

# OVERCROWDED PRISONS, DEGRADED PRISONERS: *RES IPSA LOQUITUR?*

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*The prison mega-crush has reached Australia; many of our gaols are bursting at the seams. Most months the problem gets worse.*<sup>1</sup>

The above quotation, from an article written nearly 15 years ago by Professor Richard Harding could perhaps have not been a more appropriate description of the prison overcrowding issue confronting States within Australia at the end of the 1990s. Indeed, Harding goes on to predict that overcrowding would become 'chronic' as prisoner numbers expand in Australia, and the resources of correctional authorities become stretched to cope with this increase.<sup>2</sup> Notwithstanding the warning contained in Harding's article, the issue of overcrowding has seemingly become a permanent feature of the penological landscape in this country.<sup>3</sup>

Professor Harding's prediction of an increase in prison numbers is borne out further by the annual guide to crime prepared by the Australian Institute of Criminology,

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<sup>1</sup> Richard Harding, 'Prison Overcrowding: Correctional Policies and Political Constraints' (1987) 20 *The Australian and New Zealand Journal of Criminology* 16, 16.

<sup>2</sup> *Ibid* 18.

<sup>3</sup> The situation in Victoria has become particularly acute. A spokesperson for the Corrections Minister, the Honourable Mr Bill McGrath, has indicated that the prison system in Victoria is operating at a capacity of 95% (Peter Mickelborough, 'Crush in Cells Appalls Police', *Herald Sun* (Melbourne), 21 May 1999, 8). This has led to police cells holding more than two hundred prisoners overnight, which is in excess of the number of 50 deemed suitable by the Minister. The effects on prisoners are particularly deleterious. Obviously, police cells are not ideal as remand facilities, and the conditions in such cells are often inadequate and inappropriate for such use for any significant period of time. According to the report in the *Herald Sun* which relied on police officers' memoranda about crowded police cells, overcrowding has led to, 'an increase in self mutilation, suicide attempts and assaults on fellow inmates and police personnel' (*ibid*). A number of months later the situation had not improved—see Tanya Giles, 'Crowded Cells on Razors Edge', *Herald Sun* (Melbourne), 13 August 1999, 26. More recently, a Deputy Chief Magistrate from Victoria, Mr Brian Barrow, has expressed alarm at the situation in Victoria, and indicated that Magistrates were concerned about overcrowding in police cells and the number of young offenders and women kept in police cells in excess of the maximum three day limit prescribed by government guidelines. See Sue Cant, 'Magistrates Demand Prison Reform', *The Age* (Melbourne), 22 September 1999, A3.

*Australian Crime: Facts and Figures 1998*, which found that '[b]etween 1983 and 1997, the overall imprisonment rate has increased from 91.6 to 145.4 per 100,000 relevant population, an increase of 48%'.<sup>4</sup> In addition the survey found that '[d]uring this fifteen year period the imprisonment rate of sentenced prisoners has increased by 44% and that of remandees by 75%'.<sup>5</sup>

In Australia then, it is apparent that with an increasing imprisonment rate and reports of overcrowding in a number of jurisdictions, in particular those of the most populated States, New South Wales and Victoria, the issue of overcrowding will, if anything, become more problematic and pose significant questions for public policy in this country. This follows patterns established in the United States<sup>6</sup> and, to a lesser degree, the United Kingdom.<sup>7</sup>

It is beyond the scope of this paper to consider in any great detail the reasons contributing to the overcrowding of prisons in Australia. The concern here is with whether prisons *ought* to be overcrowded, rather than what *is* the cause of overcrowding in jurisdictions within Australia.

## I THE NEGATIVE EFFECTS OF OVERCROWDING

Overcrowding, almost by definition, is problematic. The term itself suggests something out of the ordinary and undesirable. Ironically, what the literature on this particular aspect of prison life does make clear is that there is not a simple, unequivocal relationship between overcrowding and a deterioration of the conditions of confinement for prisoners.<sup>8</sup> That is, although overcrowding does generally have an adverse impact on the quality of life for prisoners within an institution, distinctions have to be made between different institutions and, significantly, how other aspects of institutional life may interact with overcrowding to produce negative effects or otherwise.<sup>9</sup> Thus there is a need for specificity and the need to avoid universalising this phenomena.<sup>10</sup> However, this caveat as to how the literature of overcrowding ought to be approached does not of itself, of course, allow the conclusion that overcrowding is either justified or, indeed, morally permissible on that basis. This is because the issue of whether the consequences of overcrowding are acceptable is, of course, a normative question and the empirical research on prisons which has

<sup>4</sup> Australian Institute of Criminology, *Australian Crime: Facts and Figures* (1998) 37.

