

Bureaucracy, Private Prisons, and the Future of Penal Reform

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INTRODUCTION

The plan to reform the Model Penal Code's sentencing provisions aims to rationalize punishment. Is this a good thing? It depends on what rationalization entails. One way that the revision plan of the reform explicitly seeks to rationalize punishment is through a sentencing commission model, a means of making sentencing decisions more systematic, transparent, and predictable.¹ The revision plan makes a strong case that lack of uniformity and proportionality in sentencing has contributed to the massive growth in the U.S. incarceration rate. The revision plan also offers a sentencing rationale of "limited retributivism" that provides the philosophical justification to gird the practical work of the sentencing commission.² In the attempt to make sentencing more sensible, and indeed more fair, the reform plan pursues an admirable kind of rationalization, providing a scheme to render a patchwork of penal law and practice legible and acceptable to a diverse twenty-first-century audience through a governing normative theory and a tested institutional measure.

The American Law Institute will doubtless have its hands full with the many issues and solutions proposed in the revision plan, and yet this paper urges it to consider more critical perspectives on rationalization. In a lay

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1. American Law Institute, Model Penal Code: Sentencing, Plan for Revision (January 29, 2002).

2. *Id.*

sense, “rationalization” can mean a retroactive and expedient justification for an action. In a sociological sense, “rationalization” means the increase and expansion of rules, technologies, and institutions to coordinate social activity.

The Model Penal Code (MPC) revision plan’s focus on penal rationales and sentencing mechanisms, while having the intention of restraining growth in prison populations, has the potential to rationalize expansive incarceration practice. This is because the current approach to reform does not take on the decades of poorly managed growth in carceral populations but only hopes to affect future increases to an already intolerably high incarceration rate. Under these circumstances the deployment of limited retributivism as the animating philosophy of this reform plan risks becoming the post facto justification for an excessive incarceration rate. The revision plan, in fact any conceivable reform contemplated by the ALI, is also likely to produce rationalization in the sociological sense, in that the logical reformative response to flaws in sentencing and corrections is to provide more explicit rules, expert staff and efficient technology to manage the problems.

Rationalization in this latter sense is not a dangerous thing in itself, but becomes so when the moral and ethical principles which originally guided and constrained the penal system no longer command authority. This paper develops this claim first by describing the lack of a legitimate basis of prison (as distinct from the issue of the legitimacy of punishment), a problem I describe as the *normative* ambiguity of prisons. I focus on the need for establishing the legitimacy of *prison* because prison *is* punishment in America: it is the most dominant, costly, and intrusive punishment in use, and one aim of this paper is to make clear how irrelevant current debates about punishment’s purpose are to making sense of or justifying the practice of imprisonment.³ Prisons also display an

3. By making this point I would like to challenge an academically notable but to me ultimately distracting claim that the fine constitutes the most common, longstanding, and dominant punishment in the late modern West. See, e.g.,

operational ambiguity in that it is unclear what practical goals they achieve. These two facets of ambiguity reduce the prison's role to the minimalist function of containment.

At the same time the penal system is characterized by its normative and operational ambiguities, it is expanding at a terrific rate—which includes the related phenomena of rapid growth of prisons and enlargement of the infrastructures that administer them. To assess this paradox, I turn to Max Weber's sociology of bureaucracy to try to understand punishment in America not as a moral problem but as an institutional and cultural one. One key claim of Weber, and applied to the problem of prisons here, is that bureaucratic structures, with their need for calculability and predictability, regulations, and performance measures, impose their own normative systems, introducing procedural qualities like efficiency as values that come to overwhelm more substantive principles. Efficiency of practice, as opposed to moral worth or ethical necessity, then explains and rationalizes penal growth.

The paper takes the case of the for-profit prison as a particularly salient example of punishment as bureaucracy, arguing it represents the general and widespread emergence of an amoral basis of penal legitimacy. Private prisons are evaluated not according to whether they are good or bad, but whether they are cheap, safe, and legal. The focus on expedient and technical measures of efficiency in the private prisons debate not only displaces attention from fundamental issues of the prison's moral worth and

Anthony Bottoms, *Neglected Features of Contemporary Penal Systems*, in *The Power to Punish* 166 (David Garland & Peter Young eds., 1983). It might also seem arrogant to talk about prison as the most intrusive punishment given the persistence in the United States of the death penalty. Judicial execution is obviously more intrusive an infringement of liberty than imprisonment, but it is prison which affects many more hundreds of thousands of lives, including not only those incarcerated in them but those who pay for them or whose quality of life is affected by paying for them, such as the future students of California whose educational system has been directly degraded because of the amount of the state budget allocated to corrections. See Zygmunt Bauman, *Social Issues of Law and Order*, 40 *Brit. J. Criminology* 205 (2000).

practical accomplishments but replaces these normative concerns with technocratic ones. The experience of the private prisons debate, in which moral and ethical criticisms are persistent non-starters, suggests that the way in which academics think about punishment generally, by insisting on the traditional categories of moral philosophy, is not only mildly irrelevant but dangerously ignorant of the fact that the penal system is an increasingly important sector of global public and private economies. And it is the reality of these global economies, with their internal value systems, resource constraints, and growth potentials which has enduring influence on how and how much we punish. It makes no sense to develop concepts like intention and retribution without any awareness of empirical constraints and contexts, which make certain claims about punishment more or less supportable or worthy.

The way that the private prisons industry is developing thus shows how rationalization that proceeds in the absence of moral conviction might act as a cautionary tale for the reform of the MPC's sentencing and corrections provisions.

I. NORMATIVE AMBIGUITY OF PRISONS

What makes the isolation of a person from society, housed among hundreds or thousands of others, with the particular qualities of life that this containment entails, *right* or *good* or *ethically necessary*? There is very little debate about the moral worth of prison as a form of punishment, especially compared with the glut of positions advanced about punishment in the abstract. Problems of punishment are presented as different than problems of the prison. Questions falling into the realm of the former seek out a justificatory basis for a state to inflict pain on its constituents, and also seek to specify highly abstract notions like retribution in terms of slightly less abstract notions like moral communication.⁴

4. Antony Duff, *Punishment, Communication, and Community* (2001).

In contrast to the style, level, and orientation of the normative discourse of *punishment*, questions about the specific penal practice of *imprisonment* tend to be asked by sociologists, lawyers, and policymakers, who worry about who's in prison, what they do while they are there, and running the specialist buildings in a cost-efficient manner. The answers to these sorts of questions certainly implicate normative problems, as the massively disproportionate representation of blacks and Latinos in carceral populations highlights. But in another way, this example is proof of the divide between abstract discourses of punishment and pragmatic discourses about imprisonment: all the aspects of prison that are disturbing or unethical (sexual and physical abuse of inmates, disproportionate representation of minorities, revival of chain gangs and striped convict uniforms, hiring for-profit companies to operate prisons) do not lead to a debate about the legitimate existence of the prison itself, at least not in the same way that it is the very purpose of the philosophical interest in punishment to connect the power to inflict punishment with the right to do so. The decoupling of the morality of punishment from the morality of imprisonment, when imprisonment is mainly synonymous with punishment in contemporary times, renders the philosophy of punishment of very marginal relevance. More important for this discussion, however, this decoupling means we lack any clear normative basis for the prison.

