Persistent puzzles

Persistent Punishment: The Philosophy and Ethics of Private Corrections in the Context of Contemporary Penality

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Abstract – Research Summary:

Our paper attends to the implied outlooks ('philosophies' in the sense of operative practical discourses and assumptions) and the competing ethical concerns that animate differing views on privatizing corrections. We consider some normative arguments and empirical observations that have been mobilized for and against privatization since the inception of the modern version of this debate in the late 1980s, and seek to place these in the context of accounts of penal problems over that contentious period. We argue that a multidimensional approach to understanding the sociology of punishment and in particular how certain forms of punishment persist, survive and thrive is required when considering the privatization of corrections. Such an approach raises quizzical questions regarding the pairing together of punishment and privatization, and seeks to sharpen discussion about future prospects.

Policy Implications:

Greater attention must be paid towards public involvement, knowledge and understanding about penal policies. With particular regard to the involvement of private sector actors and interests, this has implications both at the initial contract negotiation stages of expanding correctional privatization as well as the rescission of such contracts. The impact of penal arrangements on the dignity and integrity of offenders – especially but not only prison inmates - their loved ones and communities, and wider considerations of public interest, are abiding and unresolved concerns, and privatization policies must be evaluated in light of these.

Key words: punishment; philosophy; ethics; privatization; corrections.

Biographical Notes:

James Gacek recently completed his doctoral candidacy at Edinburgh Law School, University of Edinburgh. He has lectured in criminology and criminal justice at the University of Manitoba and the University of Winnipeg, Canada. He continues to publish in the areas of incarceration, genocidal carcerality, visual and media studies, the exploitation of human-animal relations, the regulation of obscenity and indecency, and the broader politics of judicial reasoning. With Richard Jochelson, he has co-authored *Criminal Law and Precrime: Legal Studies in Canadian Punishment and Surveillance in Anticipation of Criminal Guilt* (Routledge, 2018).

Richard Sparks is Professor of Criminology at Edinburgh Law School, University of Edinburgh. He is author of editor of a number of books, latterly including (with Albert Dzur and Ian Loader, eds) *Mass Incarceration and Democratic Theory* (Oxford, 2016) and (with Jonathan Simon, eds) *The SAGE Handbook of Punishment and Society* (SAGE, 2012) and (with Dario Melossi and Máximo Sozzo, eds) *Travels of the Criminal Question* (Hart, 2011).

Introduction

The story of the privatization of penal institutions and services is not new. Indeed, Malcolm Feeley has argued on a number of occasions over many years (for example 1991; 2014) that the association between penal practices and private enterprise is a remarkably extended, embedded and extensive one. For Feeley the implication of this long-standing involvement is that simple rejectionist arguments based on the alleged incompatibility between the state-mandated phenomenon of criminal punishment and the many and diverse roles of commercial actors are implausible (see further Harding and Rynne, this issue).

Feeley, however, also notes that the particular roles and contributions of private enterprise in respect of punishment have long included those of introducing innovative practices and techniques, and thereby of extending states' penal capacity and reach. Such admonitions should alert us to the difficulty and scope of the task we confront in this paper. If we think (and we do think this) that there are special normative problems posed by private sector involvement in penal affairs we had better be on our mettle in identifying these. It would be wise not to assume that we can simply eliminate everything that is 'private' from the penal realm, and in so doing somehow solve its multitude of moral, political and practical problems. At the same time, the nature of the phenomena under discussion is ever-mutating. If we are to speak illuminatingly about them it is *these* practices and *these* institutions – the ones we confront now or that are coming into being now – with which we must reckon. For this reason, discussion of the philosophical and ethical questions posed by privatizing corrections and the changing scope and challenges of contemporary penality cannot meaningfully be separated.

'Privatization', as the essays collected in this volume make apparent, is a singular term for a many-sided phenomenon, and for this reason its use sometimes threatens to obscure rather than

clarify. It is used to refer to the actions of large, profit-seeking corporations and small social enterprises and non-profit agencies. It refers equally to the for-profit management of prisons (its most obvious as well as most contentious form) and to a wide range of other phenomena from non-custodial supervision, notably in the form of electronic monitoring for example, to the collection of fines and other monies, to the provision of a host of ancillary services. It should be handled with care, therefore. Some of its manifestations may not brook large in many people's lists of the most controversial aspects of criminal justice practices. Some may be welcomed, in some quarters at least, as sources of innovation, progress, and liberalization. Others, however, may raise pointed questions about delegated authority, accountability, the expansion of the scope of the penal network and many other questions. As will become apparent in this essay, we think Feeley is probably quite right to argue that we cannot simply reject 'it' out of hand, for it is not one thing. Nonetheless, it may be premature to think that key questions of principle have been all resolved (often they have simply been put aside because private sector involvement has become more familiar and less questioned).

Privatization, Contemporary Penality and its Policy Dilemmas

Notwithstanding its long history debates about the merits of penal privatization, such debates have intensified in recent decades and taken on a particular form (Lindsey et al., 2016). The contours of those debates took shape about thirty years ago when a novel-looking and intensely controversial proposition – the management of entire prisons on a for-profit basis – began to be seriously entertained in some advanced liberal democracies (for the first time since the eighteenth century, that is). The antecedents to which Feeley and others refer barely prepared many of those concerned (the criminologists perhaps no less than the administrators,

practitioners, judges, legislators) for that shock, nor for its many sequels in respect of probation supervision, electronic monitoring and the rest. What was and is really at stake in those arguments? Where does the debate stand now? And what does the current scope and reach of private sector involvement in penal matters portend for the future?

One problem, we argue, with the condition of recent debates on this issue, is precisely that the sheer ubiquity of privatizations (even if the private management of prisons as such has not swept the world to quite the extent once predicted) has latterly served to suppress explicit normative discussion. In many cases – with the partial exception of the for-profit management of prisons – they have become largely (largely, but as show further below, not wholly) unquestioned parts of the penal landscape in many of the jurisdictions where they exist. Where once there was vehement disagreement between arch proponents of opposing views (such as DiIulio (1988) versus Logan (1990)) now there is an established industry and some official letting contracts. Certainly, there is still an opposition, but the tendency has been for the issue to get swept up by the tsunami of mass incarceration and for the specificity of the case against or on behalf of privatization to be submerged in the resulting flood.

