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# Prison Privatisation and its Consequences

Fulbright Flinders University Lecture Series 2


## Professor Malcolm M Feeley

Distinguished Chair in American Political Science

# Welcome

**Professor Michael Barber FAA, FTSE, FAICD**
Vice-Chancellor and President
Flinders University

I am delighted to present the lecture delivered by Professor Malcolm Feeley as part of Flinders University's involvement in hosting the Fulbright Flinders University Distinguished Chair in American Political Science.

Flinders University is renowned for its strong international links with universities and research institutions across North America and Asia. A key strategic priority is intensifying the University focus on our engagement with Asia across education, research and community partnerships.

The Fulbright Flinders University Distinguished Chair in American Political Science enhances Australia's national engagement with the United States, an engagement for which the Fulbright program has been such a successful and distinguished instrument.

The lecture 'Prison Privatisation and its Consequences' presented by Professor Malcolm Feeley, the current Fulbright Flinders University Distinguished Chair in American Political Science, challenges readers to consider that through outsourcing justice whether privatisation expands social control.

**Professor Phyllis Tharenou**
Executive Dean
Faculty of Social & Behavioural Sciences
Flinders University

The Faculty of Social & Behavioural Sciences is proud to be the host Faculty for the Distinguished Chair program. Over the course of this program, the Faculty will host a series of distinguished scholars, each contributing to the comparative political analysis of Australia and the United States, and each adding significantly to the teaching and research profile of the Faculty.

Through events such as lectures and colloquia, these scholars will provide an invaluable resource to undergraduate and postgraduate students across the Faculty, and will help to foster research links between Flinders and universities in the United States.

As part of the Distinguished Chair program, a series of publications will provide a worthy record of the work of each Distinguished Chair. Each publication, a transcription of a lecture, will provide a resource for future students, and will contribute to the ongoing dialogue and cooperation between the United States and Australia.

**Professor Don DeBats**
Head, American Studies
Flinders University

A principal goal of the Fulbright Flinders University Distinguished Chair program in American political science is fostering on-going collaborative research programs; Malcolm Feeley's tenure has produced strong evidence of realising this intent.

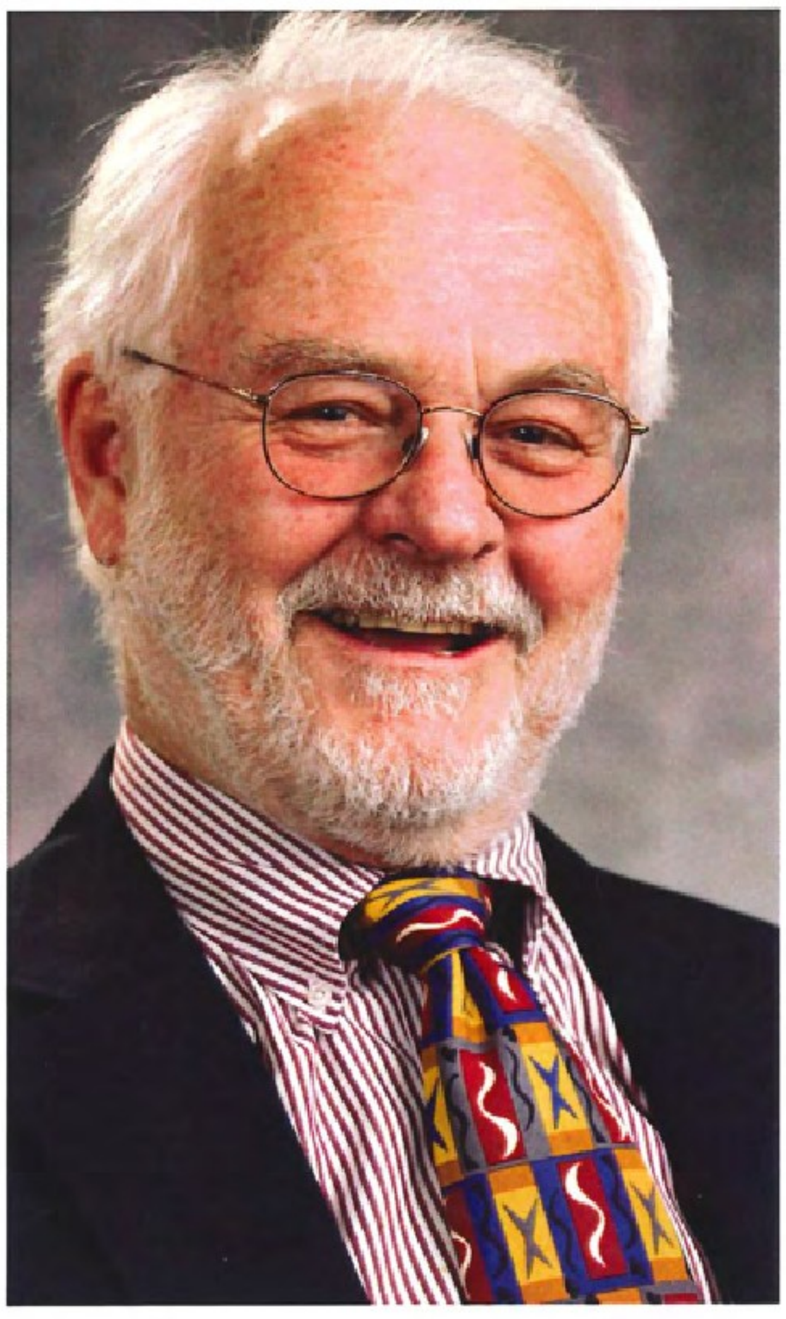
His project at Flinders focused on the privatisation of prisons, a penal reform of considerable interest in this country. The opportunity to research widely in Australia has informed Professor Feeley's evaluation of the modern incarnation of what he shows to be a surprisingly traditional idea, long associated with prison reform in both Australia and the US. Malcolm's comparative analysis looks at the relative gains that can accompany privatisation of prisons, but also reminds us of the dangers that have always accompanied the outsourcing of justice.

**Tangerine Holt**
Executive Director
Australian-American Fulbright Commission

The Australian-American Fulbright Commission is pleased to support the publication of the principal public lecture of each of the Fulbright Flinders University Distinguished Chair in American Political Science. Each of these talks brings to a wider public each scholar's reflection on the research which underpins this distinguished chair program.

Each scholar expands their academic expertise, shares their knowledge, and strengthens the nexus between Australian and U.S. stakeholders through their research and a national lecture tour across Australia which is coordinated by the Commission and Flinders University.

# Introduction



**Professor Malcolm M Feeley**
**Fulbright Flinders University Distinguished Chair in American Political Science**

September 2012

In this lecture I discuss what I think is the single most important question about private prisons and other forms of privately-operated, officially-approved sanctions and surveillance.

