

Social Solidarity, Penal Evolution and Probation¹

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Abstract:

Compared to the sociology of the prison, the 'sociology of probation' has been much neglected. In Europe and the USA, that neglect is beginning to be addressed by a number of scholars, both empirically and conceptually. Where these scholars have looked to the founding figures in the sociology of punishment, they have tended to examine probation through a Foucauldian or Marxist lens. This paper takes a different direction, reexamining Durkheim's ideas about social solidarity and penal evolution to try to offer some analytical resources for making sense of probation's historical development and contemporary struggles. In so doing, we hope to illustrate both the continuing value of Durkheimian analyses of penalty and the need to extend Durkheimian analyses beyond the prison. More broadly, we aim to briefly illustrate and to stimulate new cultural analyses of probation's historical emergence and contemporary adaptations.

Keywords: Social theory; criminal justice; probation; social solidarity; penal evolution; Durkheim

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Introduction

In a recent book chapter, Robinson, McNeill and Maruna (2013) set out to solve the puzzle of how probation² has survived and indeed expanded despite the eclipse of the penal welfarism with which it has been so deeply associated. Having reviewed probation's legitimisation crises and adaptation strategies over the course of the last century or so, Robinson, McNeill and Maruna (2013: 335-6) suggest that:

‘In a very important sense, for all their travails, the position of CSM [community sanctions and measures] may be symbolically fragile but materially secure, expressively insufficient but instrumentally necessary.’

This paper starts where that chapter ended – exploring probation's relationships with the symbolic aspects of punishment. In an important sense, this has been a neglected theme in probation scholarship; typically, both in the public-political domain and in the academy, probation has been debated mostly in terms of its instrumental utility. The questions have most often been ‘Does it work?’ or ‘Does it work better than prisons?’ or ‘Is it at least as effective as prison while being cheaper?’ The sort of ‘working’ implied here usually relates to the reduction of reoffending. Probation's pitch for political, judicial and public support is thus bound up with its cognitive appeal as a relatively effective and inexpensive response to problems of crime control or the management of offenders.

There have been exceptions to this rule. In the UK, for example, repeated attempts have been made to make ‘community service’ or ‘unpaid work’ or ‘payback’ more ‘visible’ (Scottish Prisons Commission, 2008); in some cases, this has been linked to a concomitant drive to make the work more demanding, some might even say more publically degrading (Casey, 2008). So it seems that a discussion about the emotive or visceral appeal of community sanctions has also begun to emerge (Maruna and King, 2008); one or two papers have begun to ask about probation's capacity to send certain signals to communities; whether redemptive or reparative or protective (Bottoms, 2008; McNeill, 2011).

But while questions about the symbolic and expressive aspects of probation have begun to

² In this paper, we use the term ‘probation’ not to refer to a particular legal order or sanction, but rather as an umbrella term for those penal institutions involved in the delivery of ‘offender supervision’ in the community. In the various jurisdictions of the UK and the USA (with which this paper is principally concerned), these institutions might be labeled community corrections, criminal justice social work, probation and/or parole services.

be discussed, that discussion has rarely been connected to theoretical debates in the sociology of punishment. Equally, recent 'Punishment and Society' scholarship has been negligent in failing to assess the meaning and significance of probation as a penal institution. In those few cases where probation has been the empirical object of theoretical work, the theorizing has tended to be Foucauldian (see Cohen, 1985; Simon, 1993; Robinson, 2002) or, more rarely, Marxist (see Young, 1976). We might crudely summarise the analyses as converging in a depiction of probation primarily as a disciplinary technology directed at the urban poor, at least where and when social and economic conditions have lent it greater appeal than imprisonment. This may indeed be a more critical account of probation, but it remains an essentially instrumental one. It rejects the superficiality of debates about 'What Works?' but it still understands probation's fate mainly in terms of its utility as a mechanism of social control imposed on some people by others, and made possible by the development of new forms of knowledge and new technologies.

What is missing in these accounts – and much more apparent in historical and contemporary debates about imprisonment -- is analysis of the significance of probation's *cultural* contexts, forms and functions. It is true that Garland's (2001) analysis of *The Culture of Control* in late modernity includes some attention to probation, noting the demise of the welfarist criminology on which it was built and which it most perfectly expressed (on the origins and development of this 'criminological project', see Garland, 1985). But, beyond recognizing probation's late-modern reconfiguration as a method of managing risk and protecting the public, rather than as a means of restoring lost or errant fellow-citizens, Garland has relatively little to say about probation's precise place in and relationship with the 'culture of control'. Several others have undertaken valuable empirical work exploring how probation has adapted to political, social and technological changes (for example, Lynch 1998, 2000; Robinson, 2002; McNeill et al., 2009; Deering, 2011; Werth, 2013; Worrall and Mawby 2013), but none have examined the inter-relationships between probation's *cultural* contexts, forms and functions.

This paper's attempt to offer an original contribution to the sociology of punishment (and more specifically to a still nascent sociology of probation) therefore has two interdependent aspects. The first of these is exegetical. In order to lay the groundwork for a cultural analysis of probation's emergence and adaptation, we offer a revised reading of Durkheim's work on social solidarity and on penal evolution, stimulated in part by its recent re-

appraisal by David Garland (2013). Durkheim's work is crucial to our substantive interest in analysing probation precisely because of his awareness of the importance of culture.. Indeed, a 'cultural Durkheim' is becoming prominent in the secondary sociological literature (Smith and Alexander 2005: 14). Yet, as we shall argue, and in contrast to most discussions of Durkheim in the sociology of punishment, his is a cultural awareness which is characteristically intimately connected to the political sphere, most notably concerning the constantly evolving role of the state (Durkheim 1958) and its relation to the 'secondary associations' of what he terms 'political society' (Durkheim 1992). Furthermore, cultural awareness exists within the context of a historically grounded conception of the differing forms of solidarity which give shape to political forms. These forms of solidarity will be a major topic within our discussion.