<sup>5</sup> *Ibid.*

<sup>6</sup> See generally, Franklin E Zimring and Gordon Hawkins, *The Scale of Imprisonment* (1991); Alfred Blumstein, 'U.S. Criminal Justice Conundrum: Rising Prison Populations and Stable Crime Rates' (1998) 44(1) *Crime & Delinquency* 127; E Schlosser, 'The Prison Industrial Complex' (1998) 282(6) *Atlantic Monthly* 51; Kenneth Adams, 'The Bull Market in Corrections' (1996) 76(4) *The Prison Journal* 461.

<sup>7</sup> See Roy D King and Kathleen McDermott, *The State of Our Prisons* (1995) ch 4; Sean McConville and Eryl Hall Williams, 'The English Response to the Penal Crisis', in Stephen D Gottfredson and Sean McConville (eds), *America's Correctional Crisis: Prison Populations and Public Policy* (1987) 111, 115.

<sup>8</sup> Gerald G Gaes, 'The Effects of Overcrowding in Prisons', in Michael Tonry and Norval Morris (eds), *Crime and Justice: An Annual Review of Research* (1985) vol 6, 95, 96.

<sup>9</sup> *Ibid.*

<sup>10</sup> Paul B Paulus, *Prison Crowding: A Psychological Perspective* (1988) 16.

documented the deleterious results of overcrowding for inmates does not of itself suggest what is to be done, or whether the placing of prisoners in such conditions of confinement is justified as this is, ultimately, a question for the 'legislators and the *conventional wisdom and morality* of the community.'<sup>11</sup>

Notwithstanding the above qualification, it has been suggested that overcrowding may result in a number of negative consequences for the quality of life of prisoners.<sup>12</sup> Research<sup>13</sup> has suggested that overcrowding may lead to greater levels of inmate violence and a greater number of violent incidents between staff and prisoners.<sup>14</sup> In addition, disciplinary infractions by inmates tend to rise, as do the complaints of inmates about illness.<sup>15</sup> What overcrowding may also do is to place a significant strain on the resources of the prison to provide not only the basic amenities such as proper ventilation and sanitary levels,<sup>16</sup> but also in relation to the provisions of services such as education, counselling and vocational training, which would be expected to assist prisoners upon their release from prison.<sup>17</sup> Such programs are compromised because of the need to guarantee the security of the facility, which results in the privileging of good order and management over other aspects of prison life which may be of benefit to prisoners.

Overcrowding also contributes to a further reduction in the already meager sphere of autonomy available to prisoners after correctional administrators have put in place such regulations and policies to ensure the good order and security of the

<sup>11</sup> Gaes, above n 8, 141.

<sup>12</sup> Lee H Bowker, *Prison Victimization* (1980) 164; Paulus, above n 10; Robert G Leger, 'Perception of Crowding, Racial Antagonism, and Aggression in a Custodial Prison' (1988) 16 *Journal of Criminal Justice*, 167; Paul Paulus et al, 'Some Effects of Crowding in a Prison Environment' (1975) 5 *Journal of Applied Social Psychology* 86; Verne Cox, Paul Paulus and Garvin McCain, 'Prison Crowding Research: The Relevance for Prison Housing Standards and a General Approach Regarding Crowding Phenomena' (1984) 39 *American Psychologist* 1148.

<sup>13</sup> Research in this aspect of prison life is normally American. This may be partially due to the importance of the effects of overcrowding of prisoners in relation to civil suits brought against state and federal correctional authorities and the need for both courts and correctional administrators to develop a knowledge base as to the effects of overcrowding on prisoners. Indeed, one of the leading psychologists on crowding and prisons, Paulus above n 10, observed that when his colleagues and he commenced their research into this aspect of prison life during the early 1970s there was a paucity of research on crowding in prisons (at 1-2). Paulus also notes that he and his colleagues have offered expert testimony in suits brought by prisoners who alleged that they were being subject to cruel and unusual punishment due to overcrowded correctional facilities (at 4-6).

<sup>14</sup> Gaes, above n 8, 136; Paulus, above n 10, 84-6; Sheldon Exland-Olson, 'Crowding, Social Control and Prison Violence: Evidence from the Post-Ruiz Years in Texas' (1986) 20 *Law & Society Review* 389; Gerald Gaes and William J McGuire, 'Prison Violence: The Contribution of Crowding Versus Other Determinants of Prison Assault Rates' (1985) 22 *Journal of Research in Crime & Delinquency* 41; Desmond Ellis, 'Crowding and Prison Violence: Integration of Research and Theory' (1984) 11(3) *Criminal Justice & Behaviour* 277.

<sup>15</sup> Gaes, above n 8, 136; Paulus, above n 10, 2; Garvin McCain, Verne Cox and Paul Paulus, 'The Relationship Between Illness and Degree of Crowding in a Prison Environment' (1976) 8 *Environment & Behaviour* 283.

