

# INDUSTRIALISM AND MODERN SOCIETY



A STUDY IN SOCIAL THEORY

## Punishment and Social Solidarity

*The Work of Emile Durkheim*

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Émile Durkheim's legacy to the sociology of punishment is an ambiguous one. On the one hand, Durkheim did more than anyone else to develop a sociological account of punishment and to emphasize the social importance of penal institutions. On the other hand, many of his interpretations appear flawed in important respects and, recently at least, have been pushed aside by more critical accounts of the phenomena. My intention in this chapter and the next is to rework the Durkheimian legacy, showing that despite its faults it has important insights to offer. I will be arguing that despite the limitations of Durkheim's theory and the conceptual vocabulary in which it is phrased, his work nevertheless opens up perspectives and indicates connections which can help us come to terms with the foundations of punishment and some of its social functions and meanings. My discussion of Durkheim's work is thus undertaken not as an end in itself but as a first step towards the construction of a more adequate framework for the analysis of penalty.

### 1. AN INTRODUCTION TO DURKHEIM'S SOCIOLOGY

More than any other social theorist, Durkheim took punishment to be a central object of sociological analysis and he accorded it a privileged place in his theoretical framework, returning to it again and again as his life's work progressed. This analytical concern with punishment came about because, for Durkheim, punishment was an institution which was connected to the very heart of society. Penal sanctioning represented for him a tangible example of the 'collective conscience' at work, in a process that both expressed and regenerated society's values. By analysing the forms and functions of punishment, the sociologist could gain systematic insights into the otherwise ineffable core of the moral life around which community and social solidarity were formed. Thus, in the processes and rituals of penalty, Durkheim claimed to have found a key to the analysis of society itself.

Durkheim, of course, had a very specific conception of society and pursued a particular line of sociological enquiry. He was concerned, above all, to uncover the sources of social solidarity which were, for him, the fundamental conditions of collective life and social cohesion. For Durkheim, society and its patterned forms of mutual interaction can only function if there first exists a shared framework of meanings and moralities. Without such a framework, social life is inconceivable, as even the most elementary exchanges between individuals require an agreed set of norms within which they can take place. These social norms and 'collective representations' are not fortuitous or self-determining, but are instead an aspect of the forms of social organization and interaction

which exist at any particular time. As Durkheim puts it at one point, 'the morality of each people is directly related to the social structure of the people practising it'.<sup>1</sup>

The culture and ethics of any society are thus grounded in a particular social organization, thereby forming a functioning social whole. Emergent patterns of social interaction give rise at the same time to shared classification on the part of those involved, so that the categories of conscience and consciousness are constructed in ways which accord with the realities of group life. These emergent categories in turn form the collective framework through which social life can routinely exist and through which individuals are bonded to each other and to society in a cohesive way. In Durkheim's conception, societies thus consist of material forms of life which are understood, sanctioned, and sanctified through the cultural categories to which they give rise. The moral (or mental) aspects and the social (or material) aspects of group life are seen as mutually conditioning and constitutive, and, in normal circumstances, they function together as different dimensions of a cohesive social whole.

It is this distinctive conception that makes Durkheim's work at once a social science and also a 'science of ethics'. His sociology is, above all, concerned with those distinctive moral bonds which for him constitute the truly social aspects of human life. His fundamental object of analysis is the relationship between social moralities and their conditions of existence. This also forms the basis of his 'holistic' approach to society, and his concern to understand aspects of social life in terms of their functional significance for the social whole. Finally, this conception of the moral and the social as two sides of the same coin allows Durkheim to take a particular social practice—such as punishment—and view it as a moral phenomenon operating within the circuits of the moral life, as well as carrying out more mundane social and penal functions.

Within this general understanding of society, Durkheim's more specific concern was to come to terms with the changing forms of solidarity which emerged as societies evolved and their basic structure and organization began to change. In particular, he sought to understand the sources of solidarity in modern societies where the rise of individualism, the specialization of social functions, and the decline of universal religious faith gave the impression of a world without shared categories. His interpretation of this modern situation differed profoundly from that of social conservatives who feared that society was destined to tear itself apart in the clash of individual interests, and who advocated a return to traditional forms of morality and religious faith. On the other hand, he also opposed the views of social utilitarians such as Herbert Spencer who argued that modern society could survive without need of any collective morality, since the untrammelled pursuit of private individual interest would itself produce collective welfare and stability. Against these views, Durkheim asserted that society did indeed require a moral framework,

but that its form and content had to reflect the current conditions of social organization. In large part, he claimed, the division of labour itself had already given rise to a suitable modern morality, centred around the cult of the individual and a cluster of associated values such as freedom, rationality, and tolerance. These moral conceptions had emerged hand in hand with the restructuring of society brought about by industrialization, specialization, and secularization and were already embodied in the thinking and action of individuals. In effect, modern society had begun to produce the morality it required, but it had not done so self-consciously, and further moral developments would be required before the new conditions of social life were fully reflected and made meaningful in the realm of social ethics.<sup>2</sup> The role of sociology was, in Durkheim's view, to produce this modern self-consciousness—to identify the forms of morality to which modern society gave rise, and to facilitate their full development. Its task was thus to identify the sources of social health and to show what action would be needed to promote the optimum functioning of the social organism.

Durkheim's view of society, including modern society, thus centres upon his conception of the moral order and its vital role in social life. He is concerned to show how this moral order functions to constitute individuals and their relationships, how it forms a symbolic centre around which solidarities are formed, and how it is itself transformed over time in keeping with the development of the social division of labour and the material conditions of group life. But the notion of a moral order is, of course, an abstraction—a generic term for a multitude of specific intuitions and categories shared by the members of a community. It is a 'social fact', but not one which can be directly observed or studied in a scientific mode. Consequently, Durkheim was forced to analyse this crucial moral entity indirectly, by reference to other, more tangible, social facts which bore its imprint and were most closely associated with it. In his later works, and in respect of simple societies, Durkheim would turn to religious rites and primitive classifications as a means of studying solidarity through the forms of its expression. But the 'visible index' which he adopted first of all, and which he found most valuable in the analysis of modern society was that of law, and in particular the kinds of sanctions which each law entailed.<sup>3</sup>

In his classic work, *The Division of Labour*, and again in several subsequent essays and lectures, Durkheim conceives of punishment as a straightforward embodiment of society's moral order, and an instance of how that order represents and sustains itself. We are thus presented with a detailed account of punishment's functioning and moral significance (in *The Division of Labour* and

<sup>2</sup> See E. Durkheim, *The Division of Labour in Society* (New York, 1933), p. 228.

<sup>3</sup> See Durkheim, *The Division of Labour*, p. 64. Durkheim argues that the penal sanctions characteristic of 'repressive law' are a manifestation of a strong *conscience collective* and mechanical solidarity. The non-penal sanctions of 'restitutive' law are, on the other hand, indicative of the organic solidarity associated with a developed division of labour.

again in *Moral Education*) as well as a lengthy discussion of the historical evolution of punishment and its connections with the evolution of social types (in 'The Two Laws of Penal Evolution'), all the time connecting the facts of penal practice to the essential constituents and processes of social life. Durkheim thus provides a full-scale sociological account of punishment as a kind of by-product of his concern to substantiate and elaborate his general social theory. Moreover, it is an account which is remarkable in a number of respects, not least in attributing to punishment a moral seriousness and a functional importance for society which far outweigh its contribution as a means of controlling crime.

