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COMPASSION CAN BE CRUEL: DURKHEIM ON SYMPATHY AND PUNISHMENT*

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Emile Durkheim's perspective on punishment has been examined in considerable detail, but criminologists still neglect one dimension of his perspective: his account of the causal relationship between "sentiments of human sympathy" and the intensity of criminal punishment. Unlike conventional accounts, which propose a negative relationship between these variables, Durkheim argued that there are conditions under which the relationship is positive. According to Durkheim, increments in feelings of compassion for humans in general can heighten public outrage to acts of "human criminality" and, for this reason, can intensify the punitive response to such crimes. In this article, Durkheim's account of this relationship is abstracted from his theory of penal evolution and is revised to improve its plausibility and temper its problematic implications. It is concluded that his account represents another irony of his work which warrants attention, and which may further our understanding of the persistence of both imprisonment and punitive attitudes.

The work of Emile Durkheim, taken as a whole, includes several interesting ironies; these are contentions that stand in direct opposition to "common sense" and appear contradictory on the surface. One notable example is his argument that a society with an exceptionally low crime rate is unhealthy in comparison with other societies at a comparable level of development, and suffers from "some social disturbance." In The Rules of Sociological Method ([1895] 1982:85-107), Durkheim described crime both as an incapable side effect of conditions necessary for healthy social development and as something that occasionally promotes social

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development directly by weakening collective sentiments that impede favorable social change. Thus, to reduce the crime rate to an exceptionally low level, a society would have to eliminate progressive conditions and, in effect, stunt its own development.

Another irony in Durkheim's work is his argument that people who are entirely free from social restraints cannot be free. In Suicide ([1897] 1951) he held that humans are born with desires which, if left unrestrained, could never be satisfied. Accordingly we need the moral regulation of society to control our naturally unlimited aspirations: without such restraint, we would be "enslaved" by our passions. Unable to escape an "endless pursuit," we would be condemned "to a state of perpetual unhappiness."

In "Two Laws of Penal Evolution" ([1900] 1969), 1 Durkheim presented yet another irony, one that centers on the causal relationship between "sentiments of human sympathy" and the intensity of criminal punishment. In short, he implied the following: all else remaining the same, punishments for crimes that injure human beings and offend "humanity" only—that is, punishments for acts of "human criminality"—will tend to become more intense as our compassion for humans in general increases in strength. According to Durkheim, growth in our sympathy for other human beings intensifies our contempt for such crimes and incites us to punish offenders more severely. Human sympathy also generates contempt for punishment, but this contempt is surpassed by our abhorrence for acts of human criminality because we naturally feel more sympathy for the victim than for the offender. In other words, following Durkheim's reasoning, the growth of public indignation toward punishment caused by increments in human sympathy cannot generally keep pace with the growth of public indignation toward human criminality, which has the same cause. Thus, all else being equal, an ironic, positive relationship will tend to exist between human sympathy and the intensity of punishment for human criminality. 2

1 Currently there are at least two English translations of Durkheim's "Two Laws of Penal Evolution": one by William Jeffrey Jr. (Durkheim [1900] 1969) and the other by T.A. Jones and A. Scull (Durkheim [1900] 1983). In this article, I use Jeffrey's translation as the primary source, although I also use Jones and Scull to confirm important assertions and interpretations.

2 The list of ironies present in Durkheim's work can be extended. For instance, there is something ironic about his contention that the division of labor is a source of solidarity. By way of the complementary differences it entails, "the division of labor unites at the same time as it sets at odds ... it brings closer those that it separates" ([1893] 1984:217). In sum, the above-mentioned ironies may be reduced to the following: under certain limited but normal conditions, there is a sense in which "evil" is good, domination is liberating, compassion is cruel, and division is unifying.
Although Durkheim's perspective on punishment has been examined extensively, criminologists have given little attention to his account of the causal relationship between sentiments of human sympathy and the intensity of criminal punishment. The main purpose of this article is to draw more attention to his explanation of this relationship and to develop it as an argument worthy of some recognition. The inquiry includes an outline of Durkheim's conception of crime and its relationship to punishment; a summary of his "law of quantitative variations," the immediate theoretical context of his human sympathy/punishment irony; a description of the development and structure of this irony; and an overview of its implications and contemporary relevance. I propose that Durkheim's account of the relationship between human sympathy and punishment, with modest revisions, may further our understanding of the persistence of both imprisonment and punitive attitudes despite the shortcomings of his more general theory of crime and punishment. In this connection, I have revised his account of this relationship to make it more plausible and moderate its problematic implications; in particular, I have replaced his assumption regarding perceptions of individual responsibility with a variable that allows for perceptions of societal responsibility. Finally, in view of the revised account and Durkheim's concern with empirical verification, I discuss issues pertaining to testability.

To develop an adequate understanding of Durkheim's human sympathy/punishment irony, it is first necessary to understand his conception of crime and its relationship to punishment. (I set aside the common criticisms of Durkheim's viewpoint on crime, punishment, and penal evolution until the end of this article to avoid lengthy digressions that have little bearing on the main purpose of this inquiry.)

