

The Paradox in Incarceration and Crime

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Prison is a recruitment centre for the army of crime. That is what it achieves. For 200 years everybody has been saying, 'Prisons are failing: all they do is produce new criminals.' I would say

on the other hand, 'They are a success, since that is what has been asked of them.'¹

~ Michael Foucault ~

Introduction:

Australia is experiencing a rise in the use of incarceration in all states and territories, with the number of individuals in jail rising over 6 percent from 2006 to 2007 alone. The result is a shifting locus to more intrusive legislation, which is increasingly giving less credence to rehabilitation and educative prevention. Currently the number of people in prison across the country totals 27,224, representing an imprisonment rate of 169 prisoners per 100,000 adults – a startling 23 percent increase over a span of a decade.² Statistics are grim on all fronts: in the course of a year, the number of male prisoners has increased by 5 percent, the number of woman prisoners has been raised by 9 percent and the number of Indigenous prisoners has also seen a 9 percent rise. Sentenced prisoners increased by 5 percent, while those who were unsentenced increased by 9 percent.³ This phenomenon, although arguably higher than in other common law jurisdictions, is not unique to Australia alone. For example, in the last 30 years, the United States has seen a 500 percent rise in incarceration, while the general population has risen by less than 40 percent.⁴ With over 2,258,983 individuals held in US prisons at the close of last year, these numbers offer cause for concern not only in the North American context, but

¹ Roger-Pol Droit, "Interview with Michael Foucault, On the Role of Prisons", *The New York Times* (5 August 1975). Note that it first appeared in the Paris newspaper *Le Monde* and was translated by Leonard Mayhew, online: <http://www.nytimes.com/books/00/12/17/specials/foucault-prisons.html?_r=1>

² Australian Bureau of Statistics, "4517.0 – Prisoners in Australia, 2007" (December 2007), online: <<http://abs.gov.au/ausstats/abs@.nsf/Latestproducts/4517.0Main%20Features22007?opendocument&tabname=Summary&prodno=4517.0&issue=2007&num=&view=>>

³ *Ibid.*

⁴ Ryan S. King, Marc Mauer and Malcolm C. Young, "Incarceration and Crime: A Complex Relationship", *The Sentencing Project* (2005), online: <http://www.sentencingproject.org/Admin/Documents/publications/inc_landc_complex.pdf>

also for other jurisdictions such as Australia who are also seeing a rise in the use of imprisonment as a crime management technique.⁵

Proponents of increasing the use of incarceration as a tool for state control suggest that this ‘get tough on crime’ approach has been the primary reason that crime has decreased in recent years. Opponents, on the other hand, have suggested that jails are in fact contributing to the crime problem by incubating problems. Studies indicate that ex-prisoners have the highest reoffending rates, with approximately two-thirds being rearrested within the following three years of being released.⁶ Given the complexity of the relationship between crime and incarceration, researchers have had a difficult time accurately quantifying the rate at which imprisonment may have an influence on the *reduction* of crime. An even more difficult task thus arises in an attempt to quantify to what extent, if any, the rate of imprisonment may have on *contributing* to a rise in crime. Numerous factors are at play in examining this analysis: analyzing various time frames; variances between state and national trends; differences in measures of crime and victimization. Additional factors outside of incarceration also have an influence: employment rates; economic trends; demographics; drug use in a given area; and other geographical differences.⁷

This paper firstly aims to dispel the myth that rising incarceration rates are solely responsible for the falling crime rate; it will then subsequently examine the role imprisonment plays upon recidivism rates – namely, the influence that spending time in jail has on the ex-criminal’s chances of reoffending. Surprisingly, little research

⁵ Office of Justice Programs, Bureau of Justice Statistics, “Prison Statistics”, *U.S. Department of Justice* (2006), online: <<http://www.ojp.usdoj.gov/bjs/prisons.htm>>

⁶ Office of Justice Programs, Bureau of Justice Statistics, “Reentry Trends in the U.S.”, *U.S. Department of Justice* (2006), online: <<http://www.ojp.usdoj.gov/bjs/reentry/recidivism.htm>>

⁷ For a more in-depth examination of each of these factors, please see Ryan S. King, Marc Mauer and Malcolm C. Young, “Incarceration and Crime: A Complex Relationship”, *The Sentencing Project* (2005), online: <http://www.sentencingproject.org/Admin/Documents/publications/inc_landc_complex.pdf>

has been done to date in this important area, which is troublesome given the major policy ramifications at play in both Australia and in the international realm. Prison conditions, unlike most other determinates of crime, are under direct control of the criminal justice system. One of the primary enquiries for effective crime control therefore requires a thorough examination of the consequences of imprisonment on recidivism.⁸ This paper does not propose to present any new empirical research and/or scientific methodology; the scope is rather to offer *Justice Action*, a respected Australian criminal justice and reform organization, a briefing of the current literature on the topic of crime's correlation with imprisonment for use in further research and community-based campaigns.

It will be argued that despite an obvious gap in the literature to date, credible research has recently emerged to support the significant proposition that prisons do, in fact, *cause* crime. From a policy perspective, the Australian government needs to take these findings in the utmost seriousness and immediately curb the move towards more intrusive legislation and the build up of a growing prison industrial complex. Instead, credence should be given to the critical task of channeling future funds into much-needed research on the effect that jails have on reoffence rates, post release programs and ultimately a variety of other alternative methods to mass incarceration. It should be noted that a substantial proportion of dialogue that is currently researched and published on the topic of crime and recidivism is generated by international scholars, so a consideration of other countries' penal policies will be referred to throughout this analysis. By no means does such a comparison indicate that other criminal justice systems are a normative yardstick upon which to measure Australia's problems, as each jurisdiction is unique in its' penal experiences. The reality is,

⁸ Keith Chen and Jesse M. Shapiro, "Does Prison Harden Inmates? A Discontinuity-based Approach", *Cowles Foundation Discussion Paper No. 1450* (2004) at 2, online: <http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=470301>

however, that many developed countries have recently seen a massive increase in the use of incarceration as a vehicle of crime control, indicating that the reality of Australia's growing prison crisis can no longer afford to be viewed in a political vacuum.

