

## *Durkheim, punishment, and prison privatization*

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**DURKHEIM, PUNISHMENT, AND PRISON PRIVATIZATION**

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**ABSTRACT**

In a seminal statement, Emile Durkheim argued that punishment of crime has a salutary effect on society by reaffirming the collective consciousness. With few exceptions, Durkheim assumed that criminal punishment is done on behalf of society. With the rise of prison privatization, this assumption is increasingly called into question. For-profit firms carrying out punishment, though legally agents of the state, are motivated by private gain. This article asks: *How might privatization modify the functional effects of punishment?* It develops answers to this question by using insights from Durkheimian and neo-Durkheimian scholarship and the empirical case of modern privatized punishment in the United States. The article proposes three trajectories through which privatized punishment may (or may not) affect solidarity: *Parity in Punishment*, in which private and public punishers are seen as interchangeable; *Public Interest*, in which perceptions of greed and self-interest mar privatized punishment and sap it of its functional effects; and *Sacred Transgressions*, in which the private sector encroaches on sacred rites of punishment to the detriment of solidarity.

**Keywords:** privatization; private prisons; punishment; Durkheim; culture

### DURKHEIM, PUNISHMENT, AND PRISON PRIVATIZATION

Much recent sociological research on punishment owes a debt to Emile Durkheim. As David Garland recently wrote, "Punishment and society scholarship takes as its analytic starting point Emile Durkheim's theory of punishment and social solidarity" (Garland 2013:23). This paper takes up some of Durkheim's central claims about crime and punishment, first laid out in *Division of Labor in Society* (Durkheim [1893] 1997), and considers them in light of modern-day privatization of punishment. Durkheim's major claim, as elaborated in *Division*, is that criminal punishment is functional for a society. While crime immediately degrades and attacks society's shared beliefs, the subsequent act of punishing a crime revivifies society by reaffirming shared moral understandings of right and wrong. By dramatizing the violation, punishment firms up the bounds between the acceptable behaviors of upstanding citizens and the intolerable behaviors of criminals.

While Durkheim wrote at length on criminal punishment, he gave little attention to the identity of the entity administering punishment. Governments increasingly contract with private organizations—often operating for private profit—to carry out state-mandated criminal punishment. Such an arrangement raises a number of questions regarding the relationship between criminal punishment and social solidarity. What happens when ritualized ceremonies of punishment are carried out by non-state actors? What happens when punishers are motivated by private profit instead of (or perhaps in addition to) the health of society as a whole? What happens when punishment looks less like a public ceremony and more like a business enterprise? The expanded use of

*privatized punishment*<sup>1</sup> serves as a catalyst to rethink Durkheim's theory of criminal punishment in an era of neoliberal governance (Greenhouse 2011:181; Harcourt 2011; Wacquant 2010).

Incorporating Durkheimian and neo-Durkheimian insights, we develop three cultural trajectories through which privatized punishment may bolster or degrade social solidarity. These trajectories focus attention on the cultural meanings broadcast by privatized punishment and received by citizens. In the first trajectory, *Parity in Punishment*, private firms and public agencies are seen by the public as interchangeable in the practice of punishment. In this trajectory, privatization leaves the message of punishment unaltered and therefore has no deleterious effects on solidarity. In the second trajectory, *Public Interest*, private punishment firms are seen as acting out of a sense of greed and disregard for public welfare. In this trajectory, privatization degrades solidarity by virtue of its perceived self-interest and rapacity. In the third trajectory, *Sacred Transgressions*, privatized punishment is seen as encroaching on the most sacred forms of punishment, which are imposed on criminals beyond the pale. Here, privatization debases solidarity to the extent that private actors are allowed to punish society's most vile offenders.

This article makes three contributions. First, it extends Durkheimian theorizing to explicitly consider the possibility that the identity of a punisher moderates the supposed relationship between punishment and social solidarity. Second, the article shifts our focus away from observable performance indicators to the meanings and narratives surrounding privatized punishment. In doing so, it argues for increased cultural analysis of privatized

punishment, which may shed light on its potentially destabilizing consequences. Third, in explicating three cultural trajectories, it offers a guide to future empirical research on punishment, social solidarity, and the cultural narratives that link the two. The article first reviews Durkheim's major statements on punishment and the state. It then reviews neo-Durkheimian scholarship on punishment, which calls attention to cultural narratives and meaning. The article then introduces the empirical case of privatized punishment in the United States, which serves to focus our theorizing of the three cultural trajectories.