<sup>16</sup> Richard Sluder, 'Double Ceiling' in Marilyn McShane and Frank Williams III (eds), *Encyclopedia of American Prisons* (1996) 166.

<sup>17</sup> Malcolm M Feeley and Edward L Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (1998) 379; James Austin, 'Using Early Release to Relieve Prison Crowding: A Dilemma in Public Policy' (1986) 32(4) *Crime & Delinquency* 404, 412.

prison. What the overcrowded prison is analogous to is a state of emergency in the life, or day to day working, of a prison. For staff and inmates prison becomes a limited, impoverished existence characterised by the institution attempting to cope with a situation that is nothing other than the mere secure containment of inmates. Feeley and Rubin<sup>18</sup> note that, in the United States context, as a result 'prison officials have been compelled to shift from management to coping strategies.'<sup>19</sup> What prison life then becomes for prisoners is a state of mere existence; in Aristotelian terms the ends of prison become existence rather than anything approaching the good life.<sup>20</sup>

Positively what this means is that the prison environment, if it is not to jeopardise a prisoner's health and other aspects of existence which contribute to a persons quality of life, must have features which allow a degree of privacy and control over one's environment<sup>21</sup> and provide the appropriate conditions under which prisoners may take steps towards rehabilitation.<sup>22</sup> That is, prison ought to be an environment that allows a prisoner to live a 'normal' life as he or she would outside of the correctional context.<sup>23</sup>

Thus, to the extent that overcrowding contributes to the augmenting of the negative aspects of the prison environment, and consequently compromises the ability of the prison to provide a prison regime which is as close as possible to replicating conditions that a prisoner will face upon his or her release, it may be expected that punishment of a prisoner will extend beyond the maximum threshold of depriving a person of his or her liberty. It is to that aspect of overcrowding that we now turn to consider the moral problem created by the overcrowded prison for the community which seeks to punish fairly and humanely.

## II OVERCROWDING AND THE MORAL RELATIONSHIP BETWEEN THE STATE AND PRISONERS

As a sanction for criminal behavior, punishment by imprisonment involves a diminution of a person's status and reduction in the sphere of personal autonomy. This is the case due to the unique and particular exigencies of the prison environment where correctional administrators place priority on achieving the end of the good order, security and management of the prison rather than a maximum degree of

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<sup>18</sup> Feeley and Rubin, above n 17, 379.

<sup>19</sup> Ibid.

<sup>20</sup> C Hibbert, *The Roots of Evil* (1963) 448.

<sup>21</sup> Paulus, above n 10, 40, 78-9. Also see Lee-Jan Jan, 'Overcrowding and Inmate Behaviour: Some Preliminary Findings' (1980) 7 *Criminal Justice and Behaviour* 293.

<sup>22</sup> See generally, Edgardo Rotman, 'Do Criminals Have a Constitutional Right to Rehabilitation?' (1986) 77(4) *Journal of Criminal Law & Criminology* 1023.

<sup>23</sup> Rod Morgan, 'Just Prisons and Responsible Prisoners', in Anthony Duff et al (eds), *Penal Theory & Practice: Tradition & Innovation in Criminal Justice* (1994) 131.

freedom for prisoners.<sup>24</sup> Within the hierarchy of values to be realised, or ends to be achieved, by correctional administrators, is the opportunity for prisoners to exercise a degree of autonomy and thus to preserve their liberty to the extent that this is commensurate with achieving the end of good order and security. Thus the degree of freedom permitted to a prisoner is *residual* in nature and to that extent subject to the overarching need of correctional authorities to maintain good order and security.

Thus prisoners are confined in institutions where the traditional demarcation between the state and civil society is abandoned and the need to maintain the good order and security of the prison is of paramount importance.<sup>25</sup> Whereas, in the free community, there is typically a need for the state to articulate an interest to justify an intrusion into a citizen's private sphere or domain, such limitations are not necessarily applicable to the correctional context because of the unique, endogenous facets of the prison environment. This idea was encapsulated in the notion of the 'hands off' doctrine. This has, as its fundamental premise, the idea that courts should be reluctant, if at all, to interfere in claims brought by prisoners against correctional administrators because of a perception that a number of negative consequences would arise for prison administrators, and a belief that this may compromise discipline and security within prisons.<sup>26</sup> This doctrine thus placed prisoners outside the protection of the law. The case law from the jurisdictions of the United States, United Kingdom and Australia that supported this doctrine, or method of approaching prisoners' rights cases, permitted prisoners to be subject to correctional administrators' decisions of how best to achieve the ends or good of the prison.<sup>27</sup> This doctrine has now lost a significant degree of support from courts with the recognition now of not only the ability of prisoners to access courts for curial supervision of the conditions of their confinement,<sup>28</sup> but that prisoners also possess

<sup>24</sup> John J Dilulio Jr, *Governing Prisons: A Comparative Study of Correctional Management* (1987); Israel Barak-Glantz, 'Toward a Conceptual Schema of Prison Management Styles' (1981) 61 *The Prison Journal* 42.