This Durkheimian conception of punishment, at least in its simplest form, is well known in the sociological and penological literature. Nevertheless, it is rarely taken very seriously as a means of interpreting the forms of punishment in modern society. This is so for several reasons. First of all, Durkheim's account of punishment is clearly generated by his general social theory, and, in a number of important respects, is dependent upon it. This general theory is now widely acknowledged as being deeply problematic at key points, and dissatisfaction with this framework has led many to reject the Durkheimian approach to the study of punishment.<sup>4</sup> Secondly, Durkheim's discussion of punishment implies, and at one point explicitly presents, an evolutionary account of the history of penal law. Subsequent historical studies have shown Durkheim's penal history to be based upon inadequate and misleading data and to present a developmental pattern which is, at least in some respects, quite untenable. Finally, Durkheim's account of punishment seems, at least at first sight, to be more in keeping with 'primitive' than with modern societies. Much of the penological material which he uses is drawn from ancient or small-scale societies—he talks of aborigines, of the laws of Manou, of the ancient Hebrews—and his characterization of penal processes seems to be grounded within this pre-modern world. Thus, in his account, punishment is depicted as a group phenomenon of great intensity. It is supposedly propelled by irrational, emotive forces which sweep up society's members in a passion of moral outrage. Its procedures are depicted as ceremonial rituals with unmistakably religious overtones, undertaken to reaffirm group solidarities and restore the sacred moral order violated by the criminal. Diverging as these scenes may be to the modern reader, they seem to speak more to another world—perhaps a primitive 'anthropological' world—than to the realities of penal practice today. Faced with the mundane appearance of our very utilitarian, very bureaucratic, very professionalized, and very profane institutions of punishment, Durkheim's vision can seem altogether inappropriate.

All these considerations have tended to make Durkheim's interpretation of punishment well known but little used. And like all theories which survive in

<sup>4</sup> See e.g. my 'Durkheim's Theory of Punishment: A Critique' in D. Garland and P. Young (eds.), *The Power to Punish* (London, 1983), which is at pains to reject the Durkheimian framework, even though it stresses some positive aspects of Durkheim's work.

classroom textbooks rather than in research and serious discussion, this important interpretation has come to be more and more bowdlerized as time has gone on. The extensive discussion of Durkheim's work which I will present here is an attempt to recapture the subtleties and insights of his theory of punishment and to present them in ways which are relevant to an understanding of the present. As suggested in the previous chapter, my exploration of Durkheim's theory of punishment will assume that it is not entirely determined by his general social theory, so that aspects of the former will be able to survive the criticism aimed at the latter. My contention will be that Durkheim's questions about the moral basis of penal law, about the involvement of onlookers in the penal process, about the symbolic meanings of penal rituals, and about the relationship of penal institutions to public sentiment, are all questions which are worthy of our close attention, even when the answers which Durkheim suggests are not themselves convincing. I will also assume that Durkheim's theory is primarily an account of the motives, functions, and significance which attach to legal punishment rather than an account of its historical development. It is thus perfectly possible to reject his historical account while retaining important aspects of his theory. Finally, I will approach and evaluate Durkheim's interpretation of punishment not as a once-upon-a-time account but as a means of understanding punishment *today*, in modern society.

Certainly there are compelling reasons to doubt the immediate relevance of Durkheim's interpretation. We now live within a developed division of labour, and in a contested moral order where collective public ritual no longer has a very prominent place. 'Society' no longer punishes—if it ever did—but instead delegates this function to a state apparatus and to specialist institutions on society's margins. Emotive acts of vengeance have long since become taboo—at least in official conduct—and have been displaced by what appears to be rational processes of crime control; and so on. But these discrepancies form an interpretative challenge rather than a refutation; they show the work which has to be done if we are to think through Durkheim's theory to an understanding of its field of application. Durkheim was well aware of the differences between simple and advanced societies—his whole life's work was devoted to understanding such changes. And, in full awareness of these differences, he insisted that his interpretation of punishment was appropriate to modern societies as well as to primitive ones. His argument is that despite the appearance of modern punishment, and whatever the contrary intentions of its administrators, the elementary characteristics he identified in primitive societies still underpin our practice and give it its true meaning. Durkheim claims to be speaking to us and to our society, though like his contemporary Sigmund Freud, he is well aware that we will resist his propositions and find them strange.

In the pages which follow I will first give an exposition of the theory of punishment which is developed in Durkheim's work, and then later pursue in

more detail the individual themes and elements which compose this overall account. The first, expository section which forms the rest of this chapter will endeavour to give an accurate paraphrasing of Durkheim's work, taking care to stick to the texts and trying to reconstitute their meaning. The chapter which follows on from this, though, will be much more exploratory, and will be concerned to think through Durkheim's questions and analyses, using the work of other theorists as well as contemporary material on punishment to explore their validity and relevance today.

Punishment is discussed at many points in Durkheim's work but there are three major texts which set out his theory at length: *The Division of Labour* (1895), 'Two Laws of Penal Evolution' (1902), and the university lectures which came to form *Moral Education* (1902–3). Although each of these texts comes at the problem from a slightly different angle, and each one develops and refines the theory in certain ways, the underlying essentials of the theory of punishment are consistently presented and unchanging throughout. Moreover, many of Durkheim's other texts—particularly *The Elementary Forms of the Religious Life* and *Primitive Classifications*—contain discussions (for example, of the nature of the sacred, of ritual practices, of collective representations) which illuminate while remaining consistent with the basic elements of his account of punishment. Wherever it seems helpful, I will use these later texts to explicate or enlarge upon Durkheim's earlier conceptions.

## 2. THE THEORY OF PUNISHMENT IN *THE DIVISION OF LABOUR*

*The Division of Labour* is Durkheim's masterpiece, in the original sense of that term. It is the early text which sets out the fundamental problems which will form his life's work and which provides the necessary intellectual tools for their analysis. In it, Durkheim's central concern is with the changing nature of social morality and social solidarity, and his extensive discussion of punishment is undertaken as a means of illuminating that larger problem.

Durkheim sees punishment as a social institution which is first and last a matter of morality and social solidarity. The existence of strong bonds of moral solidarity are the conditions which cause punishments to come about, and, in their turn, punishments result in the reaffirmation and strengthening of these same social bonds. Durkheim is, of course, aware that these moral aspects are not uppermost in our social experience of penal practice. Like most institutions, punishment is generally understood in terms of its mundane, instrumental tasks—the control of crime, the enforcement of law, the restraint of offenders, and so on. But then much of social morality is, for Durkheim, unspoken, latent, taken for granted. Indeed it is a characteristic of modern society that the moral bonds which tie individuals together are embodied within acts such as contracts, exchanges, or interdependencies which appear, on their surface, to be purely matters of rational self-interest. Durkheim's analysis of punishment—like his analysis of the division of labour itself—is thus a deliberate and

counter-intuitive attempt to bring into view these submerged moralities and thereby to elucidate punishment's moral significance and moralizing social functions. As we have seen, Durkheim's concern in pointing to the moral content of instrumental action was to make this morality more self-conscious and thereby allow it to be better preserved and developed. It seemed to him that such a task was particularly urgent in the penal realm because, as Durkheim frequently mentions, many turn-of-the-century penologists were intent upon removing all traces of moral censure from penal law, and giving it a purely technical character as a form of treatment and rehabilitation.