One possible outcome of this circumstance is that we attribute *too much* independent causal influence to privatization. In the case of private prisons, we might mistake a delivery system that has never housed more than 10 per cent of the inflated prison population of the United States for the primary motor of growth of the system as whole, something that in reality has much more complex, distributed and far-reaching causes. This is the basis of Wacquant's well-known and widely-debated critique of the thesis of the 'prison-industrial complex', for example (Wacquant, 2009: 84-7).

Another possible problem, however, is that if we make the question of prison numbers the sole or primary focus we miss much else that is also qualitatively and normatively important regarding the legitimacy or otherwise of punishment and problems of justification, purpose, dignity and coercion in its enactment. Moreover, we need equally alert and careful attention to the sheer range and complexity of private actors involved in the shallower and less visible parts of the penal realm (whether in the classical form of delegation of supervision or enforcement to for-profit enterprises, or in the endless shape-shifting variety of any number of public-private-voluntary 'partnership' arrangements; see further McNeill (2018) on the emergent forms of 'mass supervision').

In this context, therefore, even raising the idea of a *philosophical* conversation concerning privatization feels faintly old-fashioned. Yet this apparent reversion, we suggest, is precisely what is needed now. In revisiting this matter we have the opportunity to pursue a number of objectives in what we hope is a helpful way. The language of philosophy and ethics of course raises questions of normative justification, but in this context it refers mainly to disagreement at the level of declared principles about what should or should not be done here and now in the name of public policy. (As it turns out, it makes a real difference in this context where 'here' is.) Secondly, these terms also denote underlying or implicit assumptions at work in the operation of particular forms of social practice and the effort involved in bringing these to the fore. 'Philosophies' in this sense are the discourses that get activated in the operation of actually existing systems and institutions and the forms of penal action that compose them. What then are the respective roles and functions of public authorities and private providers in the penal realm that we now inhabit, and what new forms and assemblages are they bringing into being? How do we judge and assess these? What considerations of legitimacy, propriety, intended effects and

unintended consequences do they pose for us? In what follows, we actively try to bring these together, because the discourses and the real-world practices are, jointly, our topic. The question "What shall we do next?" is not answerable without first attending to the question "What is going on?"[1]

Privatization, Punitiveness, and the Question of how Punishment is Administered

While it is inherently difficult to measure punitiveness, "it is common currency amongst criminologists that, if imprisonment rates are employed as a barometer, America is the most punitive country in the world" (Teague, 2016: 100). That is to say, the United States has, notoriously, consistently experienced rates of incarceration several times greater than those of its cultural neighbors and comparators, such as Canada and even the United Kingdom (the case with which it is most often bracketed), at least since the 1970s. Explanations for variations in prison populations abound, and certainly exceed our scope here (see, amongst many, Lacey 2008; Lacey et al., 2017). It seems unavoidable that population pressures play a significant role in shaping the decisions of policy-makers to experiment with privatizing prisons and other penal sanctions and measures. It might be no more than a pragmatic adjustment to a pressing reality on the part of policy-makers that they should reach for a solution that appears to them to offer

[1] This effort relates to each of our work in particular ways. Richard Sparks was an active participant in an earlier phase of debates on the privatization of prisons (Sparks, 1994, 1995, 2001). As someone who articulated what he saw as irreconcilable objections to that development he 'lost' the argument, in the sense of finding himself on the wrong side of an historical current. He has written little overtly on the subject since, though a good deal on the question of conditions of legitimacy in relation to prisons. James Gacek has recently completed a doctoral thesis on electronic monitoring in contemporary Scotland, a measure that is wholly provided by one private contractor (G4S). James's work concerns the experience of delivering and receiving this form of supervision, and the texture of the new form of carcerality that it creates (Gacek, 2019). This is precisely an example of Feeley's new techniques and modalities of punishment. So for James the question of what forms of penal subjectivity (and subjection) are brought into play through a contractual relationship between state authorities and private providers is a central one.

additional capacity rapidly and at an acceptable cost, or one which they see as providing more scope for innovation and improvement than existing and notoriously inflexible state-governed institutions. Early commentators on the privatization movement in the United States in the 1990s noted that the idea of addressing a growing crisis of prison space was central to the marketing pitches of the companies involved (see for example Lilly and Knepper (1992)).[2]

Yet this alone hardly seems sufficient to account for why some jurisdictions have gone so much further, faster than others. Thus, to take the example of the two other countries mentioned above: Canada and the United Kingdom have faced somewhat similar population pressures over the last few decades. However, Canada has had very little engagement with private prisons (and currently has none), whereas England and Wales (by far the largest of the three United Kingdom prison systems) was an early adopter and has remained committed to (and dependent on) private sector involvement for well over two decades and through many vicissitudes. It thus seems likely that the responses of authorities to such practical challenges is at least mediated by or has some clear elective affinity with dominant philosophical or ideological outlooks. To some decision-makers, in some times and places this presents itself as a credible, and perhaps in principle preferable, solution (whereas to others it remains foreclosed). How shall we explain or interpret this?

One line of explanation is that we have tended to see a high level of interest in privatization in "'neoliberal' Anglophone jurisdictions [exemplifying]…the adoption of…punitive and politicized approach[es] to crime and punishment" (Jones and Newburn, 2013: 439). Therefore, on one hand it is widely argued that the USA and the UK are among those countries which "have

[2] Many readers will likely equate the term 'privatized corrections' to 'private prisons.' Therefore, we wish to clarify and note that the points made in this paper apply to all types of corrections and not just prisons.

the highest incarceration rates, not least because of the impact of their political and economic structures" (Teague, 2016: 100). On the other they have often favored private-sector solutions to the resulting problems because their ideological preferences have latterly included "maximum marketization of government services" (Aman and Greenhouse, 2014: 365). The relevant ideas and policy innovations circulate widely, including particularly readily across the Atlantic (typically in one direction; that is, imported to the UK from the USA) (Newburn, 2002; Jones and Newburn, 2006, 2013).

