarly untrained, Prison Custody Officers assisted the manager in the work of the security office.[136]

Doubts were also raised about crisis management:

> Should a serious incident occur the question of command seemed thoroughly unsatisfactory. It was explained to us that the higher level to which the Controller would be expected to report would be the CCU in Prison Service Headquarters. This is currently headed by a civil servant who has no

> operational experience of prisons. The Director would be accountable to senior people in the headquarters of Group 4 where it was equally unlikely that anyone would have prison experience. Presumably it was hoped that these two elements would communicate with each other to agree instructions which would be given to people on the ground. In a serious situation of disorder in a prison, time is of the essence. We doubted whether the arrangement described to us would ensure that timely and sensible decisions would be made and communicated.[137]

In terms of the regime provided, the Wolds was seen as having a more civilized atmosphere, with less reliance on locking prisoners in their cells. Basic amenities, contact with family, access to sport, education and exercise all fully met the requirements of a remand regime. However, there were deficiencies:

> There was no bail information scheme, an unfulfilled part of the contract. The quality of induction was poor with insufficient explanation of rights and personal responsibility. There was insufficient personal attention given to inmates to encourage them to make best use of the opportunities available. There was an absence of

> group work and counselling to tackle problems of assertiveness, anger management, drug and alcohol abuse etc.[138]

Clearly, there are obvious breaches of contract. The prison inspectors draw attention to this, expressing surprise that no payments in default had been required from the contractors, making particular reference to the delayed introduction of a library service and the continued absence of a bail unit. The report concludes that:

> ...the absence of systems for checking the financial aspects of the contract was a serious weakness. In the circumstances, it was impossible to determine the value for money of this contracted arrangement in any detail.[139]

*4.9.1 PRIVATISATION AND PRISONS: AN OVERVIEW*

The term privatisation describes a complex and multidimensional concept encompassing a wide variety of economic arrangements and rearrangements affecting the distribution of the production of goods and the delivery of services between the public sector and the private sector. The unifying theme of privatisation is directional: a shift in the allocation of

responsibilities from state provision to the private sphere.

The perception that drives the proponents of privatisation is that government has become involved in business at which it is not particularly effective or efficient. A number of explanations are offered for this, monopoly and security being the most popular. The cure for these perceived ills is to take operations away from the Government and to give all or part of such responsibilities to the private sector. Yet such an approach forgets history. It fails to take cognizance of the fact that the bulk of state operations were accrued because of necessity - because of the failures or inadequacy of private provision.

In the context of criminal justice a number of contracts have been introduced (for services such as education and court escourts), the most recent being for the management of prisons. However, the observance of contract specifications to date has not been as envisaged, and the enforcement of contract specifications not as promised.

Notes

1. J. Le Grand and R. Robinson, 'Privatisation and the Welfare State: An Introduction', in J. Le Grand and R. Robinson (eds), *Privatisation and the Welfare State* (Unwin Hyman, London, 1984), pp.7-8.

2. See A. Walker, 'The Political Economy of Privatisation', in J. Le Grand and R. Robinson, *ibid.*

3. J. Le Grand, 'Privatisation and the Social Services', in J. Griffiths (ed), *Socialism in a Cold Climate* (Allen & Unwin, London, 1983), p.69.

4. Detailed in A. Walker, *op. cit.*

5. M. Pirie, *Privatization* (Wildwood House, Aldershot, 1988), p.11.

6. R. G. Porter, 'The Privatisation of Prisons in the United States: A Policy That Britain Should Not Emulate', *The Howard Journal*, 1990, vol.29, no.2, p.65.

7. D. Saunders-Wilson, 'Privatization and the Future of Imprisonment', *Prison Service Journal*, April 1986, p.9.

8. P. Clarke, 'Creating a Prisons Market', *Economic Affairs,* Dec/Jan 1989, p.20.

9. See R. G. Porter, *op. cit.*, p.67; or S. Borna, 'Free Enterprise Goes to Prison', *The British Journal of Criminology*, 1986, vol.26, no.4, p.326.

10. S. McConville, *A History of English Prison Administration*, vol.1 (Routledge, London, 1981), p.124.

11. L. T. Hume, 'Bentham's Panopticon: an Administrative History', *Historical Studies*, 1973, no.5, p.49.

12. S. Borna, 'Free Enterprise Goes to Prison', *The British Journal of Criminology*, 1986, vol.26, no.4., p.328.

13. *Ibid.*, p.325. In 1983 the corporation made no more than $40,000 on its $900,000 contract with Pennsylvania.

14. R. G. Porter, *op. cit.*, p.68.

15. The Criminology Department of the University of Florida estimate that there are 43 privately run secure adult facilities in the U.S.A., quoted in Penal Affairs Consortiumn, *The Case Against Prisons for Profit*, (Penal Affairs Consortium, London, November 1992), p.2; also, see S. J. Brakel, 'Privatisation in Corrections: Radical Prison Chic or Mainstream Americana?', *New England Journal on Criminal and Civil Confinement*, 1988, vol.14.

16. R. G. Porter, *op. cit.*, p.68.

17. *Ibid.*

18. *The Sunday Times*, 28.7.85; D. Saunders-Wilson, 'Privatisation and the Future of Imprisonment', *Prison Service Journal*, April 1986.

19. R. Boothroyd, 'Private Prisons: Making Money from Porridge', *The Law Magazine*, 22 Jan, 1988.

20. E. S. Savas, 'Privatisation and Prisons', *Vanderbilt Law Review*, 1987, vol.40.

21. R. G. Porter, *op. cit.*, p.69.

22. *Ibid.*

23. M. Ryan and T. Ward, *Privatization and the Penal System* (Open University Press, Milton Keynes, 1989), p.2.

24. Quoted *ibid.*, pp.2-3.

25. *Ibid.*, p.3.

26. *Ibid.*

27. Quoted in *Nacro Briefing*, no.25, 'Imprisonment in Western Europe: Some Facts and Figures' (NACRO, London, 1993).

28. R. G. Porter, *op. cit.*, p.69.

29. Quoted *ibid.*

30. *Ibid.*, pp.69-70.

31. Quoted *ibid.*, p.70.

32. Fourth Report of the House of Commons Home Affairs Committee, 1986-87, *Contract Provision of Prisons* (HMSO, London, 1987), p.v.

33. The Adam Smith Institute (A.S.I.) was originally set up in Virginia, U.S.A., in 1978 by two British intellectuals connected with the Heritage Foundation, the multi-million dollar pressure group of the American New-Right. In 1981 it was registered as a charity in Britain, with financial support from British United Industrialists. The A.S.I. boasts that many of its policies have been implemented by the Conservative Government. Many of these were promoted as part of the 'Omega Project' launched by the A.S.I. in 1984. It was in the *Omega Report* on *Justice Policy* that the idea of private prisons made its British debut. The Omega Project was an ambitious attempt to spell out the policy implications of the neo-Liberal strand in New-Right thinking. See Ryan and Ward, *op. cit.*, p.45.

34. P. Young, *The Prison Cell* (A.S.I., London, 1987).

35. *Ibid.*, p.38.

36. M. Ryan and T. Ward, *op. cit.*, p.46.

37. *Ibid.*, p.47.