**CRIME AND PUNISHMENT**

Throughout his work, Durkheim maintained that crime and punishment are intimately connected. This is clearly evident in "Two Laws of Penal Evolution," where he writes: "Because punishment results from crime and expresses the manner in which the public conscience is affected, we must seek the determining cause of the evolution of punishment in the evolution of crime" ([1900] 1969:51). Consequently an understanding of Durkheim's conception of punishment requires an understanding of his conception of crime.

In his first major work, *The Division of Labor in Society* ([1893] 1984), Durkheim concluded that crimes are not only "acts repressed by prescribed punishments" but also acts that directly or indirectly
offend a society's common (collective) consciousness. He emphasized that most crimes offend the common consciousness directly by violating strong, precise collective sentiments. In other words, they violate deep feelings concerning what is important or right; such feelings are generally connected to "clearly defined" practices\(^4\) and are "shared by most average individuals in the same society." According to Durkheim, these feelings are shaped by "very diverse causes" and differ from one society to another and across time within the same society; in this way he accounts for variations in repressive law (criminal law) across societies and time. Moreover, some of these sentiments, in themselves, may serve no useful social purpose and may even be detrimental to society: that is, they are not necessarily intrinsically related "to the vital interests of society or to a minimum of justice" (p. 40).

Durkheim ([1893] 1984:41-43, 60-61) extended his conception of crime to include acts that offend the common consciousness indirectly by threatening "the organ of government." Because government generally symbolizes and defends the common consciousness more strongly than does any other social institution, acts that injure government can weaken the common consciousness. Some of these acts may be treated as crimes, even though they do not violate a strong, precise collective sentiment. Governmental authority, according to Durkheim, derives its power from the common consciousness; yet it can achieve a somewhat "autonomous" existence in which it is "capable of producing its own spontaneous actions." This independence allows government to classify "as crimes those acts that are harmful to it, even when the sentiments of the collectivity are not affected to the same extent" (p. 43). Thus Durkheim can explain why some crimes may be punished more severely than called for by the public indignation they provoke.

Durkheim ([1893] 1984) also contended that the process of social development is generally accompanied by a gradual weakening of many strong states of the common consciousness and consequently by the disappearance of many repressive laws, particularly those which designate "domestic," "sexual," "traditional," and "religious" crimes (pp. 105-25). This process, however, is not accompanied by a weakening of every dimension of the common consciousness. One class of sentiments, those concerning "the dignity of the human person," becomes stronger and more precise: "As all the other beliefs and practices assume less and less religious a

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\(^3\) Durkheim ([1893] 1984:38-39) defines the common consciousness as "(t)he totality of beliefs and sentiments common to the average members of a society."

\(^4\) Such practices may include actions "undertaken or avoided . . . It is a question of doing or not doing this or that, of not killing or wounding, or uttering a particular formula, or accomplishing a particular rite, etc." (Durkheim [1893] 1984:38).
character, the individual becomes an object of a sort of religion” (p. 122). This contention implies an increase in the number of repressive laws that correspond to these sentiments. It also allows for the number of specific repressive laws in a society to increase with the decline in the number of general “classes” and “sub-classes” of repressive laws (see Durkheim [1893] 1984:108; [1900] 1969:59-60).

In “Two Laws of Penal Evolution” ([1900] 1969), Durkheim addressed this issue once more, but there he reduced the categories of repressive law he had identified earlier (e.g., domestic, sexual, traditional, religious, and individual) to “two fundamental categories”: “religious criminality” and “human criminality.” In keeping with his earlier analysis, he held that social development is generally accompanied by a decline in religious criminality and a growth in human criminality. Religious criminality refers to offenses against collective sentiments associated with “some external power superior to humanity,” a “superhuman” force such as an ancestor or a god ([1900] 1969:51-53). The repressive laws representing this category of crime are often accepted as the commandments of a god or some other “august personality,” and their violation is regarded as an offense against that entity. According to Durkheim, religious criminality includes not only crimes against religion proper (faiths that avow the existence of one or more superhuman entities), but also crimes against cultural traditions and the state, because the latter are often penetrated by religion proper and thus are endowed with a quality superior to humanity. Accordingly, in some societies, it may be a crime to advocate a belief or practice opposed to the common faith, to reject traditional forms of dress, or to insult a ruler who is perceived to be “more than human.”

In contrast, human criminality concerns offenses against collective sentiments associated with “humanity,” a force that is transcendent only in part (Durkheim [1900] 1969:51-52, 54-55). Because humanity is an abstraction, an “ideal,” that cannot be realized entirely in any particular individual, it has a transcendent quality; yet its transcendency is less than that of a god, for “we know and perceive ourselves to be human,” and “each of us embodies something of humanity.” Hence the repressive laws representing this category of crime are not viewed as commandments of a superhuman entity, nor is their violation regarded as an offense against such an entity. Instead they designate crimes against humanity. Such actions contravene “feelings that protect human dignity,” the “sympathy we have for mankind in general”—in short, sentiments of human sympathy. Acts of human criminality are thus violations of strong feelings of respect for the lives, freedom, honor, and possessions of individuals. These crimes, which “injure
only individuals" (i.e., offend only humanity), include murder, assault, theft, and "other outrages against human beings." (Also see Durkheim [1893] 1984:108, 122; [1898] 1969:22-28.)