Our second and related aspiration is more modest. In this paper, we aim to illustrate our re-interpretation of Durkheim's ideas by beginning to map out what a cultural analysis of probation might imply and require. We make no claim to have completed that analysis, far less to provide it here. Necessarily, in this paper we focus on developing the resources for ourselves and, we hope, for others to take that project forward. The contemporary significance of such analyses rests ultimately in the emergence in late modernity of what some scholars have recently termed 'mass probation' or 'mass supervision', referring both to the remarkable expansion in scale and reach of penal supervision and to its intensification (McNeill, 2013; McNeill and Beyens, 2013; Phelps 2013a, 2013b). Ultimately, understanding this neglected phenomenon will require the development of a range of forms of analyses and their integration (McNeill and Beyens, 2013; Beyens and McNeill, 2013), but developing an understanding of probation's cultural contexts, forms and functions seems to us to be necessary if not a sufficient part of that wider project.

Punishment and social solidarity

Durkheim argued that social solidarity depends on the unity of moral beliefs in social groups. As social facts, such moral beliefs will be influenced by three factors: the historical context, the national setting and whether society is mono-cultural with a low division of labour or multicultural with a high division of labour. Durkheim terms these three factors 'stage of evolution', 'species' and 'complexity' of society respectively (Durkheim, 1982).

Although its forms will change adjust in response to changes of these three sorts,

punishment of crime is always a passionate collective reaction to violations of these core shared beliefs; its rituals are important as a means of allowing us to communicate, reaffirm and reinforce them. As Garland (2013: 25) puts it, offending shocks 'healthy' (i.e. well-socialized) consciences into punishment as a reaction:

'The essence of punishment, [Durkheim] claims, is irrational, unthinking emotion driven by outrage at the violation of sacred values or else by sympathy for fellow individuals and their sufferings' (Garland, 2013: 25).

In fact, these different two sources of outrage – one founded in shared religious belief and one based upon a shared conception of the moral individual – partly reflect the two different forms of social solidarity that Durkheim distinguishes.

Mechanical solidarity is characteristic of societies that are structured and dominated by the needs and interests of fairly small collectives whose unity of moral belief is religious in type. Durkheim refers to such societies as 'segmentary' (Durkheim, 1982: 95, 1984: 200). Law and sanctions here are primarily repressive rather than restitutive; their function is to express *and* to reinforce the *conscience collective* (Durkheim, 1984).

The division of labour in modern societies occasions the transition to more organic forms of social solidarity. Although repressive law and sanctions continue to exist, the development of increased social diversity and the necessity of complex inter-group cooperation require the moral code to be based on moral *individualism*. With the decline of a shared church-based religion and the rise of social/geographical mobility, 'the members of a single social group will have nothing in common among themselves except their humanity'; meaning 'nothing remains which men [sic] can love and honour in common if not man himself' (Durkheim, 1973a: 52). For this reason, restitutive law and sanctions develop apace to regulate intra- and inter-group cooperation in ways which rely less on repression and more on restoration to health of a social organism whose ills were caused by the offence committed against the 'sacred' individual (Durkheim, 1958: 48). As this indicates, moral individualism includes a religious element since: 'the religion of the individual was socially instituted, as were all known religions. It is society which fixes for us this ideal as the sole common goal which can rally our wills' (Durkheim, 1973a: 54). But these socio-religious ideals now exist outside church-based religions. Rather, moral individualism is religious in a *sociological* sense, providing the common morality needed for social solidarity to form.

Garland's (2013: 36) recent re-analysis of these ideas makes two important points. Firstly, he insists on a reading of Durkheim which stresses that 'the social processes of punishment, insofar as they are social, *presuppose* solidarity as well as *reinforce* it'. In other words, punishment is *both* a project solidarity-building *and* a product of it. To put this in Durkheimian language, punishment is a 'normal' social fact since its 'general character' or function is 'related to the general conditions of collective life in the [society] under consideration' (Durkheim, 1982: 97). Its existence as a normal social fact highlights that a lack of punishment, like a lack of crime, would be a pathological state (Durkheim 1982: 97-104). Consequently the question is not whether punishment exists or not – it has a clear role to play in reinforcing common morality and, thereby, social solidarity – but rather what form it takes.

Like any other social institution, the form of punishment in any society may be normal or pathological. For Durkheim, an institution (or 'social fact') is pathological if it does not correspond with the collective conditions of social life. This might be because the social fact does not fully realise its collective or expressive function or, more likely, because the current form of the social fact corresponds to an earlier period. For example, Durkheim saw the institution of inheritance as a pathological social fact in an era of individualised capitalism since it was a relic, or 'morbid' of the feudal system (Durkheim, 1982:95).

Garland's second argument is that, in Durkheim's later discussions of organic solidarity, he relies less on notions of interdependence (linked to the division of labour) and more on 'the cult of the individual as an overarching moral framework' (Garland, 2013: 36). In our view, Garland is right to highlight a change in Durkheim's framing of the question of solidarity throughout his writing and, indeed, Garland's outlining of these two stages in Durkheim's thought reflects Steiner's (2011) separation of twin research programmes into the economic (concerned with the division of labour) and religious (concerned with individualism)(see also Nisbet, 1965).

However, it is also possible to exaggerate the changes which come with a change in terminology. As Giddens (1971) has noted, Durkheim's tendency to ditch the language of organic versus mechanical solidarity in his later work has led many to see Durkheim as 'moving beyond' the organic/mechanical solidarity dialectic. For Giddens however, Durkheim's later writings 'have everything to do with the attributes of contemporary

society as formulated in *The Division of Labour* (Giddens, 1971: 478). This concern with the division of labour was always combined with a focus on individualism, such as the claim in *The Division of Labour* that organic solidarity had created 'a greater independence of individuals in relation to the group' (Durkheim, 1984: 229)³. Therefore, throughout this paper, we will be using the contrasting conceptions of solidarity as well as the notion of individualism to frame Durkheim's overall intellectual purpose.