38. P. Young, *op. cit.*, p.6.

39. *Ibid.*, p.37.

40. See J. Mullen, *The Privatisation of Corrections* (National Institute of Justice, Washington DC, 1985); or M. R. Wooley, 'Prisons for Profit', *Dickinson Law Review*, vol.90.

41. S. Borna, *op. cit.*, pp.330-331.

42. E. S. Savas, *op. cit.*

43. R. G. Porter, *op. cit.*, p.71.

44. *Ibid.*

45. S. Borna, *op. cit.*

46. R. G. Porter, *op. cit.*, p.71.

47. See *The Times*, 10.5.93, p.3, 'Head of jail service calls in Group 4 after inmate's death'.

48. R. G. Porter, *op. cit.*, p.73.

49. *Ibid.*

50. S. Borna, *op. cit.*, p.331.

51. I. P. Robbins, 'Privatisation of Corrections: Defining the Issues', *Vanderbilt Law Review*, 1988, vol.40, no.4, p.816.

52. R. G. Porter, *op. cit.*

53. See B. E. Evans, 'Private Prisons', *Emory Law Journal*, 1987, vol.36; W. J. Ellison, 'Privatisation of Corrections: A Critique and Analysis of Contemporary Views', *Cumberland Law Review*, 1987, vol.17.

54. Minutes of Evidence taken before the Home Affairs Committee of the House of Commons on 11.2.87, para 9, p.99.

55. R. G. Porter, *op. cit.*, p.74.

56. *Ibid.*, pp.74-75.

57. D. N. Wecht, 'Breaking the Code of Deference: Judicial Review of Private Prisons', *Yale Law Journal*, 1987, vol.96.

58. R. G. Porter, *op. cit.*, pp.75-76.

59. *Ibid.*, p.76.

60. P.O.A. memorandum to the House of Commons Home Affairs Committee, 11.2.87., *op. cit.*, para 12, p.100.

61. R. G. Porter, *op. cit.*, p.77.

62. See W. J. Ellison, *op. cit.*

63. I. P. Robbins, *op. cit.*, p.827.

64. L. Radzinowicz, *The Times*, quoted in *The Case Against Prisons for Profit*, *op. cit.*, p.2.

65. See the subsequent section on the Wolds Remand Prison.

66. See the Green Paper: *Private Sector Involvement in the Remand System,* Cm 434 (HMSO, London, 1988).

67. Quoted in *The Case Against Prisons for Profit*, *op. cit.*

68. Green Paper, *Private Sector Involvement in the Remand System, op. cit.*, para 23, p.4.

69. Centre for Alternative Industrial and Technological Studies, *Prison Services Privatisation* (February 1992), quoted in *The Case Against Prisons for Profit*, *op. cit.*

70. *The Times Educational Supplement*, 15.11.91., p.12.

71. *Prison Services Privatisation*, *op. cit.*

72. Quoted in *The Times Educational Supplement*, *op. cit.*

73. Deloitte, Haskins and Sells, *Report to the Home Office on the Practicality of Private Sector Involvement in the Remand Sector* (February 1989), p.45, quoted in *The Case Against Prisons for Profit*, *op. cit.*, p.3.

74. P. Green, *Private Sector Involvement in the Immigration Detention Centres* (Howard League, London, 1989), para 13, p.13.

75. *The Case Against Prisons for Profit*, *op. cit.*, p.3.

76. Deloitte, Haskins and Sells, para 59, *op. cit.*

77. *Prison Service Briefing*, Number 17, 16th January 1990, (Prison Service, London, 1990), p.2.

78. *Prison Disturbances April 1990*, Report of an Inquiry by The Rt Hon Lord Justice Woolf (Parts I & II) and His Honour Judge Stephen Tumim (Part II), Cm 1456 (HMSO, London, 1991), para 13.72, p.346.

79. Quoted in *NACRO Criminal Justice Digest*, October 1993 (NACRO, London, 1993), p.8.

80. Speech by the Rt Hon Michael Howard QC MP (Folkestone & Hythe), Home Secretary, speaking to the 110th Conservative Party Conference, at the Wintergardens, Blackpool, 6.10.93.

81. *Private Sector Involvement in the Remand System*, (HMSO, London, 1988), paras 27-29, p.5.

82. Quoted in *The Case Against Prisons for Profit*, *op. cit.*, p.3.

83. *Ibid.*, p.4.

84. See U. R. Q. Henriques, *Before the Welfare State* (Longman, London, 1979), pp.156-58.

85. *The Times Educational Supplement*, *op. cit.*

86. Figures for overcrowding in local prisons are listed in the *Prison Service Annual Report and Accounts*, April 1992 - March 1993, vol.2, Cm 2385 (HMSO, London, 1993), p.18.

87. *Prison Disturbances April 1990*, *op. cit.*, para 12.119, p.301.

88. See the Green Paper: *Private Sector Involvement in the Remand System*, *op. cit.*, para 51, p.9.

89. Quoted in *The Case Against Prisons for Profit*, *op. cit.*, p.4.

90. *Ibid.*

91. *Ibid.*

92. *Ibid.*

93. R. G. Porter, *op. cit.*, pp.77-78.

94. J. E. Field, 'Making Prisons Private: An Improper Delegation of a Government Power', *Hofstra Law Review*, 1987, vol.15, p.673.

95. Deloitte, Haskins and Sells (Accountants), *Report to the Home Office on the Practicality of Private Sector Involvement in the Remand System*, *op. cit.*

96. R. G. Porter, *op. cit.*, p.78.

97. *Ibid.*, pp.78-79.

98. The original estimate of £4.4m was reported in *The Times Educational Supplement*, 15.11.91., p.12. However, in July 1994 it was disclosed that Group 4 was being paid £5.9m a year to run The Wolds, see *The Times*, 30.7.94., p.7, 'Group 4 wins prison deal with higher bid'.

99. S. Tumim, Report by H.M. Chief Inspector of Prisons, *Wolds Remand Prison* (Home Office, London, 1993), para 1.36, p.19.

100. See *ibid.*, para 2(c), p.2; and para 1.37, p.19.

101. *Ibid.*, para 2(b), p.2.

102. *Ibid.*, para 1.43, p.21.

103. Covering 6 April 1992 - 31 December 1993.

104. Wolds Remand Prison, *op. cit.*, para 1.42, p.21.

105. *Ibid.*, Para 1.45, p.21.

106. *Ibid.*, para 1.49, p.23.

107. *Ibid.*, para 2.01, p.24.

108. *Ibid.*

109. In the glossary of the report the term 'Prison Custody Officer' is described as being a near equivalent to a Prison Officer.

110. *Wolds Remand Prison, ibid.*, para 2.02, p.24.

111. *Ibid.*, para 2.07, pp.26-27.

112. *Prison Disturbances April 1990, op. cit.*

113. At the time of the report senior management consisted of a Director and seven senior management positions - Head of Custody, Inmate Services Manager, Finance Manager, Facilities Manager, Human Resources Manager, Nurse Manager and Personal Secretary to the Director.

114. *Wolds Remand Prison, op. cit.*, para 2.08, p.27.