<sup>25</sup> Stephen Livingstone and Tim Owen, *Prison Law: Texts & Materials* (1993) 289-93.

<sup>26</sup> See George Zdenkowski and David Brown, *The Prison Struggle: Changing Australia's Penal System* (1982) 112-130; M Feldberg, 'Confronting the Conditions of Confinement: An Expanded Role for the Courts in Prison Reform' (1977) 12 *Harvard Civil Rights-Civil Liberties Law Review* 367; George Zdenkowski, 'Judicial Intervention in Prisons' (1980) 6 *Monash University Law Review* 294; Graham Zellick, 'The Prison Rules and the Courts' [1981] *Criminal Law Review* 602.

<sup>27</sup> See, for instance, the following decisions from Australia, United Kingdom and the United States of America affirming the hands off policy in relation to prisoners rights: *Flynn v The King* (1949) 79 CLR 1; *Veztitis v McGeechan* [1974] 1 NSWLR 718; *Smith v Commissioner of Corrective Services* (1978) 1 NSWLR 317; *R v Classification Committee; ex parte Finnerty* [1981] VR 561; *Arbon v Anderson* [1943] KB 252; *Becker v Home Office* [1972] 2 QB 407; *Cullum v Californian Department of Corrections* 267 FSupp 524 (1967); *Tabor v Hardwick* 224 F2d 526 (1955); *Banning v Looney* 213 F2d 771 (1954); *Stround v Swope* 187 F2d 850 (1951).

<sup>28</sup> See, for instance, *Wolff v McDonnell* 418 US 539 (1974); *R v Board of Visitors; Ex parte Germaine* [1979] QB 425; *Sandery v State of South Australia* (1987) 48 SASR 500; *Binse v Governor, HM Prison Barwon* (1995) 8 VAR 508; *Rich v Gronigen* (1997) 95 A Crim R 272.

enforceable rights which are not inconsistent with the ability of the correctional authorities to provide a secure and orderly environment.<sup>29</sup>

This recognition of the residual autonomy of prisoners by the law emphasises that prisoners, despite their status, are still considered to be rational, responsible beings with the capacity for choice and autonomy, notwithstanding the restricted choices presented by the prison environment. Given the nature of the correctional context, the effects of overcrowding for prisoners may be compounded due to the attenuated sphere of autonomy that is available to prisoners. This may reduce, or compromise, the narrow *residual* liberty interest of prisoners. As previously noted, overcrowding tends to augment the privations special to prison life. Ideas of space, the notion of privacy, and the ability of prisoners to maintain some control over their external environment are curtailed when a prison is operating beyond optimal capacity and thus undercuts further the limited residual sphere of liberty available to prisoners after the ends of correctional administrators are achieved.

The recognition of the responsibility and autonomy of prisoners made explicit by the shift away from the hands off doctrine also makes clear that prisoners ought not to be subject to conditions of confinement which are harsh, and which impose an additional punishment beyond the loss of liberty. Such a moral claim or argument limits the power of the state to impact negatively on the marginal quality of life available to individual prisoners and may require the state to act in an affirmative or positive way to ameliorate the negative aspects of the prison environment. It is also embodied in the idea of the 'keeper philosophy', a correctional administrator's working ideology, which is predicated on the notion that when a person is sentenced to a term of imprisonment he or she ought not to 'suffer pain beyond the deprivation of liberty.'<sup>30</sup> That is, deprivation of liberty, or the mere fact of confinement, forms the extent, or outer limit, of the punishment of a person.<sup>31</sup> Overcrowding by exacerbating the conditions of confinements extends the meaning of imprisonment by imposing additional consequences to the deprivation of liberty, which, in theory, is the ostensible, singular aim of punishment by imprisonment. As a result, overcrowded prisons require a further moral justification than that traditionally put forward to justify the infliction of punishment.<sup>32</sup>

Overcrowding then stands in need of moral justification because it may expose prisoners to conditions of confinement that are inhumane or degrading.<sup>33</sup> In addi-

<sup>29</sup> See for instance, *Fricker v Dawes* (1992) 57 SASR 494; *Modica v Commissioner for Corrective Services* (1994) 77 A Crim R 82; *Raymond v Honey* [1983] 1 AC 1; *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 588; *R v Deputy Governor of Parkhurst Prison*; *Ex parte Hague* [1992] 1 AC 58; *Turner v Safley* 482 US 78 (1987); *Wilson v Seiter* 111 S Ct 2321 (1991).