Furthermore, following Sirianni (1984), we would argue that the conception of organic solidarity in *The Division of Labour* is as much a normative as an empirical statement, with Durkheim often collapsing the two in his discussion. Organic solidarity is the *goal* of modern societies as much as it is their constitution. This normative goal is clear in Durkheim's view that such a society can 'be said to be a mission of justice' (Durkheim, 1984: 321). This is reflected in Durkheim's conceptions of penal evolution.

Penal evolution

Though Durkheim does not refer directly to the two forms of solidarity in his famous essay *Two Laws of Penal Evolution*, that essay does serve to elaborate them. The first ('quantitative') law is that:

'The intensity of punishment is the greater the more closely societies approximate to a less developed type - and the more the central power assumes an absolute character'. (Durkheim, 1973b: 285)

The forms of solidarity speak to the first of these two forces for penal moderation. For example, Durkheim refers to the lower 'complexity' of these, segmentary societies (Durkheim, 1973b: 285). This lack of complexity and the strength of the shared religion require intense punishment, befitting repressive laws. However, Durkheim is careful to distinguish this from a second moderating force; i.e. the diminution of the absolute power of the sovereign. Perhaps most importantly, he is sensitive to the possibility that the relationships between these two forces – social solidarity and political authority -- are contingent and need not always be aligned. Thus:

³ The greater emphasis given to individualism in the latter writings can also be traced to the political context, with Durkheim defending his sociological conception of individualism against the 'egoistic cult of the self' of utilitarian individualism, as in his rightly famed polemic, *Individualism and the Intellectuals* (Durkheim 1973a).

‘...these two causes of the evolution of punishment - the nature of the social type and of the governmental organ - must be carefully distinguished. For being independent, they act independently of one another, on occasion even in opposite directions. For example, it happens that, in passing from a primitive type of society to other more advanced types, we do not see punishment decreasing as we might have expected, because the organisation of government acts at the same time to neutralise the effects of social organisation. Thus, the process is a very complex one.’ (Durkheim, 1973b: 288-9).

This is an important observation and one which Durkheim doubtless intended to defend his theory from countless historical counter-examples (i.e. of repressive complex societies and of restitutive simple ones). It may also serve to illuminate the penal fate of some late-modern societies. We have already seen that Garland (2013) has argued for a more subtle reading of solidarity than is commonly deployed in comparative criminal justice; a reading that attends to *solidarity-building* as well as to *solidarity-reinforcing* measures. But equally, we could argue that the penal effects of their more complex forms of social order have been affected by changes in the character of their ‘governmental organs’. Here we must turn to the aforementioned centrality of politics to Durkheim’s sociology.

Durkheim argued for a conception of the state, in social conditions of organic solidarity, as the ‘social brain’ (Durkheim, 1992: 53). Its job is to absorb the information delivered by the social senses; to interpret, to reflect, to moderate, to regulate, to guide and to inform – but not to act. To be exact, as Durkheim puts it, the state provides ‘collective representations’ which hold for society. These are termed civic morals and include the moral individualism discussed above, as well as the collective representations of ‘the nation’. But, the state ‘does not execute anything’ (Durkheim, 1992: 51) and is in effect seen as a sort of parliament.

Extending the previous metaphor, if the state is the social brain, the organs of the social body (and its hands, which do the work) are to be found in wider ‘political society’. A political society is

‘formed by the coming together of a rather large number of secondary social groups, subject to the same one authority which is not itself subject to any other superior authority duly constituted’ (Durkheim, 1992: 45)

Therefore, a political society presupposes a state (the 'same one authority') yet is in no way dependent upon it. Rather political society is found in 'secondary social groups' which have executive autonomy and the responsibility of moral regulation over a particular sphere of social life. Most prominently, these groups include what Durkheim called the 'corporations': professional and democratically organised groups made up of all those working within a particular field (Durkheim, 1984: xxxi-lvii).

Durkheim argued that a well-functioning polity depended on a kind of balance of power between the state, the corporations and the citizen. The state had to hold in check the potentially repressive power of civic associations and to balance their competing interests. In doing so, the state 'keeps a rein on all these inequalities' and 'the more active the State becomes' in holding in check such inequalities, 'the more the individual increases his liberty. It is the State that sets him free' (Durkheim, 1958: 50). But equally, the modern state was far too removed from the individual to act as an effective agent of socialization and moral regulation beyond the broad civic morals provided by its collective representations – and, Durkheim argued, it would become repressive should it seek to do so. Therefore, the development of morals relevant to a specific field is left to the corporations.

Durkheim terms such morals 'professional ethics' which exist below civic morals and concern the particular rights and responsibilities of one's profession (Durkheim, 1992: 4-5). Since the increasing geographical and social mobility of modern societies meant that the family's capacity to sustain moralizing functions was limited, it followed that only associations could sustain the professional ethics on which a well-functioning society relied. Only such bodies, due to their consistent contact with their members could provide the specialized professional ethics; 'those of the industrialist are quite different from those of the soldier, those of the soldier from those of the priest, and so on' (Durkheim, 1992: 5).

We will return to this 'balance of powers' later, but the key point is that, according to Durkheim's first law, the evolution of punishment will depend not just on forms of solidarity but also on forms of political authority, and thus on the character of the relationships between the state, political society and the citizen.

Durkheim's second ('qualitative') law is stated thus:

'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' (Durkheim, 1973b: 294).