Durkheim ([1900] 1969:51-55) presented another way of conceptualizing both religious and human criminality that augments and (to some degree) explains the above descriptions. Specifically, religious criminality also may be viewed as offenses against collective sentiments that have "collective 'things' as their object." Collective "things"—such as religion proper, traditions, and the state—extend "beyond the circle of our private interests" and require from us "sacrifices and privations of all sorts." Because our respect for these "things" tends to enter us "without our efforts" and prompts us "to do violence to our natures," we often associate it with some "external force" that is "superior to us."

Alternatively, human criminality may be viewed as offenses against "collective sentiments whose object is the individual." This is simply a rewording of the previous definition because "the individual" that Durkheim had in mind is not the "sensible, empirical individual" of utilitarian theory, but rather the "human person in general" (i.e., humanity). In any case, unlike sentiments related to collective "things," sentiments related to the individual do not prompt us to do violence to our natures, for they are generally compatible with "the natural inclinations of our sensibilities." Consequently there is no great need to associate them with a superhuman force.

Complicating the distinction between religious and human criminality is the fact that injuries to individuals can be viewed as offenses against a superhuman entity. Conversely, certain offenses against collective "things" can be interpreted as transgressions against humanity (Durkheim [1900] 1969:56-57). In simple premodern (preindustrial) societies, repressive law, from Durkheim's viewpoint, is generally dominated by religious criminality. Thus the injuries to individuals that are forbidden generally bear an "imprint" of religiosity: "So long as crime is, in a general manner, thought of as being essentially an offense directed against divinity, crimes committed by man against man will also be thought of along the same lines" (p. 56).

As societies develop, however, this situation is reversed to some degree. In modern (industrial) societies, repressive law is generally dominated by human criminality. Thus the offenses against collective "things" that remain unlawful tend to be perceived as acts of "lese humanity" rather than as acts of "lese divinity."
[H]uman criminality, as it gains ground, reacts upon religious criminality and, so to speak, assimilates it to itself. Although attacks against persons constitute the principal crimes today, attacks against collective “things” (crimes against the family, against the mores, against the State) can still occur. On the other hand, these collective “things” themselves tend increasingly to lose the religiosity formerly so characteristic of them . . . As a result of this, crimes directed against these collectivities share the character of those that directly injure individuals. (p. 57)

To develop a basic understanding of Durkheim’s theory of punishment and penal evolution, we must keep in view two contentions of his theory of crime. First, the “essential” nature of crime has not changed with social development. In both premodern and modern societies, crime usually refers to acts that offend strong states of the common consciousness, intense feelings shared by the “average” members of a society. Second, an important change nevertheless has accompanied the process of social development; that is, religious criminality has given way to human criminality. As societies develop and as religion proper is gradually replaced by the “religion of humanity,” collective feelings become less sensitive to violations of beliefs and practices associated with superhuman entities, and more sensitive to violations of our evolving respect for humanity. Accordingly, crime has been defined increasingly in terms of acts that injure human beings only, and human criminality has become the predominant form of criminality in modern societies.

Durkheim ([1893] 1984) believed that a precise definition of crime must explain all the essential characteristics of punishment, and that the essential characteristics of punishment, like those of crime, have not changed as societies have developed from premodern to modern types. Of course Durkheim ([1900] 1969) argued that as societies develop, punishments tend to become less intense and to change their form, at least where political authority is far from “absolute in character.” As discussed below, he explained the decreasing intensity of punishment in terms of the development of human criminality and the decline of religious criminality, while he described the changing form of punishment in terms of the rise

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5 In discussions of Durkheim’s work, the “religion of humanity” is commonly referred to as “the religion (or cult) of the individual.” I use the former expression here because it communicates his intended meaning more effectively. The “motive force” of this modern faith, of “individualism” as conceived by Durkheim ([1898] 1969:24), “is not egoism but sympathy for all that is human, a wider pity for all sufferings, for all human miseries, a more ardent desire to combat and alleviate them, a greater thirst for justice.” Moreover, for Durkheim, the religion of humanity is a religion because it embodies strong collective sentiments that are transcendent in part and inspire “reverential respect” for the individual in general (see Durkheim [1893] 1984:119-120, 122; [1898] 1969:22-28).
of imprisonment and the corresponding decline of corporal punishments. These changes, however, do not (from Durkheim’s viewpoint) represent changes in the essential characteristics of punishment. As David Garland (1990:27) observes, “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.”