### **DURKHEIM ON CRIME, PUNISHMENT, AND STATE POWER**

For Durkheim, crime and punishment are inseparable. Durkheim defined crime as an act that offends the collective consciousness--"[t]he totality of beliefs and sentiments common to the average members of a society [which] forms a determinate system with a life of its own" (Durkheim [1893] 1997:38–39). Crime, in offending these sentiments, "provokes against the perpetrator the characteristic reaction known as punishment" (Durkheim [1893] 1997:31), defined by Durkheim as "a reaction of passionate feeling, graduated in intensity, which society exerts through the mediation of an organized body over those of its members who have violated certain rules of conduct"([1893] 1997:52). While punishment affects the person punished, it "is above all intended to have its effects upon honest people" (Durkheim [1893] 1997:63). When a crime offends the collective consciousness, the emotional response of punishment reaffirms the collective values and beliefs that were infringed, and, in doing so, bolsters social solidarity, which Durkheim described as "a certain number of states of consciousness [that] are common to all

members of the same society” (Durkheim [1893] 1997:64). Because crime offends *deeply felt* sentiments, the response must be passionate. “A mere re-establishment of the order that has been disturbed cannot suffice. We need a more violent form of satisfaction... [I]t is thanks to the intensity of its [society's] reaction that it recovers, maintaining the same level of vitality” (Durkheim [1893] 1997:55). This emotional response to a crime is thus necessary for a well-functioning society.<sup>2</sup>

Can the state delegate authority to punish? Durkheim (1958) viewed the state as society's agent, although he acknowledged that it may delegate powers. In *Professional Ethics and Civic Morals*, he wrote: “the State does not execute anything... [T]hey give the orders for action to be taken. They co-ordinate ideas and sentiments, from these they frame decisions and transmit these decisions to other agencies that carry them out” (Durkheim 1958:50–1). *To whom* may the state delegate critical societal responsibilities? Certainly Durkheim had in mind government agencies charged with administering regulations and carrying out mandates (see Cotterrell 1999). But can delegation extend to private actors explicitly motivated by private gain? This is a critical question for a Durkheimian analysis of modern American punishment, in which government increasingly relies of private firms to implement punishment.

A brief aside is in order to justify our application of Durkheim's functional theory of punishment to modern day American society. In Durkheim's evolutionary view of society, affronts to society were felt more intensely and punished more severely in societies characterized by mechanical solidarity and a *repressive* (i.e., punitive) system of law (Cotterrell 1999; Durkheim [1893] 1997). Contemporary American society, in many

respects, operates on the basis of *restitutory* law, which "restor[es] the previous state of affairs [and] re-establish[es] relationships that have been disturbed from their normal state" (Durkheim [1893] 1997:29). This is evident in the American civil justice system, in which private parties bring suit for private harms, and in which compensatory damages are intended to make whole the injured party. Importantly for our purposes, Durkheim viewed legal evolution as a continuum, which can be seen in his roughly chronological account of the development from highly repressive to highly restitutory legal systems (e.g., Durkheim [1900] 1969, [1893] 1997:92–98). By implication, it is unreasonable to believe that any society could abandon repressive law entirely for restitutory law.<sup>3</sup> Furthermore, given the array of punitive responses to crime—harsh sentencing laws (Sutton 2013), overreliance on imprisonment (Clear 2007), punitive attitudes (Frost 2010), use of solitary confinement (Reiter 2012), broad application of collateral sanctions (Ewald 2012)—we are comfortable stating that repressive law is alive and well in the modern U.S. Thus, even in societies with a robust system of restitutory law there remains a space for the functional effect of punishment to operate.

While Durkheim's own writing offers fertile ground for theorizing the cultural effects of punishment, it is lacking in three respects. First, it does not explicate the mechanisms that link punishment to solidarity (Smith 2013:116-118). Second, it assumes that punishment has a positive effect on solidarity. And third, it does not theorize the importance of the punisher's identity. Neo-Durkheimian scholarship can help address the first two omissions, which then allows us to address the third.



## **LINKING PUNISHMENT AND SOCIAL SOLIDARITY: THE IMPORTANCE OF MEANING**

In Durkheim's construction, punishment is assumed to have a functional effect. However, neo-Durkheimian scholars call attention to cases in which punishment becomes dysfunctional. They make two points. First, the cultural effect of punishment depends on the meanings, narratives, and images that are conveyed by the punishing authority and received by the citizenry. Second, the meanings of punishment may become distorted, thereby leading to dysfunction and dissatisfaction. These points have been developed most fully in Philip Smith's work (2008, 2013). For Smith (2008), punishment is a "ritualized effort towards the containment and elimination of pollution" (23), which restores order and reaffirms the sacred in society. In his neo-Durkheimian account, meanings of punishment emerge and change based on the interplay of sacred codes and rites of punishment, which involve the punisher (typically the state), the punished (the criminal), and civil society (the audience and repository of the collective consciousness).

The literature contains numerous examples of fluid cultural narratives surrounding forms of punishment: growing dissatisfaction with public displays of punishment (Pratt 2013; Spierenburg 1984; Smith 2008; Garland 1990); concerns about the scope of the state power (Willis 2008); and the rise and decline of particular execution methods (Smith 2008; Garland 1990, 2010; cf. Lynch 2000). In each of these cases, popular narratives and images led to a change in the meaning of punishment. These forms of punishment, while initially deemed acceptable responses to crime, became polluted and unworkable in an evolving civil society. One aspect of modern punishment

that is subject to shifting penal narratives is the delegation of punishment to private, self-interested actors.