His explanation of this development in the *form or style* of punishment relies heavily on his account of the rise of moral individualism. In this regard, he distinguishes between 'religious' and 'human' criminality; the former being against the collective, the latter against the individual. To the extent that offending ceased to violate the religious and became an offence of one citizen against another, forms of brutalizing punishment were less likely to be invoked. As Durkheim puts it:

'The moral scandal which the criminal act constitutes is, therefore, less severe, and consequently does not call for such violent repression. The offence of man against man cannot arouse the same indignation as an offence of man against God. At the same time, the sentiments of pity which he who suffers punishment evokes in us can no longer be so easily nor so completely extinguished by the sentiments he has offended and which react against him; for both are of the same nature... But there is a real and irremediable contradiction in avenging the offended human dignity of the victim by violating that of the criminal. The only way, not of eliminating the difficulty (for strictly speaking it is insoluble), but of alleviating it, is to lessen the punishment as much as possible'. (Durkheim, 1973b: 303)

With the rise of individualism, the collective sensibilities of the audience of such punishments shifted; while we retained a sense of outrage now rooted in fellow-feeling for the individual victim (which, due to its shared belief, is still 'sacred'), we could not so easily yield to our punitive passions by feasting on the spectacle of the ritualized abuse of the offender; s/he had become a moral individual too.

This sense of moral individualism which inspires the qualitative law is always a major inspiration for Durkheim's view on the centrality of justice, in the philosophical sense, to organic solidarity. Moral individualism requires that *both* the victim and offender be given appropriate consideration without recourse to punishment for punishment's sake.

Therefore, the style of punishment reflects a wider trend towards notions of justice in organic solidarity, also found in the move from 'religious' to 'just' contracts (Durkheim, 1973b: 286-287, 1992: 196-220). To put this in Durkheimian language, the qualitative law of punishment, with its focus on justice, becomes a normal social fact for organic solidarity.

This qualitative evolution in punishment, and, in particular, the rise of the prison is also accounted for, in part, because of the prison's usefulness as a technological (or architectural) fix for a social function whose contours were changing:

'...at the very time when the establishment of a place of detention was becoming useful in consequence of the progressive disappearance of collective responsibility, buildings were arising which could be utilized for this purpose... In proportion as the penal law abandons the archaic forms of repression, new forms of punishment invade the free spaces which they then find before them' (Durkheim, 1973b: 298).

Consequently, a new way had to be found of (literally) holding the *individual* to account. Durkheim recognizes that this 'holding' originally developed as a prelude to punishment, rather than as a punishment in its own right. However, he argues that, in this case, the social function followed the new penal form; once the pains of (pre-trial) imprisonment became apparent, its utility as a punishment became established. And as it came progressively to be defined by its essential property – the deprivation of liberty -- its punitive character became less and less associated with the particular conditions or peculiar hardships of confinement. So, it was not merely that the prison displaced the gallows (and the stocks); it was also that the penal severity of the prison diminished over time.

The use of prison, particularly its more liberal use as a form of proportionate punishment, became a normal social fact for organic solidarity since it was appropriate to the 'given phase of its development... the average society of that species... [and] the corresponding phase of its evolution' (Durkheim, 1982: 97). Therefore, the qualitative law is an expression of the changing 'function' of the social fact of punishment in organic solidarity (Durkheim, 1982: 134).

However, Durkheim's essay ends, not with a celebration of the relentless and civilizing progress of penal moderation, but with recognition that penal law was in a state of crisis. By the turn of the 20th century he had identified a failure of modern institutions of punishment to find more adaptive ways of fulfilling their functions in terms of building and reinforcing social solidarity, but in a manner consistent with modern moral sensibilities. Moreover, he foresaw the expansionism implicit in coming to understand and define 'human' (as opposed to religious) crimes in ever-broader ways.

This focus on crisis in Durkheim's penal writings should not surprise us, since almost all of his writings during the *fin de siècle* speak of a sense of *malaise*. While seeing this as a fundamentally moral question of culture (Durkheim, 1959:204), In seeking a remedy for the malaise, Durkheim always returned to the political sphere, and the 'balance' of the state and political society referred to above. Indeed, he was very clear on this, commenting that: 'our political malaise is due to the same cause as our social malaise: that is, to the lack of secondary cadres to interpose between the individual and the state' (Durkheim, 1992: 96). Returning to the key point of this paper, the *malaise* or crisis within punishment was due to the lack of appropriate institutional forms of punishment for organic solidarity. As such it cannot fulfill its latent cultural function of both expressing and reinforcing the unity of moral beliefs.

Probation, solidarity and penal evolution

Summarising our exegesis thus far, Durkheim's cultural awareness is, we argue, valuable in helping us to understand the evolution of punishment. Like all other social institutions, institutions of punishment will evolve in ways which reflect their historical contexts, national settings and the divisions of labour (and degrees of complexity) within them. Punishment's institutions should *both* build *and* reinforce social solidarity. In modern societies, the relationships between organic solidarity and moral individualism ought to be associated with a decline in the volume and severity of punishment – but these evolutions will also be affected by the character of political authority in the societies in question, and by the relationships between the state, political society and the citizen within them. Pathological (or maladaptive) development occurs where vestiges or residues of older forms of punishment survive in social contexts and conditions that render them inappropriate. This was precisely Durkheim's diagnosis of punishment at the *fin de siècle*; institutional forms of punishment appropriate to organic solidarity had failed to emerge, meaning that punishment was failing to fulfill its cultural functions in expressing and reinforcing shared beliefs. For Durkheim, this was not just an empirical sociological observation; it was a normative problem. The 'mission of justice' implied in organic solidarity was failing.

In one sense, given where Durkheim's analysis end – in this pathological early twentieth century malaise – we might have expected analysts of the response to the crisis to draw

heavily on his work. Yet, perhaps partly because Durkheim's account of penal evolution is illustrated in the emergence of the prison, and partly because it was originally published in an obscure French journal and not available in English until 1973 (Jones and Scull 1973), historians and sociological analysts of *alternatives* to imprisonment have looked elsewhere for inspiration, as we noted in the introduction. Predictably, most of the familiar critical analyses of the rise of 'community corrections' that emerged in the 1970s and 1980s (e.g. Cohen, 1985; Mathieson, 1983; Scull, 1983) took their inspiration from Foucault, even where they refined or disputed some of his claims.