A.) A Brief Consideration of Imprisonment's Historical Legacy – Crime, Power and the Fight for Control

It is with government, as with medicine. They have both but a choice of evils. Every law is an evil, for every law is an infraction of liberty: And I repeat that government has but a choice of evils: In making this choice, what ought to be the object of the legislator? He ought to assure himself of two things, first, that in every case, the incidents which he tries to prevent are really evils; and secondly, that if evils, they are greater than those which he employs to prevent them. There are two things to be regarded: the evil of the offence and the evil of the law, the evil of the malady and the evil of the remedy.⁹

~ Jeremy Bentham ~

Penal theorists have attempted to map the history of thought regarding justifying probation services throughout the eras: some assert that it started as a missionary endeavour whose purpose was to save souls, and later evolved into a professionalized attempt by the state to “cure” a prisoner of future criminal inclinations through rehabilitation.¹⁰ Other commentators focus on the shifting locus from community punishment to public protection and risk management.¹¹ Throughout the various phases of the history of imprisonment, academics and practitioners alike have attempted to convey new paradigms for the justification of imprisonment. The examination of prison as an institution with its own agenda has been well-documented over the years; for example, Emile Durkheim examines the

⁹ Jeremy Bentham, “Of Political Good and Evil”, *Principles of Legislation*, 1802.

¹⁰ Fergus McNeil, “A Desistance Paradigm for Offender Management” (2006) 6 *Criminology & Criminal Justice* 1, at 40.

¹¹ *Ibid.*

historical significance of imprisonment, and argues that it becomes the ultimate form of punishment as society matures.¹² Max Weber considers the rationalization of punishment and the centralization and hierarchical systems¹³, while Michel Foucault maintains that the expanding prison population is tied to a states' attempt to control its citizens.¹⁴ Indeed, crime control has recently become part of a 'normal economic landscape'¹⁵ as authorities seek to exploit the public's fear of crime to maintain a dominant position through increased imprisonment.

The Honourable E.D. Bayda suggests that a large majority of the population wants a system of binary justice, where two fundamental premises are promoted. The first is that punishment is a prerequisite to a just outcome; this position is predicated on the belief that punishment is necessary in order to restore the balance of an offender taking advantage of those who are law abiding citizens. The second premise is that imprisonment is the only form of punishment; all other alternatives are viewed as a leniency, or a 'letting off'.¹⁶ The Western criminal system thus focuses on guilt and punishment, as the control of crime becomes an industry in and of itself.¹⁷ Sending individuals to jail is viewed by policymakers as an immediate, easily-implemented response that has relatively few political opponents.¹⁸ A successful

¹² Emile Durkheim, "The Evolution of Punishment", in Steven Lukes and Andrew Scull, eds., *Durkheim and the Law* (London: Palgrave Macmillan, 1983) at 114.

¹³ David Garland, *Punishment and Modern Society: A Study in Social Theory* (Chicago: The University of Chicago Press, 1990) at 177-192.

¹⁴ Michel Foucault, *Discipline and Punishment: The Birth of Prison*, trans. Alan Sheridan (New York: Vintage Books, 1977) at 231.

¹⁵ The Honourable E.D. Bayda, "The Theory and Practice of Sentencing: Are They on the Same Wavelength?" (1996) 60 Sask. L. Rev. 317 at 8.

¹⁶ *Ibid.* at 8.

¹⁷ *Ibid.* at 8.

¹⁸ D. Garland at 200, as referenced in Brian Steels, *Declared Guilty, a Never-ending Story: An analysis of the impact of the criminal justice system upon the self* (Thesis, Murdoch University, 2005) at 14.

prison thus arguably has to fail in reducing crime if it wants to expand its' own market.¹⁹

B.) The Problem on the Outside: The Fallacy of Rising Crime

In both Australia and abroad, governments have been quick to cite examples of rising crime for policy reasons, particularly to justify increased spending on law enforcement expansion and tougher prison sentences. Executive Director of *The Sentencing Project* Marc Maurer warns that these claims are largely unfounded as statistical examination, and when compared with findings from other jurisdictions, offer ambiguity in their results. Despite claims to the contrary, half of the cities in the United States that kept sufficient data for statistical analysis saw a decrease in the rate at which crime was committed. Context must therefore always be taken into account when examining suggestions that crime is rising – for example, although a recent 2-3 percent raise in violent crime may seem to be a cause for concern in some areas, it must be examined within the context that the overall rate for violent crime is in actuality 40 percent lower than it was in the early 1990s. A short-term rise in crime does not always suggest a trend in crime overall, but legislation implemented during periods of increased crime (such as mandatory minimum sentencing laws) are extremely difficult to change once the problems inherent with these solutions are

¹⁹ Foucault theorizes that the problems inherent in prisons are a mechanism that is integral to the system that penal institutions are trying to purport. Expanding on the work of Durkheim, Foucault questions what utility is served by the fact that prisons continue to be ineffective. By looking at it through this lens, his reader is able to recognize how disciplinary punishment allows prison officials, parole officers and other individuals in a position of power to maintain dominance over prisoners – particularly in relation to the length of the prisoner's sentencing time. This theory should be looked at from an economic loss/profits type of analysis, because it indicates that a failure of a prison [in terms of crime and recidivism rates] is a structural requirement. A prison as a 'corporation' is faced with expanding its own market, thus always being in need of new inmates. If money was funneled into programs to reduce recidivism instead of into the prison itself, the prison as a business entity would no longer be successful in expanding its own market. For a more thorough discussion on the topic, see work by Michel Foucault, *supra*. note 14.

identified after the political climate has cooled down.²⁰ Politicians clearly cater to the fears of the public in moments when crime appears to be fluctuating upwards; Michael Tonry argues that “[i]n times of anticrime hysteria, the safest position on crime issues may be the preemptive strike.”²¹

Mauer also raises concern with the explanations that have been suggested to justify the rise in violent crime; many commentators believe that lack of funding to hire more police officers has led to a strain on policing services due to understaffed departments. Although this may in fact merit some truth, findings suggest that police funding has “little or no effect on crime.”²² Commentators John L. Worrall and Tomislav V. Kovandzic maintain that changing the locus to police strategies to problem-solving policing are in fact more effective than simply funneling more funding into police forces.²³ “Increasing incarceration while ignoring more effective approaches will impose a heavy burden upon courts, corrections and communities, while providing a marginal impact on crime.”²⁴