115. A number of initiatives to introduce flatter hierarchies in public service have been attempted by bodies such as Newcastle City Council and Walsall M.B.C.; see Howard Elcock, *Local Government: Politicians, Professionals and the Public in Local Authorities*, 2nd Ed. (Methuen, London, 1986), p.306.

116. *Wolds Remand Prison, op. cit.*, para 2.09, p.28.

117. See *ibid.*, para 2.15, p.30.

118. The Controller at the Wolds was by background a Prison Service Governor 3, with a Governor 5 as deputy and a full-time typist/clerical assistant as Personal Secretary.

119. *Wolds Remand Prison, op. cit.*, para 2.16, p.30.

120. *Ibid.*, para 2.18, p.31. 'Governor 5' is a junior Governor grade, the Governor 5 normally being in charge of a prison wing.

121. *Ibid.*, para 2.19, p.31.

122. See *ibid.*, para 2.33, p.32.

123. *Ibid.*, para 2.49, p.40. The average sick leave per member of staff was only two days per year.

124. See *ibid.*, paras 2.24 and 2.25, p.33.

125. *Ibid.*, para 2.26, p.37.

126. *Ibid.*, paras 2.33 and 2.34, pp.35-36.

127. *Ibid.*, para 2.41, p.38.

128. Incidents such as escapes and a prisoner dying during a Group 4 court escort attracted wide media attention and there were questions raised about the competence of Group 4 staff. See *The Times*, 16.4.93., p.4, 'Group 4 loses fifth prisoner as firm's name is cleared'; and 10.5.93., p.3, 'Head of jail service calls in Group 4 after inmate's death'.

129. *Wolds Remand Prison*, *op. cit.*, para 2.43, p.39.

130. *Ibid.*, para 3.27, p.55.

131. See *ibid.*, para 3.19, p.52; para 7.05, p.115.

132. *Ibid.*, para 3.34, p.59.

133. *Ibid.*, para 3.54, p.66.

134. *Ibid.*, para 3.44, p.63.

135. *Ibid.*, para 3.35, p.59.

136. *Ibid.*, paras 3.56 and 3.57, p.67.

137. *Ibid.*, para 3.79, p.73.

138. *Ibid.*, para 4.05, p.76.

139. *Ibid.*, para 7.06, p.116.

# 5. CONCLUSIONS

The conclusions drawn about public policy on guilt and punishment in Britain fit into three broad categories: thoughts, programmes and solutions. The thoughts section embraces the conception and justification of punishment. The programmes examined are essentially the dominant criminal justice policies of those political parties in competition for government. The solutions part addresses the present Government's responses to some of the more pressing problems found in the British criminal justice system.

## 5.1 THOUGHTS

Punishment is a term used loosely and in a variety of ways. In its central or primary sense it implies the intentional infliction by some authority upon an offender, of some penalty intended to be disagreeable, for some offence authorized by that authority. The references to authority and intention are essential. Intention removes the potential inclusion of consequential misfortunes. Authority differentiates between, on the one hand, mere vengeance, and on the other, the calculated and purposeful infliction of harm by the state or comparable power.

The use of punishment in the primary sense emphasizes the logically necessary connection between guilt and unpleasantness. The concept of guilt is that of usage. Guilt is not merely a feeling of guilt. There is nothing to stop a person from being guilty without having any feelings of guilt and *vice versa.* Generally speaking, contemporary definitions of guilt are formulated not by calculating the assimilation of behaviour to the doctrines of natural law, but by reference to convention. Thus, to incur guilt is to have brought oneself, by a transgression, into a situation where one must expect to be greeted with ill will and reproach.[1] Moreover, guilt is not referred to as a consequence of an offence, but as a presupposition of responsibility for it. It is not sufficient to view guilt as a reaction to an offence. Guilt is being in breach of a certain kind of rule. It is a position entered into by deliberately crossing socially defined borders: a position which will be discouraged by the disincentive of punishment.

Punishment has manifested itself in many forms - ostentatious ridicule, physical pain, systematic deprivation or the deliberate infliction of death. These modes of harm have found substantial influence in the prevailing social and political philosophies of their time. From the collapse and fall of the Roman Empire through to the sixteenth century, medieval punishments were, in general, both arbitrary and

barbarous, subsequently increasing in severity between the Reformation and the Enlightenment.[2] These early manifestations of punishment were not as pluralistic as appeals to convention would suggest. Michel Foucault argues that, during this period, punishment represented a symbolic assertion of power and authority by the monarchy. It was a ceremony of sovereignty: it used ritual marks of vengeance to present spectators with a spectacle of the physical presence of the sovereign and of his power.[3] It is against such a background that the developing views of mankind and of society must be considered.

The social and intellectual milieu of the Enlightenment was to change penology. The Enlightenment included theories of philosophers so diverse as Rousseau and Voltaire, Montesquieu and Diderot, each of them ranging widely in his opinions and feelings. But a few leading ideas did become salient. All were affected by a growing scientific approach to social problems. All turned to reason and common sense as weapons against the old order. All revolted against the unquestioning acceptance of tradition and authority. Appeals to natural law and the doctrine of self-ownership gave the individual a new sense of freedom governed by the notion of the social contract.[4] The theory that man owed absolute obedience to government was replaced by the notion that obligations between the two were mutual and

analogous to a voluntary contract. Subordination was by consent. The citizen was now presumed to have accepted the very law by which he may be punished.

Implicitly, the criminal was assigned a paradoxical complexion. On the one hand, he had broken the social compact, becoming an enemy of society as a whole. On the other, he participates in the punishment received since he is a citizen. Thus, the adoption of contractarian assumptions by the prevailing political philosophies made punishment coextensive with the functions of the social body. On these grounds, the right to punish has been shifted from the vengeance of the sovereign to the defence of society.

In the context of punishment, the social contract implies a quantitative dilemma. How is punishment to be meted out? The penalty the malefactor is exposed to seems to be without bounds. Contractarianism implies mass consensus and an unlimited power to punish. Hence, the social compact brought with it the need to establish a principle of moderation for the power of punishment. An age that valued liberty above everything saw moves which sought to supersede the savage penalties of the past with punishments corresponding to offences both in nature and extent. Whereas retribution was seen as the obvious way by which to calculate the penalty - matching the

intensity and abhorrence of the crime to that of the punishment - a competing penal philosophy emerged.

Cesare Beccaria's seminal work, *An Essay on Crimes and Punishments*, caused a sensation throughout Europe. At the heart of Beccaria's thoughts was a new conception of the role of law and the proper functions of punishment. The purpose of punishment was not to bolster the power of the sovereign but to sustain the social benefits enjoyed by the citizenry. The essay proposed increased pro-activity in the justification of punishment. Whereas retributivists sought to establish both a quantitative and qualitative relation between crime and its punishment, looking back to the offence to ordain an equivalence of pain, Beccaria looked to the *effects* of punishment for its rationale. The penalty was to be calculated in terms not of the crime but of its potential repetition. The past offence was subordinated to an emphasis on future disorders. Hence, the medium of deterrence was introduced. Instead of punishing a malefactor for his rationality and will, punishment was engineered to destroy the dynasty of crime.

That one of the major functions of punishment was to deter crime had, for centuries, been a justification of the right to punish. However, an important distinction was now born. The degree of prevention that had hitherto been expected as an effect of the

punishment and its spectacle - and therefore of its excess - tended now to become the principle of its economy and the measure of its just proportions. The criminal had now to be punished exactly enough to prevent repetition.