How, then, are we to understand punishment as a moral form of social action? In what precise sense is punishment a cause and yet also an effect of social solidarity? Durkheim begins his discussion of punishment with an analysis of the crimes against which punishments are used. Crimes, as he points out, are not 'given' or 'natural' categories to which societies simply respond. The content of such categories changes from place to place and from time to time and is a product of social norms and conventions. Moreover, crimes are not always or everywhere equivalent to acts which are harmful to society, or contrary to the public interest. They are not, then, merely prohibitions made for the purpose of rational social defence. Instead, Durkheim argues that crimes are those acts which seriously violate a society's *conscience collective*.<sup>5</sup> They are essentially violations of the fundamental moral code which society holds sacred, and they provoke punishment for this reason. It is because criminal acts violate the sacred norms of the *conscience collective* that they produce a *punitive* reaction. Where social rules of a less fundamental nature are violated, the violators can be sanctioned by other means—for example by means of restitutive laws and regulatory sanctions. But crimes are, in effect, moral outrages which 'shock' all 'healthy consciences' and give rise to a demand for punishment rather than any lesser form of social reaction.<sup>6</sup>

So far, Durkheim has argued that it is the connection with sacred things and fundamental values which gives crime a grave moral significance and which necessitates a punitive response. At this stage, he pauses to qualify the argument in one important respect. He points out that while most criminal offences are recognizably violations of cherished moral values, there is also a class of criminal acts which do not strike all 'healthy consciences' as outrageous and yet are deemed criminal none the less. The crimes in question are offences against the state, which, he says 'are more severely repressed than they are

<sup>5</sup> Durkheim defines 'the *conscience collective* or *commune*' as 'the totality of beliefs and sentiments common to the average citizens of the same society [which] forms a determinate system which has its own life'. Durkheim, *The Division of Labour*, p. 79. For a discussion see S. Lukes, *Émile Durkheim: His Life and Work* (London, 1973), pp. 4–6, and also S. Lukes and A. Scull (eds.), *Durkheim and the Law* (Oxford, 1983), introd.

<sup>6</sup> Durkheim, *The Division of Labour*, p. 73. Durkheim here simply assumes the existence of criminal acts as a feature of society. In his book *The Rules of Sociological Method* (New York, 1938) he argues that acts which breach social norms will necessarily be a feature of any society. This is the famous 'crime is normal' argument, which links up with the one developed here.

strongly reproved by general opinion'.<sup>7</sup> The existence of such crimes seems to raise problems for Durkheim's theory, because it suggests that not all crimes are violations of the *conscience collective*. As he points out, the definition of such conduct as criminal and punishable might be thought of as being an act of the governmental power, operating independently of collective sentiments, thus denying the absolute bond which Durkheim posits between legal punishment and collective morality. However he resolves this difficulty by arguing that the state is, in effect, the guardian of the collective sentiments, whose 'primary and principal function is to create respect for the beliefs, traditions and collective practices: that is, to defend the common conscience against all enemies within and without'.<sup>8</sup> The state is thus conceived as a kind of secular priesthood, charged with protecting sacred values and keeping the faith. It becomes the 'symbol and living expression' of society's collective beliefs—'the collective type incarnate' so that offences against its powers are viewed as offences against the *conscience collective* itself.<sup>9</sup> The linkage between punishment and collective sentiments thus survives intact after all.

One must ask, however, why it is that violations of collective sentiments must always result in a punitive response. What causes crimes to be *punished* rather than dealt with in some other way? In making this step in the argument Durkheim provides a complex and intriguing discussion which touches upon the nature of sacred things, the psychology of moral outrage, and the social-psychological mechanisms which give force and authority to social conventions. We should therefore take some care to grasp precisely what he is saying. The starting-point for his discussion is the insistence that at least some criminal laws have the status not merely of conventions or regulations but of sacred prohibitions which command widespread assent: 'what gives penal law its peculiar character is the . . . extraordinary authority of the rules which it sanctions.'<sup>10</sup> According to Durkheim, the violation of sacred values always produces an outraged response. The criminal act violates sentiments and emotions which are deeply ingrained in most members of society—it shocks their healthy consciences—and this violation calls forth strong psychological reactions, even among those not directly involved. It provokes a sense of outrage, anger, indignation, and a passionate desire for vengeance.

So penal law rests, at least in part, upon a shared emotional reaction caused by the criminal's desecration of sacred things. But despite the importance of this point for Durkheim's theory, his psychological account of such reactions is actually fairly cursory. He stresses that our commitment to these collective values has the character of a deeply held religious attachment. They are 'strongly engraven' on our consciences, 'cherished', 'deeply felt'. They occupy a position of depth in our psychic organization, and are thus fundamental to who we are. Unlike abstract ideas, to which we attach ourselves on only a superficial level, and in which we can tolerate contradiction, these deeper

<sup>7</sup> Durkheim, *The Division of Labor*, p. 82.

<sup>8</sup> *Ibid.* 84.

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

<sup>10</sup> *Ibid.* 141.

moral feelings have a force and importance which brooks no disagreement: ' . . . when it is a question of a belief which is dear to us, we do not, and cannot, permit a contrary belief to rear its head with impunity. Every offence directed against it calls forth an emotional reaction, more or less violent, which turns against the offender.'<sup>11</sup>

Crimes are offences against society's sacred moral order which in turn corresponds to deeply held sentiments within society's individual members. Crimes are thus a violation of society's morality and a personally felt outrage against every 'healthy' individual. The result is a passionate, hostile reaction on the part of the public which demands the offender be punished. For Durkheim, then, 'passion . . . is the soul of punishment', and vengeance is the primary motivation which underpins punitive actions.<sup>12</sup>

In order to substantiate this contention, Durkheim turns to the actual penal practices of various societies, and shows how such vengeful passions manifest themselves. Less cultivated societies exhibit this trait clearly enough, he says, since they tend to 'punish for the sake of punishing' and 'without seeking any advantage for themselves from the suffering which they impose'.<sup>13</sup> In such societies, punishments continue, unlimited by other considerations, until all passion is spent, often pursuing the criminal beyond death itself or else spilling over on to the punishment of innocents such as the offender's family or neighbours. In modern societies, one has to look harder to see the operation of these vengeful passions in punitive action, since such emotions have been officially denied and displaced by more reflective, utilitarian concerns. Nowadays we claim that it 'is no longer wrath which governs repression, but a well-premeditated foresight'.<sup>14</sup> But Durkheim insists that it is merely our understanding of punishment which has changed, not its reality: 'the nature of a practice does not change because the conscious intentions of those who apply it are modified. It might, in truth, still play the same role as before, but without being perceived.'<sup>15</sup> As proof of the continuing role of vengeance in modern punishment he points to our continuing retributive concern to make the punishment fit the crime, as well as to 'the language of the courts' which continues to express a strong concern with public denunciation.<sup>16</sup> Modern penal systems may try to achieve utilitarian objectives, and to conduct themselves rationally and unemotionally, but at an underlying level there is still a vengeful, motivating passion which guides punishment and supplies its force. According to Durkheim, 'the nature of punishment has not been changed in essentials'. All that can be said is that

<sup>11</sup> *Ibid.* 97-8.

<sup>12</sup> *Ibid.* 86.

<sup>13</sup> *Ibid.* 85-6.

<sup>14</sup> For this passage I have used the new trans. by W. D. Hall, of *The Division of Labour* (London, 1984) quoted in Lukes and Scull (eds.), *Durkheim and the Law*, p. 60, in preference to the Simpson trans. to be found at p. 86 of *The Division of Labor* (New York, 1933). Elsewhere I rely upon the Simpson version.

<sup>15</sup> Durkheim, *The Division of Labor*, p. 87.