## **PRIVATIZED PUNISHMENT IN THE UNITED STATES**

The private sector has gained increased responsibility for administering punishment in the post-sentencing phase of the American criminal justice system.<sup>4</sup> Privatized prisons—in which a government pays a private firm to manage all incarceration-related responsibilities—have been the most salient and controversial form of privatized punishment in the late modern U.S. (see Logan 1990; Selman and Leighton 2010). They emerged in the 1980s from the confluence of two major trends.<sup>5</sup> The first was the beginning of what would become an unprecedented 30-year rise in incarceration rates (Western 2006), which caused demand for prison beds to outstrip supply. The second strain was an ascendant market-oriented conservatism, which painted government as inept and inefficient and held up the private sector as a superior service provider (Chi and Jasper 1998; President’s Private Sector Survey on Cost Control 1983).

Privatization has reached into other modes of punishment as well. In 1975, Florida became the first state to contract with private firms to supervise probationers in the community (Schloss and Alarid 2007). Today, ten states, mostly in the South, use private firms to provide probation supervision (Lee 2012; Schloss and Alarid 2007).<sup>6</sup> Private firms have managed immigrant detention centers for the Immigration and Naturalization Service (now Immigration and Customs Enforcement, or ICE) since 1980 (Logan 1980). Immigrant detention is not technically punishment; suspected illegal

immigrants are not held for crimes they have committed, but are temporarily detained so that a determination can be made about release or removal (Simanski and Sapp 2011). Nonetheless, detention is coercive and involves forcibly imposing limits on a person's freedom. Today, immigrant detention is a growth area for private corrections industry. The number of detainees held by private firms for ICE tripled between 2002 (4,841) and 2010 (14,814) (Mason 2012). Private firms also operate jails, though they have only managed to take control of roughly two percent of all jail inmates (Stephen and Walsh 2011).

In sum, private actors have gained increasing shares of the punishment market since the 1970s and 1980s. Private firms can be seen operating prisons, jails, community supervision, and immigrant detention centers. Below, we explore how Durkheimian and neo-Durkheimian ideas about punishment, meaning, and solidarity may bear on the privatization of punishment.

## **CULTURAL TRAJECTORIES OF PRIVATIZED PUNISHMENT**

We develop three *cultural trajectories* that may describe the functional effects of privatized punishment. The use of 'trajectories' carries a note of uncertainty. Trajectories are predictable paths, which nonetheless allow for contingencies and changes of course. These trajectories are cultural in the sense that privatized punishment has some effect on social solidarity via the meanings emanating from punishment. These trajectories extend Durkheim's thesis on the function of punishment in two ways. First, they explicitly consider the identity of the punisher as a possible moderating factor in the causal chain

from punishment to social solidarity, describing several ways in which punishment by private actors may (or may not) mitigate the positive societal effects of punishment.

Second, the trajectories incorporate a neo-Durkheimian emphasis on the meanings that are projected by punishment.<sup>7</sup>

We draw on the case of modern privatized punishment in the United States to develop the three trajectories: *Parity in Punishment*, *Public Interest*, and *Sacred Transgressions*. The analysis below does not aim to be a test of the prevalence or salience of the trajectories. Rather, discourse and empirical patterns are used to motivate the conceptual development of the three cultural trajectories. Various secondary data sources are used to document the empirical patterns of privatization, while coverage of privatized punishment in major American newspapers serves as a source of public discourse on the issue.

### ***Parity in Punishment***

The first cultural trajectory, *Parity in Punishment*, claims that the identity of the punishing entity has no implications for the meanings and interpretations of criminal punishment. Prisons, in general, can be understood as places “whose evolution responds to the deep cultural imperative for order and purity” (Smith 2008:89). In this Durkheimian understanding of prisons and punishment, the prison is part of a purification ritual for both society and prisoner. For a prison to properly perform its cultural role, the prisoner’s pollution must be contained and cleansed, but in a way that preserves the sacredness of society and the individuality of the prisoner.

Private and public prisons are not so different in the duties they perform (conditional on the level of security and type of facility). In fact, private contracts generally recreate many if not all of the regulations and legal protections constraining public prisons. Some proponents have even claimed that the private sector performs the functions of punishment at levels superior to the public sector. For example, the executive director of the Association of Private Correctional and Treatment Organizations boasted in 2006 that "44% of privately managed prisons are accredited to the rigorous standards of the American Correctional [Association]; only 10% of public prisons have received that recognition" (Doucette 2006:A34). Provided that private prisons perform the cleansing rituals adequately and on par with public prisons, the messages transmitted by private and public prisons should be the same.