Criminologists Franklin E. Zimring and Gordon J. Hawkins purport the straightforward theory that the effect of crime rates on the prison population should be a mechanical one, asserting that “... imprisonment is a criminal sanction: its use will therefore fluctuate in direct proportion to changes in the level of the behaviour to which it is designed to respond.”²⁵ Despite this mechanical explanation, a variety of empirical research on the correlation between crime rates and the use of imprisonment

²⁰ Marc Mauer, “What Wave?” *The American Prospect* (27 March 2007), online: <<http://www.prospect.org/cs/articles?articleid=12601>>

²¹ Michael Tonry, *Malign Neglect* (London: Oxford University Press, 1995) at 180.

²² Mauer, *supra*. note 20.

²³ For further discussion on this topic, see John L. Worrall and Tomislav V. Kovandzic’s article published in *Criminology*, as cited in Mauer’s article, *supra*. note 20.

²⁴ Ryan S. King, Marc Mauer and Malcolm C. Young, “Incarceration and Crime: A Complex Relationship”, *The Sentencing Project* (2005), online: <http://www.sentencingproject.org/Admin/Documents/publications/inc_landc_complex.pdf>

²⁵ Franklin E. Zimring and Gordon J. Hawkins, *The Scale of Imprisonment* (Chicago: University of Chicago Press, 1991) at 121.

indicates that there is very little evidence to suggest the proposition that higher crime leads to a greater rate of incarceration,²⁶ although it must be recognized that some studies have found a (very) weak impact of crime on imprisonment.²⁷

Researchers offer a variety of reasons to explain why the effect of crime on imprisonment rates has been difficult to identify in empirical analysis. For example, Yair Listokin suggests that a major problem with empirical studies to date is that there is an endogeneity bias, which confines efforts to accurately assess the response of incarceration to crime rates. He posits that because the number of prisoners influences the amount of crime, crime cannot be treated as an exogenous variable in a regression of imprisonment rates on crime rates. Because the relationship between the number and change of prisons is not static, accurately calculating the amount of crime is particularly challenging. This is especially true given the fact that many convicted criminals often spend more than one year in prison and the number of inmates housed in jail in a particular year is influenced not only on the crime rate for that specific year but is also dependent on lags of the crime rate.²⁸

Listokin's statistical examination attempts to use an instrumental variables approach to curb some of these defects by comparing crime to abortion rates in the United States. He believes that the focus should be on admissions to prison rather than on the aggregate prison population as a whole, because "[u]nlike the total prison

²⁶ Yair Listokin, "Does More Crime Mean More Prisoners? An Instrumental Variables Approach" (2003) *J. of Law and Econ.*, vol. XLVI at 181-182. As mentioned above, other studies that find no effect of crime on imprisonment include: Michael Tonry, "Why Are US Incarceration Rates So High?" (1999) 45 *Crime & Delinq.* 421-22; Thomas B. Marvell and Carlisle E. Moody, "Prison Population Growth and Crime Reduction" (1994) 10 *J. Quantitative Criminology* 109; Lee H. Bowker, "Crime and the Use of Prisons in the US: A Time-Series Analysis" (1981) 27 *Crime & Delinq.* 206; and William G. Negel, "On Behalf of a Moratorium on Prison Construction" (1977) 23 *Crime & Delinq.* 154, 160, 172-74.

²⁷ See David Biles, *Crime and the Use of Prisons* (1979) 43 *Fed. Probation* 39; Gary Sykes, Gennaro E. Vito and Karen McElrath, "Jail Populations and Crime Rates: An Exploratory Analysis" (1987) 15 *J. Police Sci. & Admin* 72; Patrick A. Langan, "America's Soaring Prison Population" (1991) 251 *Science* 1568; and Marc Ouimet and Pierre Tremblay, "A Normative Theory of the Relationship between Crime Rates and Imprisonment Rates: An Analysis of the Penal Behaviour of the US States from 1972 to 1992" (1996) *J. Res. Crime & Delinq.* 109, 114-24.

²⁸ Listokin, *supra*. note 182-183.

population, admissions to prison should depend primarily on crime rates in the present or recent past, thus moderating the need to examine the impacts of lagged values of crime on incarceration.”²⁹ Contrary to past research on the topic, supporters of the current mass-imprisonment approach will be quick to point out that Listokin’s study found that a relationship between crime rates and entrance to prison did, in fact, exist – indicating that that the mechanical theory of crime and imprisonment may hold some empirical support.³⁰ What one must be cognizant of, however, before embracing his findings unequivocally is that his instrumental regressions model suggests that prison numbers should have increased by 80 percent as the population expanded immensely and crime went up between 1970 and 1997. Yet in reality, as Listokin explicitly recognizes but cannot adequately account for, there has been a 500 percent increase in the use of imprisonment during this period.³¹ Crime appears to be on a decrease worldwide, yet more jails continue to be constructed as prisoner rates rise. A reason for this inconsistency in Listokin’s empirical analysis may lay in the fact that if the instrument chosen is weak and unavailable [such as abortion] larger standards of errors on the coefficients may apply, thus reducing the effectiveness of the study.³²

Another method of examining the effect to which crime and incarceration go hand-in-hand is predicated on the assumption that rational individuals act to minimize their utility when presented with the opportunity to allocate their time or resources to various activities, including crime. An Australian study undertaken by Philip Bodman and Cameron Maultby intended to follow up the work of G. Withers, who up until that point in time had been the only statistician to use an aggregative analysis of

²⁹ *Ibid.* at 184.

³⁰ *Ibid.* at 204.

³¹ *Ibid.* at 202.