Punishment, for Durkheim ([1893] 1984), remains an act of vengeance involving some injury or disadvantage imposed upon a criminal; more important, it remains a passionate and graduated reaction to crime. Durkheim held that these two characteristics of punishment “derive from the nature of crime.” Punishments tend to be reactions of “passionate feeling” because most crimes offend sentiments that are exceptionally strong. As a result, the crimes deeply disturb those who share the sentiments and are aware of their violation:

When some cherished belief of ours is at stake we do not allow, and cannot allow, violence to be done to it with impunity. Any assault upon it provokes an emotional reaction of a more or less violent nature, which is turned upon the assailant. (p. 54)

If emotions are not evident in the direct administration of punishment (if they are masked, for instance, by the bureaucratic norms of modern prison systems), nonetheless they may be found in the process leading up to punishment. As Durkheim commented,

We need only observe how punishment operates in the law-courts to acknowledge that its motivating force is entirely emotional. For it is to the emotions that both prosecuting and defending counsel address themselves. The latter seeks to arouse sympathy for the guilty person, the former to stir up the social sentiments that have been offended by the criminal act. (pp. 47-48)

In keeping with this line of reasoning, Durkheim ([1893] 1984) argued that punishments are “graduated in intensity” not simply because some crimes cause more physical injury or property loss than others, but because different crimes violate sentiments of different strengths and to different degrees: “A strong state of feeling reacts more than does a weak one, and two states of equal intensity

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6 “(P)unishment has remained an act of vengeance, at least in part. It is claimed that we do not make the guilty person suffer for the sake of suffering. It is nevertheless true that we deem it fair that he should suffer... What we are avenging, and what the criminal is expiating, is the outrage to morality” (Durkheim [1893] 1984:46-47).

7 Durkheim ([1893] 1984) also concluded that punishment is social and organized. For purposes of this article, however, a discussion of these two additional characteristics is unnecessary.
react unequally according to the degree to which they have been violently attacked" (p. 57). For instance, where collective sentiments concerning "filial piety" are stronger than those which prohibit physically wounding another person, the act of striking one's parents (or perhaps even disobeying them), given Durkheim's reasoning, generally will be punished more severely than an assault of equal physical intensity on someone outside the family. Similarly, in regard to sentiments about physical wounding, assaults that cause serious bodily injury will ordinarily be punished more severely than assaults that cause only moderate injury. In both cases the same sentiment has been violated, but it has been violated to a greater degree by the assault that resulted in serious injury. In short, Durkheim concluded that the severity of punishment usually increases with the strength of the offended sentiment and of the violation of that sentiment.

Durkheim's conception of crime also informed his standpoint on the primary function of punishment. In his view, this primary function is neither the correction of criminals nor deterrence. In his words, punishment "does not serve, or serves only very incidentally, to correct the guilty person or to scare off any possible imitators" ([1893] 1984:62). Instead its primary function, in the most general sense, is to help preserve the common consciousness by reinforcing the strong collective sentiments that are injured by crimes and by supporting the governing authority that symbolizes and protects the common consciousness. The sentiments violated by criminal acts will weaken if there is no punitive reaction or if the reaction is too moderate. A crime may signify, to average, law-abiding people, that a cherished belief or practice is considered by others to be unimportant or wrong; punishment signifies that the belief or practice is important and right. In this way it reinforces and restores strength to the offended sentiment. Accordingly, if criminals are not punished, the strength of the common consciousness is diminished.

This line of argument led Durkheim ([1893] 1984:63) to conclude that "punishment is above all intended to have its effect upon honest people." As he stated in Moral Education (1925/1973:167), "the essential function of punishment 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 — even though they themselves aren't aware of it." In short, punishment is

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8 The law concerning violence in the second book of Moses may be interpreted in this way (see Exodus 21:15-19).
not only an emotional and variable reaction to the violation of strong collective feelings; it also reinforces those feelings.  

This outline of Durkheim's conception of crime and its relationship to punishment will introduce us to the more immediate theoretical context, in which he presents his irony concerning the relationship between human sympathy and punishment. The groundwork is now in place for an overview of his theory of penal evolution, particularly his law of quantitative variations.

**PENAL EVOLUTION AND THE LAW OF QUANTITATIVE VARIATIONS**

Durkheim ([1900] 1969) argued that punishments historically have displayed both quantitative and qualitative aspects. The quantity of punishment, which concerns "severity" or "intensity," centers on the degree of pain inflicted and the loss suffered. In this connection, Durkheim implied a simple ordinal ranking in punitive intensity. This ranking begins with death preceded by corporal punishment, and moves sequentially to the less intense punishments: "simple death," "mutilations" without death, imprisonment supplemented by additional hardships (e.g., very limited rations, chains, or hard labor), and finally imprisonment alone (see pp. 37-43, 49-50).

The quality of punishment concerns the form of punishment: the primary distinction is that between punishments inflicted upon the body and deprivations of liberty. These variables are the focus of his two laws of penal evolution: "the law of quantitative variations" and "the law of qualitative variations." Durkheim suggested that his two laws may represent only "gross approximations," and subsequent studies imply that his reservations were well advised (Garland 1990; Malinowski [1926] 1989; Sorokin [1937] 1962; Spitzer 1975). Even so, they constitute the immediate framework for his most complete account of the relationship between human sympathy and criminal punishment. Because his law of quantitative variations is particularly significant in this regard, it will be the focus of the following discussion.