It is true that the late 20th century crisis of the rehabilitative ideal (Allen, 1981) and the associated 'penal crisis' (Bottoms, 1980) led scholars both to analyse (Bottoms, 1983) and to advocate (Bottoms, 1980; Hulsman, 1986) a move from repressive to restitutive measures and sanctions. But, for example, Bottoms (1983) invokes Durkheim in this context not to analyse the development of probation or alternatives to custody but more generally to re-assert the importance of the relationships between the *moral* evaluation of crimes and *social* and *penal* responses to them; thereby noting how Durkheim's work might help make sense of the rise of the victim in late 20th century criminal justice. Bearing this in mind, and despite something of a recent revival in Durkheimian analyses of punishment (e.g. Smith, 2008), we think it reasonable to make three claims: (1) that there is, as yet, little in the way of Durkheimian analysis of the emergence and development of probation *as a penal institution*; (2) that anyone who aspires to offer an analysis of late-modern penalty will need to attend very carefully to probation (or, more accurately, to penal supervision in the broadest sense), given its remarkable growth, pervasiveness and intensification (McNeill and Beyens, 2013), and (3) that Durkheim's ideas can still contribute in important ways to that task. In the remainder of this paper, we seek to sketch out, in speculative fashion, some of what such an analysis of probation might offer.

A Durkheimian reading of probation would be centrally concerned with what probation has *communicated* on behalf of and to society, and with what effects; in other words it would explore how it has *performed* its penal function. Reflecting the above discussion, such an account would have to include consideration of whether probation has embodied elements of justice found in the normal social facts of organic solidarity. Here we return to an earlier point of Durkheim's, that while the forms of solidarity may change from mechanical to organic this is not a sudden and painless shift, rather it is a long process which, as in

Sirianni's reading, has to be brought into being, at least in part. In the case of modern punishment, this would have required seeking or devising social mechanisms that expressed the 'mission of justice' in organic solidarity. More specifically, three inter-related sets of questions suggest themselves:

1. What forms of social solidarity have differently constituted institutions and forms of probation expressed and reinforced, and how?
2. With respect to the nature of political authority (and relationships between the state, political society and the individual citizen), to whom, on whose behalf, and with what effects on social solidarity, have different forms of probation spoken? This would also include consideration of the role of the market or, as Durkheim terms it, the 'amoral character of economic life' (Durkheim 1992: 12).
3. In what ways has probation's message(s) or 'performance(s)' been shaped by the technologies available to it?

Although Durkheim never wrote of probation as a solution to the *fin de siècle* problems he identified, its rise to prominence in 20th century penology can be understood within the framework of penal evolution he elaborated. Once again (as with the contingent relationships between forms of social complexity and of political authority), the same sort of conjunctural account of the importance of the relations between shifting cultural conditions and emerging technological possibilities can be applied to probation's development.

With respect to solidarity, the progenitors of probation were typically committed not just to moral individualism but to building and working through the types of civic associations prototypical of organic solidarity. Thus penal reformers, police court missionaries and others sought to rescue offenders from de-moralizing experiences of imprisonment and to build or restore their character through example, temperance and/or religious instruction (McWilliams 1983; Simon, 1993; Vanstone, 2004). The available architecture was the legal order itself. In many states, the order represented a suspension of punishment and the establishment of a quasi-civil contract between the court and the offender. It was, in essence, a promise of good behaviour and of restitution or repair – even if that promise was directed principally at the offender him or herself. At the same time, the promise was subject to surveillance; and more repressive sanctions loomed for promise-breakers.

A little later, the pioneers of more professionalized forms of probation developed new technologies: the same legal architecture and supervisory relationship was now to be furnished with social diagnosis and social casework (McWilliams, 1985, 1986; Garland, 1985; Simon, 1993). Just as the prison began as a place of pre-trial detention that came to be seen as 'punishing' and then as a means of punishing, so the technique of social enquiry began as a mode of investigation and classification but evolved into a form of and rationale for intervention with scientifically informed rehabilitative potential (Garland, 1985, Vanstone, 2004). More recent technological innovations -- whether risk assessment tools or offending behaviour programmes or electronic monitoring need to be critically analysed in the same way -- not only in relation to their putative instrumental utility or their effects on practice cultures and identities (see Robinson, 2002), but also in relation to their social functions and meanings. Putting it somewhat crudely: Are they about analyzing how to graft a risky subject back into the social body, or about working out who or what to excise?

Probation's position in the mid-20th century as an expression of a wider current of (penal) welfarism seems intelligible both as a product of organic solidarity and as a solidarity-building project. What probation 'said' in this era was that society needed to enact a commitment to an inclusive (if somewhat over-bearing) vision of organic solidarity; one which insisted that the delinquent acquire the motivation and capacity to live up to his or her civic obligations, but needed and deserved help to do so. Where the family had failed to foster such sensibilities, probation would step in and connect or reconnect the delinquent to pro-social civic associations (Mahood, 1991). A little later, community service (or 'unpaid work') emerged as a different expression of the same message: supported restitution or reparation would act as the socializing, moralizing discipline, but the means of repair would be unpaid work itself rather than the labour of personal transformation.

Indeed, this kind of professionalised (re-)socialisation was a major justification for Durkheim's advocacy of corporation-based activity. Left to themselves individuals 'can take in no more than a small stretch of the social horizon' (Durkheim, 1992: 15). Being part of a corporation however encourages the individual to take in this broader social picture meaning 'a new sort of moral discipline would be established' (Durkheim, 1952: 350). The early and mid-century probation officer's task was to communicate and deliver this sort of moral discipline.