Durkheim's own work on the division of labor motivates this trajectory. With modernization, professions became more specialized and distinct from each other. Occupational types proliferated, creating a more heterogeneous society (Durkheim [1893] 1997:91-92). At the same time, the rise of contract law in modern society expanded the forms of relationships that can occur between two or more entities. The contract is a "regulatory force that is imposed by society and not by individuals: it is a force that becomes ever more weighty and complex" (Durkheim [1893] 1997:158). This view of professional specialization and contractual regulation jibes with modern American society, in which many previously governmental responsibilities—education (Renzulli and Roscigno 2005), welfare (Marwell 2004), military operations (McCoy 2009)—are contracted to private service providers. If prison privatization is just one piece of a

broader move to contract-based governance, then we may expect that contracted punishment will generate the same narratives and images as governmental punishment.

Contemporary writings on neoliberalism in criminal justice also give credence to this trajectory. According to Harcourt (2011:39), ideals of efficiency and freedom have become so hegemonic in modern American society that economic thinking has colored our assumptions about punishment. In fact, Garland (2001:189) has highlighted private prisons as an exemplar of the economic rationality permeating the late modern culture of crime control. This claim is echoed by Dolovich (2009) and Burkhardt (2014), who have documented how cost effectiveness has become the overriding concern in debates over privatized prisons. Such claims have come from private industry (Doctor Crants, the chairman of Corrections Corporation of America [CCA]: “The cost competition showed that we were a little bit cheaper, and the performance evaluation showed that we were a little bit better [than a public facility]” (Marx 1995:1)); from justice system officials (Montgomery County, Texas, Judge Alan Sadler: “A private company can do this more efficiently than government” (Kuhles 2005:1)); and news media (*Los Angeles Times* Editorial Board (2002:B10): “[T]here is growing evidence that private prisons, for some uses, are cost-effective. How can politicians ignore this alternative?”). The neoliberal critique is most biting when it takes aim directly at the public sector. For example, one letter to the editor excoriated public prison guards in California to make a case for privatization: “the 34% increase in wages and its \$500 million a year cost to taxpayers is criminal” (Wood 2003:B.18).

Beyond efficiency, many critics question the efficacy of the state's response to crime. Private actors have increasingly taken on criminal justice tasks (e.g., private security, target hardening, surveillance), in part because of the perceived failings of the central state and its inability to properly address the problem of crime (Carlson 2012; Garland 1996, 2001; cf. Wacquant 2010). The relative performance of the private sector is thus cast against the failings of the public sector. CCA's Doctor Crants made precisely this point in 1991, saying, "Quite simply, the influx of new inmates is outstripping the ability of government to build new beds...*The government needs us badly, as do the taxpayers,*" (emphasis added, Buursma 1991:3).

If indeed efficiency, efficacy, and economic rationality have come to define modern punishment, then privatization may do little to disrupt the messages conveyed by criminal punishment.<sup>8</sup> However, if privatization does call into question the meaning of punishment, it is likely to do so according to one of two trajectories.

### ***Public Interest***

Durkheim viewed state-sponsored punishment as a reflection of society: "The power to react [to crime], which is available to the functions of government...is only an emanation of the power diffused throughout society, since it springs from it. The one power is no more than the reflection of the other" (Durkheim [1893] 1997:60). Our second trajectory, *Public Interest*, draws on this idea to consider the perceived correspondence between the private entity and society. While government agencies are generally assumed to act on behalf of society, the same may not be true for private punishers. We expect the meanings of privatized punishment to be enhanced to the extent

that private punishers are seen as *acting in the public interest*. To the extent that private punishers are perceived to be acting on behalf of *private* investors, and not on behalf of society, we expect that privatization will degrade the image of punishment.

In political struggles, opponents attempt to characterize particular actors and institutions as violating sacred democratic codes in civil society (Alexander and Smith 1993:165; Smith 2008). At the same time, they “shield themselves behind the discourse of democracy” in order to bolster their own claims (Alexander and Smith 1993:165). At the intersection of punishment and privatization, such contestation will involve attempts to brand privatized punishment as working to serve private interests rather than the public good. If privatized punishment is deemed to be a *private act*, then its image as a societal good may be tarnished. If private actors are perceived as being overly avaricious, unusually cruel, or sacrificing quality in the name of profit, the punishment ritual will break down as roles of punisher and punished change characterization (Smith 2008). For example, one 1999 letter to the editor of the *Los Angeles Times* stated, “Society (government) has a responsibility to both the prisoner and the public, not to stockholders of a for-profit enterprise” (Kania 1999:6). This profit motivation may further be viewed as the source of operational deficiencies, as when the president of the Harris County [Texas] Deputy Sheriff’s Union claimed: “Their [private jail operators] goal is to make money for the company, for the investors. They’re going to have to cut something to make a profit. What are they going to cut?” (Stinebaker 1995:1). A later op-ed raised the issue of democratic accountability, saying that “[s]elf-interested private profiteers are not answerable to the public and shouldn’t be given the job of locking



people up. What's next, contracting out the Highway Patrol and police?" (Fama 2007:A.25). Critics of privatization lack trust in private companies to act in the public interest, and they defend the government as a valued and necessary actor in tasks as weighty as punishment. Through these critiques, the (privatized) punishment ritual may become spoiled.