<sup>16</sup> *Ibid.* 88.

the need for vengeance is better directed today than heretofore. The spirit of foresight which has been aroused no longer leaves the field free for the blind action of passion. It contains it within certain limits; it is opposed to absurd violence, to unreasonable ravaging. More clarified, it expends less on chance. One no longer sees it turn against the innocent to satisfy itself. But it nevertheless remains the soul of penalty.<sup>17</sup>

Thus for both modern and primitive societies, Durkheim presents a very forceful and distinctive interpretation of punishment. To think of punishment as a calculated instrument for the rational control of conduct is to miss its essential character, to mistake superficial form for true content. The essence of punishment is not rationality or instrumental control—though these ends are superimposed upon it—the essence of punishment is irrational, unthinking emotion fixed by a sense of the sacred and its violation. Passion lies at the heart of punishment. It is an emotional reaction which flares up at the violation of deeply cherished social sentiments. And although institutional routines will modify these accesses of rage, and strain to use them in a productive way, the dynamic and motivating force of punishment is emotional and unreflecting; it is an authentic act of outrage. The force and energy of punishment, and its general direction, thus spring from sentimental roots—from the psychic reactions commonly felt by individuals when sacred collective values are violated. So although the modern state has a near monopoly of penal violence and controls the administration of penalties, a much wider population feels itself to be involved in the process of punishment, and supplies the context of social support and valorization within which state punishment takes place.<sup>18</sup> Thus while some accounts of punishment see only two parties involved in punishment—the controllers and the controlled, Durkheim insists upon a crucial third element—the onlookers, whose outraged sentiments provide a motivating dynamic for the punitive response.

So far, Durkheim's account of punishment has been primarily motivational and psychological—though he does ground these psychic elements within a theory of sacred social values. It depicts punishment as an expressive institution—a realm for the expression of social values and the release of psychic energy. Strictly speaking, it has no 'objective' or 'intended goal'. It is not a means to an end. Punishment simply occurs in the nature of things. It is a collective reaction sparked off by the violation of powerful sentiments—like the sparks that fly when someone disturbs an electric current. But this much forms only half of Durkheim's account, for it is at this point that he moves to a fully sociological explanation and describes how these individual passions produce, in the aggregate, a more powerful and more useful social outcome.

<sup>17</sup> Durkheim, *The Division of Labor*, p. 90.

<sup>18</sup> *Ibid.*: 102. 'As for the social character of this reaction, it comes from the social nature of the offended sentiments. Because they are found in all consciences, the infraction committed arouses in those who have evidence of it or who learn of its existence the same indignation. Everybody is attacked; consequently everybody opposes the attack.'

The passions provoked by crime are, in their immediate origin, the spontaneous reactions of individuals. But in being voiced collectively and at the same time, these reactions reinforce each other and give rise to an important social consequence. In effect, 'crime brings together upright consciences and concentrates them'.<sup>19</sup> It serves as an occasion for the collective expression of shared moral passions, and this collective expression serves to strengthen these same passions through mutual reinforcement and reassurance.<sup>20</sup> In effect, the social reality of the moral order is demonstrated by this collective, punitive response and is thereby further strengthened. The important point that Durkheim is making here is that the moral order of society—and hence its solidarity—rests entirely upon its sanctioning in social convention. When crimes occur which violate the norms of social life, these norms are weakened and shown to be less than universal in their binding force. The effect, however, of the upswelling of a collective passionate reaction to such crimes is to give a powerful demonstration of the real force which supports the norms, and thereby reaffirm them in the consciousness of individual members. This functional outcome effectively completes a virtuous circle set off by crime. The existence of a sacred moral order gives rise to individual sentiments and passionate reactions, which in turn demonstrate the existence and reinforce the strength of the sacred moral order. Crime and punishment, for Durkheim, are important in so far as they set this moral circuitry in motion.

So, having begun by emphasizing the emotional, expressive, non-utilitarian roots of punishment, Durkheim then introduces what one might call his paradox of higher utility. For he proceeds to argue that punishment does, after all, achieve a definite end or objective. But it is not the petty calculation of social controllers which makes punishment useful—these attempts rarely succeed in their control and reform ambitions. Instead it is the common expression of outrage that turns out to have a spontaneously functional effect. These outbursts of common sentiment—concentrated and organized in the rituals of punishment—produce an automatic solidarity, a spontaneous reaffirmation of mutual beliefs and relationships which serve to strengthen the social bond:

Although [punishment] proceeds from a quite mechanical reaction, from movements which are passionate and in great part non-reflective, it does play a useful rôle. Only this rôle is not where we ordinarily look for it. It does not serve, or else only serves quite secondarily, in correcting the culpable or in intimidating possible followers. From this point of view its efficacy is justly doubtful and, in any case, mediocre. Its true function is

<sup>19</sup> *Ibid.*: 102.

<sup>20</sup> 'We have only to notice what happens, particularly in a small town, when some moral scandal has just been committed. They stop each other on the street, they visit each other, they seek to come together to talk of the event and to wax indignant in common. From all the similar impressions that are exchanged, from all the temper that gets itself expressed, there emerges a unique temper, more or less determinate according to the circumstances, which is everybody's without being anybody's in particular. This is the public temper.' *Ibid.*: 102.

to maintain social cohesion intact, while maintaining all its vitality in the common conscience.<sup>21</sup>

Punishment then, like all moral phenomena (including human beings themselves), has a dualistic character.<sup>22</sup> It is at once a matter of individual psychic emotion and, at the same time, one of collective social morality. These two aspects coexist within a functional spiral which helps create and re-create social cohesion. This, for Durkheim, is the character of punishment in all societies—modern or primitive.

For the sake of balance, one ought to stress that punishment is by no means the sole process which contributes towards social cohesion—religious rituals, family life, education, economic exchange all have similar consequences. And it is also worth noting that solidarity-through-punishment is clearly more important in some societies than in others, as Durkheim himself points out.<sup>23</sup> It is the thesis of *The Division of Labour* that penal law, and the common conscience which it enforces, play a central role in the cohesion of simple societies—it is in fact the very basis of mechanical solidarity. In modern, organic society, on the other hand, the division of labour becomes the predominant source of solidarity—'the principal bond'—so that penal law and common values come to play a much reduced but none the less essential rôle.<sup>24</sup> In effect, the *conscience collective* of modern societies ceases to be a pervasive, intensive force which demands a religious conformity in every sphere of life. Instead it occupies a much shallower, but none the less important sphere operating as the guardian of those fundamental values (such as 'freedom' and 'individualism') around which modern moral and social diversity flourish. As Durkheim puts it, '... the common conscience is [not] threatened with total disappearance. Only, it more and more comes to consist of very general and very indeterminate ways of thinking and feeling, which leave an open place for a growing multitude of individual difference'.<sup>25</sup> In this sense then, '... mechanical solidarity persists even in the most elevated societies', and along with this solidarity there persists the fact of penal law and of punitive responses to crime.<sup>26</sup>

The final point concerning punishment in *The Division of Labour* draws attention to the *organized* nature of this collective punitive response. Durkheim describes how the spontaneous social action of the outraged community comes to be institutionalized in the form of a tribunal and a penal apparatus, charged with the expression of public feeling and the carrying out of the punishment itself. Once established, this governmental agency continues to draw its force and authority from the common conscience: its powers are thus derivative and

<sup>21</sup> Durkheim, *The Division of Labour*, p. 108.

<sup>22</sup> On Durkheim's conception of human nature see 'The Dualism of Human Nature and its Social Conditions' in K. H. Wolff (ed.), *Essays on Sociology and Philosophy* (New York, 1964).

<sup>23</sup> 'The part that [punishment] plays in the general integration of society evidently depends upon the greater or lesser extent of the social life which the common conscience embraces and regulates.' Durkheim, *The Division of Labour*, p. 109.

<sup>24</sup> *Ibid.*: 173.

<sup>25</sup> *Ibid.*: 172.