My review of the literature—both historical and contemporary—suggests that privatisation has an expansionist effect. In the discussion below, I identify a number of privatisation efforts, and trace their effects on penology. As I will show, they consistently are found to expand the reach of the criminal sanction.

What occurred at the outset of the modern Anglo-based criminal justice system continues today. The most important feature of privatisation is not that private contractors are less expensive than public agencies, but that private contractors innovate and promote, and thereby expand, new forms of social control.

My discussion examines two quite different sets of innovations in Anglo-American criminal justice. One set was put in place two hundred years ago. The other is still in its infancy. By linking them, I can underscore the radical consequences they have unleashed.

## PROFESSOR MALCOLM M FEELEY

Professor Malcolm Feeley is the Claire Sanders Clements Dean's Chair in Law at Berkeley, where he brings a political science perspective and a focus on the policy process into the teaching program. From 1987 to 1992, Professor Feeley served as the Director of the Centre for the Study of Law and Society at Berkeley, having previously taught at the University of Wisconsin (Madison) and at Yale University.

Professor Feeley has received research support from the Russell Sage Foundation, the Guggenheim Foundation, the National Institute of Justice, the National Science Foundation, the American Bar Foundation, and the Twentieth Century Fund. He has been a Fellow and visiting scholar at Kobe University, the Institute of Advanced Studies at Hebrew University, the Center for the Advanced Study in Behavioral Sciences at Stanford, and the Law and Public Affairs Program in the Woodrow Wilson School at Princeton.

Professor Feeley is the author of *Judicial Policy Making and The Modern State* (with Edward Rubin), *Federalism, Political Identity and Tragic Compromise* (with Edward Rubin) and *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Change* (an edited collection with Terry Halliday and Lucien Karpik, eds).

# Contents

# Outsourcing Justice: the Current Debate*

Advocates of privatisation argue that private contractors are more efficient, more effective, and more responsive to consumer needs than governmental agencies, and that consequently they should be adopted whenever practical. Their objective is to reduce public functions to the core and divest the state of responsibilities that are not crucial to its functioning (Osborne and Garbler 1992). Available evidence suggests that they are probably correct. There is mounting evidence from many sources that private contractors do provide services at the same or improved levels and at lower costs (Savas 1987; MacDonald, 1990, 1992; Logan 1996; Thomas 1997; Dolovitch 2009). Comparison after comparison suggests private contractors are more flexible, more cost-conscious, more sensitive to client needs, and less costly than their public counterparts.

Despite this, critics of private prisons challenge the claimed benefits of private prisons on two main grounds.

First, they maintain that the claims of cost savings are overblown and many costs that should be considered are hidden from view, and that private correctional programs skim off more manageable prisoners, so simple cost comparisons are not valid (Ryan and Ward 1989). More careful comparisons would reveal, they claim, that cost savings are illusory. Or if there are savings, it is because private contractors do not provide – and are not required to provide – the same standard of services required of public agencies.

Second, others argue that punishment is a quintessential function of government, and should not be delegated to private contractors (Dilulio 1988; Dolovitch 2005; Harel 2012; Dorfman and Harel 2013). To do so, they warn, impoverishes the public sphere and weakens the moral bond between citizen and state. This is the conclusion of the Supreme Court of Israel, which in a 2009 decision ruled that the country's single private prison, then on the verge of opening, violated basic constitutional principles and could not open (Academic College v Minister of Finance 2009). Still others argue that privatisation of punishment is not really private at all since contractors are (or should be) so circumscribed by public obligations that they are in effect agents of the state in only slightly different guise (Robbins 1988; Jody Freeman 2000). In addition, some critics of prison privatisation believe privatisation is an attempt by the state to evade some of its core obligations by shifting responsibilities to private contractors who have less liability than do state officials (Dilulio 1988). Recent rulings by the US Supreme Court suggest that this concern is warranted. Thus, a variety of critics share a belief that privatisation is unacceptable.[1]

1 This literature is presented and carefully reviewed in the various essays in Schichor and Gilbert 2011.

* This is a revised and elaborated version of my Fulbright Chair Lecture presented at Flinders University, September 2012. The author wishes to thank Professor Don DeBats for helpful comments and his kind hospitality during his stay as Fulbright Distinguished Chair in the Department of American Studies, Flinders University.





# Widening the Net of Social Control

As important as these issues are, I do not address them here. Instead I raise another, and in my view, even more important question about outsourcing justice: whether privatisation expands social control.

This question has not been addressed in any detail in the debate about private prisons and related activities, but I think it the single most important question about private prisons and other forms of privately-operated, officially-approved sanctions and surveillance.

My review of the literature – both historical and contemporary – suggests that privatisation does have this expansionist effect, and indeed that the single most important feature of privatisation in the criminal justice field—at least in England and the United States—has been to unleash entrepreneurs to devise new forms of punishment.

Further, I argue that this has been more or less a constant in Anglo-American penology for the past two hundred years. We see it with the introduction of transportation of convicted felons from England and Ireland to North America in the seventeenth through late eighteenth century (but much less so later, when transportation shifted to Australia), and we see it in the contemporary criminal justice system, with the rise of private jails and prisons, juvenile facilities and programming, and other auxiliary services such as substance abuse programs, pre-trial diversion programs, electronic monitoring, restitution programs and even expanded use of cameras to identify traffic offenders. And we see it in developments in between.

If I am correct, the following things are true:

- privatisation has increased, not decreased, the reach of government,
- it has expanded, not contracted, public social control,
- it has increased, not decreased governmental expenditures for social control, and
- it has done this by unwittingly encouraging entrepreneurs to develop new and more efficient forms of control, which when expanded and transferred to the state, draw the state ever more deeply into the management of social control. At times this permits what is, in effect, countless numbers of government-franchised social control centres. Ironically, in the name of shrinking government, privatisation (in the criminal justice realm at least) has expanded both the functions of state and the costs of government. Furthermore, it has done so in ways that make these functions less accountable and the costs less visible.

Finally, this development has taken place largely unnoticed, or if noticed, without self-conscious reflection.

Hence my concern that the most distinctive feature of privatisation in the administration of criminal justice is that it expands rather than contracts the capacity of government. In sum, it widens the net of social control.

## Sentenced to Transportation

### Transporting Felons to North America

The first large-scale private development in the modern criminal justice system, one that had significant long-term consequences, was the emergence of transportation of convicted felons from England and Ireland to North America. It began as an *ad hoc* arrangement – an agreement to leave the country in exchange for a pardon for the death penalty – and after passage of the *Transportation Act* of 1718, judges could impose a sentence of transportation directly. Between 1607 and 1776, well over fifty thousand felons were shipped to North America, at negligible cost to the government. Beginning in the early seventeenth century, merchant shippers pioneered the development of transportation as a form of punishment, and it remained a standard practice for well over two hundred years (Smith 1965; Ekirch 1987). Its appeal was instant and obvious; at no or little cost to the state, shippers would transport convicted felons to North America. They made their profit by selling their human cargo into a form of limited-term slavery to tobacco and cotton farmers in middle Atlantic colonies who were desperate for labour. This system remained popular and profitable up to the American Revolution, at which time it was suspended. The suspension and eventual end of North American transportation led to many temporary solutions and experiments before it was radically altered and redirected to Australia.