<sup>30</sup> Dilulio, above n 24, 167.

<sup>31</sup> Israel Drapkin, 'The Prison Inmate as Victim' (1976) 1(1) *Victimology* 98, 102.

<sup>32</sup> See generally, Ted Honderich, *Punishment: The Supposed Justifications* (1969); C L Ten, *Crime, Guilt and Punishment: A Philosophical Introduction* (1987).

<sup>33</sup> See Richard Lippke, 'Arguing Against Inhumane & Degrading Punishment' (1998) 17(1) *Criminal Justice Ethics* 29. It is also important to note that the concepts of inhumane and degrading are separate and independent notions and that it is possible to contemplate conditions of confinement which are either degrading, or inhumane, and conditions of confinement which are both inhuman and degrading. By

tion, although it may be argued that the state has a duty to incarcerate those who would threaten the community's security, it is equally as valid to argue that such confinement ought not 'in addition degrade them or treat them inhumanely.'<sup>34</sup> That is, to the extent that a community or an elected government advocates or legislates for a greater number of defendants to be imprisoned for a greater length of time there arises, due to the humanity of a prisoner as a rational, autonomous human being, a moral duty to place prisoners in conditions of confinement. The process of punishment should not be extended beyond the deprivation of liberty so as to render a type of punishment which was not contemplated by a sentencing court.

The overcrowding of prisoners is an abrogation of the maxim that punishment by imprisonment is solely the punishment to be inflicted<sup>35</sup> and is a compounding of the harm, or pain, inflicted upon a prisoner resulting from a term of imprisonment. As previously noted, it stands in need of justification above and beyond the justifications put forward for punishment by imprisonment because, by virtue of the additional harm inflicted by overcrowding, the nature of the experience of imprisonment for prisoners becomes *qualitatively* different in nature. The traditional justifications put forward to account for legal punishment (for instance, deterrence, retribution, just deserts, denunciation, incapacitation, rehabilitation or a combination of such ends) are not sufficient because such accounts do not generally attempt to justify the administration, or the means, of the punishment, but rather are merely concerned with the fact of punishment *in abstracto* and under what circumstances it is justified.

It is beyond the scope of this paper to consider further the implications for traditional accounts of punishment because of overcrowded prisons. Suffice to say that it would be expected that, to the extent that overcrowded prisons become the norm, it will be necessary for there to be an account of punishment which, if it is possible, can morally justify overcrowded prison conditions. This will ensure a nexus between the means and ends of punishment, and the traditional arguments put forward for legal punishment.

### III WHITHER OVERCROWDING?

#### A *The Appeal to Reason*

As noted previously overcrowding is not new, nor can it be expected to be solved by reference to traditional arguments that emphasise the humanity of the offender. The spectacle of overcrowded prisons and a lack of response by the government or

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example, Lippke suggests that inhumane punishment may consist of the failure to provide the necessities in life such as food, proper accommodation and shelter, whereas a degrading type of punishment is of a type which fails to give notice to the idea that prisoners are rational and responsible beings who have the capacity to make choices and thereby choose their good in life.

<sup>34</sup> *Ibid* 32.

<sup>35</sup> Rotman above n 22, 1028.

the community make clear that this will not provoke, or compel, the government or the community to act. In addition, changes required to ameliorate overcrowding will not be solvable by reference to arguments which assume that penal policy is either rational, or susceptible to cogent arguments about the associated cost inefficiencies and externalities of the increased use of imprisonment to deal with the crime problem.

McConville and Williams provide an example of such a 'rational' and cogent response.<sup>36</sup> In their article on overcrowding of prisons in the United Kingdom they suggest that the problem of overcrowding may be solvable by: more efficient use of resources; more diversionary programs, and sentencing reform that reduce sentence length.<sup>37</sup> Similarly, in the United States context Blumstein<sup>38</sup> has put forward proposals to deal with overcrowding: these include, inter alia, prison capacity constrained sentencing guidelines, and that any new sentencing legislation should be accompanied by a 'prison impact statement' that would ascertain the effect on the population of the prison system and, if necessary, provide sufficient funds for prison construction.<sup>39</sup> In the Australian context, similar proposals have been put forward based on: diversion; shorter terms of imprisonment; the use of imprisonment as a sanction of last resort; a greater range of sentencing options to be available to courts when determining sentence; amendments to bail legislation; pre release schemes; greater opportunity for executive or administrative involvement in determining the length of sentence; early release and the reduction of judicial discretion.<sup>40</sup>

These remedies are conceived as being either front or rear end solutions depending upon which stage of the criminal justice system it is implemented.<sup>41</sup> The underlying assumption of these remedies and solutions is the view that such rational proposals may be simply adapted to the criminal justice system and that the system itself, once infused with such notions in day to day practice, will return to equilibrium. Then there will be a 'fit' between the amount of prisoners and available prison space. Further, arguments based on the cost of community based corrections in comparison to the cost of imprisoning a person are also suggested with, again, the implicit assumption that crime control in general, and penal policy in particular, is somehow an accounting exercise. There is a belief that if such an economic argument was put forward it would otherwise persuade the community to reduce prison

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<sup>36</sup> McConville and Williams, above n 7, 115-130. Also see Vivien Stern, *A Sin Against the Future: Imprisonment in the World* (1998) 320-3.