Normative and practical penal discourses have not always been bifurcated. Kant and Beccaria's respective philosophies of punishment entailed particular institutional forms. For the pure retributivist, the recognition that all lives have an intrinsic and equal worth requires both the institutional means of court and legislator to protect and enforce these values, and the method of the death penalty to retaliate against the wrongful and intentional taking of a life.⁵ Beccaria's

5. Immanuel Kant, *The Metaphysics of Morals* 333 (Mary J. Gregor trans., 1996).

similar insistence on the equality of all before the law coupled with his elaboration of a theory of deterrence through the certainty rather than the severity of punishment followed from a political critique of the arbitrary and harsh power of punishment in his time and led him to the institutional solution of proportional sentences of imprisonment.⁶

In a more recent example, the original Model Penal Code's embrace of rehabilitation as a main penal purpose encompassed both the normative and the practical-institutional. Rehabilitation was presented as morally (because it was seen as more humane and socially defensible) and scientifically (because it is subject to empirical testing) superior to retribution,⁷ and this normative view was tied to a specific setting for treatment growing out of developments in clinical psychology: a behavioral approach delivered according to an individualized medical model that favored the setting of a large and isolated institution (e.g. hospital, asylum, or prison).⁸ Although the disillusionment with the 1950s and 1960s version of offender rehabilitation is now largely total, this loss of faith in treatment as the main penal value did not produce a decline in use of the prison. Perhaps this is the point which marks the parting of the ways between deciding on an appropriate basis for punishment and designing the technology to deliver it. For now we observe that while the question of punishment's retributive, rehabilitative, deterrent, restorative, or incapacitative role continues to be debated, how that purpose will be carried out is settled. The prison is the site where the criminal offender will experience punishment, whether he be in need

6. Cesare Beccaria, *On Crimes and Punishments, and Other Writings* (Richard Bellamy ed., Richard Davies trans., 1995).

7. See, e.g., Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Penal Code*, 4 *Buff. Crim. L. Rev.* 53 (2000), for a brief history on the MPC drafters' support for treatmentism.

8. See, e.g. Francis A. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* 12 (1981): "[treatment] became an important element in . . . penological thought only when imprisonment became a principle mode of punishment."

of treatment, a good scare, a chance to reintegrated into the community, and, above all, when we simply want him kept away from others. Punishment *is* prison, and the abstract and practical problems of prison are therefore the problems of punishment.

II. OPERATIONAL AMBIGUITY OF PRISONS

If we have no clear basis for why we *ought* to use prisons, are there yet some important practical reasons why prison makes more sense than another penal sanction? Treatment programs for offenders, despite their political unpopularity and limited evidence of success, will always be an important element of the prison regime.⁹ Whatever else they do, treatment programs take up inmate time and can be fed into the disciplinary structure in an environment where there are precious few incentives. This inverts the original rehabilitative ideal in which it was conceived that the large, isolated institution offered the setting most conducive to inmate treatment. Instead these massive buildings, still standing despite the razing of their philosophical foundations, must be made manageable by organizing the lives of their inmates around security routines, food and hygiene routines, and treatment and recreation routines. Treatment programs “work” by fitting into a larger strategy of population control. This does not amount to a practical reason for relying on prisons as punishment: it only tells us about techniques for minimizing disorder in an institution inherited from another age.

What has succeeded, what practices of punishment do send an appropriate message to wrongdoers? This question, of course, sends criminologists and moral philosophers in pursuit of their particular visions of the holy grail. While they hunt for the definitive answer in empirical studies and analytical debates, the cities, counties, states, and federal government of America get on

9. See *id.*

with building and filling their jails and prisons with up to 2% of the U.S. labor force.¹⁰ While the social scientists hold up magnifying glasses to the lives of probationers, and while the moralists employ ever more convoluted hypotheticals to express their theories of punishment, the question has been answered. What works? Prison works.¹¹

The power of prisons to rescue suburban and rural Americans from unemployment is one way that prisons “work.” They also work to solve a looming, though self-inflicted, problem for legislators; that is, the problem of responding to increasing criminal legislation. The consequence of minimum-mandatory sentencing and “Three Strikes, and You’re Out” laws has been a massive increase in demand for prison places.¹²

The one problem that prisons are very poor at solving is crime itself. Until the mid-1990s growth in the U.S. incarceration rate was accompanied by growth in crime rates.¹³ Deterrence, causing an offender enough discomfort to dissuade him and others from crime while not violating his human rights, was the main normative justification of the prison. This theory fails when measured by its own utilitarian calculus: the weight of the research tells us that prisons are very poor at accomplishing this aim.¹⁴ And, as far as I am aware, there are no studies that have attempted to evaluate the extent to which experiencing a particular period of incarceration correlates to a specific amount of retribution intended.¹⁵ Even if we give up on

10. Katherine Beckett & Bruce Western, *How Unregulated is the U.S. Labor Market? The Penal System as a Labor Market Institution*, 104 *Am. J. Soc.* 1030 (1999).

11. In fact, “Prison Works” was a slogan of the Conservative Government during Michael Howard’s tenure as Home Secretary in the early 1990s.

12. Franklin Zimring, *Imprisonment Rates and the New Politics of Criminal Punishment*, 3 *Punishment & Soc’y* 161 (2001).

13. *Id.*

14. Andrew von Hirsch et al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); Franklin E. Zimring & Gordon Hawkins, *Deterrence; The Legal Threat in Crime Control* (1973).