No doubt the idea of neo-liberalism is often deployed too broadly and imprecisely in these discussions. Nevertheless, there remain good reasons to think that those contemporary societies most influenced by free-market ideas, with more deregulated labour markets, less inclusionary social policies and, importantly, more volatile and adversarial political cultures are more likely both to be drawn to expansionist tough-on-crime policies (Lacey et al., 2017) and to market-based solutions to the resulting steering and capacity problems, such as the privatization of penal institutions and services. Under such conditions the idea that the state *purchases* correctional work (in much the same way as it contracts for construction projects or perhaps for aspects of health or social care provision) becomes more readily thinkable and comes to be seen as having the distinct advantages of competition and contractual regulation[3]. Seen from within that horizon there is no longer a significant *moral* problem. The allocation of punishment by a legitimate authority (the imposition of a criminal sentence in a court of law) has been separated conceptually from its execution, which can be sub-divided into a series of practical tasks carried out by skilled providers under its supervision and competing with one another for its business

[3] As Amy Ludlow shows with respect to the privatization of prisons in England and Wales, once the primary decisions have been taken the debates tend to shift as much to matters of public procurement, labor and competition policies as to criminal justice *policy* properly so-called (Ludlow, 2017).

(Sparks, 1995). In order for that set of decisions to be viewed as philosophically and ethically problematic it has to be viewed from a perspective *external to* that set of premises. In other words, arguments for and against privatization may incorporate all kinds of claims and counter-claims about cost, practicality and effectiveness, but they are in the last instance contests over legitimacy between proponents of different ideologies of politics and law (see further Loader and Sparks, 2016).

Our contention that we need to situate privatization debates within the broader sociology of punishment rests on the view that we can thereby better understand how privatization and punishment came to be coupled together and to be viewed as social practices that are seen in some places as legitimate and continuing, but in others as largely unacceptable. A sociology of punishment allows us to further explore "the function punishment fills, the effects it produces and the meanings it communicates" (Daems, 2011: 806). In this spirit, a reconsideration of privatizing corrections becomes part and parcel of such efforts of comprehending how certain forms of punishment survive, thrive and extend, and thus how the persistence of such forms of punishment pervade society and come to represent a viable source of opportunities to the private sector. In other words, if we wish to grasp the bringing-together of this pair in a new light, we need to inspect them, as it were, from a greater distance:

> Instead of engaging with the institution, as everyone feels compelled (and surprisingly competent) to do, the social science strategy is to disengage, to avoid taking positions *within* the field of debate and instead to chart how the institution—and its debates—appeared when viewed from the outside. (Garland, 2010: 13; italics in original)

Garland (2010) establishes this strategy in terms of understanding capital punishment in the USA, but we suggest it applies equally well within the realm of privatizing corrections. In other words, as Garland (1990: 10) put it on an earlier occasion: "we need to know what punishment is in order to think what it can and should be."

In this sense the task is one of making the familiar appear strange (Garland, 1990). Indeed, asking ourselves why we punish, who deserves to be punished, and what are the benefits or consequences for society to punish, makes us consider the shifts in *how* we punish. Put differently, as Garland further argues, if penal practices always conjoin the mentalities and sensibilities of their time in particular ways, they thereby generate shifting stances on what can be construed as ethically acceptable. It is on this basis that we arrive at judgments as to which forms of punishment feel appropriate, just, or just plain cruel and unusual.

Making these familiar questions appear strange also speaks to how certain forms of punishment – most notably perhaps the prison - have survived across and throughout widely different historical eras of punishment. In other words, competing views on privatization and punishment belong to different universes of discourse which speak to – and often uncomprehendingly past - each other in the same conversation. The overarching premise of the competing parties is generally that in some form or other punishment serves a legitimate societal function. To approach the issue in this way is to advocate the "reconnection of penological research with normative moral and political reflection" in order that we may seriously reconsider "the location of the penal within the variety of actual or possible political outlooks" (Sparks, 2001: 172). As one of us has previously argued, "the arguments over the justification of *any* practice of imprisonment (private or otherwise) need to be more strenuously pursued than contemporary rhetorics allow" (1994: 14; italics in original). Taking the philosophical grounds and ethical considerations together, to privatize corrections beyond the conventional space of punishment (i.e. the prison) is to further expose and legitimize punishment's necessity in our lives, a troubling concern revealed in our societal awareness we can no longer suppress or evade.

For and Against Privatizing Corrections: The Role of Ideologies and Beliefs

Garland (1991: 120) argues that conventional penological and philosophical approaches to punishment base themselves on an implicit sociology of punishment, "insofar as they rely upon certain common-sense conceptions of what kind of institution punishment is and what kinds of social purposes it serves." Irrespective of which rationale is deployed in order to justify imposing a punishment in any given time and place, there remains a deeper need to understand the complexities and inner ambivalences of punishment as a social institution, its obdurate persistence and thriving proliferation (Garland, 1991). As we observe below, particular ideologies and beliefs lay the foundation for particular punishments in society to persist, survive and thrive. Privatizing corrections, we believe, involves more than issues of cost-efficiency and service delivery; the philosophical framing of privatization that predominates at present obscures fundamental questions about why and how societies punish, and simultaneously eschews discussions of legitimacy for the sake of furthering the privatization movement.

For example, the prison as a primary site of punishment is as at least as old as modern liberal and democratic states, yet it continues to face challenges over its legitimacy. As Mincke (2017: 236) indicates, human rights and prisons "were conceived in the same epoch (during the eighteenth century), but have always been in tension. Accordingly, thinkers and policy makers have constantly had to re-examine and consolidate the legitimacy of the latter." The conception of the prison was meant to deprive its inmates of what was considered essential in and by liberal society – namely, their liberty and autonomy. However, the fact that the prison in the nineteenth century through to the start of the twenty-first century came to be considered by many to be "inefficient and, worse, counter-productive, lent it even less legitimacy" (Mincke, 2017: 236). Other scholars have also expressed concerns about the lack of attention given to correctional

philosophy and goals (for discussions pertaining specifically to private prisons see Shichor, 1995; Harding, 1999; Schneider, 1999; Brakel and Gaylord, 2003; Schwartz and Nurge, 2004).

Critics argue that private prisons are often operated and managed in a manner that is consistent "with the dominant correctional philosophy of incapacitation" (Wright, 2010: 76; see also Blakely and Bumphus, 2004). For example, some leading authorities in the US argue that the entire American penal system is currently based on rational choice and issues of cost (Cullen et al., 2002) and that privatization became a viable policy-choice only under this dominant correctional philosophy. Advocates of private imprisonment, and independent commentators sympathetic to it (Logan, 1992; McDonald, 1992; Feeley, 2014), on the other hand, have long argued that this is not a necessary association and that privatization is better thought of as a means of providing whatever the state mandates. That may, and sometimes does, include rehabilitative services at or above the level that public institutions have offered.