Durkheim ([1900] 1969:32) summarized his law of quantitative variations as follows: "The severity of punishment is greater where

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9 Following Durkheim's reasoning, punishment serves other functions as well. It reinforces "mechanical solidarity," especially in premodern societies. (Mechanical solidarity is a form of social solidarity based on similarities and is more intense in premodern societies.) It also may help maintain respect for human dignity in modern societies by reinforcing collective sentiments associated with humanity. In addition, punishment may help alleviate the social psychological distress caused by violations of strong collective sentiments: that is, it may help restore a sense of well-being among the average members of society.
societies are of a less advanced type and where the central power is more absolute in character.” This statement embodies two distinct propositions: (1) as a society advances, punishment generally becomes less severe; and (2) as the government of a society becomes increasingly absolute, punishment generally becomes more severe. Regarding the first proposition, Durkheim maintained that punishments typically became less severe as societies advanced from “ancient” forms (e.g., Egyptian, Assyrian, and Hindu) to the city-states of Athens and Rome, to the Christian societies of the Middle Ages, and finally to modern Western societies. He explained this pattern of “punishment regression” in terms of the gradual change in the common consciousness described earlier; this change is reflected in the decline of religious criminality and the growth of human criminality.

According to Durkheim ([1900] 1969), as societies develop and as human criminality represents an increasing proportion of the repressive law, the intensity of punishment declines gradually for two reasons. First, the offender’s status and that of the entity offended generally become more equal; this phenomenon reduces the degree of public outrage stimulated by crime. With social advancement, more and more crimes have come to be viewed as offenses against “individuals” or “mankind” (acts of “lese humanity”), and fewer crimes are viewed as offenses against a god or some other superhuman entity (acts of “lese divinity”). Thus, in modern societies, both the offender and the offended are likely to be defined as essentially human; this situation tempers the intensity of public outrage and, accordingly, of punishment. Where a crime is viewed primarily as an offense against a superhuman entity, as is commonly the case in premodern societies, it incites greater anger and more intense punishment: “The attack of one man against another man does not arouse the same indignation as does the attack of a man against a god” ([1900] 1969:55).

Second, social development and the rise of human criminality involve a changing cultural context in which sentiments of human sympathy, particularly “compassion” or “pity” for those who suffer punishment, can be felt more strongly. These sentiments, according to Durkheim, are “stifled” in instances of religious criminality. As societies develop, however, religious criminality generally declines. As a result, sympathy for the offender can be experienced: “[T]he compassion whose object is the condemned man, is no longer overwhelmed by contrary sentiments which do not permit it to make its action felt” ([1900] 1969:56). This compassion for the condemned person opposes the public outrage that is stimulated by
crime; it shields the offender from the full force of public emotion and thus moderates the intensity of punishment.¹⁰

Two additional points need to be emphasized regarding the first proposition. First, its scope is historically limited in that we should not expect a continuous decline in punitive intensity far into the future. According to Durkheim’s reasoning, ongoing social advancement does not translate into the gradual disappearance of punishment; instead the historical decline in the intensity of punishment should halt, once religious criminality has faded away.

Second and more important, this proposition may help explain why Durkheim’s account of the human sympathy-punishment relationship has been neglected. In his discussion of this proposition, Durkheim concluded that a negative correlation historically has existed between sentiments of human sympathy and the intensity of criminal punishment, and he agreed that the extension of these sentiments to criminals has contributed to a decline in the intensity of punishment. On the surface, then, Durkheim’s account contains no irony. The irony is hidden, however, because the key explanatory factor is the decline of religious criminality, not the corresponding rise of human sympathy. As I discuss more fully below, Durkheim emphasized that where human sympathy grows stronger, punishments for acts of human criminality generally become more severe, all else remaining the same. Indeed, his reasoning suggests the possibility that the historical decline in punitive intensity may be reversed: after religious criminality has disappeared, increments in compassion may lead to more intense punishments.

The second proposition of the law of quantitative variations centers on the concentration of governmental power within a society, or the degree of “governmental absolutism.” According to Durkheim ([1900] 1969), government becomes more absolute as other social institutions lose their ability to “limit” or “balance” governmental power, as government’s relations with the rest of society become more “unilateral” (i.e., as the average person is reduced to property of the elite),¹¹ and as “the directive functions of a society”

¹⁰ In addition, the sentiments offended by human criminality embody a feeling (sympathy) that tempers reactions to their violation, whereas the sentiments associated with religious criminality do not, at least not to the same degree (Durkheim [1900] 1969).

¹¹ “(T)he more that the relations of the supreme power to the rest of society have a unilateral character—in other words, the more they resemble those which link a person with the property he owns—the more absolute is the government” (Durkheim [1900] 1969:34).
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are controlled by fewer persons. In other words, government becomes more absolute as it becomes less democratic.\textsuperscript{12} To be entirely absolute, governmental power must be concentrated in the hands of one person only and must be completely free of limitations imposed by other social institutions. Although such a situation may be "inconceivable," governments can become "more or less absolute"; such governments may be found in both premodern and modern societies.

Durkheim ([1900] 1969) offered two reasons for the existence of a positive relationship between the degree of governmental absolutism and the intensity of punishments. First, he held that as a government becomes more absolute, laws are more likely to be viewed as expressions of the ruler's will, and the ruler is more likely to be considered "more than human."\textsuperscript{13} Thus, once again, his reasoning revolves around the status of the offender in relation to the status of the entity offended. In societies characterized by a "hyper-centralization" of power, crimes will tend to be viewed as offenses against the ruler, someone who is superior to humanity; thus they will engender greater public outrage and more severe punishments. Conversely, as a government becomes less absolute, laws are less likely to be viewed as expressions of the ruler's will, and the ruler loses his or her superhuman image; therefore public contempt for offenders weakens and the severity of punishment declines.