Transportation revolutionized the criminal justice system in England (Beattie 1986). For the first time, the state had both the will and the means to impose severe penalties short of death on a massive scale. The magnitude and significance of this new form of sanctioning has been largely overlooked by the historians of criminal justice in the eighteenth century.

Or (when it has been considered), its significance has been understated. Some accounts hold that transportation was an important progressive step forward because it replaced, or was an alternative to, capital punishment. Others view it as a historical curiosity, an interim effort sanctioned by a bumbling judiciary. Still others subordinate it to the more exciting and politically significant project involving transportation of felons to Australia.

## Transportation: a new, harsher sanction

Yet a careful analysis of sentences actually administered reveals that this is not true (Feeley 1999). Although in early modern England the penalty of death was regularly imposed on those convicted of the most serious felonies, throughout the seventeenth century the numbers of actual executions declined precipitously as the use of royal pardons, benefit of clergy and other acts of mercy expanded. At the beginning of the seventeenth century, the annual number of felons actually executed in England numbered in the thousands. By the end of that century it was reduced to a few dozen. The numbers plummeted during the seventeenth century, long before transportation developed into a routine punishment for large numbers of offenders (Middlesex County Record 1886-92; Sharpe 1992).

By the time transportation had become a staple of the judicial sentencing repertoire, capital punishment was at an historical low. By the time transportation was institutionalised, transportation was at best an alternative to the gallows for only a tiny number of offenders (Jenkins 1990; Rubin 2012).[2]

In short, transportation must be understood on its own terms, a substantial and sustained regime of punishment of its own. It provided judges with a new and potent sanction, and was used more extensively as a harsher sanction for those who otherwise would have been punished by a short period of incarceration, a whipping, or a period in the stocks. Indeed, North American transportation constituted an awesome expansion of the state's capacity to punish. It increased several-fold the numbers of those receiving substantial sanctions.

Perhaps more than any other single criminal justice innovation in the seventeenth and eighteenth centuries, it shaped the agenda for criminal justice reform for the next one hundred and fifty years. It established the importance of private entrepreneurs and encouraged others to find private solutions to the public problems of criminal justice. It increased the capacity of the state to punish, and this in turn fostered efforts to increase the capacity of the state at other junctures in the criminal process, arrest, prosecution, and adjudication. It is simply a misreading of history to argue, as some historians do, that transportation emerged as an alternative to capital punishment (Feeley 1999), or that it was an incidental and short-lived practice.

## Transportation to Australia

After the American Revolution, officials experimented with other locations, and eventually settled on Australia. But this new scheme was vastly different than the one it replaced. North American transportation cost the state little [3]; Australian convicts were the first settlers in a wildly expensive project of colonisation. British naval vessels, not merchant ships, carried the first convicts to Botany Bay. British officials, not planters, were responsible for maintaining them. Once the Australian colonies were established, some convicts were leased out to offset costs, although this did not appreciably reduce state costs. But by the time Australian transportation came to an end, the prison had taken firm hold in England.

North American transportation is typically treated as a curious and short-lived episode in English criminal justice history.[4] Transportation to Australia, though treated more seriously, is often seen as a colorful chapter in that continent's colonisation rather than an integral part of English sentencing policy. This is a mistake. Transportation was a significant feature of English penal policy for two and a half centuries, and constituted the most significant form of serious sanctioning for half this period.

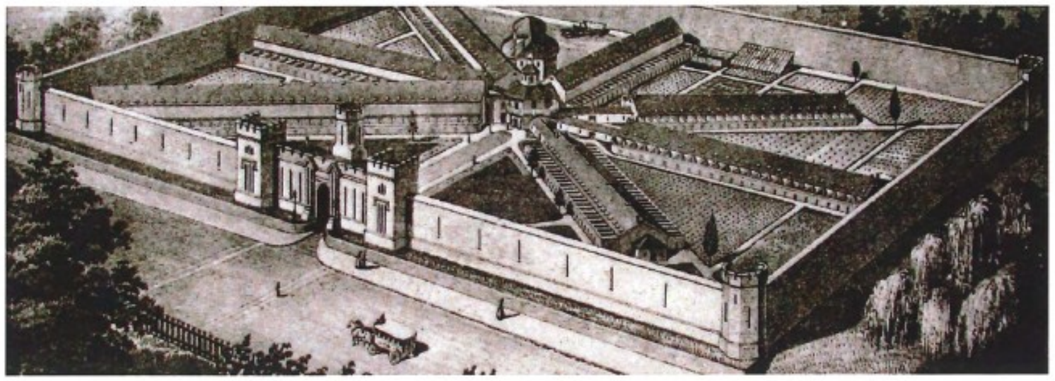
2 In a careful study, Philip Jenkins (1990) has traced the decline of executions in England between 1600 and 1900 and related them to transportation. He is correct to argue that transportation must be considered as a significant punishment in its own right rather than a temporary form of punishments used briefly between the regimes of the death penalty and the prison. Despite his own figures suggesting the contrary however, he seems to believe that transportation was an "alternative" to capital punishment. His own figures reveal that executions declined precipitously before transportation was widely used. Still, his study does an excellent job establishing transportation as a separate, distinct, and long-standing form of punishment in its own right.

3 Between 1718 and 1776, the Home Office entered into various arrangements with shippers to transport felons to North America. Throughout the period the bulk of income received by these shippers came from sale of convicts into limited term slavery. However in order to assure that shippers would take those who would fetch a low price – women, youths, old people, and cripples – shippers negotiated a subsidy from the Home Office, conditional upon their taking all convicts assigned to them. But transportation of convicts was so profitable in mid-century that the Home Office was able to eliminate the £5 subsidy in 1767, and insist that shippers take all who were assigned to them.

4 There are important exceptions. See Smith (1965 [1947]) and especially Oldham (1933); all discussed at length in Feeley (1999).







# Privatisation in the Wake of Transportation

Even as North American transportation solved a pressing problem for eighteenth century officials concerned about punishment, it created another sort of crisis.

The state had stumbled upon an effective and efficient form of punishment, but it had not yet developed other equally-as-effective institutions for the administration of criminal justice. Policing, prosecution, and adjudication were still primitive *ad hoc* operations.

In the eighteenth century, there was no police force, no public prosecutors, no professional judiciary. The criminal process was administered by amateurs and volunteers, and typically victims had to pay for whatever justice services they were able to obtain.