The question is a central one, especially as it has become increasingly strongly argued that the incapacitative conception of imprisonment has become a primary driver of mass incarceration; and that the scale of imprisonment has created powerful economic incentives in the form of relatively secure employment especially in marginal rural areas of the United States (Thorpe, 2016).

One underlying issue – a key component of some of the ethical disputes discussed below – concerns the moral and political status of the imprisoned subject under different regimes of punishment (Duff and Marshall, 2016; Ramsay, 2016). Critics argue that in delegating the practical conduct of punishment to an agent, the state thereby passes on, at least in part, its responsibility for that person's welfare. That intrinsically includes, it is further argued, compulsory and coercive dimensions (Sparks, 1995). Whether this can be done legitimately has

become central to arguments of constitutional principle as to whether the private management of prisons, or indeed any place of compulsory detention, is permissible in a number of countries (see below).

The prison privatization movement gained particular momentum in parts of the United States in the 1980s, becoming "a sort of political common sense" as electorates, helped along by politicians and lobbyists, became simultaneously alerted to the scale of the crime problem and more aware of global economic competition (Aman and Greenhouse, 2014: 368; Price and Riccucci, 2005). Privatization efforts became noticeably stronger in southern and western US states as fiscal conservatism was held high and organized labour was weak (Pozen, 2003: 260). Privatization by contract became politically popular as an approach to the governmental provision of services, especially for the poor, for immigrants, and for prisoners—in other words, dependent populations whose situations expose them extensively to managed care of various kinds (Aman and Greenhouse, 2014: 267-268). Such efforts were coupled with the loss of faith in the 'rehabilitative ideal' which made it easier for states to hand over public prisons to private companies (Mehigan and Rowe, 2007: 359) and to reduce their commitments to deliver substance abuse counseling, vocational or educational training to inmates (Schartmueller, 2014: 236).

Overall, prison privatization has become an increasingly complex entity within the expanding carceral state, which we consider here as "a set of institutional configurations and actors that prioritize punishment, containment, detention, and/or incarceration for treating poverty and marginalization" (Villanueva, 2017: 150; see also Beckett and Murakawa, 2012; Peck, 2003; Wacquant, 2009). While some private companies provide services to state-run correctional facilities, others build prisons and lease them out to governments, and even still other private

companies design, build, and run the prison in its entirety (Schartmueller, 2014: 236). Some argue that privatization, in its most ideological form, makes government an 'empty shell' (Michelman, 2000), while others have noted that, in the context of corrections, privatization does not automatically challenge the idea of core governmental functions since it does not automatically remove the state altogether from the process (for example, see Genders, 2002). Indeed, setting up the contractual terms, standards, procedures for monitoring, corporate accountability, and conditions for rescission all remain with the state (Genders, 2002; see also Volokh, 2002; Aman and Greenhouse, 2014).

Privatization proponents contend that that private companies have the ability to accomplish correctional goals more effectively and at a lower cost, provide higher quality services, and develop innovative solutions to correctional challenges at an increasingly qualitative and quantitative rate (for examples, see Logan, 1990; Calabrese, 1993; Lundahl et al., 2009). Conversely, critics indicate that effectiveness and efficiency of privatization is a myth; private correctional facilities do not result in cost savings (Sechrest and Shichor, 1996; Pratt and Maahs, 1999; Perrone and Pratt, 2003) as privatization merely expands the penal net of social control which further increases pressure on correctional services, and does not improve correctional outcomes (Lundahl et al., 2009; Aman and Greenhouse, 2014; Ramirez, 2015). In fact, the general belief of this debate can be aptly summarized by Lindsey and colleagues' (2016: 311) assertion that "[p]roponents of privatized corrections argue that there is too little of it, while opponents typically argue that there is too much of it or, in fact, no need for it."

The public's admiration of private enterprise and distrust of government contributes to a common assumption that private prisons are thought to get the best results (and lower recidivism) than their public counterparts (Spivak and Sharp, 2008). However, evidence suggests

private prisons are not inherently more effective in reducing recidivism, which may be attributable to fewer visitation and rehabilitative programing opportunities for offenders incarcerated in private facilities (Duwe and Clark, 2013). As Duwe and Clark (2013: 391) contend, "findings from this evaluation and prior studies indicate that private prisons are not a superior alternative to [public] prisons…[I]f anything, […] private prisons produce slightly worse recidivism outcomes among the healthiest and well-behaved inmates for the same amount of money."

Despite the fact that privatized services can span both public and private corrections, we are mindful that the conceptual distinction between 'public' and 'private' is of value philosophically "in relation to the different accountabilities of government and business, to democracy, and to shareholders, respectively" (Aman and Greenhouse, 2014: 405). It thus seems more sensible to perceive privatization "not as an either/or option, but rather as a continuum of private-sphere involvement in the provision of correctional services" (Aviram, 2014: 434-435). However, in more pragmatic terms, public and private values and interests are distinct from one another, as government and businesses are held to different accountabilities and rationales, and both are subject to different formulations of success.

Fitzgibbon and Lea (2014) also raise concerns about the privatization of probation. Allowing privatization to absorb probation, they contend, is akin to the general task of 'public protection'—by which the 'public' is no more than the asset-rich middle class and those still in secure employment—by neutralizing the risk of crime and anti-social behaviour from the poor and unemployed: "Those recalcitrant to workfare will end up being effectively warehoused out of sight, somewhere along the 'seamless' continuum of prison and probation" (Fitzgibbon and Lea, 2014: 26; see also Wacquant, 2009; Worrall, 2008). Indeed, as Aviram (2014: 433)

suggests, a "privatization mentality" has become legitimated and much more pervasive and intrusive, "to the point that it is no longer easy, or sensible, to draw firm distinctions between private and public prisons." What this indicates is an interest towards a particularly predominant penal sensibility, one which ingrains itself into penal systems and cultures and is successful at least by analogy with an evolutionary process of speciation (it adapts and survives), whether or not it is also successful on a strictly penological evaluation.