Among the many social institutions that had come under attack during the Enlightenment, punishment stood out in all its illogical and oppressive barbarity. Moreover, penology lent itself not only to general philosophizing but to specific schemes of reform. Beccaria's reappraisal of punishment was accompanied by a penal programme to carry it out, offering a less barbaric and more flexible approach to adjusting punishments to crimes. The method was imprisonment for a stated period of time and signalled a watershed in the general use of incarceration. Imprisonment lent itself extremely well to an exact graduation of the degree of punishment to the offence. Whereas incarceration had preceded punishment for the purpose of detention before the execution of judgement, imprisonment was to become the principal instrument of criminal justice. However, this new pro-active calculus of moderation still displayed certain assumptions of rationality. Little, if any, account was taken of the possibility that crime might be socially and individually conditioned. The potential offender was seen as an independent, reasoning individual, weighing up the consequences of crime and

deciding the balance of advantage. He was assumed to have the same powers of resistance as other individuals, to deserve the same punishment for the same crime and to react in the same way to the same punishment.

Beccaria had demonstrated an ardent belief in human reason and the perfectibility of social institutions. This approach came under challenge from the 'Positivists' who, pointing to the undiminished rates of recidivism, claimed that the criminal act is both non-rational and, in essence, non-volitional. Disease preventing a rational calculus was seen as the cause of this problem, treatment being the only solution. This school of thought introduced a moral dilemma, since the social awareness which was to grow out of the Positivist approach caused a clash between the responsibilities of social welfare and the socially abundant assumptions of desert.

Though the Positivists could distinguish themselves from the Classical school in terms of the perceived causation of crime, they were unable to formulate a new programme for the execution of their theory. From the end of the eighteenth century to the present day, the state has continually embraced incarceration as the principal instrument of criminal justice.

By the second half of the nineteenth century developments in psychiatry had introduced a new competitor into the penal arena. The doctrine of moral culpability began to be undermined by the notion that structural causes may foment the criminal will. By the first half of the twentieth century this prospect had become a certainty for some notable intellectuals. George Bernard Shaw drew attention to this hypothesis claiming that imprisonment was a corrupting influence - an experience which was likely to develop the criminal will rather than strangle recidivism. An incremental answer came into being. The notion of rehabilitation was to be tacked onto the incarceral base of punishment. Through treatment, imprisonment could be used to reform the offender's character rather than being left to nourish the criminal will.

Penology was now polarized. Theorists were either for or against the criminal. Whereas the theories of retribution and deterrence merely argued about the size and rationale of punishment, rehabilitation questioned the right to punish. From the demise of monarchical abuse, through to the liberalization and polarization of punishment, one theme has become salient - that punishment is harm and the purposeful infliction of harm requires justification.

Punishment as a practice has a number of discernible justifications. Since the 1960s there has been an increasing acceptance of the purposes of punishment. The Streatfield Committee[5] in England, after careful scrutiny of the evolution of sentencing practices, concluded that four objectives of punishment must be recognized. The old element of retribution for a wrong committed in the past could not be ignored, but in addition there were three other objectives concerned with the attempt to control the future: to stop the offender from offending again, to deter other potential offenders and to protect society from the persistent offender. It is obvious that in particular cases these purposes must sometimes conflict. The backward-looking element of retribution may clash with the forward looking element of reform. To seek to rehabilitate the offender may clash with the deterrence of others. Though not entirely distinct, three competing theories have dominated attempts to justify punishment.

*5.1.1 RETRIBUTION*

Punishment must be retributive since it is inflicted *in response* to an offence. But retribution stands alone among the principal penal theories in that it views an offence not only as a necessary but as a sufficient condition of punishment. One objection to the retributive theory is the claim that it is in fact a philosophical rationalization of vengefulness.

Whereas deterrence theory emphasizes the utility of punishment looking to future consequences for its justification; retributivists, in contrast, pay no attention to the future. They do not aim at positive results (though Hegel would argue that a negation of wrong is possible), but look solely backwards, focusing on the evil done which is a fact of the past and cannot be undone, and require that another evil be added to it, even if no future good will come of it. On this account, retributivism is not really a philosophical theory, but merely an expression of a primitive craving for revenge.

It can be claimed that the theory identifies punishment with revenge. Revenge is draped with the human limitations and deficiencies of those who resort to it. It is a legally accepted principle of natural law that no person should be a judge in his or her own cause: *nemo judex in causa sua.* This can be interpreted as going beyond a mere objection to bias, extending to a recognition that a person wronged is not always capable of relating rationally and impartially to the impugned malefactor. However, to embrace punishment in the primary sense is to remove the ambit of personal revenge. Thus, a mere similarity between retributive punishment and revenge does not amount to much of an argument against retributivism.

The retributive theory clearly differentiates between punishment and revenge. By definition, punishment is determined and executed by those authorized to do so - and not by anyone who decides to retaliate for a wrong done. Thus, retribution is not necessarily plagued by the anthropological limitation of revenge, a limitation which can render harm disproportionate and unjust.

One of the more plausible arguments against retribution is directed at the demand that punishment should fit the offence: *lex talionis*. This eye-for-an-eye doctrine, or law of retaliation, can never be, in all cases, an adequate or permanent rule of punishment. In general, differences of time, place, persons, provocation or other circumstances, may enhance or mitigate the offence; and in such cases retaliation can never be a proper measure of justice.

Criticism of the *lex talionis* does not stop here. If retaliation is accepted as the correct answer to the question of the proper measure of punishment, then practically every punishment will be unjust and illegitimate. The object of retribution is that punishment should be just, and every excess over the just amount is the equivalent of punishment of the 'innocent', an injustice which can be seen as worse than the non-punishment of the guilty.

The notion of justice goes beyond mere equality of outcome extending to the calculation of desert. This negates the notion of a riposte and implies the need to ascertain the culpability of an offender. This in turn leads to questions about the miscreant's motivations and state of reason. Consequently, the same offence may differ in its gravity, resulting in differences of desert. Here, the paradox of retribution is found. For if retribution is justice and justice is desert, then the theory which, from an external point of view, requires a direct link between offence and punishment can have the anomalous result of requiring punishments of differing severity for the same offence.

One of the more peculiar assertions of retributivists like Hegel is that an offender has a right to punishment. But a right is, in essence, a claim. A right that cannot be escaped is a peculiar right indeed. Perhaps Hegel's insistence on respect due to an offender as a moral being is not to aver a right but to hope for reformation. In committing an offence the criminal negates the moral law. Punishment forces the malefactor into realizing the validity of the law which he negates. Thus, the object of punishment is to cause the offender to repent and, by so doing, realize his true moral character which has been temporarily obscured by his wrong action. Given this

preamble, retribution provides not a right but a hope of rehabilitation.