However, if private punishment firms can be successfully painted as *servicing the public interest*, then privatization should not detract from the beneficial nature of punishment. Private corrections companies actively engage in crafting a civic-minded image. CCA's website touts the company's "social responsibility" by listing a series of accomplishments: charitable giving exceeding \$1.5 million a year; community relations committees containing local stakeholders; major provider of tax revenue; provision of employee-volunteers for local charities and civic organizations; and even environmental stewardship ("CCA uses environmentally responsible construction and best practices that reduce energy and water consumption, curb waste through recycling and repurposing systems, and protect the local ecology") (CCA 2013). The corrections division of Management & Training Corporation calls itself "a leader in social impact." To this end, it "give[s] thousands of offenders an opportunity to change their lives", allows staff and offenders to provide more than 850,000 hours of community service, and provides nearly \$250,000 to local charities (Management & Training Corporation 2015). Thus, according to these industry narratives, privatization contributes to the betterment of society.

The distinction between for-profit and not-for-profit firms may inform perceptions and narratives of privatized punishment and the public interest. Today, the

private punishment industry comprises both for-profit firms and not-for-profit organizations. The two largest for-profit firms in the industry are Corrections Corporation of America (CCA), and the GEO Group (formerly Wackenhut Corrections Corporation) (Culp 2009), both of which are publicly traded companies listed on the New York Stock Exchange. Not all private corrections firms operate for profit, though. Not-for-profit operators include the Salvation Army, Dismas Charities, and other organizations.

A for-profit firm can easily be characterized as acting exclusively (or primarily) for private gain (e.g., Carlsen 2012; Hartney and Glesmann 2012). Such perceived motivations may diminish the sense that punishment is redressing harm done to society. Not-for-profit firms could more plausibly be painted as serving the interest of society and working to redress societal harms (Armstrong 2002). While these organizations have an interest in remaining viable, they are not driven primarily by the desire to maximize profits. One writer advocated private, not-for-profit prisons, in a 1997 *New York Times* op-ed:

“There are at least 25 foundations in the United States with assets exceeding \$1 billion. Why would any one of them take up the challenge of creating a penal institution that rehabilitates prisoners? [...] Because as charitable, civic-minded organizations, their duty and privilege is to promote the public good. Imagine a prison that actually returned inmates to society as better people than when they went in. Now that's a public service if ever there was one” (Moran 1997:23).

Given the symbolically important distinction between for-profit and non-profit organizations, it is possible any salutary effects of privatized punishment are in part contingent on the business model employed.

The Public Interest trajectory allows for regional variation in perceptions of the public interest. American criminal justice is highly localized. Variable local cultures permit variable criminal justice policies (Garland 2010; Lynch 2010; Smith 2013). In jurisdictions that are most permissive of privatized punishment, the public may simply interpret and understand private corrections firms as *acting on behalf of the public*. Conversely, citizens in these jurisdictions may distrust government actors and view them as no less self-serving than private businesses (e.g., Lynch 2004:264-265). However, in other jurisdictions (for example, those with a strong history of organized labor), citizens may perceive a bright line separating the public sector and the private sector, with the latter serving distinctly and exclusively private ends. In these cases we would expect privatization to lead to questions about the true function of punishment, as when a union representative wrote in 1994:

“The 60,000 members of AFSCME Corrections United, the men and women who work in government-run prisons [...] have only one goal when they go to work: to protect the outside world from these prisoners. They always have an eye on our security, never on their profit sharing” (Puma 1994:7).<sup>9</sup>

### ***Sacred Transgressions***

*Sacred Transgressions* considers the severity of a crime as a moderating factor between privatized punishment and solidarity. Durkheim wrote, "If the feeling that has been denied [by a crime] is weak, or is only weakly offended, it can only provoke a weak concentration of those consciousnesses that have been outraged. However, quite the contrary occurs if the state of feeling is strongly offended and if the offence is grave: the

entire group attacked closes ranks in the face of danger and, in a manner of speaking, clings together" (Durkheim [1893] 1997:59). This formulation implies that the intensity of passion involved in punishment is calibrated to the level of offense done by the criminal. Crimes that do not deeply offend society may trigger a less passionate punishment; crimes that directly touch the nerves of society may provoke a severe and passionate form of punishment.

We speculate that privatized punishment will affect the meanings and interpretations of punishment *only when it is applied to crimes that deeply offend society and that trigger a highly passionate response*. When sacred values and codes are violated, a truly collective response in the form of state punishment is needed for the cultural functions of punishment to be most effective. Examples of such sacred transgressions could involve acts of terrorism, treason, or particularly brutal and callous acts. These types of crimes stir up highly passionate feelings among the public, and are broadly conceived as offenses to the sacred values of society.