The embeddedness and path-dependency of penal practices mean that mounting fiscal pressures alone will not be enough to spur communities and governments rapidly to make significant shifts in how they perceive punishment in nature, form, and function. Some observers argue that the phenomenon of 'carceral clawback' has become so tenacious (Carlen, 2002) that as the carceral state has grown "so has the political clout and political acumen of groups, institutions, and organizations with vested economic interests in maintaining [it]" (Gottschalk, 2015b: 35). On this view prison guards' unions (Page, 2013), correctional departments at federal or state level(s), law enforcement groups, and financial firms are all actors capable of exercising influence of the direction of penal policies. Similarly, it is argued, the private corrections industry is another entity which devises bonds and other mechanisms to fund and/or ensure the persistence of the carceral state and particular forms of punishment (Gottschalk, 2015b). While each may have their own particular interests in the shape and size of the carceral state, the outcome may be that predominant correctional philosophies, notably the persistent belief in the effectiveness of incapacitation, continue to survive and thrive, long after experience and evidence have raised serious questions for them. For this reason, whether or not such ideologies were the main catalysts for the origins of the carceral state, they can become "major impediments" to reducing prison populations significantly, to reining in the carceral state, and to the public's involvement

in reconsidering why certain forms of punishment in our society are allowed to persist (Gottschalk, 2015b; see also Gottschalk, 2015a).

Ethical Grounds For and Against Privatizing Corrections

As Teague (2011: 321) argues, for more than two decades governments in the USA "of both Republican and Democratic hues" have resorted increasingly to incarceration and punitive measures "as their primary strategy to address crime." Critics argue that the current reality in England and Wales is broadly similar, as the current British government "seeks to continue the long-term shift from the welfare state to neoliberalism pursued in various ways by governments of both major parties since the late 1970s" (Fitzgibbon and Lea 2014: 25). Although privatization is becoming increasingly common in criminal justice systems in a number of Western jurisdictions and latterly in other parts of the world (Mason, 2013), the ethical aspects of privatizing corrections have received rather patchy attention. Since privatization is developing within and expanding across corrections we find it essential to consider the ethical aspects of privatizing corrections in tandem with such developments and expansions.

As Nellis (2006: 105) has indicated in relation to the development of the electronic monitoring of offenders (both technologically and as a punitive means) "the questions of 'what works' and 'what's right' cannot, or should not, be so easily separated." This is crucial to consider, since the awareness of potential ethical issues and challenges reveals an urgency to formulate ethically sound legislation and regulations for the use and implementation of privatization services generally, coupled with the transfer of corrections services from the public to the private sector. In terms of ethical considerations, proponents of privatized corrections argue that private

companies provide comparable outcomes at less cost and do so without incurring any more harm than that associated with correction in the public realm, whereas critics contend that the private sector's profit incentive has the ability to distort motives, resulting in corrupt practices and compromised service quality (Logan, 1990, 1992: Lundahl et al., 2009). For example, Welch's (2003: 118) analysis indicates that with a tighter linkage between legislative initiatives and the corrections industry, prisoners have increasingly been treated as and reduced to 'raw materials.' This treatment certainly indicates a degree of warranted concern for the ethical implications of reducing these individuals in this way, exacerbating negative feelings towards their dignity, integrity, and self-worth. However, other careful and dispassionate observers have found that in some instances staff in private prisons may be regarded by prisoners as *more* humane and compassionate than many of their public sector counterparts. This may arise from the fact that they see themselves less as the direct agents of the State or as the personal embodiments of its punitive authority (Crewe et al. 2015). On this reading the culture of prison staff mediates the ways in which people act towards one another; and this may not be reducible to something so stark as whether one is a civil servant or employed by a contractor of the state. International experience produces widely differing perspectives on these questions of dignity, equality and the protection or otherwise of the human rights implications of private corrections. Courts in some jurisdictions have ruled that the very act of delegating the management of prisoners to private actors is constitutionally unacceptable. Thus in a famous judgement the Supreme Court of Israel (in the case of *Academic Center of Law and Business, Human Rights Division v. Minister of Finance)* struck down new legislation enabling the creation of private prisons on the grounds that the delegation of the execution of punishment from the state to a corporate interest intrinsically violated the rights of imprisoned persons under the Basic Law of the State of Israel, irrespective

of whether the conditions of confinement or the manner of their treatment were in practice inferior or not. The Court held that making inmates "subservient to a private enterprise that is motivated by economic considerations . . . is an independent violation [of the right to personal liberty] that is additional to the violation caused by the actual imprisonment under lock and key." Furthermore:

> the scope of the violation of a prison inmate's constitutional right to personal liberty, when the entity responsible for his imprisonment is a private corporation motivated by economic considerations of profit and loss, is inherently greater than the violation of the same right . . . when the entity . . . is a government authority that is not motivated by those considerations, even if the term of imprisonment . . . is identical and even if the violation of . . . human rights that actually takes place . . . is identical.

In the Court's view these consideration were objective and final ones, irrespective of the subjective feelings or experiences of the inmate themselves (https://reason.org/commentary/israeli-private-prison-ruling/).

Criticizing this view, Alexander Volokh argues that if the private agency operates under the direction of the state and applies similar operating rules and norms as do its directly state-managed counterparts, in what sense is it not to be considered "a competent organ of the state"? He further argues:

> One can imagine private prisons that are subject to the norms of state actors; certainly, the private prison in this case was subject to a lot of state-actor norms. Moreover, that the "civil service ethos" is a stronger force against abuse in the public sector than possible competitive or other market or contractual forces in the private sector is a contested empirical question, which is in tension with the majority's stated intention to not rest its decision on possible future violations. (idem).

Thus, critics of the Israeli Supreme Court's view of the matter (including Feeley, 2014) argue that it is simply declared rather than reasoned. The judgement treats it as self-evident that the delegation of the conduct of imprisonment is an abnegation of responsibility and care on the part of the state. This has nothing to do with the question of whether private contractors in fact run

inferior prisons, which remains to be shown. (Sometimes they do, sometimes not. They tend to do what they are funded and mandated to do. That is both the attraction of private contractors to policy-makers and the peril of that policy – to cut a very long story extremely short). Indeed, a strict reading of the judgement would suggest that it would remain a violation even if the conditions of confinement were in fact preferable (and hence presumably that the prisoner's own estimation of them would be irrelevant). Others, however, would argue that the onus is the other way about. We do not need to argue that private prisons are inferior or their operatives other than professional and conscientious in order to raise questions about whether the State is entitled to draw a line between the imposition and execution of a penalty. This would apply especially in the case of a prison sentence in that it entails the continuous imposition of authority over the life of the person undergoing punishment *by someone*. The question of who holds that power is on this view crucial to whether it is applied legitimately (Sparks, 1994). On this account, it is not the violation of a right held by the prisoner that is at stake but the failure of the State to carry out its own duty, rather than to franchise it to someone else.