<sup>37</sup> McConville and Williams, above n 7, 115-130.

<sup>38</sup> Blumstein, above n 6.

<sup>39</sup> *Ibid* 176.

<sup>40</sup> Don Weatherburn, 'Reducing the N.S.W. Prison Population: Sentencing Reform and Early Release' (1986) 10 *Criminal Law Journal* 119, 134-6; Harding, above n 1, 30-1; Maureen Kiely, *The Question of Bail and Remand* (MSW thesis, Latrobe University), 1999, 65-7.

<sup>41</sup> Don Weatherburn, 'Note: Front End Versus Rear End Solutions to Prison Overcrowding; A Reply to Professor Harding' (1988) 21 *The Australian and New Zealand Journal of Criminology* 117; see also Weatherburn above n 40, 128; Harding above n 1, 25. Another solution conceived of has been a moratorium on prison construction, see William G Nagel, 'On Behalf of a Moratorium on Prison Construction' (1977) 23 *Crime and Delinquency* 164.



numbers and develop alternative responses to crime and, for instance, divert such funds instead to a range of community-based dispositions.<sup>42</sup>

Such an argument has an unstated assumption, based on the financial cost of imprisonment in comparison to non-custodial measures, that the criminal justice system is a rational enterprise that is somehow free or independent from power relations within the community. It is an approach which is ahistorical and mechanical in nature and presents an impoverished notion of human existence. Such an approach suggests that the motivation for human conduct lies neatly in the realm of economics and the belief that every act is motivated by rational impulses and is based on, or in accordance with, logical criteria.<sup>43</sup> This type of approach ignores that correctional policies may be driven by impulses that are not necessarily conscious, nor rational, and that irrationality also has a part to play in human conduct. It is to this *irrational* understanding of crime and punishment that we now turn.

## B Overcrowded Prisons and Filth

If anything, overcrowding, and the undoubted suffering of inmates beyond the deprivation of their liberty, suggests that there is something more fundamental and *irrational* at play in this relationship of power and meaning, crime and punishment. This irrational aspect of the expansion of prisoner numbers and the use of imprisonment as a means of social control is compellingly outlined in Martha Duncan's treatise on prisons and punishment, *Romantic Outlaws, Beloved Prisons*.<sup>44</sup> This work, which draws on psychoanalytical theory and literature in an attempt to go beyond rational, surface and conscious explanations for the existence of prisons and their continuing use, is an important addition to the understanding of the role of the prison. Duncan's methodology in approaching this subject is made clear at the outset when she suggests that to account for imprisonment as an approach to criminal behaviour it is necessary to articulate the relation that exists between the putative law abiding citizens and offenders, and how both 'live together in a symbiotic as well as an adversarial relationship, needing each other, serving each other, living *for* as well as *off* each other, enriching each other's lives in profound and surprising ways.'<sup>45</sup> Thus Duncan, in a highly idiosyncratic approach, is concerned to highlight the relationship that exists between criminals and non-criminals and how, in particular, the idea of criminality as a concept, is fluid and contingent on ideas of self, and basic metaphysical questions concerning our shared, interdependent existence.

Whilst Duncan's work deals extensively with the relationship between non-offenders and offenders, it is through the use of the metaphor of 'filth' as an ana-

<sup>42</sup> Harding above n 1, 25-7; See also David Brown, 'Returning to Sight: Contemporary Australian Penalty' (1989) 16(3) *Social Justice* 141, 149-51.

<sup>43</sup> See Milan Zafirovski, 'What is Really Rational Choice? Beyond the Utilitarian Concept of Rationality' (1999) 47(1) *Current Sociology* 47.

<sup>44</sup> Martha Duncan, *Romantic Outlaws, Beloved Prisons* (1996). For a review see Francis A Allen, 'The Poignant Paradoxes of Criminal Justice: A Review' (1996) 48 *Florida Law Review* 539.