<sup>26</sup> *Ibid.*: 186.

based in public feeling. At the same time though, the fact of institutionalization has important consequences. It gives added strength to the moral order by 'realizing' it in practical and continuing ways. It also ensures the existence of routine procedures and formal occasions which will help evoke the proper moral response to criminality, while simultaneously moderating the expression of moral passions and putting them to proper use. But where other theorists would interpret these developments as the supplanting of emotion by calculation, rationality, and administrative forms, Durkheim holds on to his conception of punishment by viewing these institutions in a different light. For him, the institutions of penalty function less as a form of instrumental rationality and more as a kind of routinized expression of emotion, like the rituals and ceremonies of a religious faith.

### 3. THE TWO LAWS OF PENAL EVOLUTION

The discussion of punishment presented in *The Division of Labour* gives an extended account of the sources, the functioning, and the social significance of 'penal law'. It says nothing at all, however, about the actual *forms* of punishment—about the apparatuses, institutions, and substantive measures through which 'punitive reactions' are concretely realized. Nor does it provide punishment with a history. Apart from noting that modern societies are more circumspect about the act of punishing, and no longer do so in 'so material and gross a manner' as formerly, there is no discussion whatsoever of historical change.<sup>27</sup> In fact, Durkheim's only concern with such matters in this section of *The Division of Labour* is a negative one. He strenuously denies the relevance of history in respect of penalty's functioning and its essential underlying character, claiming that, despite all appearances: 'punishment . . . remains for us what it was for our fathers.'<sup>28</sup>

A theory of punishment which gives no place to historical change and says nothing about penal forms leaves too many questions unanswered, so it is no surprise to find Durkheim returning to these issues some years later in an essay 'The Two Laws of Penal Evolution', first published in 1902. Without announcing itself as such, this paper is essentially an attempt to round out the original theory of punishment, showing how the facts of penal history can be brought within its terms and interpreted in accordance with them. It thus represents an extension and a substantiation of the earlier work: a kind of empirical demonstration of the theory's explanatory power. With the exception of one important qualification—to do with the effects upon punishment of absolutist governments—the basic theoretical framework of the original is preserved intact, while its implications and insights are considerably extended.

In essence, Durkheim's essay addresses a paradox. It is faced with the evident historicity of punishment—the abundant evidence which shows that

<sup>27</sup> *Ibid.*: 89.

<sup>28</sup> *Ibid.*



penal methods have changed substantially over the course of time—but it also wishes to defend a thesis which asserts the ahistorical, unchanging character of punishment as a social process. The resolution of the problem lies in the argument that since the nature of social organization and the *conscience collective* change over time, such changes considerably alter the kinds of sentiments and passions provoked by criminal violations. Different passions, as well as different forms of social organization, give rise to different penal forms, so that although punishment is still an expression of collective sentiments, and a means of reinforcing them, the *forms* which it takes will have altogether changed. Durkheim's thesis is thus considerably refined by distinguishing between the forms and the functions of punishment. It now states, in effect, that it is the underlying mechanisms and functions of punishment which stay constant, while its institutional forms undergo historical change. However, in order to reach this position, Durkheim has to demonstrate precisely how different forms of collective morality give rise to different forms of punishment. This demonstration forms the substance of his essay.

The major changes which penal history displays are of two kinds, according to Durkheim. The intensity of punishment has tended to become less, as societies have become more advanced and, at the same time, deprivation of liberty by imprisonment has emerged as the preferred form of punishment, replacing the various capital and corporal methods which pre-existed it. The general pattern of evolution which he describes is thus one of decreasing penal severity and increasing reliance upon the prison, the two movements going hand in hand with each other and with the wider evolution of societies from 'simple' to 'advanced' social types. The general pattern is not, however, definite or uninterrupted. He is careful to point out that 'the succession of societies does not take a unilinear form', since societies develop at different rates and from different starting-points.<sup>29</sup> More importantly, he also argues that another, separate factor—the nature of political power—can independently influence punishment and bring about counter-evolutionary changes in its form. I will discuss this 'extraneous' influence in a moment, but first it is necessary to show how the general pattern is explained.

Durkheim accepts the conventional historical opinion of his contemporaries that 'intense' or 'severe' punishments are generally characteristic of simple societies, and that modern-day societies have become considerably more lenient in their penal methods. As confirmation of this he presents a catalogue of the atrocities and forms of suffering inflicted by the penal codes of various ancient societies, though this is more by way of an illustration than an empirical proof. A typical example is the following: 'among the various tribes of Syria', Durkheim tells us, 'criminals were stoned to death, they were shot full of arrows, they were hanged, they were crucified, their ribs and entrails

<sup>29</sup> E. Durkheim, 'Two Laws of Penal Evolution', *Année sociologique*, 4 (1901), 65–95. Repr. as ch.

4, 'The Evolution of Punishment', in Lukes and Scull (eds.), *Durkheim and the Law*. The quotation in the text is from p. 103 of Lukes and Scull.

were burned with torches, they were drawn and quartered, they were hurled from cliffs . . . or they were crushed beneath the feet of animals, etc.'<sup>30</sup> By itself, this is insufficiently precise to give an adequate understanding of Syrian penal practices (one wishes to ask were all criminals treated in this way? Were other, lesser methods also used? Which sanctions were most common? And so on) but in showing the use of methods which would be considered excessive or barbaric in late-nineteenth century France, it seems to give some support to the conventional view.

According to Durkheim, simple societies have resorted to draconian penal measures because of the intensity of the *conscience collective* which prevails in such societies. Their characteristic social morality is itself severe, rigid, and demanding, being wholly religious in form and representing all of its rules as transcendental laws, authorized by the gods. Within such societies, individuals are deeply imbued with a sense of the sacred character of social rules, and conformity to the rules is regarded as a sacred duty which is rigorously policed. Indeed, since social solidarity here rests mainly upon the sharing of collective beliefs—there being no extended division of labour to produce organic solidarities—Durkheim implies that the very existence of society itself depends upon their strict enforcement. In these circumstances any violation of the common conscience becomes a grave threat to society and an affront to deeply held religious beliefs. It consequently provokes an intensely violent reaction which manifests itself in suitably violent penal forms. The vehemence and torments of early penal systems are thus the product of a religious morality which can brook no opposition for fear of avenging gods and social collapse.

In contrast, the collective sentiments which exist in more advanced societies are less demanding and occupy a less prominent place in social life. As we saw earlier, modern organic societies are characterized by moral diversity and the interdependence of co-operating individuals, each of whom is to some extent differentiated and unique. The collective beliefs which these individuals share do not have the character of intensive religious prohibitions which regulate all spheres of life by strict decree. Instead, the common beliefs emphasize, above all, the value of the individual and correlative virtues such as freedom, human dignity, reason, tolerance, and diversity. Such values, being collective and inscribed in the foundations of social life, are still accorded a kind of transcendental status, and are deeply cherished in the consciences of individuals. But the tone and quality of these sentiments are markedly different from the stern, religiously sanctioned beliefs of earlier times. By its very nature, this new moral faith invites reflection and rational consideration in ethical matters: it no longer represents itself as the imperious will of gods who must be unquestioningly obeyed. As a consequence, social morality has a different psychological resonance—a different place in the psychic structure—and so gives rise to a more moderate reaction whenever its tenets are violated.

<sup>30</sup> *Ibid.* 108.