Similar considerations applied (to a somewhat different conclusion) in a German case brought by a man confined involuntarily in a privately managed (but non-profit) psychiatric institution in Hesse. In that instance the Constitutional Court rejected the application on the grounds that the mere fact of being subjected to compulsion by staff who were not civil servants did not amount to a violation of the Basic Law of the Federal Republic. Nevertheless, the Court upheld the view that Article 33(4) of the Basic Law continues to apply, namely that: "The exercise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law." In other words, exceptions, such as the one the Court identified in this case, are to be interpreted narrowly; and this goes to

questions such as the close control and direct supervision of the institution by the state. The operation of the "Democracy Principle" in Article 20(2) of the Basic Law remains primary: "All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies" (https://reason.org/commentary/privatization-delegation-germany/). This is significant in that Germany still has no private prisons: it seems probable that the degree of delegation of compulsion involved therein would not be seen as satisfying these requirements, and that what Volokh refers to as the 'legitimacy chain' would be interpreted as having been broken.

Even in the United States, practically and spiritually in many ways the home of the privatization movement, these principles remain disputed. Thus O'Carroll (2017) argues that the full privatization of Federal correctional facilities contravenes both the "exercise of discretion" and the "nature of function" tests required under the *Federal Activities Inventory Reform (FAIR) Act of 1998*. The Act requires that the "inherently governmental" functions of the federal government be performed by government actors whereas its commercial activities may be outsourced to private providers. O'Carroll concludes that in key respects – notably the exercise of authority over all aspects of inmates' lives and the imposition of sovereign power in depriving people of their liberty – imprisonment must be considered inherently governmental in order to remain legitimate.

One major issue that further complicates these controversies is the recognition that imprisoned populations have multiple and complex needs and are overwhelmingly comprised of members of poor, marginalized and stigmatized groups. While our basic intuitions about fairness and justice indicate that there must be proportionality between the punishment and the level of crime committed, in practice punishment can be experienced differently by different groups and

individuals (Bülow, 2014). This leads to the worrisome view that some groups and individuals will be unfairly punished. Ethically, we must acknowledge the different perspectives existing within and between social groups across racialized and classed axes. Per Alexander (2010: 20), the experience of African Americans within the US correctional system reflects, in essence, "a comprehensive and well-disguised system of racialized social control" which warehouses African Americans. Shockingly, the scale of this system's disproportionate impact upon African Americans (Teague, 2009; Walker et al., 2006) is summarized in Alexander's (2010: 7) observation that the USA incarcerates a greater proportion of its Black population than South Africa did at the zenith of apartheid. In terms of privatizing corrections, there is also evidence to suggest that African Americans have a greater concern for corruption and human rights abuses within private prisons (Ramirez, 2015). Hallett (2006) contends that private prisons have and continue to negatively influence African American communities at a disproportionate scale, as such facilities reduce the opportunities for rehabilitation and release more so than their public counterparts. Indeed "African Americans are used by the private prison industry for the coerced production of goods and services. In this manner, slavery was not abolished, but its nature has changed" (Ramirez, 2015: 233; see also Alexander, 2010). This can lead to greater political disenfranchisement for African Americans, leading to less opportunities for employment and deteriorating family and social organizations as a result (Ramirez, 2015).

Furthermore, imprisonment has been argued to serve as a social control strategy (Sexton and Lee, 2006). Private prisons, in particular, reinforce social control strategies as they represent the additional space to house minority populations, including but not limited to African Americans, Hispanics, and additional minority ethnic communities. Per Myers (1990), as the minority populations increase in relative size, social control efforts intensify based on perceived threats to

public safety. Such perceptions of threats can manifest as tougher criminal laws and higher incarceration rates, all of which directly affect minority populations (Myers, 1990; see also Ramirez, 2015). The vastness of social control and punishment practices, which have brought the experiences of incarceration particularly closer to the lives of the poor and communities of colour, have been extensively explored by scholarship on the emergence of the carceral state (Beckett and Murakawa, 2012; Peck, 2003; Wacquant, 2009).

Moreover, the expansion of surveillance and control through criminal justice systems, including probation and parole, substance-abuse treatment, and practices of 'banishment' "all point to the creative and extensive reach of the carceral state" beyond the conventional threat of incarceration into these same lives (Villanueva, 2017: 150; see also Beckett and Herbert, 2010; Belina, 2007; Goffman, 2014).

Teague's (2016) examination of offender-funded probation in the US paints a grim picture of what is lost when probation becomes privatized. Two particular issues arise with the charging of fees upfront: "Firstly, whether or not fees are compatible with the philosophy and ethos of probation, and secondly, the more pragmatic fiscal question of whether or not charging impedes the successful conclusion of supervision" (Teague, 2016: 103). With the survival of the private company dependent on its ability to raise revenue and remain competitive in the correctional market, this may impact the nature of intervention and delivery of service (Teague, 2011; 2016), and following on, one may question whether it is ethical to charge fees for those who cannot pay, and what detrimental effects it may have upon their loved ones and communities. As Teague (2016: 104) indicates, "[o]ne of the most disquieting results of imposing the role of revenue generator on probation practitioners is that they have become embroiled in a system which appears to reinforce oppression in terms of race." Once again, the disproportionality of the reach

of the penal arm onto racialized and classed groups in society echoes here of the post-Civil War era, "when former slaves were charged with minor offences, then had weighty financial penalties imposed upon them. Incarceration followed swiftly when they were unable to pay their debts" (Teague, 2016: 104; see also Alexander, 2010).

In sum, there are significant ethical issues that can arise when privatizing corrections. Academics, practitioners, and citizens alike continue to ask questions of 'what works' without allotting further attention towards issues of 'what's right'. Both questions are entangled with comprehensive ethical concerns, and a focus solely on the former pays a disservice to the latter. We can no longer accept this. The complex issues marginalized groups experience along racial and classed axes are exacerbated when we neglect the worrisome effects privatized corrections have at present (and will continue to have) within criminal justice systems on both sides of the Atlantic, as well as the legal and legislative realms they correspond with in their respective societies.