A further objection to retributivism is that it is both conservative and insular. Retribution is committed to a defence of any existing social and political order, any positive law, however unreasonable, unjust, or objectional. It is punishment by continuity. Each punishment is for an offence against legitimate laws. An adherent of retribution must justify punishment not only by ascertaining that the person charged with the offence has committed the impugned action, but by asserting that the law in question is morally legitimate. It is sometimes claimed that those who break the law are not really responsible for their offences and are not really guilty. They are merely products of certain social conditions that breed criminal behaviour, such as unemployment, poverty, bad housing, or alcoholism. Every society that tolerates such conditions is responsible for their repercussions. This argument accepted, it is hypocritical of society to put the blame on the individual, and to claim that punishment only treats the offender according to his deserts. The retributivist's defence would be to claim that environmental factors are considered in the course of determining culpability. However, this overlooks the fact that the malefactor is to be punished for an offence: an offence which might not have existed were

the offender not subject to a harsh social milieu. Retribution isolates itself from such external considerations, existing in an abstract universe of autonomy and rationality.

*5.1.2 DETERRENCE*

Deterrence is a forward-looking or consequentialist theory. It seeks to justify punishment by reference to alleged future consequences. It embraces the idea that the incidence of crime is reduced because of people's fear or apprehension of the punishment they may receive if they offend. Nigel Walker has referred to this as reductivism. Reductivism can be taken to include incapacitation since the penalty of imprisonment is used to reduce crime rates. The deterrence mechanism can be divided into two categories, individual deterrence and general deterrence.

Individual deterrence occurs when someone commits a crime, is punished for it, and finds the punishment so unpleasant that the offence is never repeated for fear of more of the same. This theory sounds quite plausible and, therefore, provides an appeal to human outrage and primitive cravings for vengeance. Unfortunately it seems not to work very well in practice: recidivism is on the increase. If individual deterrence did work as the theory suggests, then it would be expected that if harsher punishments

designed to deter were introduced, the offenders who suffered the augmented penalty would be measurably less likely to re-offend than similar offenders who underwent a more lenient punishment. This was the rationale of the introduction of the 'short sharp shock' detention centre regime for young offenders by Mrs. Thatcher's Conservative Government in the early 1980s.[6] The detention centres with the new harsher regimes were no more successful than detention centres with unmodified regimes in terms of the reconviction rates of their ex-inmates.[7] Other research suggests, contrary to claims of the theory of individual deterrence, that offenders who suffer more severe penalties are more (not less) likely to re-offend.[8] Such research does not show that punishment has no deterrent effect on offenders, or that no offender is ever deterred. But they suggest that overall, punishment has other effects which cancel out and even outweigh its deterrent effects. Consequently, the notion of individual deterrence seems of little value in justifying penal practices in Britain.

General deterrence encompasses the idea that offenders are punished, not to deter the offenders themselves, but to discourage potential offenders. This has the peculiar effect of aiming the effects of punishment not only at the guilty but at the innocent too. There can be little doubt that the existence of a system of punishment has some general deterrent effect. The

Danish experience of having their police force deported during the Second World War pays testimony to this principle. However, as the Danish example also demonstrates, the frequency of crimes of an irrational nature remained static. This highlights the fact that, to be operational, deterrence relies on psychological effects which must be dominant in the consciousness of the miscreant or potential miscreant. Moreover, the severity of the punishment is a mere side constraint. There is evidence that general deterrence can be improved if potential offenders' perceived likelihood of detection can be increased[9] but little evidence that severer punishments deter any better than more lenient ones.

The effects of deterrence are limited and easy to overestimate. If deterrence is the justification for punishment, it seems that punishment in Britain is unjustifiable. Given the fact that the United Kingdom has more prisoners proportionate to its population than any other country in Western Europe, a utilitarian deterrence theorist would conclude that the U.K.'s penal system is an immoral one. This is so because punishments are more severe than they need to be to produce a utilitarian quantity of deterrence. Thus, deterrence can justify having a penal system, but can not justify British penal policy.

*5.1.3 REHABILITATION*

Rehabilitation or reform is the idea that during punishment an offender's character or behaviour can be improved by treatment in addition to the penal experience itself. Reform of the prisoner, as the central aim of the penal system, was a highly popular notion during the 1950s and 1960s. However, reform subsequently became discredited, partly as a result of research which showed that penal measures intended to reform offenders were no more effective in preventing recidivism than were punitive actions.

Reform was seen as a treatment which would work independently of the will of the offender. This unlikely aspiration contributed to its failure and subsequent downfall. A further objection to this approach stems from the use of indeterminate sentencing which has, to an extent, brought punishment into contempt. Punishment is by incarceration - the deprivation of liberty. Individuals serving indeterminate sentences are being punished not only for what they have done but also for what it is predicted they would do. Moreover, as a manipulative theory, rehabilitation appears not to respect individual autonomy. This is positive in the sense that it identifies the fact that individual rationality cannot be relied upon to maintain an orderly society, but at the same time it leaves little room for the individual. Consequently, a person's

liberty may be dependent on the extent to which he corresponds to preconceived norms determined by a panel of experts. This is in fact a trade-off of liberty whereby freedom of movement may require the sacrifice of belief.

Finally, whether treatment or incarceration, rehabilitation requires the deprivation of liberty. The delegation of powers to determine an offender's sentence effectively bypasses the rights of the individual and the due process of law - values which are normally maintained in the interests of society. Punishment becomes punishment by conjecture and is an affront to the rule of law and the concept of justice.

In its final analysis, rehabilitation's flaws are threefold. It is ineffective, illiberal and potentially unjust. Any society falling within the broad parameters of liberal democracy would have difficulty in exonerating such practices in the name of freedom.

*5.1.4 SUMMARY*

Though punishment has become more civilized, the task of justification has become increasingly complex. The three competing theories for the justification of the institution of punishment have suffered augmentation in their inadequacy. Implicit in this penal justification impasse is the two-fold idea that on the

one hand crime is becoming increasingly frequent, and, on the other, the institution of punishment is not the only available method of limiting crime and it is necessary, therefore, to look beyond the principle of coercion.

## 5.2 PROGRAMMES

The pressures which come to bear on the three competing political parties have produced criminal justice policies which operate in two ways: either pro-actively by influencing the potential malefactor before a crime is committed, or retroactively, by reforming the prison experience for a given purpose.

### *5.2.1 THE PRISON INSPECTORATE*

For nearly two centuries, incarceration has been the principal instrument of criminal justice. As a consequence, the voice of the prison inspectorate has an important position in the formulation of public policy on punishment. The prison inspectorate claim that prison has a purpose beyond that of mere containment. They emphasize the rehabilitative function of imprisonment, implying that some form of moral regeneration can come about as a result of the incarceral experience. The use of imprisonment as an instrument of criminal justice is not in question. The incarceration of offenders can provide the utility

of social defence and simultaneously provide an opportunity for the adjustment of the offender's character. However, it is the structure and purpose of the instrument itself that is in dispute. Rehabilitation is seen as a management issue, where structural change is taken to be the motor of success. On the one hand the prison service requires increased integration and better co-ordination, and on the other, the prison regime itself needs to be made more rigourous and prison conditions more humane.

The prison inspectorate provide a somewhat negative interpretation of criminal justice problems. Their consideration of such issues is naturally insular. To be fair, this can be attributed to the constitutional position of the prison inspectorate and the slender breadth of their remit. It therefore avoids the contentious task of addressing the Government's social policies and the wider social context within which crime evolves. To this end, the proposed remedies are incremental. The entire focus of the inspectorate is retroactive: it looks to administrative responses after crime has been committed. Consequently, it has the ironic result of relying on the perpetual commission of crime in order to produce strategies for crime reduction.