The difficulty of turning over sacred duties to the private sector is implied by the current division of labor in corrections, in which the private sector largely carries out low-level punishments against low-risk offenders (Blakely and Bumphus 2004). Private firms have been much more successful at taking over community corrections facilities, in which low-level offenders are allowed to leave the facility unaccompanied (e.g., halfway houses, work release centers, custodial treatment centers), compared to confinement facilities, which severely curtail inmates' freedom of movement. For example, in 2005, 42 percent of all inmates in community corrections facilities were held by the private

sector; the comparable figure for inmates in confinement facilities was only seven percent (Burkhardt 2012). Calculations based on data from the Bureau of Justice Statistics (2009) reveal that, in 2005, private firms operated none of the 22 supermax facilities (which house the most troublesome offenders) and less than two percent of the 350 maximum or high security prisons in the U.S.<sup>10</sup> Additionally, government has retained control over the Guantanamo Bay prison, which (as the official narrative goes) houses the terrorists who pose too great a threat to be released.<sup>11</sup>

Perhaps the ultimate form of punishment is execution. This sanction has been untouched by private contractors, in two ways. First, government does not contract with the private sector to perform the executions (Aman Jr. 2009:105; Denno 2002; Jouvenal 2013). No private firms, to our knowledge, have offered to serve as executioners-for-hire.<sup>12</sup> The absurdity of privatizing execution duties was the subject of a satirical *New York Times* op-ed written by playwright Arthur Miller in 1992. Titled "Get It Right. Privatize Executions.", the piece begins:

"The time has come to consider the privatization of executions.

There can no longer be any doubt that government -- society itself -- is incapable of doing anything right, and this certainly applies to the executions of convicted criminals.

At present, the thing is a total loss, to the convicted person, to his family and to society. It need not be so." (Miller 1992)

Miller then proceeds to detail his sardonic vision for the events, which would occur at Shea Stadium and be preceded by a rendition of "The Star-Spangled Banner." Miller's satire highlights both the sacredness of individual life and the profaneness of a commercialized death. In addition to executions themselves, government still retains

control over inmates on death row waiting to be executed. Although Arizona and Mississippi recently became the first two states to propose allowing private firms to hold death row inmates, the proposals in both states stalled and died (*Mississippi Press* Editorial Board 2012; Steinhauer 2009).

While it may be symbolically potent for the state (or its public agencies) to punish terrorists, traitors, or mass murderers, since these have committed offenses *against society*, privatized punishment may be adequate for carrying out society's reaction against lower-level offenses (e.g., larceny, drug abuse, drunk driving). These crimes represent minor challenges to the sacred, and as such, may be handled by non-state actors. These gradations of severity were raised in 1986 by a California Department of Corrections representative, who defended a proposed private facility by saying,

"Our intent is to house 100 extremely low-risk parolees at Artisan Oaks. They will be the kind of inmates who do not warrant adjudication through the courts. They will be returned to custody by their parole officers for minor violations for a maximum of six months." (Barker 1986:6)

The example emphasizes the triviality of the offenses as a means of justifying the private detention, implicitly acknowledging that more serious offenders would not be acceptable.<sup>13</sup>

A corollary of the Sacred Transgressions trajectory is that privatization does not detract from punishment of mundane offenses because the response is conceived as *rehabilitative*. Kevin Wright (2009) has argued that private prisons provide an opportunity to revive and enhance rehabilitation efforts in corrections. Such efforts, he argues, will go a long way toward increasing the legitimacy of private prisons; "punishment for profit' would be replaced with 'rehabilitation for profit'" (83). Consider

the case of drug abusers, whose offense is increasingly viewed as a medical or public health issue and therefore less deserving of punishment.

One manifestation of the rehabilitative stance toward such offenders is the drug court, in which offenders are (typically) ordered to complete a treatment program in lieu of incarceration (Huddleston, Marlowe, and Casebolt 2008). While drug courts themselves operate under governmental auspices, the treatment programs are typically private (Roman, Ducharme, and Knudsen 2006). Such treatment centers are big business. In a recent example, private equity firm Bain Capital bought a chain of substance abuse treatment facilities (Habit OPCO, Inc.) for \$58 million via its company CRC Health, the largest provider of substance abuse and behavioral health treatment in the country (Healy 2014). A representative from CRC explained how the company managed to become a leader in responding to substance abuse: "We've pretty much convinced the country now that this is a health care issue. This isn't about bad people trying to become good. This is about ill people trying to get well" (Deni Carise quoted in Healy 2014). Such a narrative shifts the nature of the offense from criminal to medical, and thereby shifts the response from punitive to rehabilitative. To the extent that societal responses to low-level offenders are perceived as rehabilitative rather than (or perhaps as well as) punitive, privatization will not disrupt social solidarity because the response itself is not seen as punishment.<sup>14</sup>

The distinction between rehabilitation and punishment is also embodied in Illinois' statutory prohibition on privately operated prisons (one of two such bans, the other being in New York). The text of the law provides a rationale for the ban:

“The General Assembly hereby finds and declares that the management and operation of a correctional facility or institution involves functions that are inherently governmental. The imposition of punishment on errant citizens through incarceration requires the State, any unit of local government or a county sheriff, to exercise its coercive police powers over individuals and is thus distinguishable from privatization in other areas of government.” (Illinois Compiled Statutes n.d.:140/2)

It then proceeds to enumerate exceptions to the ban, the first of which is "state work release centers or juvenile residential facilities that provide separate *care* or special *treatment* operated in whole or part by private contractors" (Illinois Compiled Statutes n.d.:140/3, emphasis added).