Under current conditions, given the many-sided extension and diversification of the reach of the carceral state, we find ourselves in considerable doubt as to whether the privatization of corrections can be undertaken on ethically feasible terms. We need a concrete grasp of what constitutes ethically sound conditions for the privatization of corrections, before we can safely conclude that any further expansion of these practices is defensible. Clearly, much more work still needs to be done to parse out the multiple forms and meanings of the 'commercialization of corrections' (Jones and Newburn, 2006) and the relations between these and questions of persistence, change, scale and variation in contemporary punishment. To cautiously reconsider whether we continue down the road of expanding the privatization of corrections is to broach

some of the policy implications of this patchwork of practical and ethical challenges, a discussion to which we now turn.

Policy Implications

As we demonstrate above, philosophical and ethical puzzles and challenges concerning the privatization of corrections are abundant and unresolved. One overarching theme throughout these discussions continues to be *how* privatization has become a persistent form of punishment within our society, spreading throughout correctional practices and procedures in order to take shape, survive and thrive. The survival of this form of punishment is a fascinating consideration, and merits further empirical investigation into whether, much like the carceral state itself, privatization should continue to reign, be reined in, be reversed, or be razed altogether. In this spirit, we address several implications for research, theory, and policy below.

It is no mystery that significant penal policy to slash the incarceration rates in both the USA and the UK are needed, and policies which support significant shifts towards comprehensive sentencing reforms would also reconsider how probation and parole should be reinvigorated. Would such reinvigoration require us to insulate these practices from privatization and from the direct heat of politics? Or is this the very sphere in which many actors are required to compete, collaborate and co-create a new constellation of services and supports? Is there a single meaningful principle that determines which services and interventions can only be provided by public servants and which can safely be offered by others and under what contractual terms? Does that principle have something to do with the balance in any given intervention between compelling and assisting? Or with the fact of confinement as such? Especially in democratic

societies, there continues to be a disconnect between punishment policy and what the public thinks or wants. In effect, ethical problems in relying on policies, such as privatization, when the public may not want them or even understand remains an interesting aspect of public policy. Therefore, this disconnect warrants further attention by academics, practitioners, and citizens.

In a similar vein to Aman and Greenhouse's (2014) policy implications, greater attention must be accorded towards public involvement, both at the initial contract negotiation stages of expanding correctional privatization as well as its rescission. A very real task becomes how to figure out and create "a more receptive political environment" (Gottschalk, 2015b: 44) for all citizens within modern, liberal democracies to consider penal reforms and policies "and to make the far-reaching consequences of the carceral state into leading political and public policy issues" (Gottschalk, 2015b: 44; see also Mauer, 2011).

Direct human vulnerability—that is, the impact interventions will have upon the dignity and integrity of inmates and other penal subjects—mandates more direct forms of public participation that those more impersonal domains of governmental contracts concerning, for instance, the construction and maintenance of roads and bridges, or routine service contracts "in which expenses and revenues may be more definitive" (Aman and Greenhouse, 2014: 359). Procedurally, the proposed contract could be made public, perhaps on the government's or company's own website, not unlike a proposed legislative bill made available for comment. For the public to be effectively involved, information could be gathered and made public regarding the track records of those seeking the contracts (especially in terms of their corporate philosophies, aims and objectives), and information and monitoring must occur throughout the duration of the contract once it is awarded to ensure corporate accountability. Should privatization of corrections expand, contracts could, at a minimum, include "liability rules that

incentivize the private firms to carry out their responsibilities" (Aman and Greenhouse, 2014: 407) in an ethically appropriate way.

However, direct human vulnerability is by no means equally distributed within and across society; the creation of policies which recognize the diversity of minority populations warrants further attention. The extant literature suggests that support for punitive policies in the United States tends to be greater among Republicans, conservatives, men, and the religious (Bobo and Johnson, 2004; Carr et al., 2007; Johnson, 2007; Ramirez, 2013, 2015). In effect, legislative authorities and policymakers alike must see and hear difference; they must recognize the race, class, and gender of those whom are part and parcel to the marginalized populations, and they must query whether the needs of these populations are effectively and ethically being met. How these diverse yet marginalized communities perceive not only justice and punishment, but basic standard of living, living conditions, quality of health and wellbeing and legitimate work opportunities as they are must be taken into account, in order to reconfigure how we proceed going forward.

While Black, Hispanic, and additional minority ethnic populations are integral to incarceration research, their relationship to privatized corrections continues to be under-researched (with notable exceptions; see Ramirez, 2015; Petrella, 2014; Petrella and Begley, 2013). As Gottschalk (2015b: 32) contends, race matters profoundly, whether it be in discussions of incremental penal reforms or more radical debates of how to dismantle the carceral state altogether. These doubly marginalized groups (as both racialized and incarcerated) "have been and remain key targets of the carceral state" (Gottschalk, 2015b: 33) and therefore should be heard within and throughout public policies.

Future research must also recognize that the decision to privatize corrections cannot be solely attributed to "an ideological commitment to privatization" (Mattera et al., 2001: 7). In other words, while privatization may be driven by political or ideological factors (Price and Riccucci, 2005) the privatization movement may actually reflect criminal justice systems' utilization of it as an economic development tool. This is especially witnessed in economically depressed communities which require this financial and economic aid. However, should this be the case, we must remain cognizant of the fact that such development through prison or jail construction generally or privatization specifically unfortunately does not by any means guarantee the generation of economic value for these communities (Mattera et al., 2001; Price and Schwester, 2010; Russell, 2017). Further empirical studies and policies generated going forward must ensure the public becomes aware of the philosophies, goals, and politics underpinning such development of prison infrastructure.