*5.2.2 THE LABOUR PARTY*

The Labour party, in something of a contrast to the prison inspectorate, question the general culpability of offenders. Crime is taken, at least in a general sense, to have its roots in the structure of the nation's social and economic organization. The proposed solution is the reconstruction of the social and economic fabric of contemporary society: economic degeneration and unemployment being seen as the main problems. But reconstruction is not seen as a panacea for delinquency. Having facilitated a reformation of an offender's character, an assault on the criminal will is necessary. To this end, the employment of a further tool is seen as necessary - that of psychology. A theory of deterrence is employed to take up the residual offenders, having removed the material basis of crime. This form of deterrence is not merely retroactive in its effect. Rather it seeks to deter the action of crime by appealing to all potential criminals without recourse to the exploitation of existing ones. Such measures include stronger community policing to increase the chances of detecting crime, at least in the mind of the potential malefactor, so that the thought of punishment can enter the criminal calculus and foster its deterrent qualities. An additional strategy is that of crime prevention. It is assumed that an increase in the difficulty of committing crime will go hand in hand with an increase in criminal abstinence. Moreover, a

new form of political realism is introduced, since measures such as the construction of youth centres are designed to address the dynamics of social phenomena such as the increasing proportion of youth crime.

The Labour party do have a theory of punishment but it is not purely utilitarian. Though a major implication of socialism is that, due to certain social and economic antecedents, crime is not wholly volitional, the party do accept that, in certain circumstances, incarceration will be necessary if only for the purposes of social defence. However, imprisonment is viewed as a generally negative and corrupting experience.

Since the party is dubious about the efficacy of incarceration, and, therefore, of individual deterrence; and since general deterrence is subordinated to the politics of reconstruction, it appears that Labour have introduced a two-pronged definition of rehabilitation. It is a programme which seeks to bolster the foundations of moral behaviour while seeking to encumber the possibility of offending. Hence, miscreance is to be extinguished both in terms of human motivation and of practical manifestation.

*5.2.3 THE LIBERAL DEMOCRATS*

Like Labour, the Liberal Democrats are sceptical of the reformatory properties of imprisonment. They are disappointed at its failure to curb recidivism, disgruntled by the subsequent effect it has on employment prospects, and dismayed by its cost since it is generally the most expensive form of punishment in Britain. It is true that incarceration is resorted to as a method of social protection, but as a general expedient for the reduction of crime imprisonment is frowned upon.

The alternative is seen to include some degree of reconstruction accompanied by heightened levels of public participation in community affairs. To this end, crime prevention programmes would be complemented by improved services for victims, Neighbourhood Watch schemes and a more integrated police service. Access to the social and material conditions necessary for a meaningful life is to be universal, and, accordingly, a new vision will come into being whereby crime is stifled not by coercion but by the rewards of moral behaviour. Idealistic as this may sound, such a strategy rests on the side of realism. Crime exists independently of economic theory and would appear to require the positive marshalling of social and economic resources if it is to be controlled. Thus, a positive philosophy of punishment is embraced, whereby

a theory of rehabilitation appeals both to the will and to the character of the would-be offender.

*5.2.4 THE CONSERVATIVE PARTY*

The Conservatives reject the idea of reconstruction as implausible. This is due to a certain view of the fabric of society and to the intellectual milieu of neo-Liberalism which has attached itself to the party. Liberty is seen as freedom within an established order and all are taken to be rational and responsible. To adjust the social context within which crime manifests itself is to condone, not to condemn criminal activity. The purpose of punishment, in Conservative eyes, is not necessarily to reform actual offenders but to coerce the potentially guilty; and all who offend against the legal order are, themselves, guilty.

Society is free from guilt since the malfeasant is assumed to have offended by choice and free-will. Social reconstruction is seen not only as unnecessary but undesirable. The alternative is to use punishment (and imprisonment in particular) as an instrument for the repression of crime. This has proved to be a popular measure, particularly among party supporters. Getting tough with criminals can appeal to primitive human desires for revenge. Similarly, the deceptive simplicity of the Government's retributive and utilitarian justifications for punishment may further

elevate public approbation. Yet crime is a deep-seated problem which is neither fully explained nor thoroughly understood by references to an organic society.

The Conservative party is under a self-imposed ideological obligation to disclaim socio-economic causes in the explanation and definition of crime, and to assert antecedents of will. Such an approach necessarily negates any notion of reformation beyond that of the incarceral experience. The resultant response to spiralling crime rates is spiralling penalties, both in terms of their intensity and scope.

The result of this entrenchment is a swollen prison population. This has two causes. On the one hand traditional Conservatism has a reaffirmatory nature, demanding more of the same, and on the other, the neo-Liberalism grafted onto Conservatism supplements a belief in human rationality with calls for a Government limited in its interference in the socio-economic context. Such an approach is both ironic and paradoxical - the policy being both insular and stagnant. The Government is faced with a dynamic and perplexing series of phenomena, yet responds instinctively and with nowhere to go. Hence, as crime becomes increasingly buoyant, the Government's criminal justice policy becomes increasingly stagnant: this is the irony. By minimizing interference in the

social and economic fabric of society the tax-payer is allegedly emancipated from a financial burden. Yet simultaneously, more criminal offences and longer prison sentences mean a larger, more expensive prison population: hence, the paradox. This then is the enigma of the present administration: an administration which has its hands tied by the ligatures of history and myth.

## 5.3 SOLUTIONS

The Conservative Government has sought to control crime by threatening criminals and potential criminals with more of the same. Stiffer penalties with a wider scope have failed to reduce crime and recidivism. The result is a larger prison population. The growth of the prison solution implies a significant change of traditional methods of control. It seems that sheer physical repression is increasingly used in relation to significant parts of the population. Yet prison is bankrupt in terms of its intended purposes. None of the justifications for punishment provide a wholesome justification for imprisonment, at least not in the light of current developments. In addition, imprisonment is the most costly form of punishment. As a result, the British Government has created a penal crisis.

Given the Government's predilection for privatisation on ideological grounds, it is almost inevitable that privatisation has been extended to the social sphere. This has come to include the delivery of punishment. Apart from its ideological attractions, proponents of privatisation have also commended it as a quick and cost-effective solution to the many problems confronting the penal system, including the need to provide more prison accommodation and improve standards quickly and cheaply.

Much has been made of the American experience of penal privatisation. In the U.S.A., current private involvement in the field of penal practice dates back to the mid-1970s. Even after nearly two decades of expansion, however, penal privatisation is still at an embryonic stage. The number of inmates housed in institutions operated by the private sector is no more than an insignificant minority, with most of those being in low security institutions. Experience in the United States has been unsatisfactory. Anticipated cost savings have not always been achieved, and conditions within privately run prisons are not necessarily any better than in state-run facilities.