15. Indeed the original Model Penal Code rejected retributivism because key drafters derided its messy tendency to legitimate emotional vengeance making rational apportionment of prison impossible. See, Dubber, *supra* note 7.

prisons as places for offenders to unlearn offending behavior, we cannot even be sure that prison causes a retributive sort of pain; it is likely that those we would like most to experience the “pain” of imprisonment, the persistent hardened offender, are the ones most resistant to this effect. At best, we have no idea whether prison accomplishes any penal justification and some evidence that prison has no impact on encouraging individual offenders along law abiding paths; at worst, we have evidence that prison increases the proclivity to engage in violent behavior.¹⁶

Prisons do not work in any of the ways they were intended to. This has opened up the possibility for analyses such as above, that prisons work as an economic strategy. Foucault’s thesis on prison failure is similarly cynical. He argued that the failure of the prison is one of its core purposes, for the reform movements that prison failure provokes secure the prison’s existence by increasing the demand for more resources to improve it.¹⁷ Even attempts to use prison less, by creating and making wide use of alternatives to custody, only deepen our reliance on prison, as the massive literature on net widening argued in the late 1970s and 1980s, because alternatives rely on the stick of prison for their enforcement.¹⁸

Offender treatment programs do occasionally work. Even Martinson’s notorious article contained some evidence of recidivism reductions.¹⁹ The problem is that

16. See Sasha Abramsky, *When They Get Out*, *Atlantic Monthly*, June 1999, at 30.

17. Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans., 2d ed. 1995).

18. See, e.g., Stanley Cohen, *Visions of Social Control: Crime, Punishment, and Classification* (1985), and James Austin & Barry Krisberg, *Wider, Stronger, and Different Nets: The Dialectics of Criminal Justice Reform*, 18 *J. Res. Crime & Delinq.* 165 (1981). This literature has been criticized, often accurately, for failing to back up strongly worded claims with rigorous empirical evidence. See Maeve W. McMahon, *The Persistent Prison?: Rethinking Decarceration and Penal Reform* (1992).

19. Robert Martinson, *What Works?—Questions and Answers about Prison Reform*, 35 *Pub. Int.* 22 (1974). The *What Works?* movement returned to Martinson’s study and performed meta analysis on the evaluations to assess

there is no program evaluation that has shown that the particular setting of the prison is the effective element of treatment. The increasing influence of cognitive-behavioral therapy in offender treatment seems to be a most promising development, but these programs work in a variety of settings, custodial and non-custodial; in fact, it may be the successful ability of the therapist to overcome a large institutional environment that is helpful to the therapeutic process.²⁰

And so we still lack an explanation of how prison is supposed to work, especially since the claim of the large institution's advantage as the best setting for treatment has been abandoned by the disciplines—medicine and psychology—that led support for its use. And if prison programs work when they are run in a way that de-emphasizes the totalitarian setting, then what explains the proliferation in the number and size of mega-prisons and supermax prisons, buildings that highlight a maximum-security aesthetic, and practically speaking, which make it impossible to ignore the prison's particular ambience?

The answer is that prisons work very well at simply keeping people away from us, while also keeping them alive. Big prisons can achieve economies of scale. Beyond this, the operational ambiguity remains. We have no normative basis for the prison's legitimacy, and no practical understanding at how it achieves any conception of punishment, and so we are forced to speak about prisons in the most minimalist, functional terms as containers of live human beings. Justification of the prison's persistence seem to boil down to the mere fact of its existence. It is easier to continue using something we have already got that fails to accomplish any clear good than to invest money and imagination in solutions that might be equally poor at realizing ideals and worse at keeping the dangerous away from us. Additionally, the prison still satisfies a

elements of successful treatment programs. See *What Works: Reducing Reoffending* (James McGuire ed., 1995).

20. McGuire, *supra* note 19; Iain Crow, *The Treatment and Rehabilitation of Offenders* (2001).

powerful symbolic need to think of punishment as unmitigated suffering—the endless obsession of prison movies with male rape, for example, is one way that the institution fulfills the role of punishment to expiate our rage towards criminal offenders.

Paradoxically, the waning legitimacy of the prison has been accompanied by a massive expansion in the penal bureaucracy. Bearing in mind Foucault's prison failure thesis, an increase in penal skepticism and reform activism has led to a larger penal organization. While the rehabilitative ideal was in decline, a due process revolution generated masses of case law strengthening criminal defendants' rights. At the same time there was a boom in success for prisoners litigating over the conditions of their confinement that produced a tradition of judicial oversight of prison management.²¹ At the legislative level, the National Institute of Justice and the Juvenile Justice Delinquency Prevention Act created new federal offices to administer criminal justice funds to the states for the implementation of justice programs and to engage in criminal justice research. These developments directly expanded the penal bureaucracy and also triggered indirect growth, as the states used federal reforms as a model for their own practice. Taken together these governmental changes required bureaucratic enlargement entailed by the increased need for more court monitors and experts, more justice system researchers, more administrative staff to produce research documents, more law school clinics focused on criminal justice, more legal advocacy groups, and more involvement of private providers of justice services.

III. PUNISHMENT AS BUREAUCRACY

What explains this relentless expansion? Some commentators have tried to explain penal expansion as the

21. Malcolm Feeley & Edward L. Rubin, *Judicial Policymaking and the Modern State: How the Courts Reformed America's Prisons* (2000).

senseless commandeering of criminal justice policymaking by politicians representing and fomenting a populist punitivism. Dubber describes the explosion in the amount of penal legislation that targets recidivists as “arational,” a situation where the state moves beyond being merely irrational, or innocently misguided, in its attempt to solve the crime problem through sentencing law to a point where legislators have no interest at all in how their symbolic and punitive legislation will affect crime rates or budgets.²² This perspective critically raises awareness of the disjuncture between the kinds of values that are supposed to inspire and control state practice, and the social reality of punishment. However, they do not move us much farther than that. The notion that penal legislation is “arational” makes pointless the exercise of trying to explain, analyze, or predict because its central claim is that this sort of conduct is so bizarre it can never be understood. We can only hope that vengeful decision makers will eventually come to their senses.

The inclination of legal discourse for prescriptive and normative modes means that the possibility of explanation is lost once the normative mooring gives way. When behavior is unjust, or lacking a clear moral basis, it becomes also senseless. Given this quality of academic legal discourse, different analytical tools are needed to understand why the penal system invariably expands while its claim to moral legitimacy continues to erode. Weber’s sociology of bureaucracy is very helpful in this regard because it allows us to think of the institution of punishment not as a failed normative project but as a successful bureaucratic organization. Understanding the penal system as a stable organization indicates that there must be a clear set of principles and strategies supporting it, and which can form a viable basis for continuing to support its growth. In Weber’s terms, this is the “legitimate” basis of the penal bureaucracy, which it is

22. Markus Dirk Dubber, *Recidivist Statutes as Arational Punishment*, 43 *Buff. L. Rev.* 689 (1995).

important to distinguish from a normative concept of legitimacy. In Weber's sociology, "legitimacy" does not mean a universally applicable moral authority. It is a non-normative description of power that people accept as valid, and they may do so from a belief in the moral rightness of a command or because they fear the consequences of not obeying. In both instances it is the fact that an order is voluntarily complied with that for Weber shows it to be a legitimate source of authority for the people under its jurisdiction.²³ This sociological approach to legitimacy allows us to seek out the sources of the penal bureaucracy's stability without getting caught up in a futile debate over its ideal purpose. It rescues us from an unproductive frustration at the de-coupling of normative and practical problems of punishment, allowing us to ask questions in another way. Instead of wondering why the prison system grows even though it fails to achieve any of its claimed normative goals, we can now ask, what values does the current arrangement of penal institutions promote (that we may or may not consider right, but which do seem to provide a stable basis for operations)?