<sup>45</sup> Duncan, above n 44, ix (italics in original).

lytical, explanatory category that is most useful in attempting to understand the function of imprisonment and particular penal practices such as overcrowding. Moreover, when considering the notion of filth, Duncan makes clear that it is not sufficient to consider the rational, traditional justifications put forward as the 'official' story for the imposition of punishment in attempting to understand why the community permits prisoners to reside in such conditions of filth. Thus Duncan adopts an explanatory method beyond those approaches which assume that the criminal justice system is a rational, cogent entity that merely puts into practice ends, and commitments, by the implementation of rational means.<sup>46</sup> For Duncan, this irrational attitude to offenders has been neglected by previous accounts of punishment that have not connected cultural metaphors like 'filth' to accounts of the criminal justice system. As Duncan argues:

One of the most common metaphors in our culture is that of the criminal as filth. Reference to criminals as 'dirt', 'slime' and 'scum' pervade the media and everyday conversation. Yet, despite the familiarity of these figures of speech, scholars have devoted little attention to such questions as the following: What is the origin of the metaphor likening criminals to filth? Is this metaphor accidental or essential to our thinking about lawbreakers? And, to the degree that this metaphor governs our understanding of criminals, what are the consequences for our criminal justice system?<sup>47</sup>

More particularly, for our purposes, Duncan then suggests that this metaphor is useful when considering how punishment is to be inflicted and how it may 'cause authorities to imprison criminals in places that are ... suitably filthy and malodorous.'<sup>48</sup> There is, according to Duncan, something almost primordial and base in the process of punishment which cannot be understood by reference to rehabilitation, retribution or deterrence and other objectives that have traditionally been put forward to account for the prison as a type of punishment for criminal behavior.

To sustain this aspect of her argument Duncan draws on historical events, primarily on the settling of Australia as a penal colony.<sup>49</sup> Duncan notes that the conventional understanding of the settling of Australia by historians attempts to display that it was rational and purposive.<sup>50</sup> Due to overcrowded prisons in England, prisoners would be transferred, half a world away, to Australia where they faced banishment. The penal colony would also have a degree of comparative economic advantage for England over other countries because it would allow for the development of certain industries, such as ship-building.<sup>51</sup> In addition there would be strategic benefits that would accrue to the British Empire in that other nations, particularly France, would

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<sup>46</sup> Ibid 121-2.

<sup>47</sup> Ibid 121 (citation omitted).

<sup>48</sup> Ibid 122.

<sup>49</sup> For an account of the arguments put forward on behalf of transportation in late eighteenth century England see Robert Hughes, *The Fatal Shore* (1987) 25-33, 36-42.

<sup>50</sup> Duncan, above n 44, 148-9.

<sup>51</sup> Ibid.

be prevented from establishing a greater presence in the South Pacific.<sup>52</sup> Thus ostensibly the creation of the penal colony in Australia was justified by three central aims: the prevention of crime and punishment of criminals by banishment of offenders to Botany Bay; economic benefits to the British government; and a military and strategic advantage over other countries who were attempting to settle colonies in the South Pacific.

The problem with this conventional understanding of the settling of Australia as seen by Duncan, is that these traditional economic and military arguments began to lose their force, and are now simply not supported by the evidence from the period. Scholars have been left to conclude that there was a degree of *irrationality* in the whole enterprise.<sup>53</sup> As Duncan argues,

If the arguments for commercial and strategic motives are weak at best, we are left with the traditional explanation: that the British founded Australia as a place to dump criminals. But this theory, though widely accepted, is unsatisfying to virtually everyone, because it implies that the British government acted irrationally.<sup>54</sup>

Thus stripped of its utilitarian, economic justification, it becomes apparent that the establishment of the penal colony in Australia was, according to Duncan, about the *unconscious* desire to expunge those who it was felt were contagious to the social body of England.<sup>55</sup>

Duncan's approach to the settlement of Australia does not attempt to retrospectively impugn intentions, or motives, to government policy makers and she makes extensive use of government publications and reports on transportation and the views of high profile individuals of the nineteenth century such as Jeremy Bentham who, in discussing the transportation of offenders to Australia, noted that England was projecting a 'sort of excrementitious mass'.<sup>56</sup> Duncan further argues that this conception of Australia as a dumping ground for offenders can benefit from the use of psychoanalytic theory to understand, but not necessarily solve, the possible unconscious motives behind particular government policies.<sup>57</sup>

### **C      *The Relevance of 'Filth' for Contemporary Prison Policy***

What is the relevance, if any, of Duncan's psychoanalytical framework, and in particular the metaphor of prisoners as filth or excrement, to contemporary issues confronting correctional authorities such as overcrowding? In addition, in what way, if any, are the considerations of the settlement of Australia and the early stages of development at Botany Bay relevant to the understanding of late twentieth cen-

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<sup>52</sup> Ibid.

<sup>53</sup> Ibid 149.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid 150ff.

<sup>56</sup> Ibid 152.