The existence of privately-run facilities in the U.S.A. is equated with their success by advocates of penal privatisation. However, there is evidence to the contrary. In 1982 a private company operating in

Florida found that it could not run as cheaply as the state, and in 1984, private contractors in Tennessee ran $200,000 over budget because of unforeseen costs.[10]

The theme of cost has also provided a focus for 'the paradox of success'. The private management of prisons seems highly likely to induce a conflict of interests. Private profits depend on the existence and expansion of the prison population. Yet, imprisonment is taken by the Conservative Government to be the principal instrument for the reduction of crime and recidivism. The re-introduction of the profit motive into the area of imprisonment will, at best, pull the private entrepreneur in opposite directions.

Since the function of these private operators is mere executive and managerial work, privately run prisons are unlikely to offer any long-term solution to the prison population crisis: this is a task for the institutions of government within the framework of public policy. Moreover, since private operators may have an interest in maintaining a high, if not expanding, prison population, they may make it harder for governments to switch from an expansionist to a reductionist penal strategy.

The transference of the delivery of punishment from public to private provision has been spurred on, not

only by politicians, but by pressure groups. It was the Adam Smith Institute that first put the question of prison privatisation on the British political agenda.[11] However, the case put forward by the institute's former director of research, Peter Young,[12] is a dubious one. The research method used is unreliable: it seems that information was selected to support a preconceived theory. Consequently, Young provides a very flattering, though ill-conceived, picture of private operators while displaying pathological pessimism about the public sector.

Proponents of prison privatisation see it as a way of alleviating overcrowding since any form of new prison building by the private sector will increase capacity. But there is no reason why prison construction could not be undertaken by the public sector or, at least, the construction of new prisons contracted to the private sector separate from the custodial role. A more pressing concern is the 'Parkinson's law' theory of prison building whereby additional prison capacity could generate increased numbers of prisoners. This is so, it is argued, because prison populations will expand to fill available buildings.[13] Critics claim that judges who were reluctant to incarcerate convicts because of the plight of existing prisons will be more willing to send them to the new, improved establishments. Also, new political pressures may come to bear, giving impetus to the existing, but

inefficacious, policies of imprisonment. Tax-payers themselves may question the logic of spending millions in constructing prisons if they are not to be used.

The arguments in favour of the privatisation of areas of criminal justice lay much emphasis upon potential efficiency gains achieved by private construction and management. Though the representatives of private prison companies claim that savings can be brought about by operating free of political considerations, savings are most notably achieved by reducing inputs in general, and by hiring non-unionized employees in particular.[14] Such employees need not be paid the same salary levels as prison guards in state-run facilities. Though substantial saving could be made by operating in this way it is an undesirable practice. It is within the unionized work-force that the skills and experience needed for incarceral duties are concentrated. A series of controversies involving Group 4 staff in the criminal justice system illuminate the need for caution.[15]

A further claim made by supporters of privatisation is that the functions of the state will become subject to the discipline of competition. Competition means that private companies will have to compete with each other and state provided services will have to compete with private competition. For this to happen, it is necessary for the business of all providers to be open

to scrutiny. The British Government has already invoked defences of 'commercial confidentiality'[16] which prevents the proper evaluation and measurement of performance by all but an inner-circle of ministers and officials. The concept of commercial confidentiality negates openness and direct public accountability.

The incompatibility of private interests and social responsibilities is not limited to a purely financial sphere. The accession of inmates to parole, and the operational characteristics of prison discipline, can impact on the maintenance or expansion of the prison population. Where operators are remunerated on a per inmate basis, considerable advantage could accrue from gaining control of disciplinary matters in prison. Moves in this direction have already been attempted by Group 4 officials at the Wolds remand centre on Humberside.

Another possible abuse by for-profit operators would be to use political lobbying to further their commercial concerns. It is easy to envisage a situation where private corrections corporations initiate advertising campaigns to make the public feel more fearful of crime than it already is in order to fill new or existing prisons.

The British experience of the privatisation of prisons is still in a condition of genesis. Only the Wolds remand prison on Humberside has operated under private contract for more than a year. This is the only genuine experience of a privately managed prison in Britain this century. Perhaps it is this experience which displays the texture and proclivity of the proprietary prison future.

Like many privatisation initiatives, proprietary prisons are likely to attempt cost savings through lower levels of training, staff cuts and reductions in pay and conditions of service. This is in diametrical opposition to the recommendations of the Woolf report on prison disturbances.[17] Further, the thrust of Government policy on criminal justice seems to place an increasingly greater reliance on imprisonment. Consequently, the worry arises that a 'scissors crisis' will come into being due to the divergent parabolas of staffing levels and inmate numbers. This is not conducive to the maintenance of public safety.

Privatisation is certainly not a panacea for the problems of spiralling crime rates and prison overcrowding. The majority of private facilities operating in the U.S. are reform schools and immigration detention centres which, though they have an incarceral role, are very different in nature from the state operated high-security institutions which

have the most important function in terms of protecting the public. The fact that private firms have shown little interest in these more troublesome areas, demonstrates a preference for the 'softer', lower-security institutions.

Close scrutiny of the Wolds remand prison's performance after its first year of operation has fuelled the fires of doubt regarding the efficacy of private involvement and contractual arrangements. Criticism can be made of the Wolds in terms of service delivery, administrative arrangements and its integration within the criminal justice system. The prison inspectorate's querulous report found fault with the fact that time out of cell for prisoners had been reduced, facilities (such as a library and a bail information scheme) had not been provided as required, and levels of discipline and control left something to be desired.[18] The prison inspectorate were very surprised that no default payments had been sought from the contractor. The state was still bearing many of the prison's operational costs: there were anomalies concerning the charges for gas, electricity, water and the cost of vandalism. Such a situation is beneficial to the contractor in terms of cost savings but detrimental to the public in terms of value for money and additional state expenditure.

Accountability and management issues were a cause for concern. The relationship between the Director (Group 4 official) and Controller (Home Office representative) is ambiguous. Already, it has been suggested that the private sector official take control of inmate discipline[19] - a crucial factor in the conflict of interest argument. Monitoring was merely superficial. There were no suitable systems for the Home Office to monitor financial aspects, and comparative costing received minimal attention. The industrial relations problems that have plagued the Prison Service in the past had not materialized at the Wolds, but already there has been potential friction: poor pay, lack of consultation and high workloads being salient issues.[20]

The need for integration within the Prison Service, as illuminated by Lord Justice Woolf, was not being honoured by the administrative arrangements surrounding the Wolds. The Custodial Contracts Unit of the Home Office had not been fully incorporated into the Prison Service management structure, and there was antipathy towards the C.C.U. at many levels. This both encumbered the transfer of prisoners and hindered the exchange of ideas between the private and public sector providers. Administrative problems extended to place constraints on crisis management. Serious doubts were voiced in terms of command and experience which, it was felt, would be a serious

impediment to the successful management of a major disorder. The first year of contract operation at the Wolds remand prison seems to have been a substantially unsatisfactory experience, failing to yield the purported benefits.

The experience at the Wolds was not entirely negative. Better, more humane facilities have been introduced into the prison estate. Changes in management structure have produced more responsive and flexible arrangements, at least in terms of internal management. Yet none of these organizational developments need be peculiar to the private sector. State investment could produce identical facilities, and flatter hierarchies could operate at least at the service delivery level. In short, the positive characteristics of private sector management could be incorporated in the management of services without having to endure the negative aspects. Developing public sector organizations could well be preferable to replacing them with profiteers.