A. A Weberian Theory of Bureaucracy

Understanding the penal system as a bureaucracy has some significant implications, because a bureaucratic organizational form is "capable of attaining the highest degree of efficiency and is in this sense formally the most rational known means of exercising authority over human beings. It is superior to any other form in precision, in stability, in the stringency of its discipline, and in its reliability."²⁴ The efficiency of a bureaucratic organization flows from its preference for technical expertise, its use of technology, its hierarchical organization of power, its creation of systematic files, and its training systems.²⁵ The

23. Max Weber, *Economy and Society: An Outline of Interpretive Sociology* 212 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff trans., 1978).

24. *Id.* at 223.

25. *Id.* at 956-58.

superior efficiency of bureaucratic method relies on the impersonal and hierarchical organization of its staff, which in theory, protect it from the destabilizing forces of corruption and unpredictability. Thus the ideal bureaucracy is also a meritocracy, for it impersonally employs and promotes staff on the basis of objectively assessable performance criteria.

A bureaucratic organization makes itself “completely indispensable” so that returning to more informal, personal or other bases of authority, becomes, if not impossible, then viewed as irrational.²⁶ But in the general consciousness, bureaucracy is synonymous with inefficiency, officiousness that lacks moral purpose. It implies micromanagement, unnecessary layers of rules, forms and procedures, and indifferent staff without discretion to deviate from the rules when it would be just to do so. One way to reconcile this lay view of bureaucracy with Weber’s theory is to distinguish between the ideal type of organization that Weber sketches—that is a pure form that is never fully realized in the empirical world but which is a distillation of the distinctive tendencies of this kind of social order—and the messy reality of life in which even the most bureaucratic organizations still partly depend on non-bureaucratic and informal mechanisms of authority.²⁷ Thus the claim that the penal system presents an example of a highly successful bureaucratic structure of domination is not a claim about its actual efficiency in accomplishing any penal purpose, but *is* a statement about its success maintaining itself as an organization that is able to generate support for its growth, by claiming efficiency as a goal.

The success of the bureaucracy lies not in its perfection of the art of efficiency, but its success in creating a system whose value is efficiency, and fundamentally, its success in convincing people that this value is the most important basis of its legitimacy. “What produces empirical behavior

26. *Id.* at 223.

27. Philip Selznick, *An Approach to a Theory of Bureaucracy*, 8 *Am. Soc. Rev.* 47 (1943).

is a *belief* in formal rules . . . in routine action, as that which should as a matter of duty be 'followed,' . . . as legitimate by virtue of their *presumed* rational impersonality, their exactness, their stability, and so on."²⁸ Weber's theory of bureaucracy involves both the spread of this "bureaucratic mentality" that creates an authoritative environment for growth as well as an empirical process of rationalization of organizational processes.²⁹

The history of the prison is a story of this kind of double bureaucratization of penal administration. The decrepit conditions of older prisons has been largely remedied through prisoner litigation, establishment of accreditation standards by the American Corrections Association and related organizations (covering accreditation of prison medical services, for example). Degree programs in criminal justice studies have fuelled a growth industry for many universities and colleges, creating the norm for correctional personnel of having post-secondary education certification. The National Institute of Justice provides technical assistance to prison managers to improve strategic planning. It is not uncommon to find mission statements and business plans among the daily inmate counts and statistics taking up space on wardens' desks. State departments of corrections require annual training of staff. The importance of managerial concerns and statistical techniques has been highlighted as a new strategy of corrections. I suggest it is more than a strategy deployed by the state against offenders: it is a *new identity* for the organization and personnel of the correctional system.³⁰

The legitimacy of a bureaucracy lies in its neutrality, its commitment to applying the rules in an impersonal,

28. Richard A. Hilbert, Bureaucracy as Belief, Rationalization as Repair: Max Weber in a Post-Functionalist Age, 5 Soc. Theory 70, 77 (1987).

29. Id.

30. Malcolm Feeley & Jonathan Steven Simon, The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications, 30 Criminology 449 (1992). See also David Garland, The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society, 36 Brit. J. Criminology 445 (1996).

transparent and regular way, its success in providing a stable forum for action, and its publication of rules so that they may be understood and relied upon to guide action. Professionalization and mastery of the techniques of the successful business are at the heart of the penal system's claim of legitimacy both to those who are part of this bureaucracy and to those outside of it. Bureaucracy "is a mentality of conviction that all action *should* accord with . . . [formal rules, specified policy, rationally efficient procedure], this correspondence providing the legitimacy for all such action, and . . . it is the duty of individuals to subordinate themselves to this impersonal system of rational decision making."³¹

Weber argues that bureaucracy's "development is . . . at the root of the modern Western state."³² He links the particular style of mass democratic politics of the United States with the demand for a political equality, producing a social "levelling" that allowed for and was in turn encouraged by the emergence of a bureaucratic form of state administration.³³ The bureaucratic form implicates a particular source of authority; legitimacy derives from its legality, meant in the specific sense of a formal legal system and in the general sense of being a rule-based form of order. "Today the most common form of legitimacy is the *belief* in legality, the compliance with enactments . . . which have been made in the accustomed manner."³⁴ Not only has the administration and construction of prisons occurred amidst a proliferation of correctional facility building standards, inmate disciplinary codes and case law, and highly trained correctional personnel, but all of these techniques of rationalization have become a source of legitimacy—a belief system stabilizing the authoritative power—of the prison itself. Cases of brutality against prison inmates no longer inspire sociologists to investigate how brutality might be built into the institution of prison

31. Hilbert, *supra* note 28, at 71.

32. Weber, *supra* note 23, at 223.

33. Weber, *supra* note 23.

34. *Id.* at 37.

itself, but instead generate debates about the quality of training and managerial oversight, the modernity of prison architecture, the competent use of surveillance technologies.³⁵ Compliance with bureaucratic norms has replaced the hope of realizing moral or larger social goals.