³² John Pfaff, *The Growth of Prisons: Toward a Second Generation Approach*, Fordham Law Legal Studies Research Paper No. 976373 (2007) at 39, online: <<http://ssrn.com/abstract=976373>>

Australian crime, economic and demographic data. G. Withers' analysis strongly indicated favourable results for the deterrence hypothesis in relation to property crime.³³ Models of specific deterrence suggest that criminals who learn firsthand about the severity of prison from their own experience are less likely to commit crimes after being released.³⁴

Bodman and Maultby's findings, which profess to use improved data measures, particularly in regards to sentencing, also support this deterrence theory and the market model of crime derived under the economic theory. They maintain evidence has been found to indicate longer prison sentences correlate with lower rates of fraud, vehicle theft and robbery. Despite these findings, they were unable to find a correlation in regard to burglary. It should also be noted they failed to take into account the significance of drug addiction, particularly heroin use, into their analysis. Despite such questionable gaps in their research, these commentators nevertheless assert that the results favour an economic theory and "represent important opposition to the continuing prevalence of simplistic sociological analysis of imprisonment and recidivism, which is often based on ad hoc theorizing and limited empirical validation."³⁵

Further studies in Australia have attempted to demonstrate that the increased use of imprisonment is responsible for falling crime rates. A study conducted by Neil Donnelly, Don Weatherburn and Marilyn Chilvers suggests that a rise in burglary in New South Wales over the last thirty-five years is strongly correlated with an increase in the use of heroin, but that it was also influenced by a fall in the rates of

³³ Withers, G, "Crime, Punishment and Deterrence in Australia: An Empirical Investigation" (1984) *The Economic Record* 60 at 815-40.

³⁴ Douglas A. Smith and Patrick R. Gartin, "Specifying Specific Deterrence: The Influence of Arrest on Future Criminal Activity" (1989) 54 *American Sociological Review* 1 at 95-106.

³⁵ Philip M. Bodman and Cameron Maultby, "Crime, Punishment and Deterrence in Australia: A Further Empirical Investigation" (1997) 24 *International Journal of Social Economics* 789 at 896.

imprisonment for this offence. While taking into account the important variable of drug use that Bodman and Maultby ignored in their previous study, this analysis nonetheless failed to take into account simultaneity.³⁶ Another related empirical study subsequently released found that longer prison sentences did correlate with lower levels of burglary, although not robbery; again, this study did not account for simultaneity.³⁷

The most recent work put out by Weatherburn, Moffatt and Jiuzhao acknowledges that there has been a 39 percent increase of individuals being held in jail between the 1995-2004 period, with the annual cost of maintaining these prisons being AU\$1.6 billion.³⁸ These authors nevertheless conclude, on the basis of an empirical analysis of their data, that prison is ultimately an effective way to control burglary. The mathematical model used to reach this conclusion suggests that the more time criminals spend in jail, the less likely they will be to commit offences. The problem with this analysis, however, lies in the assumptions that their arguments are based on, which they expressly acknowledge in their report. Perhaps the most serious of these assumptions is “that the experience of imprisonment does not change the expected length of a criminal career or the rate at which individuals will reoffend.”³⁹ Weatherburn, Moffatt and Hua acknowledge that it is hard to measure the relationship between imprisonment and recidivism, and concede that sending people to prison may make them more likely to reoffend, but rehabilitation programs may help lower the

³⁶ Neil Donnelly, Don Weatherburn and Marilyn Chilvers, “The Impact of the Australian Heroin Shortage on Robbery in NSW” (March 2004) *Crime and Justice Statistics Bureau Brief*, NSW Bureau of Crime Statistics and Research.

³⁷ Steve Moffatt, Don Weatherburn and Neil Donnelly, “What Cause the Recent Drop in Property Crime?” (February 2005) *Crime and Justice Bulletin*, NSW Bureau of Crime Statistics and Research, No. 85.

³⁸ Don Weatherburn, Jiuzhao Hua and Steve Moffatt, “How Much Crime Does Prison Stop? The Incapacitation Effect of Prison on Burglary” (January 2006) *Crime and Justice Bulletin*, NSW Bureau of Crime Statistics and Research, No. 93 at 1.

³⁹ *Ibid.* at 8.

risk of further reoffending, which at the aggregate level could (theoretically) cancel each other out.⁴⁰

These authors alarmingly admit that if imprisoning individuals does, indeed, make them more likely to reoffend “... the incapacitation effect of longer prison terms will be higher than our estimates suggest”⁴¹ – indicating that their current findings would be significantly skewed. Similar to studies in the United States and United Kingdom, the authors concede that even though the results of their findings suggest that prison is an effective way of preventing a large number of burglaries, this does not necessarily mean that an increased use of imprisonment would be successful in further reducing the burglary rate. If the sentenced rate were doubled, at a cost of AU\$26 million per annum, it would nonetheless only reduce the annual number of burglaries by 8 percent.⁴² Indeed, research from the United States indicates that the usual tools used by policy analysts to measure crime rates (such as multiple regression of aggregate data) all have varied widely, in some cases up to 50 percent – even when all researchers relied on the same data and statistical techniques.⁴³

The inconsistent results presented in past studies serve to remind researchers and policy makers that empirical investigation into the correlation between rising crime and rising imprisonment is questionable, at best. As commentator David Biles argued over a quarter of a century ago:

This mixed bag of results on the crime preventing (or crime reducing) effects of differing levels in the use of imprisonment must at least be interpreted as casting doubt on the assumption that sentencing large numbers of offenders to prison will necessarily reduce the crime rate. In some situations that may be the result, but in others the result may be the opposite. Until this question is resolved with less equivocal research findings it would seem reasonable as a matter of policy to

⁴⁰ *Ibid.* at 8.

⁴¹ *Ibid.* at 8.

⁴² *Ibid.* at 8 - 9.