Thus the sudden capacity to impose substantial sentences on masses of offenders sent a shock wave through the system, and created pressures to improve capacity at other stages of the process. And during the next one hundred years, this is precisely what occurred: prosecution societies, insurance schemes organised by lawyers to pay the costs of prosecution; the rise of stipendiary magistrates in London; the Bow Street Runners, a semi-private police force. And finally the Metropolitan Police and government-funded prosecution (Radzinowicz, vol. 1, 1948).

Such institutions are features of modern government and eventually they would have been established. But the success of privatised schemes of transportation meant that they were adopted sooner than later, and that initially they were operated by private entrepreneurs.

## Prosecution Societies

Although crime in England had long been considered an offense against the crown rather than the victim, nevertheless it was the victim who had to bear the cost of prosecution. As is the case in accident law today, the victim had the responsibility of identifying the accused, paying the fees for an initial hearing, for the order binding the accused over to the grand jury, for preparing the indictment, and at times for paying the costs of transporting the accused to court and paying the costs of witnesses and the prosecuting lawyer, if any. Needless to say, this arrangement was far from efficient. Victims had little incentive to pay these costs, and even if they did and they prevailed, their only reward was to see the guilty punished, not restitution. The weak and hapless government employed a number of means to try to badger crime victims into performing their civic duties and bear the costs of prosecution. Parliament made it a criminal offense to 'compound' the felony or misdemeanor; that is, to settle and withdraw after a prosecution had been initiated. Circuit-riding assizes judges delivered sermons sternly admonishing victims to do their civic duty and shoulder the costs of prosecution, reminding them that without prosecutions no one would be safe.

This problem is, of course, the classic free-rider dilemma that leads to the tragedy of the commons. In the aggregate the public at large will benefit if the law is enforced, but no individual has much of an incentive to bear such costs since their contribution will make a big difference to them, but have only negligible impact on the community as a whole.

One response that eventually emerged to counter this collective dilemma was the establishment of prosecution societies. Taking their cues from colleagues who were forming friendly societies to insure against losses of cargo in the colonial trade, entrepreneurs in the mid-1700s began to organise prosecution societies to insure against the costs of investigation and prosecution in the event that members were victims of a crime. For a small fee people could insure themselves against the cost of search, apprehension, and prosecution of their assailant. The numbers and size of these prosecution societies mushroomed during the eighteenth and nineteenth centuries.

To twenty-first century ears, the term 'prosecution society' may imply a voluntary social group emerging spontaneously among a collection of like-minded people. However, **prosecution societies were hard-headed insurance schemes formed by entrepreneurs, probably lawyers who had a pecuniary interest in their formation.** Whatever the case, privately-financed prosecution schemes demonstrated that the criminal process could operate much more effectively than it had under traditional victim-initiated prosecutions. By some estimates, as many as half of all criminal prosecutions in England in the early nineteenth century were handled by prosecution societies.

Indeed prosecution societies were so successful that they eventually put themselves out of business. First came a rudimentary legal aid scheme to reimburse to some types of victims the costs they had incurred in pursuing a successful prosecution. As coverage for reimbursement expanded, the scheme was shifted so that prosecutors could be paid directly (Philips 1989; King 1989). This set the scene for the modern and efficient system of prosecution still in operation.

For our purposes, what is most important is that criminal prosecution became immensely more effective once organised prosecution societies were established. Following on the heels of the transportation to North America, the entrepreneurs who founded the prosecution societies contributed a second immense innovation, setting the scene for the modern criminal justice system that came to be fully realised by the end of the nineteenth century.

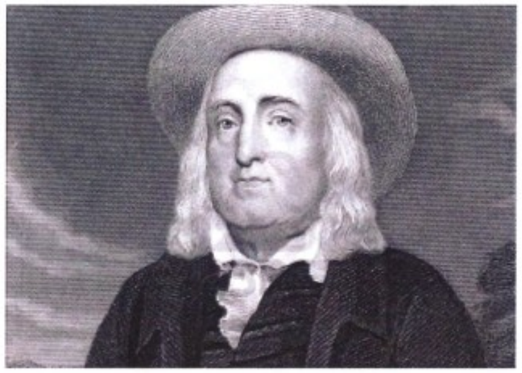
## The Birth of the Modern English and American Prison

A third impact of North American transportation was its effect on thinking about prisons. Throughout the eighteenth century, English reformers had occasionally cast their eyes to the Continent and reflected on the emerging institution of the prison, and considered adopting their own Tudor-era workhouses to this end. But English sentiment opposed the prison. Traditionalists thought that it was too soft and urged greater use of gallows to keep the unruly classes in line.

Others recoiled at the idea of keeping "free Englishmen" in cages not fit for animals. Still others asked why criminal offenders should be rewarded with free room and board while the deserving poor went without.

But **early capitalism and the industrial revolution led to the idea of the factory, which in turn affected thinking about large-scale buildings for all sorts of uses, including the idea of a factory-like prison.** The continuing capitalist revolution and the success of transportation aided in the development of a new conception of the prison.

## Bentham and the marriage of conscience and convenience



*Jeremy Bentham*

The idea of the prison took root for two reasons, one well-known and the other less so. The well-known and dominant explanation is that the prison represented the culmination of the Enlightenment project as applied to penology. It represented a humane and measured response to crime, a great advance over the personalistic, capricious, and cruel practices it replaced (Radzinowicz 1956; also see Hay 1977).

It represented rationality and systematic planning. It was part of rising capitalism and the accompanying government modernisation project. It went hand-in-hand with schemes to improve prosecution, adjudication, and law enforcement along modern rational legal lines (Radzinowicz 1968).

This general account is not in dispute, although there are vigorous interpretations about the development. Some see it as the triumph of liberalism (Radzinowicz 1968; Rothman 1971).





Others, rejecting the idea of progress, see it as a new and insidious form of discipline (Foucault 1977). And still others regard it as a natural consequence of the emergence of the modern welfare state (Garland 1985). Despite their significant differences, each of these accounts would probably agree with David Rothman's claim, wrenched somewhat out of context here, that, **once established by idealists, conscience gave way to convenience; the penitentiary became a warehouse for the forgotten.** I do not dispute this conclusion or engage intramural arguments here. Certainly English and American prisons emerged as a result of conscience, the consequence of tireless efforts of high-minded reformers.

However, this account is only a part of the story of the birth of the modern prison. Another group of reformers with a somewhat different agenda also promoted the idea of the modern prison. They too were there at the outset. They too were high-minded. And they too played a major – perhaps decisive – role in the state's decision to embrace the prison as the punishment of choice for serious offenses. If some reformers were motivated primarily by conscience, as the name they selected for the prison – the penitentiary – suggests, it might be said that this second group was motivated by convenience, or more accurately the marriage of conscience and convenience. The leading figure in this development was Jeremy Bentham.