The prison system's bureaucratic characteristics become the justification to increase the use of it. Judges who hesitated to incarcerate children with adults now can institutionalize more youth for more reasons through a separately organized juvenile justice system. Reluctance to send people with drug problems to prison is overcome by the fact that prisons have the capacity to diagnose drug dependency and offer some sort of drug treatment, AA and NA at the very least, and have a substance abuse module built into training regimens for correctional staff. Correctional managers then press for more resources to train staff and run programs on the grounds that doing so benefits inmates and the public. Prisons as bureaucracies means punishment has dusted off its necessary evil image to become a sophisticated, professional institution that is aware of and borrows from the successes of other organizations from both the public and private sectors. Prison has become an *acceptable* option under these rationalizing processes; acceptability has been achieved through the acquisition of general business performance standards and constitutes the source of its legitimacy.

When the value of efficiency, achieved through techniques of rationalization like training and standards, becomes an important source of legitimacy it means that more substantive principles have been displaced. This for Weber has been the fate of the particular system of law and justice in the West.

The modern system of the administration of justice linked formal rational law to the political legitimacy of the modern state through their common origins in rational legislation. However, by placing the origin, and hence validity, of the

35. Erving Goffman, *Asylums; Essays on the Social Situation of Mental Patients and Other Inmates* (1968).

law in either the authority of the legislator or the internal characteristics of the system of norms this broke the connection between law and right that had given a normative quality to formal rational law. With this failure of the normative basis of the law was removed the only possible means for checking its growth.³⁶

The law, absorbed as a tool of the bureaucratic structure of justice, “is a rational technical apparatus, which is continually transformable in the light of expediential considerations and devoid of all sacredness of content.”³⁷ This has gloomy implications for the restoration of a substantive normative basis for prisons. More immediately, a sociological framework makes clear that abstract normative debates about punishment risk becoming deployed instrumentally to justify penal expansion.

B. Implications of Bureaucracy for Prison Reform

The loss of a moral grounding for the use of prison is one problem for penal reform. The second, related problem, is that the dominant bureaucratic logic of penal administration makes it nearly impossible to re-introduce normative critique. The Eighth Amendment’s prohibition against “cruel and unusual punishment” started life as a general principle that even those guilty of breaking criminal laws have a right to humane treatment. It has become, in the penal bureaucracy, the authorization for the technical oversight of correctional facilities, specifying “such details of institutional administration as the square footage of the cells, the nutritional content of the meals, the number of times each prisoner could shower, and the wattage of light bulbs in prisoners’ cells.”³⁸ Principles designed to ensure a humane approach to punishment have

36. Lindsay Farmer, *Legal Theory, Legal Order and Modernity* 14 (1998) (unpublished manuscript, on file with the author).

37. Weber, *supra* note 23, at 895, cited in Farmer at 15.

38. Feeley & Rubin, *supra* note 21, at 13.

been contorted by the penal bureaucracy to endorse a kind of torture by humane-ness. Feeley and Rubin's analysis of American prison conditions litigation shows that prisoner suits systematically fail if the prison in question, no matter how dehumanizing, satisfies technical criteria. So the supermax prison at Marion, in which inmates may be isolated from all human contact, remain locked in cells up to 23 hours each day, disallowed any personal items, receive meals through slots, and exercise alone in tiny, walled enclosures, lacks a legal basis for judicial intervention because "the food, sanitation, and sleeping conditions at Marion met the highest standards for a correctional institution."³⁹

Zygmunt Bauman claims that it is this kind of valueless operation of rationality which creates the potential for a Holocaust in all modern societies. The contortion of moral problems into ostensibly rational choices and "the calculation of objective possibilities and computation of costs only blurs the moral essence of the problem."⁴⁰ How this argument will play out in the reform of the Model Penal Code's sentencing and corrections provisions is not yet clear, but it is not difficult to imagine how rationalization in the absence of fundamental debates about ethical principles of criminal justice can set us on paths we never meant to take. Can a sentencing commission undo the sentences of offenders now serving life sentences thanks to their shoplifting in states with Three Strikes laws? Can it overhaul the national mistake, made state by state and administered county by county, of the war on drugs? These are questions of principle about which there will be sharp disagreements; a sentencing commission will not be able to resolve these debates so much as ensure that the 300 years served by the offender whose act of petty larceny and history of two felonies 20 years ago matches that for another offender with a similar offense profile.

39. *Id.* at 141. Another example of the phenomenon is the Prisoner Reform and Litigation Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, which makes physical injury a prerequisite of prisoner lawsuits.

40. Zygmunt Bauman, *Modernity and the Holocaust* 205 (2000).

Let us turn now to the case of private prisons to explore the effect of rationalization that occurs in the face of normative ambiguity.

IV. PRIVATE PRISONS

Why focus on prison privatization if what is missing is a fundamental analysis of the general phenomenon of prisons and their normative basis for legitimacy? Private prisons are important for thinking about punishment generally because they exemplify the salient features of any prison in late modernity, a bureaucratic institution lacking a clear normative basis; they are not departures from contemporary penal practice, but the embodiment of its most characteristic features. If punishment mainly means imprisonment, and imprisonment mainly works by containing, then private prisons are well-placed to perfect the modern punishment of carceral containment.

The jurisdictions that have chosen to contract with the private prison companies have not done so out of a moral conviction that the private sector will punish more humanely, or somehow fulfill the spirit of the Eighth Amendment better than the government can. Governments look at privatization as one of a very limited number of options to deal with severe overcrowding and the great expense of running a correctional system. Under pressure to avoid serious overcrowding, or to comply with consent decrees where overcrowding has already triggered adverse litigation, states and counties simply need beds, and fast. If they can afford to finance their own construction of correctional beds, they will. If they have prison gymnasiums that can be converted to emergency dormitories, they have made conversions. Under the extreme pressure of demand for correctional space, there is little time to reflect on any higher value of incarceration. Moreover, the organization of the justice system means that those with the power to send people to jail or prison (e.g. legislators, prosecutors and judges) are not those with the responsibility for running these facilities. Hence, even

where correctional managers would encourage less use of prisons, they have little influence to accomplish this.