Durkheim indicates this crucial difference by means of a distinction between 'religious criminality' and 'human criminality'. Virtually all offences against the *conscience collective* of a simple society have the status of 'religious criminality'. As such, these offences provoke a veritable horror amongst the reverential onlookers, whose revulsion at this abomination, and whose fear of its consequences, drive them to take violent measures against the criminal. Religious passions are thus the source of atrocious punishments, and indeed it is precisely because a deity has been attacked that such punishments seem to show little concern for the offender's suffering, 'for what is an individual's suffering when it is a question of appeasing a God?'<sup>31</sup> By contrast the criminality typical of secular, modern societies is 'human criminality', i.e. offences against persons and their property. Such crimes still provoke strong reactions, and still give rise to a public demand for punishment, but, as we have seen, the sentiments involved in this reaction are qualitatively different, since '... the offence of man against man cannot arouse the same indignation as an offence of man against God'.<sup>32</sup> Moreover, with the rise of humanism and individualism, a new dialectic finds its way into punishment. For, as Durkheim points out, the same moral sentiments which are outraged when an individual is offended against are moved to sympathy at the sight of the offender's own suffering when he or she is punished. The consequence is that '... the same cause which sets in motion the repressive apparatus tends also to halt it. The same mental state drives us to punish and to moderate the punishment. Hence an extenuating influence cannot fail to make itself felt'.<sup>33</sup> The combined result of these interlinked changes is to make the average intensity of punishments in modern societies much less than was formerly the case.

The intensity of punishment, then, is seen to be a direct consequence of the nature of the *conscience collective*, and the development of a modern, secular morality tends automatically to bring about a general diminution in the severity of penal measures. Durkheim stresses that this evolution represents a change in the quality of the collective sentiments rather than a simple weakening of their strength. 'It is no longer that lively emotion, that sudden explosion, that indignant bewilderment aroused by an outrage directed against a being whose value immeasurably surpasses that of the aggressor; it is more that calmer and more reflective emotion provoked by offences which take place between equals'.<sup>34</sup> The collective sentiments of modern societies are not a watered-down version of an older morality: they form a wholly different mentality, with different practical consequences.

It is in terms of the quality of collective sentiments and their consequences for penal measures that we can understand, also, the major qualification Durkheim introduces into his evolutionary account. He points out that the correlation between social types and the intensity of punishment is complicated by another, independent factor, namely, the emergence of absolutist political

regimes. Absolutist governments are characterized by an absence of limiting restraints on their powers, a capacity to assume an ascendancy over the rest of society, and a tendency to treat individual subjects as if they were the property of the state rather than its citizens. Such governmental forms can occur in any social type, so they are independent of the general pattern of change which leads societies to become more organic and punishments to become more lenient. The relevance of absolutism to this discussion is that absolutist governments are notoriously prone to the use of draconian modes of punishment. As Durkheim notes, 'the apogee of the absolute monarchy coincides with the period of the greatest repression'.<sup>35</sup>

Absolutism thus has the same consequences for punishment as do the collective sentiments of simple societies, even though they appear to exist independently of one another, so Durkheim is forced to confront this problem of a separate cause for the same effect. In the event, his solution is disarmingly simple. He argues that the power and charisma of an absolute ruler gives rise to a kind of religious aura which surrounds this apparently superhuman power. The revival of the religious idiom imparts a divine quality to laws and, thus, a sacrilegious quality to their violation which in turn increases the violence with which crimes are punished:

wherever the government takes this form, the one who controls it appears to people as a divinity. When they do not make an actual God of him, they at the very least see in the power which is invested in him an emanation of divine power. From that moment, this religiosity cannot fail to have its usual effects on punishment.<sup>36</sup>

In effect then, punishment is always to be understood in terms of the quality of collective sentiments, though the latter may be shaped by governmental forms as well as by the structures of social organization and morality. Absolutist governments in advanced societies are an obvious example of this double conditioning, but Durkheim also illustrates the obverse case in his discussion of the ancient Hebrews. Here he notes that the Hebrew penal code was more lenient than one would expect in such an undeveloped social type, and accounts for this by pointing to the non-absolutist political organization of that society, and the fact that 'the temper of the people remained profoundly democratic'.<sup>37</sup> By linking democracy to leniency of punishments, and tyranny to severity, Durkheim effectively restates Montesquieu's doctrine of the politics of punishment, though he does so within a much more developed theory of how these linkages are made.

So far, Durkheim's discussion of the changing form of penal measures has been exclusively concerned with the 'intensity' or the 'quantity' of punishment involved. A very large and disparate catalogue of ancient punishments involving all sorts of different techniques, arrangements, and symbolic meanings are treated simply as examples of 'severe' punishment, while the various forms of modern punishment, particularly imprisonment, are reduced to so many

<sup>31</sup> Durkheim, *The Division of Labor*, p. 124.

<sup>32</sup> *Ibid.*, 126.

<sup>33</sup> *Ibid.*, 126.

<sup>34</sup> *Ibid.*, 130.

<sup>35</sup> *Ibid.*, 112.

<sup>36</sup> *Ibid.*, 129.

<sup>37</sup> *Ibid.*, 109.

examples of 'leniency'. One should not be surprised at this. Durkheim's theory views vengeful emotion as the immediate source of punishment, so he is easily led to see penal forms in terms of the amount of violent passion they seem to manifest. We should, however, be aware that there are always other dimensions involved in the forms which penal measures take. Penal sanctions always have a specific organization and a specific institutional form. They inflict suffering in a particular way, using particular techniques, distinctive procedures, and particular symbolic forms of self-representation. Concrete sanctions are never just a matter of more or less intensity.

Durkheim's second 'law of penal evolution' begins to address this further problem of the 'quality' rather than the 'quantity' of punishment. It states that: 'deprivations of liberty, and of liberty alone, varying in time according to the seriousness of the crime, tend to become more and more the normal means of social control.'<sup>38</sup> However, for the most part, he tends to treat the prison as an example of modern leniency in punishing, rather than a specific penal measure with definite attributes. He begins by pointing out that a consequence of punishment's tendency to become more lenient as societies developed was the eventual necessity of abandoning practices such as executions, mutilations, tortures, etc. and replacing them with less severe measures. The new institution which tends to replace the old atrocities—the prison—is, according to Durkheim, itself the product of the same processes which tend to decrease the severity of punishment. The break-up of undifferentiated societies and the development of individualism ended the ethic of collective responsibility and also increased social mobility, necessitating the use of places of detention for offenders awaiting trial. At the same time another social process—the differentiation of the organs of government—began to manifest itself in the construction of functional buildings (the manorial castle, the royal palace, fortresses, city walls, and gates) and the development of military and administrative capacities which would eventually provide the architectural and managerial conditions necessary for incarceration. Thus the social need for a place of detention became marked at the same time (and from the same causes) as the material conditions for such an institution. Once established, the prison lost its purely preventive or custodial character and took on more and more the character of a punishment in itself. Gradually, says Durkheim, it became the 'necessary and natural substitute for the other punishments which were fading away'.<sup>39</sup>

In many respects this is a limited and disappointing account of the rise and social basis of a major modern institution. The connections which Durkheim makes between the prison and the modern forms of organization and morality are superficial and rather obvious, when one might have expected a more penetrating discussion. The targeting of 'liberty' as the object of punishment, the intensive focusing upon the individual in prison cells, the efforts at moral reform characteristic of penitentiary regimes, or indeed the de Tocquevillian

irony which leads liberal democratic societies to institute the despotic tyranny of prison regimes—all these issues seem to present themselves as obvious and urgent questions, which at least in principle are fully explicable within Durkheim's theoretical framework. Yet they are not even touched upon here or elsewhere in Durkheim's work.