Although he too justified his scheme in idealistic terms, Bentham's distinct contribution was to show how conscience and convenience could co-exist. He maintained that prisons could be self-financing and self-sustaining. Well-known for his plans for the design of Panopticon, a prison of efficient design that allowed for maximum surveillance at minimum cost, as well as his efforts to rationalize and codify the criminal law, Bentham is less well known for his scheme to gain the monopoly contract to operate self-financing workhouses for the poor, and private prisons for criminals (Himmlefarb 1968; Semple 1993).

Reacting to the crisis brought about by the American War of Independence and the end of transportation (and continuing on for over twenty years), Bentham campaigned tirelessly to obtain an exclusive contract to build and operate a prison. He expected to reap huge profits from small fees paid by the government and the productive labour he would extract from his convicts.

To this end, he and his brother Samuel spent a small fortune and invested countless hours trying to acquire a suitable building site, perfecting the design for an efficient prison-factory, and courting influential friends to support his effort. His voluminous correspondence with well-placed officials and all the influential criminal justice reformers of the day reveals an obsession with this idea. With this venture, he hoped to become rich. (Himmelfarb 1968: 33; Semple 1993; Feeley 1999).

**Bentham failed in his personal quest – he so alienated officials in his drive to obtain a prison contract that they probably rebuffed him out of spite – but his efforts did much to legitimate the idea of the prison and to convince reformers that it could be an effective and efficient venture.** Prisons would be factories – not cages. They would be sites of industry – not repositories of idleness. They would teach discipline – not indolence. They would contribute income to the state rather than be a drain on its resources.

At the time, the factory was emerging as the new model for economic organization and Bentham was the first to see clearly how it could be adapted to address social problems as well. Despite Bentham's obnoxiousness, a skeptical government slowly came to embrace his ideas. But it decided against contracting with Bentham. Instead, it chose to build and operate the prison as a government enterprise, although it planned to lease out prisoners when feasible.

In the United States, Bentham's ideas were taken more seriously. Indeed, the first modern prisons were constructed in the United States and not England. And they closely accorded with Bentham's vision. Eastern State Penitentiary, established in Philadelphia in 1829 (best known for its philosophy of the Silent System which housed inmates in solitary confinement) put inmates to work in self-contained workshops in individual cells, and was expected to operate at a profit. America's second modern prison, Auburn in New York, is famous for its philosophy of the Separate System, which housed inmates in individual cells at night, but brought them together during the day to work in a rudimentary factory in silence. Not surprisingly, Auburn was more effective since it was organized as a factory rather than a large number of individual workshops. The earliest annual reports of both Eastern State and Auburn provide detailed reports on the income produced by the inmate labour, and their expenses. Officials were obsessed about ways to reduce costs and increase productivity, and frequently shifted the products in an effort to increase income. Auburn fared better, and soon the factory-prison became the dominant model for this new invention, the modern prison – although the Eastern model lingered on longer than it should have (Rubin 2013).

**Unable to realise his ambitions in England, Bentham's ideas took root in the United States, and while never as profitable as he had envisioned, the self-financing contract-based prison was the standard model in nineteenth-century America.**

Throughout that century, the American states experimented with various forms of the self-financing prison. It was common for a state to build a prison, and then turn it over to a contractor who would operate it as a business and occasionally return a surplus to the state. In some places, contractors were even required to finance and construct the prisons themselves (McLennan 2008).

Perhaps the most explicit plan to implement Bentham's ideas occurred in Louisiana. In his proposed 1834 'Code of Reform and Prison Discipline' for Louisiana, Edward Livingston, a disciple of Jeremy Bentham, developed a detailed plan covering every facet of prison management, including a provision that the warden's pay was to be determined in part by a 'percent of the gross amount of sales ... of the articles manufactured in [the state's] prisons and also [a] percent of the amount of sums paid for the labour of the convicts by manufacturers' (Livingston 1878). Although this proposed code was rejected by the state, some of his plans for for-profit prisons were later implemented in that state, and variations were adopted in other American states.

For instance, in 1825 the state of Kentucky entered into a contract with one Joel Scott. In exchange for an annual fee of $1000, he obtained the right to use prison labour in his highway and canal construction business. Later he built a prison and contracted with the state to manage it, but continued to earn additional income by exploiting inmate labour. The arrangement was successful, at least for a while. For the better part of two decades there were no scandals, and the state did not pay for the upkeep of the prison and its inmates. In some years the prison yielded a surplus for the state. When, periodically, the contract expired, there was fierce competition among those wanting to obtain it. Similarly, in Tennessee in mid-nineteenth century, prisoners were leased to work in coal mines and the income was used to offset costs (Ayers 1984).

Elsewhere, prisoners were employed in small-scale manufacturing. And after the Civil War, several western states relied upon contractors to manage convicts. Nebraska, Kansas, and Oregon leased their prisons and prisoners to contractors who paid a small fee in exchange for the right to the prison facilities and convicts' labour. In the wake of the population explosion brought about by the Gold Rush, the fledgling state of California turned to a private contractor to build its first prison at San Quentin and then operate it as a brick factory.





Following the Civil War, another variation on private prisons emerged and continued to operate for well over one hundred years. In the 1870s, southern states avoided the cost of building prisons by seizing abandoned slave plantations and turning them over to contractors who would run them. Substituting felons for slaves, they were run as self-sustaining enterprises that could regularly produce surpluses for the state. In some states such prisons operated with very little change in philosophy and organisation well into the 1970s (Feeley and Rubin 1998).

A variation on this scheme, also widely used in the South, was the convict lease system. Here convicts were leased to contractors who used them on work gangs to build railroads, highways, dams, and other public projects, or used them in small-scale manufacturing, logging, turpentine production and farming operations. This form of for-profit sentencing also continued to operate well into the twentieth century; it kept state costs for imprisonment to a minimum, and it provided virtually-free labour for well-connected contractors.

With the exception of the American South, the idea of no-cost prisons and the convict leasing arrangement proved to be failures, but still the vision of a no- or low-cost prison was an important legitimising element in the adoption of the novel new idea. Any careful account of the early experience with prisons in the United States reveals that, despite the eventual failure of the idea, the entrepreneur's vision of the prison as a self-financing, privately-administered institution played an important and under-appreciated part in securing support for what, at the time, was an extremely controversial idea. Indeed, as we will see, **the idea of an economically-productive prison continues to resonate, even though aspirations are now lower.**

## Parallels in Contemporary Penology

Contemporary entrepreneurs who promote 'alternatives' to prison or new, cheaper prisons present a historically similar situation. They maintain their reforms are substitutes for less-efficient and less-effective current programs. But these new forms of punishment, like their earlier counterparts, must be understood as augmentations to – and not replacements for – older, disfavored or more expensive forms of sanctioning (Shearing and Stenning 1983).