A minority of jurisdictions have attempted to reduce the particular factors that generate demand for scarce correctional beds, acting on what criminologists already know: demand for incarceration is not driven primarily by crime rates, but is a function of the behavior of the criminal justice system itself. The way prosecutorial discretion is exercised, the culture of the bench towards different offenses, the practice of law enforcement agencies in enforcing warrants, the sentencing consequences of the layer upon layer of habitual offender statutes are more directly responsible for the explosion in the total incarcerated population size and the incarceration rate than the actual crime rate.⁴¹ This combination of personal, structural, and organizational factors internal to the criminal justice system is what generates demand for more prisons and jails and further emphasizes that the role of incarceration is simply to contain and thereby comply with a judicial sentence, a legal requirement, a regulatory code.

Privatization's critics ignore the systemic nature of the problem of prison growth, naïvely focusing on the for-profit quality of prison companies, treating a profit motive as innately and irredeemably evil and thus distracting us from the evidence showing that an entirely public prison system grows out of proportion to crime rates, and in the absence of a profit motive.⁴² This section builds on Weberian bureaucratic theory to link the development of a private sector prison market to a general penal expansion. A consideration of the pragmatic character of the private prisons debate is interpreted as evidence of the triumph of bureaucratic values; this is revealed in another way through a discussion of the perceived irrelevance of moral and ethical criticisms in the debate over privatization.

Finally, the belief that "accountability" is the best way to regulate private vendors is an example of bureaucratic

41. Zimring, *supra* note 12, at 161.

42. See, e.g., David Schichor, *Privatizing Correctional Institutions: An Organizational Perspective*, 79 *Prison J.* 226 (1999).

values subverting more fundamental normative principles. Accountability, introduced as a monitoring tool for the private sector, also becomes the means of managing conduct within the public elements of the penal bureaucracy, despite ultimately containing no substance itself. Accountability implies enforced adherence to some normative standard but, as played out in the contract terms of prison agreements, in fact provides an amoral goal of compliance with technical terms, which are more readily specified as tangible benchmarks than are ultimate principles.

A. *Pragmatic Tack of Debate*

The normative and operational ambiguity of prison means that debate about privatization's worth necessarily occurs over pragmatic concerns.⁴³ While the philosophers decide why we punish, and the sociologists come up with theories about how prisons work or what role they play in reflecting social power, government agencies negotiate with private vendors over contract terms. Academics have responded mainly, not to the philosophical or sociological dimensions of privatized prisons, but to policy concerns such as cost-efficiency, legality, safety and security, and accountability.⁴⁴

Many attempts have been made to compare the performance of public and private prisons. One of the more recent and comprehensive efforts has been the 1998 study

43. See John D. Donahue, *The Privatization Decision: Public Ends, Private Means* (1989), in which he argues that successfully privatizing a formerly public function generally requires the ability to specify the product or service of the function. Private prisons present a problem because of the uncertainty about what prisons are supposed to do. See also Douglas McDonald et al., *Private Prisons in the United States: An Assessment of Current Practice* v. 48 (1998) [hereafter McDonald et al., *Private Prisons*].

44. See J. Robert Lilly & Mathieu Deflem, *Profit and Penalty: An Analysis of the Corrections-Commercial Complex*, 42 *Crime & Delinq.* 3 (1996), for a critique of the academic debate's failure to assess the implications of prison *privatization* in terms of social relations and the nature of state power in society. An exception is Richard V. Ericson et al., *Punishing for Profit: Reflections on the Revival of Privatization in Corrections*, 29 *Canadian J. Criminology* 355 (1987).

by Abt Associates.⁴⁵ Except for the question of legality, which is the one area of dispute which nearly everyone agrees has been resolved in favor of privatization, the Abt study echoes pretty much all privatization comparisons in its inability to come to any strong conclusion about the benefits of privatization.⁴⁶ However, the Abt assessment is equally unable to find clear evidence that private prisons are overwhelmingly more costly, more dangerous, or less accountable places than public prisons.

The difficulty of comparing the practical features of prisons brings the normative and operational ambiguity of prison in general to the fore. Governments are interested in whether a private prison can provide a better service at less cost. "But how does one gauge the success of prison operations?"⁴⁷ Evaluations that try to do this either speculate as to the appropriate penal values against which one can measure performance, or, more frequently, reduce the prison function to containment, since, if "nothing else, prisons do remove prisoners from civil society."⁴⁸ Here is how the private prisons debate reveals the way in which the weakness of the prison's legitimacy necessitates a minimalist, functionalist understanding of it. Performance comprises the cost of running the facility while complying with relevant standards of care and incurring a minimum of inmate or staff injuries. Private prisons are no better and no worse than public ones in conceiving of their operations in these rationalistic and morally neutral ways. This point is lost in the vehement but ultimately trivial arguments about cost and quality of care that currently dominate the debate over their use.

Opponents of privatization often point to examples of inmate abuse, sometimes quite extreme, in private prisons. The causes of inmate discipline and injury are attributed to

45. McDonald et al., *Private Prisons*, supra note 43.

46. For one attempt to challenge the legality of privatization, see Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 *Am. U. L. Rev.* 531 (1989).

47. McDonald et al., *Private Prisons*, supra note 43, at 48.

48. *Id.*

the tactic of private firms in failing to keep staff positions filled, and inadequately training staff or using non-unionized staff to manage disturbances. While these particular conditions may be rare in public prisons, this does not protect public prisons from being equally guilty of the worst kinds of abuses. The staging of “gladiator fights” by prison guards at California State Prison at Corcoran is but one example picked up in the press.⁴⁹ Goffman reminds us that it is the essential dynamic of total institutions like the prison to dehumanize.⁵⁰ And it was a public prison that Gresham Sykes studied in presenting a convincing picture of the correctional environment as one in which disorder always threatens and strategies of manipulation and coercive control are constantly necessary to hold it at bay.⁵¹

Prison itself is a brutal, brutalizing setting and so it is no surprise that both private and public prisons experience problems like suicide at a greater rate than occurs among the general population. The bureaucratization of the prison system, with its regard for rules of conduct and its efficient architecture and security systems make prison an increasingly safe place (i.e. a legally defensible space) for inmates at the same time it is increasingly de-humanizing.

The importance of the point for the discussion here is that the debate over private prisons seeks out distinctions between public and private based on a rationalistic analysis of prison conditions since the normative problems of prisons are common to both private and public forms. This narrow logic leads to an emphasis on *accountability* of a contractor to a contract, rather than on more open-ended and outcome-oriented ways of measuring performance, or the more complicated questions about the need for prison in the first place. The accountability focus, discussed below, acknowledges the normative and operational ambiguity problem by providing that even if we cannot

49. Eric Schlosser, *The Prison-Industrial Complex*, *Atlantic Monthly*, December 1998, at 73.

50. Goffman, *supra* note 35.

51. Gresham M. Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (1958).

claim to know what prisons are for, or how they work, we should still have a means of watching over them so they do not degenerate into the kinds of places we know we do not want. The problem is that accountability provides minimum conditions of care but does not provide the values needed to constrain or guide overall growth: what is the minimum number of prison beds per capita that any community should have?