Second, Durkheim implied that where authority is highly centralized, those who are in power will be more sensitive to criminal acts and will punish them more severely: "The fact that authority is concentrated to such a high degree . . . renders it more sensitive to everything that offends it and more violent in its reactions" ([1900] 1969:58-59). Consequently an offense against a more or less absolute ruler can result in a punishment more intense than is called for by the public indignation it provokes.

From Durkheim's ([1900] 1969) viewpoint, social advancement is more significant than the concentration of governmental power in explaining historical variations in the intensity of punishment. Moreover, he believed that the two variables are independent of each other. The effect of social advancement on punishment, in other words, may be altered by variations in the concentration of governmental power. For example, Durkheim asserted that when

\textsuperscript{12} Durkheim ([1900] 1969) contrasts absolutism with democratic government; yet he does not provide a definition of the latter. This point is significant because he may have been using the term \textit{democratic} to refer to something other than "direct" or "representative" democracy (see Giddens 1972:19-20).

\textsuperscript{13} "The establishment of an absolute power necessarily has the effect of elevating its holder above the rest of humanity . . . he who exercises the power seems to men like a divinity" (Durkheim [1900] 1969:58).
authority became more absolute in Rome and later in the Middle Ages, punishments became more severe. He also concluded that the Hebrews imposed milder punishments than many other ancient peoples, not because they were more advanced, but because their governments were more "democratic." Thus Durkheim's law of quantitative variations allows some room for substantial disparities in punitive intensity among societies that are equally developed. It is possible for some modern societies to impose exceptionally severe punishments on criminals, and for some premodern societies to impose punishments that are relatively mild compared to other premodern societies.

The model depicted in Figure 1 summarizes the rationale behind Durkheim's law of quantitative variations. It applies, however, only until religious criminality has largely faded away; at that point, the effect of social advancement on punishment may cease or may be reversed.

Durkheim ([1900] 1969:44) summarized his second law, the law of qualitative variations, as follows: "Punishments consisting of deprivations of liberty, and then only for periods of time that vary according to the gravity of the crime, tend increasingly to become the normal type of repression." This law implies that as societies advance, imprisonment gradually emerges and replaces capital and corporal punishments as the prevailing response to crime. Durkheim maintained that it is possible to trace the development of detention from ancient to modern societies, even though criminologists do not agree until the eighteenth century to acknowledge "imprisonment as punishment in certain defined cases" (pp. 45-46).

Durkheim's explanation of this developmental pattern revolved around three issues: (1) the emergence of a need for "preventive detention," a phenomenon associated with a cultural shift in conceptions of criminal responsibility (from "collective responsibility" to individual responsibility); (2) the development of the material and organizational conditions necessary for detaining large numbers of persons for long periods; and (3) the subsequent predominance of imprisonment as a form of punishment; Durkheim
attributed this outcome to the quantitative decline in the intensity of punishment that generally accompanies social advancement. Although a complete overview of the law of qualitative variations is unnecessary here, issues pertaining to conceptions of criminal responsibility and the predominance of imprisonment as punishment will appear again in this paper.

THE IRONY OF THE RELATIONSHIP BETWEEN HUMAN SYMPATHY AND PUNISHMENT

Even though Durkheim's law of quantitative variations has received considerable attention, one important argument pertaining to that law is rarely acknowledged: the irony of the relationship between human sympathy and punishment. Durkheim commented briefly on this relationship in his earlier work, but not until later did he frame the relationship as an unconventional paradox or irony. The following discussion is an overview of the development, structure, implications, and contemporary relevance of Durkheim's account of this irony. In addition, I revise his account to improve its plausibility, and I discuss issues pertaining to empirical assessment.

Development and Structure

In *The Division of Labor*, while explaining the passionate nature of punishment, Durkheim ([1893] 1984:54-55) touched on the possibility that human sympathy sometimes can function as an "external" force that moderates punishment. He asserted that "there may exist between two adversaries some general sympathy which keeps their antagonism within bounds, tempering it." "This sympathy," however, "needs to be stronger than the antagonism, or else it does not survive." This point is important; Durkheim concludes: "[S]ince the sentiments that crime offends within a single society are the most universally collective ones of all, since they represent especially powerful states of the common consciousness, they cannot possibly brook any opposition."

Two years later, in "Crime and Social Health," Durkheim ([1895] 1983:94-95) addressed this issue more directly. For the moment, he appeared to accept a variation of the conventional idea that human sympathy is a force which, on its own, diminishes the

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14 In the present study I have identified only one reference to this irony in discussions of Durkheim's theory of crime and punishment: a reference by Steven Lukes (1972) in *Emile Durkheim: His Life and Work*. This is interesting because Lukes is neither a criminologist nor a penologist, but a sociologist who appears to have only a marginal interest in the sociology of punishment.