Indeed, discussions of urban versus rural communities and the human vulnerability they face from privatized corrections must be redressed in the privatization debate. For example, "[h]undreds of rural communities have chased after the illusion that constructing a prison or jail will jumpstart their ailing economies" (Gottschalk, 2015: 31), and rural prison development contributes to the pervasive depiction of economic viability and attempts to bolster political power within rural areas. However, such development also reinforces "forms of punishment that destabilize poor urban neighborhoods and harm politically marginalized populations" (Thorpe, 2015: 618). Developing prison infrastructure in economically distressed communities—particularly rural ones—rests on the back of a carceral state which upholds a system of racial hierarchy and class stratification, and while political representatives have powerful interests in protecting rural prison investments, they do so regardless of their actual economic impact in host

(rural) communities (Thorpe, 2015). In effect, an expansive carceral state and the further privatization of corrections have become immediate and short-term political remedies to rural poverty in an increasingly deregulated, globalized economy. While rural prison development continues to supply jobs, revenue, and crucial wealth transfers in particularly vulnerable areas, it also connects "the immediate stability of lower-class, rural Whites to the continued incarceration of predominantly poor urban minorities" (Thorpe, 2015: 631). Going forward, public policy must include public involvement in determining whether the detrimental connection between rural and urban communities should persist, and how to best support the needs of both communities in a more ethical and just manner. We must continue to ask ourselves whether it is ethical to address and bolster the needs of one group while hampering the life opportunities of another. Furthermore, a startling number of prisons have been built on active and former coal mines, coal ash dumps, and other environmentally hazardous locations (for examples, see Russell, 2017). Long-term confinement in these rural areas "poses severe and demonstrable health risks to the inmate populations through exposure to polluted air and water" (Russell, 2017: 741). Following on from such ethical considerations, public policy must also re-examine whether planning prison infrastructure development in locations "bearing environmental risks known to cause serious illness and death constitutes cruel and unusual punishment" towards inmate populations (Russell, 2017: 741).

Finally, it is also imperative that everything is done to assure that offenders, in prison or upon release, are no longer a threat to themselves or to society. Policies and programmes which emphasize therapeutic integrity and the principles of effective intervention are intended to not only assist offenders, but also their loved ones, ranging from parents and children to neighbours and their communities as a whole (Lipsey, 2003; Petersilia, 2003). Should privatizing corrections

have a viable future, policymakers could do more to spur greater attention towards rehabilitation and treatment to enhance public safety and the collective good, regardless if the offender requires or seeks services from the public or private sector. Doing so provides another option for the general public to get involved in debates on how to deal with people in trouble, providing opportunities to produce meaningful change in how we speak and think about the purposes and uses for rehabilitation and punishment in our society.

Conclusion

We recognize that, like much of criminology, an academic focus upon punishment "is characterized less by a settled research agenda and agreed parameters of study than by a noisy clash of perspectives and an apparently incorrigible conflict of different interpretations and varying points of view" (Garland, 1991: 121). Contemporary criminology inhabits a rapidly changing world, and criminologists—particularly those who draw upon a sociological tradition—continue to "ground their analyses in a nuanced sense of the world as it is, and as it is becoming" (Garland and Sparks, 2000: 189). There remain intellectual challenges for criminology that are difficult and discomfiting, but which are ultimately too concerning to ignore, especially for the progression of contemporary social thought and public policy.

We - as academics, practitioners and citizens - need to talk about punishment in general, and about the challenges of its private provision in particular. The construction of the carceral state resulted from a complex set of developments: "No single factor explains its rise, and no single factor will bring about its demise" (Gottschalk, 2015b: 34). However, while the carceral state may be exceptional in its size and tenacity, "many of the political, economic, and social forces

that sustain it and stand in the way of genuine penal reform are not" (Gottschalk, 2015b: 39). Greater attention towards the benefits and issues undergirding privatization, from philosophical and ethical standpoints, has the potential to reawaken public interest in and sensibilities towards how we punish, on whom punishment falls, and whether the punishment we espouse is fair, just, and appropriate in its application (Ramsey, 2016). Crime and punishment "play such integrative roles in the politics of contemporary societies, are so deeply entangled with our daily routines, so deeply lodged in our emotional lives, so vividly represented in our cultural imagination" (Garland and Sparks, 2000: 190), that they demand continual, ethically-alert monitoring. Any major changes to penal practices, sensibilities, and penal culture will require a multidimensional approach, where all components and actors of the criminal justice system must reconsider the aims and philosophies of punishment and imprisonment. Without this collaborative coordination of thought change we will remain playing "a complex and often futile game of 'Whack-a-Mole'" insofar as single-minded attention on reforming any one or several pieces of the system will not necessarily have the desired result sought (Gottschalk, 2015b: 44).

According to Wright (2010: 74), private prisons, as one of the main areas of privatizing corrections, "are here to stay irrespective of empirical findings for or against their existence in the corrections industry." Perhaps he is correct in this assertion, and if this is the case, it is not an overwhelmingly positive answer to many of the questions posed in the beginning of the paper, or to the existing empirical accounts opposed to privatizing corrections. Yet perhaps Wright is not right that private prisons, as one branch of the correctional tree, are 'here to stay', or not at least forever. As our paper has demonstrated, the philosophical grounds and ethical considerations for or against privatizing corrections rely upon particular forms of punishment surviving throughout socio-political, historical and cultural developments in crime control and penal policies.

Drawing upon Garland (1990) the persistence of punishment rests upon our ability as a society to critically query "our deep attachment to [punishment] and its centrality within our culture, vocabulary, and sensibilities" (Sparks, 1994:19). How we view punishment and imprisonment (private or otherwise) speaks to how we understand its function within society and the processes of legitimacy it negotiates with us continually. Such processes are not stable, fixed, or total; there may be one day where the privatization of corrections is considered irreconcilable with societal goals, demands, and sensibilities. Indeed, to cast away the notion of privatizing corrections may result in certain forms of punishment finally passing away as well. One day we may actually uproot the current correctional tree and plant a healthier, humane replacement in its wake.

Perhaps this will come to fruition, and perhaps not; nevertheless, we endorse "more socially conscious and morally charged perceptions of penal affairs" (Garland, 1991: 161). Such penological thinking also incorporates and enriches more capacious conceptions of legitimacy, insofar as it these perceptions carry "an open and dialectical awareness of change, such that every time an attempt at legitimation…appears to promise a new settlement one can begin to discern within it the outlines of another emergent set of issues and possibilities and to reach towards them" (Sparks, 1994: 26). If we remain at all interested in the assertion that "the very purpose of producing knowledge about the social world is to change it" (Garland and Young, 1983: 32) then in this spirit, we must continue to question the legitimacy of penal arrangements in general, and both the public and private systems devised for its delivery in particular. The story of privatization is not a new one, but the continuity and persistence of privatization is another matter we must all face.

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