B. Failure of Ethical Criticisms in the Private Prisons Debate

A handful of commentators have raised moral and ethical concerns about private prisons.⁵² Arguments tend to emphasize the state's moral duty to punish but, again, treat this duty in the most abstract and ahistorical terms. These normative arguments against privatization have been non-starters in shifting the terms of debate or significantly influencing governments from investigating the privatization option. Even those trying to introduce an ethical perspective accept how marginalized their concerns are.⁵³ They speak in a language that a bureaucratic rationality is unable to assimilate. The legal reasoning of the Supreme Court in *Richardson v. McKnight* displays this process at work: the majority decision to withhold from employees of a private prison company the qualified immunity available to state actors strains to justify in market terms what one senses to be the Court's ethical discomfort with the private sector's power to punish.⁵⁴

52. John DiIulio, Jr., What's Wrong with Private Prisons, 92 Pub. Int. 66 (1988). John J. DiIulio, Jr., The Duty to Govern: A Critical Perspective on the Private Management of Prisons and Jails, in *Private Prisons and the Public Interest*, supra note 45, at 155. Ira P. Robbins, Privatization of Corrections: Defining the Issues, 69 *Judicature* 324 (1986). Robbins, supra note 46. Sharon Dolovich, *The Ethics of Private Prisons* (1999) (manuscript on file with the author). M.D. Reisig & T.C. Pratt, *The Ethics of Correctional Privatization: A Critical Examination of the Delegation of Coercive Authority*, 80 *Prison J.* 210 (2000).

53. Dolovich, supra note 52, at 4-5, and arguing that the pragmatic debate is actually a normative one, namely the promotion of a consequentialist ethic.

54. *Richardson v. McKnight*, 521 U.S. 399 (1997).

One suspects that the ethical critique of private prisons is founded on the implicit conviction that “it’s just wrong for the state to delegate this role.” Since there is no historical basis to support this intuition (the first jails, after all, were private), and since the history of government administration of prison is not a very successful one, such “gut feeling” arguments lead to the uncomfortable conclusion that the state alone should bear the burden of performing an unclear task badly. A plausible ethical critique of private prisons must first establish a viable ethical basis for public prisons, a basis that is currently lacking.⁵⁵ Until such a foundation materializes, this style of normative debate about prisons, private or public, will remain irrelevant for the very good reason that these kinds of arguments proceed from unsupportable or unspecified assumptions.⁵⁶

C. Private Prisons as a Problem of Accountability

Accountability is a powerful tool in managing privatization because it embraces the language of bureaucracy. Accountability provides a management standard that can work even where fundamental values are in dispute, since it does not demand that a contractor do a good job or perform a socially important function, but instead tests whether the contractor did a specified task at an agreed unit cost. Behavior can be regulated transparently through standards like these and success defined in terms of realizing performance targets. There is, however, growing support for the conviction that accountability can in fact be a way of pursuing larger social

55. Richard Sparks, *Can Prisons Be Legitimate?*, 34 *Brit. J. Criminology* 14 (1994).

56. This irrelevance reaches the level of absurdity in Dan Markel, *Are Shaming Punishments Beautifully Retributive?* *Retributivism and the Implications for the Alternative Sanctions Debate*, 54 *Vand. L. Rev.* 2157 (2001), in which an argument in favor of private prisons is built on a moral philosophical claim that private prisons are not inconsistent with the author’s particular version of retribution.

aims through public-private partnerships.⁵⁷ The potential of an accountability standard has even convinced some of those who have categorically opposed privatization as immoral. John DiIulio now advocates a central role for charitable organizations in the provision of all kinds of state services including welfare, employment and punishment.⁵⁸

What is seen as “the key to legitimate delegation of responsibility for corrections to the private sector is “*total accountability*.”⁵⁹ Some disagree that this is possible to achieve, while others are more hopeful. None recognizes that the choice of accountability as a management criteria promotes the bureaucratization of punishment. Even the most aspirational visions of combining “public and private energies” to “advance public values” instead of merely applying “measures of accountability” fall victim to this pressure.⁶⁰ Minow argues that school vouchers can be a vehicle for anti-discrimination values to penetrate the private-school sector.⁶¹ Ending racism is unquestionably an important goal, but simply expanding the jurisdiction of federal civil rights laws to private actors does not promote internalization of the value. The only thing that can be concluded with certainty is that extending federal civil rights law to private schools participating in voucher programs expands the regulable environment and promotes the individual school’s awareness of legal constraints on its behavior. Determining whether any given school is “accountable” to the goal of equality necessitates transforming the aspirational and normative aspects of the objective into a bureaucratically trackable measure (for

57. See the recent Symposium, Public Values in an Era of Privatization, 116 Harv. L. Rev. 1211 (March 2003).

58. John J. DiIulio, Jr., Response Government by Proxy: A Faithful Overview, 116 Harv. L. Rev. 1271 (2003). See also Daniel L. Low, Nonprofit Private Prisons: The Next Generation of Prison Management, 29 New Eng. J. Crim. Civ. Confinement 1 (2003).

59. Dolovich, *supra* note supra note 52, at 55 (citing Ira Robbins).

60. Martha Minow, Public and Private Partnerships: Accounting for the New Religion, 116 Harv. L. Rev. 1229, 1260, 1261 (2003).

61. *Id.*

example, producing annual statistical reports on admissions broken down by race and ethnicity).

Just as the moral critique of privatization is unable to raise a real challenge to privatization because it pursues an irrelevant abstract discourse about punishment generally and is unable to understand pragmatic values like efficiency as powerful bases of legitimacy, the surging optimism in accountability as the way both to manage the inevitable privatization in many sectors of our globalized world and to disperse important public values rests on a primitive understanding of market economics. Such an enthusiasm for economic techniques to manage public services and values ignores the way that the techniques of management can re-shape values and become intertwined with and compromise them. "Rights that are subject to market forces are no longer rights. But quite apart from the inability of a purely economic discourse to encompass all issues of value at stake, issues of politics and ideology tend to merge economic means of achieving certain goals with economic ends in themselves."⁶²

In the penal realm, accountability reaffirms the functionalist role of prisons to contain as it transforms some unarticulated and amorphous notion of contractor responsibility for humane treatment into such typical contractual benchmarks as minimum square footage allowances per inmate; the size of fines for inmate escape, disorder, injury or death; the size of the required insurance policy to indemnify the state from liability for such harms; minimum requirements of hygiene and facility cleanliness; and minimum number of staff posts in various categories.