⁴³ William Spelman, “Jobs or Jails? The Crime Drop in Texas” (2005), *Journal of Public Policy Analysis and Management* at 134.

argue for the lowest level of the use of imprisonment that is compatible with community attitudes.⁴⁴

One thing both critics and proponents do agree on is that a wider breadth of research is clearly needed in this area. Australians, in particular, have conducted little research on the frequency and recurrence of crimes committed by various offenders.⁴⁵ Future studies must focus models of controls for the endogenous relationship between prison populations and crime, because as John Pfaff indicates, “[w]hile crime rates influence prison populations, prison populations likewise affect crime rates; failure to control for this simultaneity biases the coefficients in the models.”⁴⁶

C.) The Problem on the Inside: Incarceration’s Effect on Recidivism

There are similar punishments and crimes called by the same name, but there are no two beings equal in regard to their morals; and every time that convicts are put together, there exists necessarily a fatal influence of some upon others, because, in the association of the wicked, it is not the less guilty who act upon the more criminal, but the more depraved who influence those who are less so.⁴⁷
~ Gustave de Beaumont and Alexis de Tocqueville ~

i.) Incarceration’s Impact on the Individual and Future Recidivism

In Australia, 57 percent of all prisoners recorded in 2007 that they had served an adult sentence prior to the current episode – an increase of 3 percent from the prior year.⁴⁸ Findings suggest that individuals who have experienced punitive conditions and harsher sentences in prison are more likely to resort back to post-release crime,

⁴⁴ David Biles, “Crime and Imprisonment: An Australian Time Series Analysis”, (1982) ANZJ Crim. 15 at 153.

⁴⁵ Don Weatherburn, Jiuzhao Hua and Steve Moffatt, *supra*. note 38 at 1.

⁴⁶ John Pfaff, *supra*. note 32 at 25-26.

⁴⁷ Gustave de Beaumont and Alexis de Tocqueville, *On the Penitentiary System in the United States and Its Application in France* (1833), from texts on Denver University College of Law’s website, online: <<http://www.correctionshistory.org/toqueville/html/titlepg.html>>

⁴⁸ Australian Bureau of Statistics, “4517.0 – Prisoners in Australia, 2007” (December 2007), online: <<http://abs.gov.au/ausstats/abs@.nsf/Latestproducts/4517.0Main%20Features22007?opendocument&tbname=Summary&prodno=4517.0&issue=2007&num=&view=>>>

indicating “doing hard time often may only produce more hard-core crooks.”⁴⁹ Charles Colson maintains a disconnect exists in terms of imprisonment; as jails become more overcrowded, murderers and rapists are having their sentences cut to make room for offenders with low-level offences such as minor drug charges or burglary. Jails serve as an incentive for the legislative and judicial realm to enact harsher legislation and incarcerate minor offenders. As Colson asserts, “[P]risons are like parking lots: as soon as they’re built, more cars seem to appear.”⁵⁰ He argues from a policy perspective, it would be much more economical to revise statutes to keep the truly dangerous offenders incarcerated, whilst transferring non-dangerous criminals to alternative work and support programs outside the confines of prison. This, in turn, would keep offenders close to the things that are a positive motivating factor: jobs, communities, families and friends. It can also assist in keeping the families of criminals off of state assistance and allow them to deliver some form of restitution to their victims in some scenarios.⁵¹

As the US Joint Economic Committee emphasized, imprisonment is the most costly option in crime control policies. It is estimated that each new prison cell in the US costs between \$50,000 to \$100,000 to build with the annual incarceration of each federal inmate costing \$20,000 to \$30,000⁵² – a far heftier price than the average annual cost of \$3,700 for a youth program, \$6,000 for a job training program or

⁴⁹ Richard Morin, “Time In and Time Out: Maybe It’s Time to Get Soft on Crime”, *The Washington Post* (2 February 2006), online: <http://www.washingtonpost.com/wpdyn/contents/article/2006/02/01/AR2006020102110_inform.html>

⁵⁰ William J. Bennett and Charles Colson, “First Things: An Exchange on Crime and Punishment. Correspondence Between William J. Bennett and Charles Colson” (1994) *First Things* 40 at 2-5, online: <www.leaderu.com/ftissues/ft9401/bennett.html>

⁵¹ *Ibid.* at 2-5.

⁵² Stephen R. Donziger (ed.) *The War on Crime: The Report of the National Justice Commission* (New York: Harper Perennial, 1996) at 49-54.

\$13,000 for tuition at public universities.⁵³ Prisoners' health care costs rise as they age in prison, and the tax-paying public often has to bear the responsibility of footing the bill to assist the impoverished families of these offenders during an inmates' sentence.⁵⁴ In addition to the economic burdens that imprisonment causes, there is the far-reaching emotional hardship that serving time has on offenders and their families, as well as the negative social effects of racial disharmony that arises from the belief that the criminal justice system excessively targets racial minorities.⁵⁵ Crime-producing effects of imprisonment increase the longer an inmate is incarcerated; readjustment issues pertaining to idleness, isolation and a value of self-worth are aggravated by time spent in prison.⁵⁶

In Washington state, American scholar Dennis J. Stevens tested the hypothesis that the longer the period a prisoner is sentenced behind bars, the more likely it is that they will recommit a crime once released. His data indicates that attitudinal values change once an inmate adapts and becomes accustomed to the prison culture. As a result of this shifting locus in values, he finds support for the conclusion that neither the threat of prison nor longer prison sentences will deter an inmate from committing future crimes. Stevens suggests reducing prison sentences in certain situations to shorter incarceration times, since research indicates that both male and female inmates who serve shorter sentences are more likely to not recidivate than prisoners who served longer sentences.⁵⁷ Mauer's work contributes to this discussion by demonstrating that although recidivism rates are high, there is no noticeable

⁵³ Carolyn Maloney, "Statement of Carolyn Maloney, Vice Chair Joint Economic Committee Hearing" (4 October 2007) United States Senate and U.S. House of Representatives, online: <jec.senate.gov/Hearings/10.04.07%20Economic%20Cost%20Cost%20of%20incarceration/Opening%20Statement%20-%20CBM.pdf>

⁵⁴ Richard L. Lippke, "Crime Reduction and the Length of Prison Sentences" (2002) 24 *Law & Policy* 1 at 31-32.

⁵⁵ *Ibid.* at 32.

⁵⁶ *Ibid.* at 31.