## 5.4 FINAL ANALYSIS: PUBLIC POLICY AND PUNISHMENT

Punishment is a topic in which theory and practice come together. As an act of coercion, punishment is, by nature, the logical responsibility of the state. It depends on this relationship for its legitimacy.

In terms of political thought, punishment is prescribed by guilt which is in turn defined by culpability. But even culpability is conventional and has changed its complexion over centuries. In the 1990s the criminal justice policies of the main political parties have become bifurcatory. They drive a wedge between those who look to the antecedents of crime for its reduction and those who rely on a psychological response in the wake of criminal activity. Of these two categories, Labour and the Liberal Democrats fit into the former and the Conservative party remains in the latter.

The Conservatives' adherence to a 'more of the same' response to the augmenting plight of criminal justice can be attributed to ideology, functioning both internally and externally. Conservatism has a reaffirmatory nature. It derives its impetus from history and myth, facilitating an insular definition of morality. Moreover, the influence of neo-Liberalism excludes the positive act of social and economic reconstruction, appealing instead to a political vacuum that wrongly espouses an abstract theory of autonomy, rationality and forbearance. Externally, the governing party, at least in the field of criminal justice, has become an essentially electioneering organization. It makes rhetorical appeals to human anger and frustration in a form perceived as righteous and just. This penal populism

has found that spiralling rates of crime and recidivism accompany approbation from party supporters, yet this social ill has been cast into the political void that is Conservative penal policy.

Rather than revamp criminal justice policy to address the wider social issues surrounding deviance, the Government has embraced an incremental solution, not to decrease crime but to augment the state's capacity for riposte. Deterrence is seen as the justification for punishment, but by its nature and assumptions, provides no justification in the light of heightening levels of crime. Incarceration is the instrument of crime prevention, but is simultaneously a very costly instrument, if only in fiscal terms: increasing prison populations require increased prison capacity. Increasing prison capacity implies increased public expenditure, and increased public expenditure requires, under normal circumstances, larger demands on tax-payers. The solution to these problems is perceived as the privatisation of prisons. Coercion and the theory of free-market economics are combined: the iron fist meets the invisible hand.

The animating motivation behind privatisation in Britain appears to be economic - in the sense of a quest for efficiency. But out of context, efficiency becomes sterile: it tells nothing of processes or intended outcomes. Moreover, privatisation has, at

least in terms of the British experience, adopted a broader, ideological complexion that defines the preferred allocation of control over social and economic activity between the private and public spheres. In the British context, it is used as a panacea for the short-term problems of Government, rather than as a long-term solution to the wider ailments of society.

Private sector involvement in such a fundamental state activity as the deprivation of a person's liberty is contestable. At a practical level, the proprietary prison is unsatisfactory. The strict market disciplines which proponents allege to be the guiding principles of efficiency and effectiveness rely for their existence on scrutiny and choice. But prisons have a closed texture and the shroud of secrecy that is commercial confidentiality will not facilitate comparative choice. Moreover, the leniency that the Government has shown towards the operation of Group 4's contract at the Wolds, would lead a sceptic to wonder if public money is being used to foster particular perceptions of the private sector in terms of public consciousness and simultaneously bolster a ruling ideology. At the philosophical level, the prisons-for-profit concept is abhorrent. To allow private interests to profit from harm, to the potential detriment of society, is unacceptable, if only in moral terms.

In terms of the policy process, privatising criminal justice is an inward-looking activity which detracts from the real issues of developing alternatives to custody and reducing crime by attacking its roots. In its final analysis, therefore, the purported benefits of privatisation should not be allowed to thwart, in the name of convenience, consideration of the broader, more difficult policy questions that are involved in the field of criminal justice.

**Notes**

1. This definition is put forward by Alf Ross in *On Guilt, Responsibility and Punishment* (Stevens & Sons, London, 1975).

2. That is to say roughly between the early sixteenth and the late eighteenth centuries. See Michel Foucault, *Discipline and Punish*, trans. A. Sheridan (Penguin, Middlesex, 1977).

3. *Ibid.*

4. Natural Law refers to principles of objectively right conduct, the rightness of which is immanent in human nature. A natural law theory is one which conceives human law as being in some sense subordinated to or grounded in natural law. The Social Contract is an abstract agreement between individuals, or between individuals and a governing power, in which some personal liberties are freely surrendered in return for the advantages of having a well-organized society, or good government.

5. *Report of the Interdepartmental Committee on the Business of the Criminal Courts*, Cmnd 1289 (HMSO, London, 1961).

6. See M. Cavadino and J. Dignan, *The Penal System* (Sage, London, 1992), pp.207-9.

7. Home Office, *Tougher Regimes in Detention Centres: Report of an Evaluation by the Young Offender Psychology Unit* (HMSO, London, 1984).

8. S. R. Brody, *The Effectiveness of Sentencing*, Home Office Research Study No.35 (HMSO, London, 1976), pp.14-16; D. J. West, *Delinquency: Its Roots, Careers and Prospects* (Heinemann, London, 1982), P.109.

9. See D. Beyleveld, *A Bibliography on General Deterrence Research* (Saxon House, Westmead, 1980), pp.147-9, 209-11. It is the offenders' subjective perceptions of the risk of detection which counts. It is often difficult to affect this perception even by increasing the real risk: see M. Maguire, *Burglary in a Dwelling: The Offence, the Offender and the Victim* (Heinemann, London, 1982), pp.156-71. Alternatively, it is sometimes possible to deter people by merely increasing the apparent risk, as when the Copenhagen police succeeded in reducing speeding offences by 33% by placing cardboard cut-out policeman by the side of the road. See *The Guardian*, 9.2.88.

10. R. G. Porter, 'The Privatisation of Prisons in the United States: A Policy That Britain Should Not Emulate', *The Howard Journal*, 1990, vol.29, no.2, p.73.

11. M. Ryan and T. Ward, *Privatization and the Penal System* (Open University Press, Milton Keynes, 1989), p.45.

12. P. Young, *The Prison Cell* (A.S.I., London, 1987).

13. Ira P. Robbins claims that, at least in the U.S.A., the number of jailed criminals has always risen to fill whatever space is available, 'Privatization of Corrections: Defining the Issues', *Vanderbilt Law Review*, 1987, vol.40, no.4, p.815.

14. R. G. Porter, *op. cit.*, p.66 and pp.71-72.

15. For example, see *The Times*, 16.4.93., p.4, 'Group 4 loses fifth prisoner as firm's name is cleared'; also *The Times*, 10.5.93., p.3, 'Head of jail service calls in Group 4 after inmate's death'.

16. Penal Affairs Consortium, *The Case Against Prisons for Profit* (Penal Affairs Consortium, London, November 1992), p.4.

17. *Prison Disturbances April 1990*, Report of an Inquiry by The Rt Hon Lord Justice Woolf (Parts I & II) and His Honour Judge Stephen Tumim (Part II), Cm 1456 (HMSO, London, 1991), pp.448-450.

18. Report by H.M. Chief Inspector of Prisons, *Wolds Remand Prison* (Home Office, London, 1993).

19. *Ibid.*, para 3.35, p.59.

20. *Ibid.*, paras 2.23-2.25, p.33.

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