These developments are best understood not as efforts of private contractors to provide the same services at less cost, as is typically maintained, but rather as new programs or new types of institutions that expand the reach of the criminal sanction.

Historically, transportation, prosecution societies, and the contract prisons reveal the same thing – the success of entrepreneurs in creating new institutions that dramatically extended the capacity and the reach of the criminal process. **Today, new types of programs introduced by entrepreneurs do much the same thing.** To characterise them as alternatives to existing institutions is to miss their significance. **They represent expansion – the creation of new forms, the harnessing of new technologies – to the task of expanded social control.** Just as historians of crime have tended to miss the most important features of transportation to North America, establishment of prosecution societies, and appeal of the earliest prisons, so contemporary observers miss the central significance of the contemporary privatisation movement.


# Current Developments in Justice, Privatisation and Entrepreneurship

Preliminary data suggest several new institutions fostered by privatisation entrepreneurs (at least) have had the same consequences of their much earlier counterparts – significant expansion of social control.

## Juvenile justice and 'community corrections'

Throughout much of the twentieth century, young people judged to be seriously delinquent were placed in state residential 'training' facilities. For all practical purposes these institutions were prisons for youths. In the 1950s and 1960s, exposé after exposé revealed them for what they were: at best woefully ineffective, at worst brutal and malevolent. This led to a growing call for alternatives.

Perhaps the most spectacular reform effort was the dramatic move in Massachusetts by Jerry Miller in 1969. Miller, then Commissioner of the Youth Authority, and with the solid support of the reform-minded governor who appointed him, removed virtually all the children from the state's training schools, and moved them into vacant dormitories at a yet-unopened state university campus. This overnight victory over retrograde guards had rightfully been hailed as a great victory for reformers. Emboldening other reformers, it set in motion reform efforts in other states. There is no question that this was a watershed moment in American custodial policies for juveniles.

But the success was not without its costs. The vacuum created by Miller's removal of the young people from the training schools created a vacuum that had to be filled. In short order, entrepreneurs proffered a variety of 'community' placements.

Among the first to respond were locally-based profit and non-profit organizations already in the 'helping' business. They devised plans to absorb these former residents of state training schools in a variety of half-way houses, group homes, camps, and the like. What occurred dramatically in Massachusetts took place less flamboyantly elsewhere. But the effects were the same.

Under the banner of 'community corrections', a new model for dealing with delinquent youths emerged. (Lerman 1983). This model held that all but the most incorrigible delinquents should be housed in the community. Various theories were put forward to justify these new programs. They were cheaper. They were more effective. They were more humane. They were less stigmatizing. There is no doubt that all of these claims are generally true.

The good news was that the harsh old-style training institutions were closed and their wards sent to better, smaller, locally-run and privately-run institutions. But so too were other youths. Judges who once would have refrained from sending a kid to a tough training institution were more inclined to send them to benign community 'alternatives'. So, here too, the new community facilities for juveniles became more than an alternative.

The programs had broad appeal and they widened the net of social control, drawing more, not fewer, into their programs. In short, this new arrangement did much more than re-deploy institution-bound delinquents to community-based programs.





Indeed, a variety of custodial treatment programs aimed at siphoning off juveniles even before they were judged delinquent emerged (Ewick 1993; also see Armstrong 2003).

A variety of such programs specialise in treating substance abuse and mental health, or providing job training, and the like. Virtually non-existent fifty years ago, they are now commonplace. Most are private, many are run for profit (Ewick 1993); almost all derive their clients as referrals from juvenile courts, and most of their income comes from contracts with local governments or with parents who fear that the alternative is placement in a government facility and a record.

Despite their growing numbers and significance, community facilities for juveniles and other treatment programs, for adults and juveniles, are almost wholly ignored in discussions of correctional privatisation. This may be because many programs regard themselves and are regarded by others as 'service' or 'treatment' rather than custodial institutions.

Or it may be that they are so effective that they do not merit much public attention. (There are of course the occasional scandals, but these are probably as like to occur in state-run and privately-run institutions.) And many of them are, technically, voluntary.

Participants agree to diversion to these programs in order to avoid the stigma of conviction or placement in a more crowded state-run institution. But often they are voluntary in name only; the threat of prosecution or a more severe sanction often lurks in the background.

In a review of these developments in privatized corrections, Richard Ericson, Maeve McMahon and Donald Evans liken privatisation to a form of franchising: "In correctional franchising", they observe, "the state functions as the franchisor and the various non-state correctional agencies as the franchisees," which produces a "dispersal of social control involving a complex web of state and non-state interests, organizations, and social forces" (Ericson, McMahon and Evans 1987, p. 361). Such a process, they conclude, "allows for the apparent decentralization of control of offenders, community involvement, and distancing from the state."

In effect, however, it secures 'publicization': centralised control of non-state agencies through the conditions of contract and attendant monitoring and auditing functions (Ericson, McMahon and Evans, 1987, p. 362).

Evaluation research overwhelmingly supports this conclusion: private community corrections programs are typically 'add-on' sanctions that widen and deepen the net of the state's capacity to control (Blomberg 1991; Blomberg and Luken 1994; Armstrong 2003).

## No-frills Prisons

The Wackenhut Corporation, Corrections Corporation of America (CCA) and other corporations manage dozens of prisons across the United States, as well as in England, Australia, and elsewhere. At least in the United States, it would be a mistake to think of most of these privately-run prisons as 'alternatives' to standard public prisons. Certainly, many privately-run prisons are just this. But many others—showing I think the success of the privatisation movement in the United States and more generally—depend on something else. Many of these new institutions were not designed to compete with existing models of prisons.

In the 1970s, many American state prison systems were under intense pressure from a variety of fronts. Federal courts required them to increase services and decrease crowding (Feeley and Rubin 1998). The nation's get-tough policies created an unprecedented surge of the numbers of convicted felons to be housed in state prisons. Furthermore, new inexpensive and reliable drug tests came to be used routinely by parole and probation departments, to detect drug use, and they identified huge numbers of violators. Once, before widespread use of such tests, probation and parole officers exercised discretion and dealt with matters informally, using revocation and return to custody as a last resort. But with the introduction of routine drug testing and accompanying computer printouts sent to dozens of officials across the state, such discretionary judgments evaporated. The result: large numbers of offenders were returned to prison to serve the balance of their sentences. Taken together, these developments put huge pressures on prisons to expand their capacities.

It was the group of probation and parole violators that first caught the attention of private contractors in Texas. They saw a unique opportunity—a new niche—and exploited it. Traditionally Texas housed all inmates in maximum security prisons, which were secure but expensive, but the contracting company Wackenhut proposed to build inexpensive, no-frills facilities for probation and parole violators who were returned to custody for technical violations. Wackenhut were persuasive in arguing that these inmates, who were back in custody for short terms only, were low risk and did not require placement in expensive full-service, maximum-security units. Their alternatives were low-cost, no-frills facilities. Although private contractors have since expanded their operations beyond this group of inmates, many still specialize in probation and parole violators and other lower-risk inmates.