Therefore, from a Durkheimian perspective, the professionalization of probation might have served to clarify its values and its message – and to sharpen its moral performance. Indeed, it was these goals which professional ethics were intended to inform and fulfill; articulating these ethics would, for Durkheim, require some form of professionalised association⁴. But the conjunction between the professionalization of probation and its progressive colonization by the state certainly would have alarmed him as state intrusion into ‘governing the soul’ (Rose, 1980). For Durkheim, as for Foucault, that might have seemed a new and insidious form of absolutism. Probation thus shifted from its locus as a professional office of the courts (or sometimes of *local* authorities), rooted in what might be conceived as institutions of political society (or at least as institutions independent of the executive). It has become instead, at least in some places, a penal ‘service’ run by the state, or even worse (in Durkheim’s terms) a service commissioned by the state from an amoral market; a shift which undermines its moral status and changes its moral message (see McWilliams, 1987 for an early and prescient analysis of these developments).

Where this convergence of centralization and commodification has occurred (see McCulloch and McNeill, 2007), it has allowed the redirection of late-modern probation from being a project of building and reinforcing organic solidarity, to being a project of managing threats to, or maintaining, and even reinforcing, the ‘morbid’ forms of mechanical solidarity (at least from those its state sponsors construct as outsiders). As with many other aspects of state-owned or state-commissioned justice and security, what probation *says* now is that we are in danger, and that we need the state – and the market -- to order and organize our protection (Robinson and McNeill, 2004). This is not dissimilar to the ‘chronic’ economic anomie which Durkheim saw as categorising the *laissez-faire* systems of *fin de siècle* society (Durkheim, 1952: 215).

Durkheim’s animosity to market provision, though infrequently remarked upon, was notable. For him, given that the economic activity favoured by market only has individual, asocial, ends (making money) ‘the unleashing of economic interests has been accompanied by a debasing of public morality’ (Durkheim, 1992: 12). Importantly, since markets will always favour the (economically) ‘strong’ against the ‘weak’, a situation emerges where the interests of the strong (principally in increasing their wealth) become the only guiding

⁴ The history of the National Association of Probation Officers in the UK (and later in England and Wales) has been well documented, not least in the Probation Journal which it co-publishes and which dates back to 1929: see <http://prb.sagepub.com>

principle; Durkheim termed this 'the apotheosis of well-being' which is 'placed above human law' (Durkheim 1952:216). Consequently each function is judged primarily by how 'it may serve what is materially useful, that is to say, serve for the most part the business professions' (Durkheim, 1992: 11). Broader moral and social considerations are impossible, or at least marginal, in this setting, meaning marketised probation becomes not a social or moral service, but rather a source of profit for the economically strong. The complicity of the state and the market means that, as Durkheim put it: 'government, instead of regulating economic life, has become its tool and servant' (Durkheim, 1952: 216). In these respects, Durkheim's analysis of the social consequences of the failure to recognise and regulate 'the moral limits of markets' is not dissimilar to that which has recently been popularized by the American moral philosopher, Michael Sandel (2012).

Returning, to the question of probation and solidarity, this re-reading of Durkheim makes clear that probation's future development – like punishment's -- may depend less on evidence of its 'effectiveness' or 'quality' and more on shifting forms of social organization; on their expression in terms of changing moral sensibilities; and on the changing dynamics of political or governmental authority. Such a discussion does not mean ignoring probation's role in disciplining the urban poor found in the Foucauldian and Marxist literature. As we have seen, Durkheim might have predicted that marketisation of probation services will likely perpetuate the 'state of subjection' (Durkheim, 1992: 11) in which the poor are kept, since the freedom of the economically dominant and their accumulation of capital becomes dependent on the lack of freedom held by the poor (Dawson, 2013: 131-133).

The important practical question for those interested in probation is whether, how and under which social and political conditions probation might resist or moderate these forces. To begin to answer it, we need to examine much more closely, in a range of different contexts (historical and geographical), what it is that probation has communicated (or failed to communicate) about social solidarity, to whom and for whom, and under what forms of political authority? Our concern, echoing Durkheim's century old anxieties about punishment, is that forms of probation have not developed their functions in a ways which express the key elements of organic solidarity. In this sense we could say that, as a social fact, probation has become somewhat pathological, but it may be more accurate (and more generous) to say that contemporary probation does not fully express the moral

individualism and the 'mission of justice' within organic solidarity; and that it may risk expressing its mechanically solid opposite -- repression.

Conclusion

Sociologists (not least sociologists of punishment) might well argue that this illustrative sketch of probation through a Durkheimian lens runs the usual risks of applying concepts developed to describe and explain modern society to late-modern contexts and conditions. Whether pointing to the eclipse of penal welfarism by *The Culture of Control* (Garland, 2001), to the de-civilising tendencies of *The New Punitiveness* (Pratt et al., 2009), to the political technologies deployed in *Governing through Crime* (Simon, 2007), or to the emergence of a penal state designed for *Punishing the Poor* (Wacquant, 2009), it might be suggested that organic solidarity and its 'mission of justice' have been progressively undermined by the social, political and cultural pressures associated with and reflected in globalization, market deregulation and re-assertions of state power through punishment.

But probation's history itself may also challenge some of Durkheim's claims and hopes. For example, Bauman (2005) has argued that Durkheim's conception of solidarity relies on a metaphor of 'society' that is too unified and all encompassing. For Bauman, this was problematic even in Durkheim's time, but has become even more so in a time of liquid modernity, where societal institutions exist in a state of flux. It could be said, following Bauman, that probation has shown that solidarity is formed not by justice and inclusion in the body politic, but rather by exclusion or 'waste management'; the offender being a 'flawed consumer' or a non-citizen facing a late-modern form of 'civil death' (Bauman, 2000). Such an analysis would perhaps be consistent with recent uses of Durkheimian concepts in discussions of 'social exclusion' rather than inclusion (Levitas, 1996). While it may be argued that Bauman is selective in his reading of Durkheim (Dawson, 2013: 179-180) and that the use of Durkheimian concepts in social exclusion debates has often been a poorly elaborated 'punk Durkheimianism' (Levitas, 1996:13), the history of probation may question what could be seen as Durkheim's optimistic reading of the centrality of justice to the development of modernity, let alone in its late or liquid modern form.