Because private actors have rarely been called on to punish those convicted of more serious crimes, empirical examples of the Sacred Transgressions narrative are hard to come by. A functionalist interpretation, faithful to Durkheim, would suggest that the absence of privatized punishment of heinous offenders is precisely due to the special need for *society* to punish sacred transgressions. On this account, any arrangement to the contrary—privatized punishment for "the worst of the worst"—would not persist for long. An alternative explanation would point to pragmatic concerns about safety and security as the operative factor in keeping the punishment of sacred transgressions in the hands of government. This alternative explanation would argue that private businesses—whether because of a corrupting profit motive or simply inexperience—are incapable of punishing the most serious offenders while simultaneously keeping the public safe. In effect, such an explanation represents the converse of assertions of declining state power to control crime (Carlson 2012; Garland 1996); *private firms* cannot keep us safe. These two explanations for the absence of privatized punishment of sacred transgressions need



not be mutually exclusive. Citizens may be justifiably concerned about the ability of a private business to securely detain wicked offenders, while simultaneously feel intuitively that the punishment is best delivered by a *public* entity. Whatever the underlying justification for such concerns, this third trajectory suggests that punishment of the most heinous offenders will remain in government hands for the foreseeable future.

## CONCLUSION

While Durkheim wrote *The Division of Labor in Society* nearly 90 years before the first privately operated prisons in the modern United States, his theory of the functions of punishment provides a foundation for a cultural analysis of privatized punishment. Durkheim ([1893] 1997) argued that punishment of crime helps to heal society following a deeply offensive act (i.e., crime). Punishment reaffirms the bounds between right and wrong behavior, and reminds both the criminal and "honest people" (Durkheim [1893] 1997:63) that society has standards and will not tolerate affronts to those standards. Durkheim assumed that punishment would flow from some sovereign power (e.g., the state) acting on behalf of society. And while Durkheim acknowledged that punishment may be routinized and delegated to specialist agencies, he did not discuss in detail how that delegation might work.

This article has examined the issue of delegation in light of recent American experimentation with privatized punishment, in which private firms enter into contracts with the government to carry out state-sanctioned punishment of offenders. Given the fluidity of narratives and symbols surrounding punishment, any beneficial effects that

punishment may have on social solidarity will be contingent on the meanings that are broadcast and received. Of the three cultural trajectories presented, only one sees private actors effectively carrying out the functions of traditional punishment (*parity in punishment*). The other two trajectories describe a shift in the meaning of privatized punishment in such a way that would detract from its functional effects. First, narratives surrounding privatized punishment may be distorted by perceptions that the private punishers are not acting in the *public interest*. To the extent that private punishment firms are generally perceived as serving private ends (rather than public ones), privatized punishment will prove detrimental to social solidarity. Second, the meaning of privatized punishment may depend on the crimes to which it applies. For *sacred transgressions*, punishment by private actors may be intolerable; for more mundane offenses, punishment (or rehabilitation) by private actors may provoke little to no controversy.

This meaning-centric analysis of punishment is in stark contrast to dominant neoliberal discourses of punishment. The latter focus all attention on efficiencies, costs, and measurable performance (see Burkhardt 2014; Dolovich 2009; Garland 2001:188–190). In the context of neoliberal punishment, the punished become expenses to be minimized (Aviram 2015) or, worse, sources of revenue to be maximized (Page and Soss 2015). This neoliberal perspective elides any deeper questions about symbols, morals, or justice, and in doing so enables non-state actors to assume the role of punisher. While elites may push this neoliberal ideology (Beckett and Sasson 2000; Hawdon and Wood 2014), there is no guarantee that it will resonate with the public (e.g., Smith 2008). A single-minded focus on efficiency may have two negative systemic consequences. First,

it may contribute to inequality, with the state facilitating private predation of already marginalized populations (for example, through extensive use of fines and other "legal financial obligations"; see Harris, Evans, and Beckett 2010, Page and Soss 2015). The resulting disruption of communities, trust, and social networks may in turn prove criminogenic (Clear 2007; Sampson 2013; Sampson, Raudenbush, and Earls 1997).