Durkheim ends this historical essay with a paragraph which refers not to the past but to the present. Recalling his general argument that penal forms are caught up in and changed by the evolution of social moralities, he suggests that this process of change 'explains the state of crisis in which the penal law of all the civilized peoples is found'.<sup>40</sup> Moreover, he goes on to indicate, albeit a little obliquely, that imprisonment—which throughout the whole essay had stood as the exemplary form of modern punishment—is increasingly an anachronism which is out of keeping with the framework of contemporary life: 'we have arrived at the time when penal institutions of the past have either disappeared or are surviving by not more than force of habit, but without others being born which correspond better to the new aspirations of the moral conscience.'<sup>41</sup> Quite what Durkheim means by this statement is not apparent from the essay which proceeds it. We are not told in what ways the current forms of punishment—presumably meaning the deprivation of liberty—are out of correspondence with the new moral conscience. Nor are we pointed to new penal measures which might better express these collective sentiments. Indeed by raising this important question Durkheim simply draws attention to his own failure to specify in detail the kind of links which pertain, or should pertain, between penal forms and social sentiments.

Durkheim in fact returned to this question very soon afterwards, though in a different context and in a different fashion. In his Sorbonne lectures on moral education of 1902–3 in which he discussed the role of the school in socializing individuals, he was led to consider the proper forms of punishment which would be appropriate to such a task. In the course of that discussion Durkheim further elaborated his theory of punishment and also proposed a number of more precise specifications as to the forms which penal measures should take. It is to that discussion that I now finally turn.

#### 4. PUNISHMENT AS MORAL EDUCATION

Durkheim's most detailed and concrete discussion of punishment is also, paradoxically, the one which is least well known to sociologists and penologists. In all the literature on Durkheim and punishment there is barely a single reference to what might be considered his final theoretical statement on the matter. This statement occupies fully three chapters of his work on *Moral Education* and provides us with his most fully developed, and also his most subtle account of the moral importance and effects of punitive measures. The

<sup>38</sup> Durkheim, *The Division of Labor*, p. 114.

<sup>39</sup> *Ibid.* 120.

<sup>40</sup> *Ibid.* 131.

<sup>41</sup> *Ibid.*

setting for this discussion is much more specific than in previous works, since Durkheim is here concerned to describe the principles and pragmatics of schoolroom education, but in fact this turns out to be a perfect setting for Durkheim to indicate the specific implications of his theoretical work. As he conceives it, the task of modern education is to develop a secular, rational morality and to find the best means of socializing the child into this new *conscience collective*. The role of punishment in this setting is thus precisely the same as its role in the wider society—it is an expression and an enforcement of social morality—so his discussion of punishment in the classroom is undertaken as an extension of the theory which he had developed in his earlier work.

An important aspect of Durkheim's argument is that modern secular moralities—which are open to rational discussion and do not depend upon the mysticism and blind faith characteristic of religions—are none the less perceived to be in some way 'sacred' and 'transcendental'. Even in modern society, 'the domain of morality is as if surrounded by a mysterious barrier which keeps violators at arm's length, just as the religious domain is protected from the reach of the profane. It is a sacred domain.'<sup>42</sup> This sense of the 'transcendent' is, in Durkheim's view, the authority of society and social conventions as experienced by the individual, but it is none the less powerful for being recognizably 'man-made' rather than divine. Precisely because such beliefs and sentiments are perceived as transcending the individual, any violation or infringement of their rules prompts the same violent reprobation 'that the blasphemer arouses in the soul of the believer'.<sup>43</sup> As Durkheim has shown us before, offences against society's sacred domain provoke a passionate and a punitive response. But, as he points out more clearly in this context, punishment cannot by itself create moral authority: on the contrary, punishment implies that authority is already in place and has been breached.<sup>44</sup> The creation of that authority and sense of the sacred is, in fact, a work of moral training and inspiration which goes on in the family, in the school, and elsewhere throughout society. Punishment can only protect and regenerate what is already well constituted by other means—it is ancillary to moral education, not its central part.

But if punishment is not the centre of social morality it is none the less an essential and necessary component of any moral order. For, as Durkheim takes pains to point out, it has a crucial role in preventing the collapse of moral authority. It ensures that, once established, the moral order will not be destroyed by individual violations which rob others of their confidence in authority. Punishment is thus a way of limiting the 'demoralizing' effects of deviance and disobedience. As he puts it at one point: 'punishment does not

<sup>42</sup> Durkheim, *Moral Education*, p. 10.

<sup>43</sup> As M. Kennedy points out, without already-established rules and forms of authority, 'punishment' does not exist. It becomes merely retaliatory injury. See M. Kennedy, 'Beyond Indetermination: Some Neglected Aspects of the Theory of Punishment', in W. J. Chambliss and M. Mankoff (eds.), *Whose Law? What Order?* (New York, 1976).

<sup>44</sup> *Ibid.*, 9.

give [moral] discipline its authority, but it prevents discipline from losing its authority, which infractions if they went unpunished, would progressively erode.'<sup>45</sup> Punishment's role is to demonstrate the reality and actual force of moral commands. Conventional rules can only command the prestige and the authority of sacred things if it is shown that violators will indeed be punished, and that the moral order has the strength to withstand direct attacks. Social relations are thus like credit relations in this respect—they depend upon trust and upon being underwritten and guaranteed by a powerful agency. Breach of trust, or doubts about the strength of the guarantor, can quickly lead to a collapse of the credit system. Consequently, individual offences must be punished, not just because of the individual harm that they do, but because of the ramifications such violations might have at the level of the moral order itself. There is thus a kind of 'system requirement' for punishment which is most obvious in the classroom, where moral order is fragile and dependent upon the teacher's actions. In the case of society at large the same system requirement exists, though it may be less easy to observe or to evidence. As Durkheim puts it,

a moral violation *demonstrates*... the law that has been violated must somehow bear witness that despite appearances it remains always itself, that it has lost none of its force or authority despite the act that repudiated it. In other words, it must assert itself in the face of the violation and react in such a way as to demonstrate a strength proportionate to that of the attack against it. Punishment is nothing but this meaningful demonstration.<sup>46</sup>

Durkheim insists that this reassertion of the moral order is the primary function of punishment, both in the classroom and in the courts. He is aware, however, that this functional effect at the level of the system, is, in a sense, automatic, and is not always well understood by the administrators of punishment—whether they are teachers or criminal court judges. Consequently, he wants to argue that this 'meaningful demonstration' of moral strength should be the primary *objective* of punishing, as well as its primary function. This is to say, he wants punishers to become conscious of punishment's real moral function, and to make this the focus of their endeavours. He therefore provides an argument which moves from the abstractions of punishment's social functioning (which was his topic in previous works) to the concrete particulars of how we ought to punish in specific cases.

He begins this argument by denying the conventional idea of punishment as a deterrent instrument which can coercively control individual conduct. There is, he says, evidence to show that 'the prophylactic influence of punishment has been exaggerated beyond all reality', and it is easy to see why.<sup>47</sup> By themselves, threats of unpleasant consequences have no moral content. They merely present practical obstacles which stand in the way of the criminal's desires. As such these are no more than '... the professional risk of the

<sup>45</sup> Durkheim, *Moral Education*, p. 167.

<sup>46</sup> *Ibid.*, 166.