⁵⁷ Dennis J. Stevens, "The Impact of Time-Served and Regime on Prisoners' Anticipation of Crime: Female Prisonisation Effects" (1998) 37 *The Howard Journal* 2 at 201.

difference between inmates serving sentences from one to five years in length. Statistics from the US Department of Justice demonstrate that it is only after five years that recidivism rates marginally begin to decrease, but Mauer maintains that this can be attributed to factors such as the aging process as opposed to the length of incarceration.⁵⁸

While the length of time spent in prison does not appear to effect recidivism rates, the level of security that the penal facility is ranked does have an influence at the rates at which a prisoner will reoffend once released. An American study, also based on data from Washington state, has found that offenders coming out of high security, “supermax” prisons demonstrate a higher rate of recidivism than those in lower security jails; furthermore, prisoners were more likely to commit a crime faster upon release than those who left non-supermax facilities.⁵⁹ Additional research confirms that high security prisons potentially contribute to further violence by contributing to mental illness and decreasing a prisoner’s social-functioning ability because of the long stints spent in isolation.⁶⁰

A recent study by economists M. Keith Chen of Yale University and Jesse M. Shapiro of the University of Chicago confirms these findings. These researchers took convicts with essentially identical criminal histories and analyzed the security risk score that each prisoner was given before entering into a federal prison. The rating system was based on a prisoner’s prior criminal record and predisposition to violence amongst other factors; each inmate was assigned a number ranging from zero to 36. The assessment determined whether a prisoner should be placed in a minimum, low,

⁵⁸ Marc Mauer, “The Hidden Problem of Time Served in Prison” (2007) 74 *Journal of Social Research* 2 at 703.

⁵⁹ David Lovell, L. Clark Johnson and Kevin C. Cain, “Recidivism of Supermax Prisoners in Washington State” (2007) 53 *Crime & Delinquency* at 633-656.

⁶⁰ Jesenia M. Pizarro, Vanja M.K. Stenius and Travis C. Pratt, “Supermax Prisons: Myths, Realities, and the Politics of Punishment in American Society” (2006) 17 *Criminal Justice Policy Review* 1 at 17.

medium or maximum security establishment. Offences were based on five categories obtained from a neutral scoring Designator at the Bureau of Prisons, ranging from lowest severity (such as “counterfeiting, under \$2000) to highest security (such as homicide).⁶¹ Emphasis was placed on inmates who had been assigned ratings within a point or two of each other, but had been placed in different security facilities because they fell below or above a cutoff. The researchers accounted for the assignment mechanism, as opposed to merely comparing the recidivism arrest rates of prior criminals in different security levels, which in turn helped isolate bias presented by the endogeneity of security levels.⁶²

Chen and Shapiro began with the assumption that inmates who had approximately equal ratings would have similar probabilities in reoffending upon release from prison. Disturbingly, the researchers found that prisoners who were assigned ratings just under the cutoff period and were thus placed in minimum security prisons were only half as likely to reoffend in the following three years after release than those who scored barely above the cutoff point to be entered into the subsequent level of higher security. This same pattern rang true for each cutoff point up to maximum security. Moving an inmate from a minimum to low security prison roughly doubles the probability of rearrest within the three years after release. However, the same effect is not present when a controlled population of prisoners are not placed with the general prison population but nonetheless assigned scores.⁶³

These findings, coupled with the fact that predetermined demographic characteristics present no discontinuities at the cutoff points, indicate that the effect of prison conditions on an inmate have a noticeable effect on recidivism rates.⁶⁴ Chen

⁶¹ Chen and Shapiro, *supra*. note 8 at 4.

⁶² *Ibid.* at 3.

⁶³ *Ibid.* at 3.

⁶⁴ *Ibid.* at 3.

and Shapiro use this information to conclude that placing offenders in higher security classes has a significant affect on chances of rehabilitation, since contact with more violent offenders frequently encourages a criminal and even educates him or her to continue with a life of crime upon being released. New skills may be acquired, new elements and prospects may be learned of and further criminal contacts may be developed. There has been growing literature on the influence of peers and intensity of contact in co-housed prisoners; coupled with information based from federal inmate surveys, evidence suggests that imprisonment conditions vary greatly depending on their respective security levels. Higher security prisons involve less freedom, external contact and subject inmates to a far higher level of violence.⁶⁵

Chen and Shapiro conclude that although the deterrence effect of harsher incarceration conditions may reduce crime from being committed in the short term, these reductions “[c]ome at the cost of future crimes.”⁶⁶ After inmates are released from prison, their criminal record greatly hampers their chances of gaining legal employment; thus, resorting back to a life of crime may appear to be their only option. It is clear that similar empirical studies need to be conducted within the Australian context immediately to supplement the American researchers’ findings that prison can actually contribute to a rise in crime. Implications from recidivism studies are incredibly important, because even marginal reductions can have huge social and economic implications.

ii.) Incarceration’s Impact on Communities

Incarceration clearly has a spillover effect onto the community, as areas around prisons often become a bed of crime themselves. Studies from Europe show that factors relating to education and employment, and above all an accumulation of

⁶⁵ *Ibid.* at 5-6.

⁶⁶ *Ibid.* at 14.

different types of resource problems, are closely tied with recidivism rates. Incarceration reduces an individual's ties to mainstream society and weakens chances of leading a conventional life, as factors like obtaining a legitimate job or stable home are severely decreased as a result of having a criminal record.⁶⁷ Within this analysis one must also be cognizant of the invisible punishments that ex-prisoners are confronted with once released, as they are often denied parental rights, licenses, student loans and residency in public housing, to name but a few examples of further marginalization faced upon release. Having a criminal record severely hampers the chances of landing employment once released; in one US study, for example, over 65 percent of employers indicated that they would not hire an ex-criminal, irrespective of the crime committed.⁶⁸

In Northern Europe, studies have examined the influence that an ex-prisoners' living conditions post-release have on the recidivism rate. Perhaps unsurprisingly, released individuals who do not reoffend have stronger conditions with respect to employment, social relations and financial situations – for example, only 14 percent of recidivism in Denmark resulted from individuals who were employed shortly after their release from prison, as compared with 50 percent who held jobs and did not reoffend at all.⁶⁹ A similar British study on recidivism takes into account dynamic factors – items subject to variation such as employment, drug abuse and housing – and compares it to static factors, such as sex and age and previous offences. The

⁶⁷ Anders Nilsson, "Living Conditions, Social Exclusion and Recidivism Among Prison Inmates" (2003) *Journal of Scandinavian Studies in Criminology and Crime Prevention* at 57-58.