15 "Crime and Social Health" is Durkheim's response to several criticisms of his work by Gabriel Tarde ([1895] 1983).
severity of punishment. He acknowledged that “the sentiments of sympathy which we feel for mankind in general” can give rise to contradictory emotions, for they are offended both by the punishment of criminals and by crimes that injure individuals. Feelings of human sympathy make us sensitive to all forms of human suffering; as a result, they arouse contempt for both punishment and human criminality. Similarly, as these feelings grow stronger, both punishment and human criminality appear more scandalous because human suffering disturbs us more deeply. Thus two opposing pressures emerge from the development of human sympathy: a growing contempt for punishment, which impels us to temper punishment, and a growing contempt for human criminality, which drives us to intensify punishment.

The model depicted in Figure 2 illustrates the contradictory forces engendered by sentiments of human sympathy and shows their effects on the intensity of punishment.

Despite the suggestion that “a sort of balance is established” between these opposing forces, Durkheim ([1895] 1983:94-95) implied that in the long run, as collective feelings of human compassion become more intense, the balance shifts at least slightly in favor of more lenient punishment for acts of human criminality: “We have more compassion for the victim, but we also have more compassion for the offender... This is why, as far as this particular kind of criminality is concerned, punishment lessens in proportion as the moral conscience becomes, on this same issue, more exacting.”

Durkheim eventually turned this idea on its head. In “Two Laws of Penal Evolution” ([1900] 1969), he explicitly proposed that the causal relationship between sentiments of human sympathy and the severity of punishment for acts of human criminality is more likely to be positive than negative. That is, an increase in human sympathy “would, by itself alone, tend to make us more severe about all crimes of which mankind is the victim and to heighten their repression” (p. 56). In his account of this relationship, Durkheim retained the idea that human sympathy creates a
pair of “opposing” or “self-contradictory” pressures: “[I]f, on the one hand, our greater humanity causes us to shun cruel punishments, it should, on the other hand, make the inhuman acts repressed by punishment appear all the more odious to us” (p. 51).

In contrast to his earlier analysis, however, Durkheim held that as sentiments of human sympathy become more intense, our contempt for crimes that injure innocent individuals will increase more than our contempt for punishment. His reasoning is simple: “Obviously, our sympathy for the culprit should be less than our sympathy for his victim” ([1900] 1969:51). Our outrage over crimes that injure innocent individuals, in other words, is more intense than that which is incited by the punishment of criminals, because we naturally feel more compassion for a victim than for an offender. Accordingly the following irony emerges: increments in human sympathy, all else remaining the same, tend to increase the severity of punishment for acts of human criminality.

Implications and Contemporary Relevance

Durkheim’s ([1900] 1969) account of the relationship between human sympathy and punishment structures and supports his theory of penal evolution in several ways. First, it reinforces his contention that the decrease in severity of punishment which generally accompanies social advancement is not simply the result of increasing humanitarian feelings. From his viewpoint, even though sentiments of human sympathy tend to become stronger as societies advance, their “greater vitality” cannot account for “the progressive moderation of punishments” (pp. 55-56). This phenomenon depends instead on the weakening of sentiments offended by religious criminality.

Second, the human sympathy/punishment irony supports Durkheim’s conclusion that punishment will not fade away; this conclusion is implicit in his argument that crime is inevitable ([1895] 1982) and explicit in his discussion of penal evolution. If human sympathy can be a motivating force behind punishment, the contention that punishment will persist appears all the more tenable. According to Durkheim ([1900] 1969), the progressive moderation of punishment will end when human criminality constitutes all of repressive law: “A time must come . . . when attacks against the person will entirely occupy the criminal law, when even whatever may remain of other crimes will no longer be regarded as anything but a remnant of old predecessors. The movement of recoil will then halt” (p. 60).
Finally, Durkheim's irony helps to explain why some crimes, some injuries to human beings, are punished more severely in modern societies than in some premodern societies. On this point, he commented:

In primitive societies, murders and mere thefts are only feebly repressed because the relevant *mores* are so very coarse. . . . From the time when sympathetic feelings of man for man have been affirmed and developed, these crimes have been more severely punished. This movement would have continued, had some other cause not intervened. ([1900] 1969:51)

In addition, Durkheim's irony is relevant to two points he neglected. One concerns the form (quality) of modern punishment; the other concerns variations in the intensity (quantity) of modern punishment.

*The Form of Modern Punishment.* Durkheim's irony can contribute to an alternative understanding of the birth and persistence of imprisonment as the cornerstone of the modern punishment response.\(^\text{16}\) Garland (1990) suggests that modern systems of punishment have been shaped to some degree by changes in cultural "sensibilities" associated with "the civilizing process." Since the seventeenth century (and perhaps earlier), people have become increasingly sensitive to physical violence and bodily suffering, to such an extent that "punishment has become a rather shameful social activity" (p. 224). During this period, "penal violence" became easier to deny. It has been hidden from public view behind prison walls and is disguised in a "sanitized" language, which speaks not of pain but of correction and deprivations of liberty. Suffering caused by punishment also has become easier to deny because it is more likely to take the form of prolonged mental anguish than of acute physical suffering. These observations fit well with the reasoning behind Durkheim's irony.