Nonetheless, we contend that probation's travails (past and present) serve to confirm the enduring importance of attending to cultural aspects of punishment. For those retaining an interest in penal reductionism or abolitionism, developing restitutive as opposed to

repressive forms of sanction remains a necessary and an enduring aspiration; and that project requires that we pay more careful attention to the communicative quality, content and impact of sanctions. Indeed, it might be argued that the attempt to advance alternatives to imprisonment through rational arguments and cognitive strategies has both missed the point and risked the prize; by neglecting the mission of justice in favour of the mission of (cost-)effectiveness, these adaptations of probation ceded too much to the economic and instrumental rationalities of managerialisation, paving the way for probation's commodification and marketization.

From our perspective, the appropriate response is not to shy away from normative debates about and emotive aspects of the mission of justice, but rather (following Durkheim) to engage them head on, using sociological method to identify and challenge pathological responses that damage the social body, and to propose better adapted ways of building more civic forms of crime control (Loader and Sparks, 2010, 2012). Indeed, to provide a partial defence of Durkheim in light of the above criticisms, the purpose of understanding social solidarity for him was not, as Bauman suggests, to accept the dictates of contemporary reason, but rather to hold them to account. Sociologists of punishment and of probation might wish to echo his claim that: 'A society like ours cannot, therefore, content itself with a complacent possession of moral results that have been handed down to it. It must go on to new conquests' (Durkheim, 1961: 13).

References

- Allen, F. (1981) *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose*. New Haven: Yale University Press.
- Bauman, Z. (2000) 'Social Issues of Law and Order', *British Journal of Criminology* 40(2): 205–21.
- Bauman, Z. (2005) 'Durkheim's Society Revisited' in J. Alexander and P. Smith (eds) *The Cambridge Companion to Durkheim*. Cambridge: Cambridge University Press, 360-382.
- Beyens, K. and McNeill, F. (2013) 'Introduction: Studying mass supervision comparatively' in McNeill, F. and Beyens, K. (eds.) *Offender Supervision in Europe*. Houndmills: Palgrave Macmillan.
- Bottoms, A. (1980) 'An Introduction to "The Coming Crisis"' in A. Bottoms and R. Preston (Eds.) *The Coming Penal Crisis*. Edinburgh, UK: Scottish Academic Press.
- Bottoms, A., (1983) 'Neglected Features of Contemporary Penal Systems' in D. Garland and P. Young (eds.) *The Power to Punish: Contemporary Penalty and Social Analysis*. Aldershot: Gower.
- Bottoms, A. (2008) 'The Community Dimension of Community Penalties', *Howard Journal of Criminal Justice*
- Casey, L. (2008), *Engaging Communities in Fighting Crime*, London: Cabinet Office.
- Cohen, S. (1985), *Visions of Social Control: Crime, Punishment and Classification*, Cambridge: Polity Press/Blackwell.
- Deering, J. (2011) *Probation Practice and the New Penology*. Aldershot: Ashgate
- Dawson, M. (2013) *Late Modernity, Individualization and Socialism: An Associational Critique of Neoliberalism*. Hampshire: Palgrave Macmillan.
- Durkheim, E. (1952) *Suicide*. London: Routledge.

- Durkheim, E. (1958) 'The State', in E. Durkheim (1986) *Durkheim on Politics and the State*. Stanford: Stanford University Press, pp. 45-50.
- Durkheim, E. (1959) *Socialism and Saint-Simon*. London: Routledge.
- Durkheim, E. (1961) *Moral Education: A Study in the Theory & Application of the Sociology of Education*. New York: Free Press.
- Durkheim, E. (1973a) 'Individualism and the Intellectuals' in E. Durkheim *On Morality and Society*. Chicago: University of Chicago Press, pp. 43-57.
- Durkheim, E. (1973b) 'Two Laws of Penal Evolution', *Economy and Society*, 2 (3): 285-308.
- Durkheim, E. (1982) *The Rules of Sociological Method*. Hampshire: Palgrave Macmillan.
- Durkheim, E. (1984) *The Division of Labour in Society*. Hampshire: Palgrave Macmillan.
- Durkheim, E. (1992) *Professional Ethics and Civic Morals*. London: Routledge.
- Garland, D. (1985) *Punishment and Welfare: A history of penal strategies*. Aldershot: Ashgate.
- Garland, D. (2001), *The Culture of Control: Crime and Social Order in Contemporary Society*, Oxford: Oxford University Press.
- Garland, D. (2013) 'Punishment and Social Solidarity' in Simon, J. and Sparks, R. (eds.) *The Sage Handbook of Punishment and Society*, London and New York: Sage.
- Giddens, A. (1971) 'Durkheim's Political Sociology', *Sociological Review*, 19 (4): 477-519.
- Hulsman, L. (1986) 'Critical Criminology and the Concept of Crime' in H. Bianchi and R. Van Swaaningen (eds.) *Abolitionism: Towards a Non-repressive Approach to Crime*. Amsterdam, Free University Press.
- Jones, T.A. and Scull, A.T. (1973) 'Durkheim's "Two Laws of Penal Evolution"', *Economy and Society*, 2 (3): 278-284.