<sup>47</sup> *Ibid.*, 162.

delinquent career'.<sup>48</sup> Of course, the penal consequences of crime can be onerous, but there are also real hardships involved in resisting temptation and doing one's duty, so that temptation will often win out if an amoral calculation of interest is all that is involved. Utilitarian regulation of this sort can at best provide a limited form of control—'a police procedure . . . guaranteeing only overt and superficial propriety'.<sup>49</sup> Such threats act 'from the outside and on externals'—they 'cannot touch the moral life at its source'.<sup>50</sup> Moreover, amoral punishments of this sort can actually be counter-productive. They risk 'eliciting bad feelings' and do nothing to improve the moral qualities of the person involved.<sup>51</sup>

In the light of these considerations, Durkheim argues, we ought to give up thinking of punishment as a utilitarian instrument and instead consider it in its true role, as an expressive form of moral action.<sup>52</sup> The proper task of punishment is to uphold moral sensibilities by censuring all offences against them. In essence punishment is a means of conveying a moral message, and of indicating the strength of feeling which lies behind it. Its point is 'not to make the guilty expiate his crime through suffering or to intimidate possible imitators through threats, but to buttress those consciences which violations of a rule can and must necessarily disturb in their faith'.<sup>53</sup> Once we understand that this is what punishment is actually about, it has important consequences for the way we think about concrete sanctions. Thus it becomes apparent, for example, that 'pain . . . is only an incidental repercussion of punishment; it is not its essential element'.<sup>54</sup> We inflict various degrees of suffering and hardship upon the offender, not for what they can achieve in themselves, but in order to signalize the force of the moral message being conveyed. Physical harms, prison cells, monetary penalties, and stigmatization are thus for Durkheim so many concrete signs by which we express disapproval, reproach, and the power of the moral order. In an important sense, then ' . . . punishment is only the palpable symbol through which an inner state is represented; it is a notation, a language through which either the general social conscience or that of the teacher expresses the feeling inspired by the disapproved behaviour'.<sup>55</sup>

Given the reproachful message that it must convey, this practical language of punishment—the specific devices through which a sanction is realized—cannot do other than take painful and unpleasant forms. But Durkheim emphasizes that these punitive devices are only the incidentals of punishment. They are a means of expressing a moral condemnation and should be designed, above all, to serve that purpose. Penal forms which are not properly

<sup>48</sup> Durkheim, *Moral Education*, p. 162.

<sup>49</sup> *Ibid.* 161. For recent discussions of deterrence and its limited efficacy, see G. Hawkins and F. Zimring, *Deterrence: The Legal Threat in Crime Control* (Chicago, 1973), and D. Bayleveland, *A Bibliography on General Deterrence Research* (Westmead, 1980).

<sup>50</sup> Durkheim, *Moral Education*, p. 161.

<sup>51</sup> *Ibid.* 163.

<sup>52</sup> For a discussion of the expressive functions of punishment, see J. Feinberg, *Doing and Deserving* (Princeton, 1970), ch. 5.

<sup>53</sup> Durkheim, *Moral Education*, p. 167.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.* 176.

expressive in this way, but are instead designed to be effective as deterrents or else to cause maximum suffering, are thus inappropriate. They distort punishment's true purpose and ought not to be used. Put simply, Durkheim's point is that the method must not undercut the message. Penal sanctions cannot help but be unpleasant, but this aspect of suffering should be reduced to a minimum.

At this point, Durkheim is prompted to introduce a new consideration into his theory of punishment. Previously the force of the punitive reaction was determined by the passions which were provoked by the offence. But in phrasing his idea of punishment in this new metaphor of a *communication*, Durkheim is led to consider another element in the operation: the receptivity of the audience.<sup>56</sup> If a forceful moral reproach is to be communicated, its audience must understand its meaning and feel its force. The language of penalty must suit the participants, and must be comprehensible to them. Consequently, the practical language of punishment—or rather the concrete sanctions through which moral reproach is realized—will depend upon the *sensibilities* of the society in question. In some societies, he suggests, 'individual sensibilities are hard to affect' and so 'it may be necessary for blame . . . to be translated into some violent form'.<sup>57</sup> However, in more advanced societies, where sensibilities are more refined, 'ideas and feelings need not be expressed through such grossly physical procedures'.<sup>58</sup> As a case in point, Durkheim argues that corporal punishment is unconscionable in a highly civilized society, except in the training of infants who are still too young to possess a moral sense. Corporal punishment is unnecessary as a means of 'getting through' to individuals, since our modern sensibility has provided us with 'more delicate nervous systems which respond even to weak irritants'.<sup>59</sup> Moreover it cannot convey a clear moral message because its very method of doing so violates one of our central moral values—the respect for persons. Thus this kind of sanction 'weakens on the one hand sentiments which one wishes to strengthen on the other'.<sup>60</sup>

The account of punishment which we find here in *Moral Education* is both important and revealing. It refines Durkheim's account of punishment's functioning, and shows how his theory relates to the practical use and design of penal sanctions. It also introduces a concern with changing sensibilities which are shown to be important in the determination of punishments, though no attempt is made to link the history of sensibilities to the history of the *conscience collective*. It is revealing because it shows much more clearly than before why

<sup>56</sup> On punishment as moral communication, see A. Duff, *Trials and Punishments* (Cambridge, 1986). Duff bases his arguments not upon Durkheim's sociology but instead upon Kant's philosophy. See also J. R. Lucas, *On Justice* (Oxford, 1980), pp. 131–4.

<sup>57</sup> Durkheim, *Moral Education*, p. 182.

<sup>58</sup> *Ibid.* This point about changing sensibilities is not further pursued in Durkheim's work. It will, however, be discussed at some length when I deal with the work of Norbert Elias and its implications for the study of punishment.

<sup>59</sup> Durkheim, *Moral Education*, p. 182.

<sup>60</sup> *Ibid.* 183.

Durkheim has so little to say about the actual apparatus and instrumentalities of punishment. It shows why he discusses only the external forms of punishment (which are directed at the public—and are moralizing signs)—not the *internal* forms (which touch only the inmates or offenders and are largely control orientated rather than moral). Durkheim's concern is not to understand punishment in all its aspects but merely to point out its moral content and its moralizing social effects. Penalty's coercive apparatus of threats, physical restrictions, monetary penalties, and so on are interesting to him only as so many means of conveying moral passions and moral messages. Prisons, being relatively lenient devices, convey a particular kind of moral sentiment—a rather humanistic, modern one as it turns out—while stonings, mutilations, and tortures express a different quality of emotion and, behind that, a more primitive, religious mentality. In so far as these penal measures are also specific devices for asserting disciplinary regimes or direct forms of behavioural control, they are no longer truly moral phenomena and they fall below the horizon of analysis. Durkheim's ideal punishment is one of pure expression, a moral statement which expresses condemnation without pursuing any lesser goals. As he says at one point, '... the best punishment is that which puts the blame . . . in the most expressive but least costly form possible.'<sup>61</sup>

More importantly, we can now see that his whole analysis of punishment in society is organized around this ideal figure. His theory considers punishment only in so far as it is a moral phenomenon. It is orientated towards the explication of punishment's moral content and its moral consequences and asks how does punishment function in the circuits of moral life? To the extent that punishment has *other* meanings, other sources, and other effects, Durkheim's work has little or nothing to say of these. Ironically then, although Durkheim opens up new and important questions concerning the semiotics of punishment—its communicative propensities, its symbolic resonance, its metaphoric capacity to speak of other things—and concerning the cultural foundations upon which punishment is based, his own reading of these phenomena is severely restricted by the theoretical framework within which these questions arise.

Such a conclusion should not surprise us. As I pointed out at the start of this chapter, Durkheim explores punishment as a means of understanding the moral life of society and its mode of operation. He makes no claim to have provided a comprehensive theory of punishment and that was never his concern. Nevertheless, what Durkheim *does* say about punishment is important and often compelling. We need to consider to what extent his interpretation—partial though it is—can help us make sense of penalty today.

<sup>61</sup> Quoted in the editor's introduction to Durkheim, *Moral Education*, at p. xvi, this is a trans. from the original French text *L'Éducation morale* (Paris, 1925), p. 232.