⁶⁸ Nicholas Freudenberg, "Jails, Prisons, and the Health of Urban Populations: A Review of the Impact of the Correctional System on Community Health" (2001) *78 Journal of Urban Health* 2 at 216-217.

⁶⁹ *Ibid.* at. 60.

empirical analysis suggests that dynamic factors are greatly correlated with recidivism rates.⁷⁰

In the American context, Dina Rose and Todd Clear's research also extends beyond a straightforward assertion that communities will be safer if offenders are removed and imprisoned. In many cases, incarceration has negative effects on a community because of roles that offenders assume in their communities outside their criminal life – as family members, neighbours and as economic producers and consumers. By displacing these individuals from their local networks, the social order is disrupted, particularly in areas where the incarceration rate amongst residents is high.⁷¹ A study conducted by Rose and Clear, funded by the Open Society Institute, investigated the secondary effects of high imprisonment rates in Florida. The study found significant attitudinal differences between people who have no exposure to incarceration versus people who have been directly touched by imprisonment. Methodologically, the study measured the impact of incarceration on structural indicators of disorganization in the community, along with individual indicators pertaining to economic and family life. Indicators used include higher rates of crime; increased cases of juvenile delinquency; higher rates of teenage birth; an increased spread of sexually transmitted diseases; reduction of the value of properties; and a greater fear of crime. Studies such as the one conducted by Rose and Clear are extremely significant because they help to clarify how policy makers can use funds

⁷⁰ C. May, "Explaining Reconviction Following a Community Sentence Home Office Research Study 192" (1999) London, United Kingdom Home Office at 21, online: <www.homeoffice.gov.uk/rds/pdfs/hors192.pdf>

⁷¹ Dina R. Rose and Todd R. Clear, "Incarceration, Social Capital and Crime: Implications for Social Disorganization Theory" (1998) 36 *Criminology* 3 at 441-480.

allocated to improving justice issues to promote a safer and higher standard of community life.⁷²

Simply incarcerating offenders, and thus displacing them from their community, clearly have negative impacts not only on the criminals themselves, but also leads to the break up of families and destruction of community ties. Criticisms with the argument that prisons result in the break up of families do, inevitably, exist. In the United Kingdom, the Social Exclusions Unit (SEU) maintains research shows that prisoners are six times less likely to reoffend if they maintain contact with their families. David G. Green comments that this statement is what statisticians would call the ‘ecological fallacy’, which assumes that the average characteristics of a particular group apply to the entirety of that subset. His proposition is that even if people with strong family ties are less prone to engage in criminal behaviour once released, it does not automatically indicate a blanket statement that everyone who has strong family connections are less likely to be criminals. He points to statistics to support this claim: the fact that 47 percent of male prisoners in the UK had run away from home as a child, and 27 percent had been in care (compared to 2 percent of the population). A further 81 percent were unmarried, and 32 percent did not have a permanent place of residence prior to incarceration.⁷³

Greens’ rebuttal is problematic on a variety of fronts. Statistics on marriage rates ignore the glaring reality of the situation on the ground; surveys have indicated that two-thirds of women in jail and more than half of all men in prison – many of whom are unmarried – have children under the age of minority. Having a parent

⁷² Todd R. Clear and Dina R. Rose, “When Neighbors Go to Jail: Impact on Attitudes About Formal and Informal Social Control” (July 1999), summary prepared by Jeremy Travis, *National Institute of Justice, U.S. Department of Justice*, online: <www.ncjrs.gov/pdffiles1/fs000243.pdf>

⁷³ David G. Green, “Crime Reduction: Are Government Policies Likely to Achieve Its Declared Aims?” (2003) *The Institute for the Study of Civil Society*, online: <<http://www.civitas.org.uk/pubs/crimeISSP.php>>

incarcerated can lead to behavioural and emotional problems for these children. This also has spillover effects into certain low-income communities, so even if a child does not have parents in prison directly, they will often still suffer from incarceration's collateral consequences by knowing someone who is serving time from their community.⁷⁴ The cycle perpetuates and an offenders' child, exposed to the effects of incarceration and lacking other options, is often lured into a life of crime as they grow up. Jails currently serve the most vulnerable populations in the country – which Green's statistics on prisoner past child run-away and foster care rates clearly demonstrate. Yet despite this vulnerability factor, the majority of inmates do not receive proper treatment in relation to substance abuse, mental health problems, perpetration of or victimization of violence, HIV or other STD infections and a range of other conditions. As a result, high prices are paid by not only the inmates themselves, but their families, communities and taxpayers.⁷⁵

iii.) A Brief Note on Recidivism, the Privatization of Prison and 'Supermax' Prisons

The push for the privatization of correction facilities in Australia is a relatively new concept; currently many developed countries are turning towards the privatization of prisons as an alternative to government-operated prisons. Some commentators maintain that private prisons lower operational costs, improve the quality and efficiency of service and provide cheaper and faster bed capacity. Furthermore, it has been asserted that private prisons encourage more rehabilitation, since such actors have increased incentive to obtain funding from the government for

⁷⁴ Dina Rose and Todd Clear, "Incarceration, Reentry and Social Capital: Social Networks in the Balance", prepared for the "From Prison to Home" Conference (30-31 January 2002), online at: <http://www.aspe.hhs.gov/HSP/prison2home02/>

⁷⁵ Nicholas Freudenberg, *supra*. note 68 at 226.

continued support.⁷⁶ It has also been suggested that innovative education and rehabilitation programs in private prison has the potential effect of correlating to lower rates of recidivism.⁷⁷

An American study by Bales et. al., the most comprehensive to date on the topic, used multivariate survival analysis to compare reoffence and reimprisonment rates for re-released inmates in Florida. This study finds no empirical justification for the policy argument that recidivism is reduced by private prisons in comparison with public prisons.⁷⁸ Given the findings of the Florida study, Gerald Gaes maintains that prior studies that appeared to support the conclusion that private prisons resulted in lower recidivism rates were most likely based on models that omitted important variables. He suggests that further empirical research is needed from other jurisdictions to see if these findings mirror results elsewhere, particularly from Australia and the United Kingdom. If researchers become better at measuring prison performance, both the private and public sectors will have to become more accountable.⁷⁹

Recommendations and Conclusions

An increase in incarceration is a product of changes in penal policy and practice, particularly sentencing, not in changes in crime rates themselves.⁸⁰ The question of imprisonment presents huge social and economic problems that need to be

⁷⁶ William Bales et. al., "Recidivism of Public and Private State Prison Inmates in Florida," (2005) 4 *Crim. & Pub. Policy* 1 at 58.