These sorts of issues then become the basis for assessing the performance of the private prison vendor.⁶³

62. Alfred C. Aman, Jr., *Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*, 28 *Fordham Urb. L.J.* 1477, 1486-87 (2001).

63. See Her Majesty's Inspectorate of Prison, *Kilmarnock Inspection Report* (2000), available at http://www.scotland.gov.uk/hmip/docs/kil_2000-00.asp (last visited January 28, 2004), showing how the prison inspection process is tied to contract terms. See para. 1.3 (available at http://www.scotland.gov.uk/hmip/docs/kil_2000-05.asp).

2003]

PENAL REFORM

303

The British firm, Securicor, incurred a “penalty of £199,950” in the last six months of 1999 for contract failures in one of its prisons including:

211 incidents of prisoner self-harm; 29 incidents of concerted indiscipline; 19 assaults on staff and others; 13 assaults on prisoners; 39 failures to complete mandatory drug tests; 178 failures of prisoners seeing a medical officer on arrival; 122 failures to respond to prisoners’ complaints; 158 failures to provide sentence plans; 18 failures to provide prisoners with a discharge report and eight failures to report on performance measures.⁶⁴

This kind of attention to a variety of minutiae flattens the distinctions between substantial and procedural problems of prison management. Presumably the charged fee for assaults on prisoners is higher than the failure to report on performance measures, but even if this is true, conduct that may be symptomatic of a more systemic problem like brutality against inmates is reduced to a single line item in the fines bill for the company.

The absence of the prison’s legitimacy and the confusion about what prisons are supposed to do with the people living in them means that contracts regulating private operation functionally treat prison as a generic residential institution from which it is impossible to discern any distinctive purpose, such as punishment, that would allow one to discriminate between prisons, public schools, and chain hotels. All three of these institutions house people and employ human actors, physical architecture, and electronic and mechanical technology to do so efficiently and securely. The costs and conditions of a private prison could be compared with the conditions of a public elementary school by similar criteria: cost spent per year per inmate/pupil, number of assaults among inmates/students, number of assaults between students/inmates and staff, educational/sentence plan prepared for every person,

64. Elaine Genders, *Legitimacy, Accountability and Private Prisons*, 4 *Punishment & Soc’y* 285, 294 (2002).

number of toilets in operation, and so on. But this comparison fails to tell us in a meaningful sense whether the prison (which it is not impossible to imagine scoring higher than a problem-ridden elementary school) is a better place than the public school.⁶⁵

For this reason I remain unconvinced by the argument that accountability is a way to preserve the guiding power of normative values.⁶⁶ Accountability is not a value in itself, even though those won over by its charms treat it as a guarantee of the kind of transparency essential for democracy. Accountability of whom to what? Accountability is the specification of a process, but does not include the goals of the process. The faith in accountability is a faith in the ability of rationalizing processes to accomplish normative goals like justice. Accountability of a private prison provider, however, does not mean prisons will become more effective simply because we have no theory of what they are supposed to be effective *at*. Either the debate over penal reform focuses on fine-tuning techniques of accountability without specifying fundamental normative principles that should guide accountability, or the debate removes itself entirely to an abstract realm of moral philosophy which does not condescend to muddy the clarity of its argument by acknowledging the fact that punishment is synonymous with imprisonment.

Braithewaite criticizes this “limited relevance of criminology, with its focus on the old state institutions of police-courts-prisons” and its neglect of how the global emergence of risk society is fundamentally re-shaping governance in all spheres of life.⁶⁷ He urges the “study [of]

65. The comparison of these ostensibly distinct facilities is only partly facetious. French company Sodexo-Mariott brings together these fundamentally different organizations by operating prisons, hotels and acting as a major provider of university dining services.

66. Jody Freeman, *The Contracting State*, 28 Fla. St. U. L. Rev. 155 (2000). Jody Freeman, *Extending Public Law Norms through Privatization*, 116 Harv. L. Rev. 1285 (2003).

67. John Braithewaite, *The New Regulatory State and the Transformation of Criminology*, 40 Brit. J. Criminology 222, 229 (2000).

strategies of regulation by state and non-state actors, where the state is both a subject and object of regulation.”⁶⁸ We can no longer believe we are solving problems of criminal justice by talking in terms of rehabilitation or retribution as the superior value, and ignore the justice system’s location in a larger administrative state, in a globalized world. The belief that accountability provides the means of managing democratic values and private sector interests reflects the criminologist’s and the lawyer’s tendency to treat the state as an all powerful entity that can intervene in the market to manipulate behavior for the public interest. Weber’s theory of bureaucracy can show us how particular methods of achieving and managing change take on a determinative power of their own, which conflicts with the moral and political positions that led us to rationalize in the first place.

CONCLUSION

Taking into account Weber’s analysis, the MPC revision plan’s adoption of a limited retributivism provides the normative justification for a penal system that no one designed or intended: sterile prisons with amazingly low rates of violence, but nevertheless places that are utterly dehumanizing and used for too many people. Too many social engineering projects fail. This is due to the adoption by states of a “high-modernist ideology . . . [,] a strong . . . version of the self-confidence about scientific and technical progress It originate[s] . . . in the West, as a by-product of unprecedented progress in science and industry,” but it

must not be confused with scientific practice. It [is] . . . fundamentally, as the term “ideology” implies, a faith that borrow[s], as it were, the legitimacy of science and technology. . . . The carriers of high modernism tended to see rational order in remarkably visual aesthetic terms. For them, an efficient, rationally organized city, village, or farm

68. *Id.* at 225.

was a city that *looked* regimented and orderly in a geometric sense.⁶⁹

It would be easy for the revision of the Model Penal Code to become preoccupied with the internal orderliness of provisions, just as prison reform has become preoccupied with the appearance of cleanliness and safety, and taken these qualities as proxy for justice and human rights. These preoccupations in fact constitute ideologies of high modernism. Important and lasting reform can only follow from a direct confrontation of the fundamental questions about the relationship of justice to institutional design. Until this happens, then, penal philosophy can only work to excuse current, failed practices. The physical longevity of prison buildings and the imposing style of their architecture have meant that prisons not only dominate how we punish but symbolize punishment itself and predetermine debates about why we should punish. We need somehow to unimagine the permanence of prison so we can stop trying to justify it and fix it in trivial ways and thus begin the difficult process of restoring normativity to the debate.

69. James C. Scott, *Seeing Like a State* 4 (1998).