<sup>57</sup> Ibid 150.

ture penal affairs in Australia? How could a consideration of the practices have relevance to the immediate problem of overcrowding which threatens to undermine the integrity of punishment by imprisonment due to its violation of the principle that the extent of punishment is the deprivation of liberty and nothing further?

The psychoanalytical insights of Duncan and the early penal history of this country offer an example of where we have been and suggest that the extent of overcrowding that is permitted in the jurisdictions within Australia is indicative of minimal progress in the relationship between the law abiding and offenders. Further, as Duncan emphasizes, appeals to arguments centered on the rationality and cogency of the criminal justice system and its constituent elements may be misplaced, as the treatment of offenders and the use of imprisonment may be driven by reasons not readily discernible or transparent. Moreover, the reasons may not be in accordance with the publicly designated aims and objectives of the criminal justice system but may be associated with, or connected to, our unconscious feelings towards prisoners and criminals.<sup>58</sup> To that extent, and despite the superficial attractiveness of proposals put forward to reduce overcrowding within the prison system, it may be expected that the problem of overcrowding will continue.

#### IV CONCLUSION

It is trite to say that communities are judged by how they treat those members of the community who are the most powerless. To the extent that the governments within Australia place priority on the use of imprisonment as a way of dealing with crime, and to the extent that they place emphasis on fiscal concerns over the obligation of the community to provide fair and humane treatment, we may expect further overcrowding of correctional facilities and police jails and the continued rise of other unsavory aspects of prison life. Such practices are not only contrary to good prison management and to the standards set by correctional administrators but also diminishes the entitlement of the community to claim that it punishes humanely.

Punishment by imprisonment is about the deliberate infliction of pain and suffering notwithstanding the euphemistic devices employed by the community to obscure the nature of the penal process.<sup>59</sup> It is also a punishment that removes the liberty of someone to lead their own life according to the good that they hold true. It is due to the negative and painful consequences of imprisonment that the community, although concerned to hold those accountable who have committed crimes, has developed procedures that ensure that those accused of criminal behavior are provided with a fair trial according to law.<sup>60</sup> However, upon conviction and sentence, the rights and status accorded to a person are reduced. He or she is now a 'prisoner' who becomes something less than human and, as overcrowding demonstrates,

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<sup>58</sup> Ibid 117.

<sup>59</sup> Nils Christie, *Limits to Pain* (1981) 5-6.

<sup>60</sup> As to the contemporary conception of what constitutes a fair trial under Australian law see Sir Anthony Mason, 'Fair Trial' (1995) 19 *Criminal Law Journal* 7.

becomes expendable and may be subject to a punishment which is at odds with the respect and accord shown to the person prior to their sentence of imprisonment.<sup>61</sup> The prisoner becomes, as Duncan terms it, 'filthy'.<sup>62</sup>

Traditional arguments that have been put forward to reduce overcrowding may not reduce the reliance on imprisonment or deal with the substandard conditions of confinement produced by overcrowding. Such arguments are, as has been emphasised, configured with a theoretical belief that if only more resources, or, alternatively, if the community adopted less exclusionary and harmful solutions or remedies to the problem of crime, then we may move beyond overcrowded prisons. Further, there is an assumption made that the penal system now operates in a fair and rational manner. Finally, no consideration is given to the cultural attitude of the community towards prisoners and how such irrational attitudes and understandings may result in particular penal practices. Many in the community, it is suggested, would resile at Duncan's central contention that to confine people in such overcrowded conditions is to treat prisoners as 'filth' or 'shit'.<sup>63</sup> Such a viewpoint does not sit well with contemporary understandings of the prison because of the assumption made that modern standards of imprisonment are necessarily humane and guided by the dictates of reason and fair play, rather than being based on irrational motives or intentions.

Perhaps the final word on overcrowding is best left to the prisoner author Evans Hopkins who, in an elaborate and compelling account of contemporary prison life in the United States, perceptively ties the treatment of inmates to the traditional accounts for the justifications for punishment:

I understand the philosophy behind the use of long sentences and harsh incarceration. The idea is to make prison a secular hell on earth—a place where the young potential felon will fear to go, where the ex-con will fear to return. But an underlying theme is that 'these people' are irredeemable 'predators' (ie, 'animals') who are without worth. Why, then, provide them with the opportunity to rehabilitate—or give them any hope?<sup>64</sup>

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<sup>61</sup> Stephen D Soble, 'A Regime of Social Death: Criminal Punishment in the Age of Prisons' (1994) 21 *New York University Review of Law & Social Change* 497, 553.

<sup>62</sup> Duncan, above n 44, 121.

<sup>63</sup> *Ibid.*

<sup>64</sup> Evans D Hopkins, 'Lockdown', *The New Yorker* (24 February & 3 March 1997) 66, 71.