One lasting consequence, however, is that a higher proportion of offenders on parole and probation who are found to have technical violations are now returned to custody than once was the case. The new institution invites revocation.

## Immigration and Naturalization Service (INS) Facilities

Similarly, on the national level, private contractors were quick to respond to the problems of illegal aliens that escalated after 9/11.

There have always been problems with foreigners coming into the United States illegally, as well as visitors who have gotten into trouble or overstayed their visas. Historically, the Immigration and Naturalization Service (INS) has had an *ad hoc* response to these problems. For the most part, they would issue summons to people charged with violations and then expect them to show up for hearings. If charges were serious enough or they were thought to be dangerous, there was a good chance that these people were already in jail pending hearings on criminal charges, and the INS might allow them to remain there and monitor developments.

If they were not already in custody the INS contracted out on an *ad hoc* basis with local jails and federal prisons to house them. 9/11 changed all this; as the challenge of managing illegal immigration and visa violations morphed into the war on terrorism, vast numbers of illegal (and legal) aliens came to be suspect and there was increasing need to detain vast numbers of them.

Here too, private contractors stepped in to fill the void. Almost overnight leading contractors constructed what some call an 'archipelago of detention centres' across the country. Some of them are akin to no-frills custodial centers, and others are more like full service prisons.

But still others are more like constrained communities behind barbed wire, where entire families reside much the way Japanese Americans placed in internment camps sat out World War Two. Almost the entire INS detention program is run by private contractors. Again, what is important here is that, once again, private contractors were responsive to new demands and indeed responded rapidly with the development of new products and new types of facilities. They sensed the market and supplied its needs.





## Electronic Monitoring

In the 1970s and 1980s, a number of companies sought to harness new wireless technology to help the elderly and the infirm. They developed devices that allowed remote monitoring by health care workers. It was not long before they saw still more candidates for their devices, including offenders released into the community. As these have become cheaper, smaller, and more reliable, the use of electronic monitors for offenders and pre-trial releases has taken off.

Pre-programed, unobtrusive GPS ankle bracelets can now become custom-tailored virtual prisons, specifying where and when each of their wearers is to be at various times of the day – at work during the day, at home at night, on a designated route to and from work – and automatically notifying authorities if there is any deviation from the pre-programmed plan. Foucault's vision of the self-disciplining individual is now perhaps being realized.

Still in its infancy, this technology has the potential to revolutionize punishment in just the same way that transportation and then the prison did in earlier eras. By all accounts, this technology works well and is constantly improving. However, almost every evaluation of the use of electronic monitors reports that by and large they serve as add-ons for probation and not alternatives to imprisonment. That is, judges and prosecutors are reluctant to agree to an electronic monitoring alternative for someone whom they think deserves to serve time in jail or prison, but they like the idea of providing enhanced surveillance for some of those released on probation, or released on bail prior to trial.

Electronic monitoring has allowed private companies to gain a near-monopoly on the management of this new form of control. The companies that developed these electronic devices started out proposing to lease their hardware to probation and sheriffs' departments, but quickly found that these agencies were sluggish and were unable to respond to their proposals.

So they reformulated their business plans; rather than selling or leasing their equipment to these agencies, they proposed to run the programs for them, and notify law enforcement officials whenever their tracking devices indicated a violation.

This revised model has been a success, though in my view the era of electronic monitoring is still in its infancy.

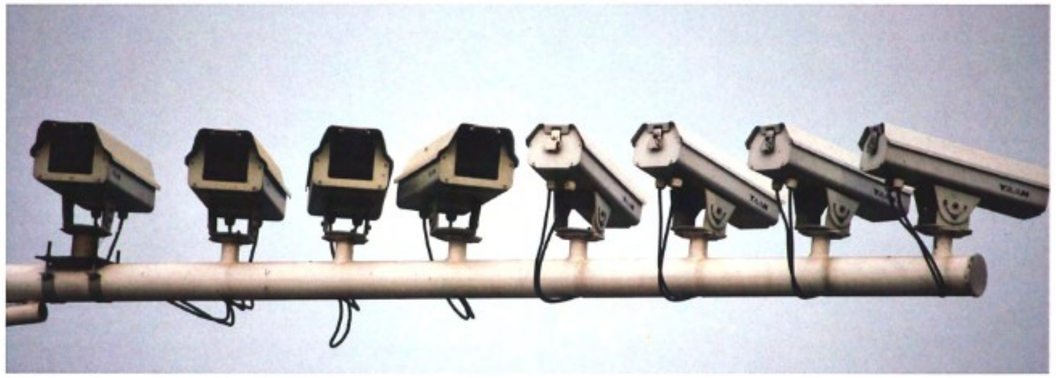
## Private Probation

Increasingly, corporations finding themselves under investigation by the SEC for violations of the *Sarbanes-Oxley Act*, or by the Department of Justice for violations of the *Foreign Corrupt Practices Act*, will try to negotiate a settlement. This is not surprising, since these laws grant significant reductions in penalties if companies come forward and voluntarily admit to violations before criminal charges are brought. What is particularly distinct about these laws is that often contracting companies develop their own detailed plans for probation. Rather than wait for a plan to be imposed on them by the court, companies act proactively, selecting their own probation officers who in turn devise probation plans. At the same time they come forward to admit to their own wrongdoing, they simultaneously propose their own plan for redemption.

This arrangement was not the spontaneous idea of a host of remorseful corporations. Rather, it was the brainchild of former Assistant U.S. Attorneys who had previously prosecuted these same types of companies. They proposed to use their inside knowledge to help companies take advantage of the Acts' provisions to go light on those who voluntarily came clean on the verge of a criminal indictment. This process is so new, that no one knows for certain how or if it works.

One possibility is the tax attorney model: no one expects tax lawyers to encourage their clients to embrace the 'spirit of the law' but instead it's expected they will find every conceivable way their clients can avoid paying taxes. It may be that these company-paid probation officers will do likewise. But, with their reputations at stake and prosecutors and the court not far off, it may be that they are effective and efficient enforcers of the law, and induce their clients to embrace the 'spirit' of the law.

Whatever the case, this is just one of several types of incursions by private entrepreneurs into the heart of the criminal process. (Barkow and Barkow 2011). (Others include rent-a-judges, and increased judicial deference to fact-finding in privately-operated grievance proceedings.)