Second, and central to this article, a focus on efficiency provides discursive support for market-based solutions that may alter the meaning of punishment itself and thereby diminish its potentially restorative qualities. This latter possibility should serve as fertile ground for future (neo-)Durkheimian research. This article has used Durkheim as a starting point in analyzing the cultural significance of privatized punishment, describing several trajectories of meaning. Future writing should work to incorporate neo-Durkheimian concepts and theories into systematic empirical analyses of privatized punishment and its consequences for public opinion and social solidarity. Such an approach will move beyond economic analyses of how privatized punishment performs on standard performance measures and will instead illuminate the cultural consequences of privatized punishment, thereby yielding new insights into the potentially destabilizing force of privatization in punishment.

## ENDNOTES

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<sup>1</sup> We use the term 'privatized' punishment to indicate a contractual relationship between government and a private, non-governmental organization responsible for implementing a state-sanctioned punishment. We intentionally avoid the use of 'private' punishment, which may connote the historical process whereby punishment moved from public venues to private, unseen spaces (Smith 2008; Spierenburg 1984).

<sup>2</sup> While we focus on his assertions regarding the solidarity-enhancing effects of punishment, Durkheim did acknowledge that social inequalities may mitigate these positive effects. In *Division*, he wrote: "If societies attempt—and they should attempt—to eliminate external inequalities as much as possible, it is not only because the undertaking is a noble one, but because in solving this problem their very existence is at stake. For they cannot continue to be sustained unless all their constituent parts are solidly linked, and solidarity is only possible on this condition" ([1893] 1997:315-316). There is now a vast literature documenting ways in which punishment may create and exacerbate inequalities within a society (e.g., Alexander 2010; Clear 2007; Uggen et al. 2006; Wacquant 2010; Western 2006). Therefore, when punishment is based on or contributes to social inequality, its positive effects on solidarity may be attenuated or reversed entirely.

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<sup>3</sup> The claim of a repressive-restitutory continuum parallels recent discussions of the implicit continuity between pre-modern solidarity and modern solidarity in Durkheim's oeuvre (e.g., Greenhouse 2011:179-180; Schiermer 2015).

<sup>4</sup> Privatized punishment merely denotes that private firms administer state-sanctioned punishment; prosecution, conviction, and sentencing still lie in the hands of governmental actors.

<sup>5</sup> Privatized punishment has a long history. For example, private shipping merchants administered the English transportation system in the 17<sup>th</sup> century (Feeley 2002), and private landowners and businessmen enacted the convict leasing system in 19<sup>th</sup> century American states (Hallett 2006). Our concern in this section is the modern manifestation of privatized punishment in the U.S., which represents a break from a long period of government monopoly over administering punishment.

<sup>6</sup> Unlike probation, though, private companies have been unsuccessful in taking over responsibility for supervising parolees released from prison (Lee 2012).

<sup>7</sup> We assume that modern American corrections is characterized partly (but not solely) by punishment. We acknowledge recent emphases on "evidence-based" practices and prisoner re-entry programming in corrections.

<sup>8</sup> The Parity in Punishment hypothesis leaves open the possibility that the implementation of punishment—private or public—is inconsequential for solidarity, contra Durkheim. Garland (1990:71), for example, has argued that the *determination* of punishment (i.e.,

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sentencing) has become more culturally consequential than the *implementation* of punishment.

<sup>9</sup> The presence of an active labor union for prison guards also allows for a countervailing narrative: unions exist to protect their professional turf and pad their members' wallets (Page 2011). For example, one *Los Angeles Times* (1988:2) editorial said, "The objections of public employee unions [to a private jail], possibly the most formidable, perhaps can be dismissed as self-interest."

<sup>10</sup> Jails do not fit neatly into the more or less punitive spectrum. Because they must hold suspects before trial, jails must be capable of holding both high-risk and low-risk suspects. Private operation of jails has remained minimal, with roughly two percent of American jails operated by private firms (Stephan and Walsh 2011).

<sup>11</sup> Private firms also provide security forces in foreign interventions (Benoit 2014; McCoy 2009). However, since such operations do not represent punishment (as used here), they fall outside the scope of this article.

<sup>12</sup> While private individuals have served as executioners at times in American history, none has attempted to turn this into a full-fledged business venture, much less an investment opportunity. Even this claim, however, must remain tentative, as case law and statutes generally protect the identities of executioners (Roko 2007).

<sup>13</sup> Offense severity is conceptually distinct from public safety risk; the former is concerned with violations already committed, the latter with potential future violations. Empirically, however, these two concepts are likely to be tightly coupled.

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<sup>14</sup> For Durkheim, the question of whether rehabilitation is 'punishment' depends on whether the offense was a 'crime'—that is, whether it wounded the collective consciousness and provoked a passionate, organized response (i.e., punishment). If minor offenses, like drug abuse, do not offend the collective consciousness and provoke a passionate, organized response, then they should not be considered 'crimes'. Regardless of whether these offenses are low-level 'crimes' or 'non-crimes', punishment (and its privatization) should have relatively minor effects on solidarity.

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