⁷⁷ Joseph Sozzani, "Privatisation in the United States and Australia: A Comparative Analysis of the Modern Privatisation Movement in Corrections" (2001) 13(1) *Bond L. Rev.* 136, online: <<http://www.auslii.edu.au/au/journals/BondLRev/2001/6.html>>

⁷⁸ Bales et. al., *supra*. note 76 at 78.

⁷⁹ Gerald G. Gaes, "Prison Privatization in Florida: Promise, Premise, and Performance" (2005) 4 *Criminology and Public Policy* 1 at 83.

⁸⁰ Jim Webb, "Mass Incarceration in the United States: At What Cost?" (4 October 2007) Hearing of the Joint Economic Committee, online: <<http://www.jec.senate.gov/Hearings/10.04.07%20Economic%20Cost%20of%20incarceration.htm>>

immediately addressed within the Australian context – a sad reality is that there is not much to gain politically, but arguably much to lose, in taking on the issue of prison reform. Crime has been commercialized to the point that prisons are being promoted by politicians as a necessary part of the economy. The promise of getting a new prison has shifted from “not in my backyard” sentiments to “in my backyard, please”, and the promise of building new prisons and creating new jobs in impoverished areas is just one means of obtaining support from the electorate in marginalized communities.⁸¹

There has been a call in recent years to expand the criminal justice realm to include other viable options to imprisonment; suggestions include drug courts, community courts, domestic violence courts and reentry programs. Elements that differentiate these options include a stronger commitment to public safety and restorative justice; a stronger connection with alternative systems such as drug treatment, mental health and child protection services; family-based therapy programs for juvenile offenders; and a recognition that harm reduction and relapse prevention are goals to be considered in addition to the current zero-tolerance, get-tough-on-crime approach inherent to traditional methods of punishment.⁸² Reducing the number of individuals in jail will also allow prison facilities to be able to offer more, much-needed services to the people that remain incarcerated.

An emphasis on social justice at the grassroots level must be emphasized throughout this analysis, since “[C]rime flourishes where the conditions of life are worst” and therefore, “the foundation of a national strategy against crime has to be an

⁸¹ Jesenia M. Pizarro, Vanja M.K. Stenius and Travis C. Pratt, “Supermax Prisons: Myths, Realities, and the Politics of Punishment in American Society” (2006) 17 Criminal Justice Policy Review 1 at 11.

⁸² Nicholas Freudenberg, *supra*. note 68 at 216-217.

unremitting national effort for social justice.”⁸³ A move away from centralized correctional power is necessary, and a greater degree of localism that works to establish a link between the community and offender upon release should be emphasized as short term objectives.⁸⁴ Research clearly indicates that penal solutions to date are unable to demonstrate clear reductions in recidivism rates. Successful reentry of prisoners into the community is essential to combating the high reoffence rates. Parole pilot projects should be explored, such as the community-based correctional program instituted in California in the late 1990s, which provided literacy training, employment services, housing assistance and substance abuse treatment. Empirical studies found the statewide program made significant strides in reducing reoffending rates amongst ex-prisoners, demonstrating that recidivism is not an inevitable outcome.⁸⁵ It is imperative that the government focuses their efforts on a reentry program that works; politicians should find little difficulty in selling a policy that promises long-term cost savings and reduced crime to the Australian public.

Growing literature exists to highlight the difficulty of reentry’s impact on communities, particularly given the fact that these same areas are often marginalized in a variety of other ways. Both the offender and community members become isolated from one another, thus increasing chances of continued recidivism. Rose and Clear emphasize that, if managed properly, reentry back into the community is a time when major strides can be made for recently released prisoners. Some suggestions to help foster and develop important networks include the building of community centers and establishment of mentoring systems, encouraging political participation,

⁸³ President’s Commission on Law Enforcement and the Administration of Justice (1967) noted in Nicholas Freudenberg, *Ibid.*, at 228.

⁸⁴ Gwen Robinson and Peter Raynor, “The Future of Rehabilitation: What Role for Probation Service?” (2006) 53 *The Journal of Community and Criminal Justice* 4 at 341.

⁸⁵ Sheldon X. Zhang, Robert E. L. Roberts and Valerie J. Callanan, “Preventing Parolees From Returning to Prison Through Community-Based Reintegration” (2006) 52 *Crime & Delinquency* 4 at 551.

engaging in family counseling and support programs, amongst various other important suggestions.⁸⁶ In light of longer term policy objectives, the government must look at minimizing the use of prison sentences all together; contrary to the current rise towards the use of imprisonment in Australia, efforts should be made immediately to facilitate a shift towards sentencing less people and halting proposed construction plans of any new Australian jails. As outlined above, there are numerous areas – from research on recidivism to social programs upon release – that the government should be diverting funds allocated to correctional services towards.

The objective of this research paper has been to dispel the myth that rising prison rates are responsible for the falling crime rate and examine the influence that imprisonment plays upon recidivism rates. It has been demonstrated that credible, empirical research exists to support the position that prisons are a cause of crime in and of themselves. Australian policymakers should not take these research findings lightly; the use of imprisonment is quickly rising, but the penal realm continues to be shielded from reform. Crime must stop being politicized, and politicians, lawmakers and the judiciary must all own up to the realities on the ground. What is right is not always popular, but the road to justice has never been without obstacles. As Justice Action has so aptly highlighted through their role as community leaders, the moment of opportunity to act on prison reform is now. Curbing rising prison rates and, as a result, stopping future crime from occurring is a pressing policy objective that needs immediate attention.

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⁸⁶ Rose and Clear, *supra*. note 72 at 16-17.

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