- Levitas, R. (1996) 'The Concept of Social Exclusion and the New Durkheimian Hegemony', *Critical Social Policy*, 16 (46): 5–20.
- Loader, I. and Sparks, R. (2010) *Public Criminology?*, London: Routledge.
- Loader, I. and Sparks, R. (2012) 'Beyond Lamentation: towards a democratic egalitarian politics of crime and justice' in J. Peay and T. Newburn (eds.) *Policing: Politics, Culture and Control, Essays in Honour of Rob Reiner*. Hart Publishing.
- Lynch, M. (1998) 'Waste Managers? The New Penology, Crime Fighting and Parole Agent Identity', *Law and Society Review* 32(4): 839-869.
- Lynch, M. (2000) 'Rehabilitation as Rhetoric: The ideal of reformation in contemporary parole discourses and practices', *Punishment and Society* 2(1): 40-65.
- McCulloch, P. and McNeill, F. (2007) 'Consumer Society, Commodification and Offender Management' *Criminology and Criminal Justice*, 7(3): 223-242.
- McNeill, F. (2011) 'Probation, Credibility and Justice', *Probation Journal* 58(1): 9-22.
- McNeill, F. (2013) Community Sanctions and European Penology, in Daems, T., Snacken, S and Van Zyl Smit, D. (eds.) *European penology*. Hart Publishing.
- McNeill, F., Burns, N., Halliday, S., Hutton, N. And Tata, C. (2009) 'Risk, responsibility and reconfiguration: Penal adaptation and misadaptation' *Punishment and Society*, 11(4): 419-442
- McNeill, F. and Beyens, K. (2013) 'Introduction: Studying mass supervision' in McNeill, F. and Beyens, K. (eds.) *Offender Supervision in Europe*. Houndmills: Palgrave Macmillan.
- McNeill, F. and Beyens, K. (eds.) (2013) *Offender Supervision in Europe*. Houndmills: Palgrave Macmillan.
- McWilliams, W. (1983) 'The Mission to the English Police Courts 1876-1936', *The Howard Journal* 22: 129-147.

- McWilliams, W. (1985) 'The Mission Transformed: Professionalisation of Probation Between the Wars', *The Howard Journal of Criminal Justice* 24(4): 257-274.
- McWilliams, W. (1986), 'The English Probation System and the Diagnostic Ideal', *The Howard Journal of Criminal Justice* 25(4): 241-260.
- McWilliams, W. (1987) 'Probation, Pragmatism and Policy', *The Howard Journal of Criminal Justice* 26(2): 97-121.
- Mahood, L. (1991) *Policing Gender, Class and Family in Britain, 1950-1940*. London: UCL Press.
- Maruna, S. and King, A. (2008) 'Selling the Public on Probation: Beyond the Bib' *Probation Journal* 55(4): 337-351.
- Mathieson, T. (1983) 'The Future of Control Systems: The Case of Norway', in D. Garland and P. Young (eds.) *The Power to Punish: Contemporary Penalty and Social Analysis*. Aldershot: Gower.
- Nisbet, R. (1965) *Émile Durkheim*. Edgewood Cliffs, N.J.: Prentice Hall.
- Phelps, M. (2013a) 'The Paradox of Probation: Community supervision in the age of mass incarceration.' *Law and Policy* 35(1-2): 55-80.
- Phelps, M. (2013b) *The Paradox of Probation: Understand the Expansion of an 'Alternative' to Incarceration during the Prison Boom*, PhD thesis, Princeton University, Ann Arbor: ProQuest/UMI.
- Pratt, J., Brown, D., Brown, M., Hallsworth, S., Morrison, W. (2005) *The New Punitiveness: Trends, Theories, Perspectives*. Cullompton: Willan.
- Robinson, G. (2002) 'Exploring risk management in the probation service: Contemporary developments in England and Wales', *Punishment and Society* 4(1): 5-25.
- Robinson, G. and McNeill, F. (2004) 'Purposes Matters: The Ends of Probation', pp.277-304 in G. Mair (ed.) *What Matters in Probation Work*. Cullompton: Willan

- Robinson, G., McNeill, F. and Maruna, S. (2013) 'Punishment *in* Society: The Improbable Persistence of Community Sanctions' in Simon, J. and Sparks, R. (eds.) *The Sage Handbook of Punishment and Society*, London and New York: Sage.
- Rose, N. (1990) *Governing the Soul: The shaping of the private self*. Routledge: London.
- Sandel, M. (2012) *What Money Can't Buy: The Moral Limits of Markets*. London: Allen Unwin.
- Scottish Prisons Commission (2008) *Scotland's Choice*. Edinburgh: Scottish Prisons Commission.
- Scull, A. (1983) 'Community Corrections: Panacea, Progress or Pretence?' in D. Garland and P. Young (eds.) *The Power to Punish: Contemporary Penalty and Social Analysis*. Aldershot: Gower.
- Simon, J. (1993) *Poor Discipline: Parole and the Social Control of the Underclass 1890–1990*. Chicago: University of Chicago Press.
- Simon, J. (2007), *Governing through crime: How the war on crime transformed American democracy and created a culture of fear*, New York: Oxford University Press.
- Sirianni, C. (1984) 'Justice and the Division of Labour: A Reconsideration of Durkheim's *A Division of Labour in Society*', *Sociological Review*, 32 (3): 449-70.
- Smith, P. (2008) *Punishment and Culture*. Chicago, IL.: University of Chicago Press.
- Smith, P. and Alexander, J.C. (2005) Introduction: the new Durkheim. In J.C. Alexander and P. Smith (eds) *Cambridge Companion to Durkheim*. Cambridge: Cambridge University Press, pp. 1-37.
- Steiner, P. (2011) *Durkheim and the Birth of Economic Sociology*. Princeton: Princeton University Press.

Vanstone, M. (2004) *Supervising Offenders in the Community*. Aldershot: Ashgate.

Wacquant, L. (2009), *Punishing the Poor: The Neo-liberal Government of Social Insecurity*, Durham, NC and London: Duke University Press.

Werth, R. (2013) 'The construction and stewardship of responsible yet precarious subjects: punitive ideology, rehabilitation and "tough love" among parole personnel', *Punishment and Society* 13(3): 219-246.

Young, P. (1976) 'A Sociological Analysis of the Early History of Probation', *British Journal of Law and Society* 3(1): 44-58.