### Traffic Cameras

CCTVs and cameras are now used in any number of applications. One that conforms to the thesis outlined here is the use of cameras to catch speeders and red-light runners. (Wells 2011). In a nutshell, how does this system operate? Well in a nutshell: companies approach local governments with a proposition too good to be true: They say in effect, "We will install cameras at no cost to you and we will maintain them at no cost to you. Indeed we will send you all the images recorded on the cameras. You can send out notices to violators, and instructions on how to pay them. Or we will do this for you as well, although you should cast a glance at our photographs to say that you have verified the results. We will even supply you with copy for your traffic tickets, and mail them for you if you like."

It is a win-win arrangement if there ever were one; the company and the local government split the income, traffic violations will be reduced, traffic safety will be enhanced, the community will make more money on fines than ever before (and with virtually no investment costs) (Wells 2011).

Traffic-camera companies even provide solutions for the inevitable problems that emerge. One initial problem was the inability of the cameras to identify drivers with sufficient accuracy for the identification to stand up in court. The companies came up with two solutions. They developed cameras with improved resolution and they positioned them better, so that the photographs could withstand judicial scrutiny. But an even easier solution was to change the law. Create a near absolute liability for car owners in the event of traffic violations caught on camera, but allow them to shift liability by revealing the names of the drivers of their cars.

Such laws are slowly being adopted around the world. Draft legislation is supplied by the camera companies, who are also aggressive lobbyists for the reforms.

Why is this so bad? It may not be. After all, the technology promotes traffic safety, holds people accountable, and generates revenue for cash-strapped local governments. Still, **it shifts (still further) the presumption of guilt in some settings, and induces people to point their fingers at violators (including their children and spouses), perhaps even at the expense of identifying the right person.** Admittedly, traffic violations are just that: violations and not crimes. But they are certainly crime-like. Traffic fines often equal fines payable for minor crimes, and depending on one's record, insurance may increase for several years, and a driver's license may be forfeited. Altogether a substantial penalty, all in the face of diminished due process rights.

### A Host of 'Auxiliary' Criminal Justice Programs

What holds for traffic light cameras also holds for many other programs: pre-trial release programs (which monitor compliance with conditions of release), pre-trial diversion programs, and 'alternative' non-custodial sentences imposed as a condition of probation. These programs require electronic monitoring, drug testing, and various types of reporting requirements, many of which are monitored by private contractors who run them. These programs may make sense. But consider this: a person released into the community pending resolution of a criminal charge may faithfully appear at all court appearances, but nevertheless fail to keep a curfew programmed into her electronic monitor or fail to appear to take a drug test. Similarly, people in diversion programs or non-custodial treatment programs may keep out of trouble and hold down jobs and attend school faithfully, but nevertheless miss a meeting with a program officer or fail to fully comply with curfew restrictions.

Such behavior may result in a return to custody for a technical violation. Thus, **the additional requirements of a noncustodial alternative may also, in fact, result in an increase in custody as well.**





## The Radical Consequences of Innovation

The discussion has examined two quite different sets of innovations in Anglo-American criminal justice. One set was put in place two hundred years ago. The other is still in its infancy. What links these programs is that they were both initiated by private entrepreneurs, but both have generally been understood or defended as more efficient alternatives to existing institutions.

My purpose for linking them is to show something of the opposite, and to underscore the radical consequences they have unleashed.

Throughout the history of the modern criminal justice system, since the early eighteenth century, private contractors have played a crucial role in developing and institutionalizing new forms of controls.

Rather than being marginal new features in the criminal process, they have played and continue to play a – perhaps, the – major role in the development of new products and services expanding the state's capacity to punish. Some of them have had revolutionary consequences.

What occurred at the outset of the modern Anglo-based criminal justice system continues today.

**The most important feature of privatisation is not that private contractors are less expensive than public agencies, but that private contractors innovate, that they promote, that they expand new forms of social control.**

## Q & A

**1** **Malcolm, you've avoided the question of whether this is a good thing or a bad thing.**
**I'm wondering whether in any of your examples, historical or otherwise, you've seen any effect on public legitimacy or trust in the system from any of these innovations?**

With respect to good or bad, I'm agnostic. It's complicated. The one thing that I do believe is that this development is occurring under the radar. There is no discussion in the state legislature in California. There is no research and development in the criminal courts and not much in the corrections system. The police are a lot more robust on this issue. So I just want to bring it onto the radar screen for discussion.

**2** **Much of what you described as occurring in America is happening here in Australia with our own law courts. And here also there is no public discussion; it's not an issue. Why is that so?**

I suspect that if you looked at many innovations, you'd find they also emerged under the radar. We are at a stage where we are overwhelmed with innovations. That's one of the reasons I am working on this project. I'm trying to connect the dots between all sorts of seemingly-different things.

**3** **In one of his books, Alan Dershowitz points out that in the 18th Century there were, in effect, two parallel legal systems: one of them a formal system of all the laws and rights; and an informal justice system run by justices who could impose pre-emptive penalties if they did not like the look of someone or who could send people to jail quite casually. We seem to be seeing a sort of repetition of this now, in the development of a parallel legal system. Is the danger of all this, ultimately, that we're reintroducing slavery by another name? Because the obvious next step is to argue, 'Well, these people are costing a lot of money, why don't we put them to work in factories or in enterprises' and then they say 'Oh, we need 25 young people to help manage such and such machine here'...**

I don't think we're really instituting another form of slavery... although the American Constitution allows for it. When we abolished slavery we abolished it for everybody except convicted felons. Prisoners don't work willingly: they're not good workers. So I think what is going to happen if electronic monitoring is taken up is that we're going to change our views on drugs.

Self-discipline is really hard. Electronic monitoring will work if we allow those inmates to gobble up large amounts of thorazine. I fear that's what we're going to have: a society with lots and lots of state- sponsored drug addicts who have electronic bracelets and won't have the incentive to violate curfew.

With respect to slavery, I guess I can't resist the point made by a distinguished colleague of mine who argues that in the US, we have had a series of regimes of controlling black people. Slavery was replaced by Jim Crow, then the ghettos, and now by the prisons. It's the new Jim Crow; and when you look at the proportion of people who are African-American in prisons in the US, it's frightening: 10% of the population and 50-60% of incarcerated people are African-American.

**4** **You talked about how entrepreneurs approach somebody with a problem and say 'I have a solution for you that just happens to make me money'. Another way market economies work is to create a demand that the provider has to then respond to. If you look at many democratic policies concerned with law and order, they often seem to set out a response greater than the empirical signs of that problem would call for.**
**Is there any sign that corporations stoke law and order concerns in order to expand their market?**

That's interesting. This has developed during a period of rapid growth of the prisons, so the real battles have yet to begin – but I expect they will begin.

Let me give you an example: there are no private prisons in California, and one of the reasons for this is that the prison workers' union is the strongest union in the state. This union gives more money through political campaigns than do the unions of nurses or public school teachers.

One does see that these drug treatment programs will morph into alcohol treatment programs, for instance.





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