Sentiments of human sympathy, as described by Durkheim, stimulate mixed feelings in response to acts of human criminality. They create contempt for the offender, which drives us to punish; they also generate pity, however, which opposes punishment. These conflicting emotions that are produced simultaneously in the average members of modern society can be accommodated by an ambiguous form of punishment: a form that is not obviously painful. In other words, modern culture seems to call for punishments

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\(^{16}\) In his law of qualitative variations, Durkheim briefly explained the emergence of imprisonment as the "typical punishment," but he overlooked the full relevance of the human sympathy/punishment irony.
that allow us to impose painful consequences while denying that they are truly severe.

Imprisonment, especially when coupled with a rehabilitation philosophy, is such a punishment. Prisons are certainly painful environments, but their painful effects are largely hidden from public view. Similarly, the common practice of requiring offenders to serve only a fraction of their sentence may be explained in part by this mixture of emotions. This practice permits extreme "sentences" that may help satisfy the public's desire for punishment, but it also creates a "reality" characterized by more moderate punishments, and allows room for the expression of "mercy" (via early release). Imprisonment and modern sentencing practices thus are consistent with modern culture and the mixed feelings it engenders. Modern systems of punishment represent an ambiguous form of penalty, which allows us to cause suffering and to deny it at the same time. This is not the case with corporal punishments, whose "violence cannot be denied" (Garland 1990:243).

After a careful review and critique of Durkheim's work, Garland (1990) chose to base his analysis of cultural sensibilities and punishment largely on the work of Elias ([1939] 1978; [1939] 1982) and Freud ([1930] 1961). Accordingly there are several significant differences between an orthodox Durkheimian account and the account offered by Garland. For instance, Garland is less inclined than Durkheim to view imprisonment as a relatively lenient form of punishment and to regard the development of "modern sensibilities" as moral progress. He also suggests that repressed aggressive instincts may be an important source of punitive hostility, whereas Durkheim ([1893] 1984) implied that such hostility, while drawing on "reserves of passion," stems from the social psychological disturbance and pain caused by violations of strong collective sentiments. Yet despite these differences and the various shortcomings of Durkheim's work, Garland's observations on this issue conform well to the human sympathy/punishment irony described by Durkheim. In fact, for those who value simplicity and cannot accept the idea of aggressive instincts, a variation of Durkheim's account may be preferable to the Eliasian-Freudian account presented by Garland.

The Intensity of Modern Punishment. The other noteworthy point regarding the relevance of Durkheim's human sympathy/punishment irony is that it can contribute to an alternative understanding of variations in punitive attitudes and the intensity of punishment in modern societies. The fundamental contention of this irony is that increments in human sympathy create a pressure to punish acts of human criminality more severely. Where this pressure is
not concealed by other factors (e.g., a decline in the concentration of governmental power), the irony suggests some interesting, though disconcerting, implications. Most especially it suggests that truly compassionate people, under some conditions, may inflict an “inhuman” degree of suffering on individuals who have severely offended their sense of humanity. Certainly it does not suggest that all people who advocate severe punishments are compassionate. Some advocates, even in modern societies, may view certain conduct as offenses against God or a political leader who is “more than human”; others may have more personal motivations. The point is that despite these exceptions, many people who support severe punishments may do so out of a sense of compassion for the victim that overwhelms the compassion they also feel for the offender.

The implications of Durkheim’s irony also extend to projections of future trends and interpretations of cross-national variations in punitive intensity. In regard to the future, the irony implies that once human criminality becomes the predominant form of criminality, people will generally become more punitive as they become more sensitive to the suffering of others. In other words, the state-administered punishments of modern societies will tend to become more intense as collective feelings of human sympathy increase in strength. If the moral climate of a modern society becomes increasingly compassionate, we may observe a growing call for longer prison sentences, prison sentences supplemented by additional hardships (e.g., hard labor), the death penalty, and perhaps even a return to certain forms of nonlethal corporal punishment. The punishment of criminals also may become more visible. In particular, the painful consequences of imprisonment may receive more attention from the press and may become more prominent in the media of popular culture, including novels, movies, and television shows.

As to interpretations of cross-national variations in the intensity of punishment, the irony implies that some modern societies may be more punitive than others because they are in fact more humane. In other words, among modern democratic societies in which human criminality is the predominant form of criminality, relatively severe punishments may indicate a higher level of social development, in which the “religion of humanity” is more advanced.

For those who are struggling to constrain the severity of punishment in the name of humanity, this extension of Durkheim’s reasoning may be unsettling and may even appear dangerous. It suggests that truly humane people will tend to support severe punishments for those who commit serious crimes against humanity. Moreover, it could be exploited by death penalty advocates and other “hard-liners” to help rationalize their position and maintain
their “civilized” self-conceptions. Nevertheless, as I argue below, the disconcerting implications of Durkheim’s irony can be tempered without abandoning its logic completely.

A Preliminary Revision

One preliminary revision of Durkheim’s human sympathy/punishment irony seems necessary to improve its plausibility and moderate its unsettling implications. This revision centers on the issue of criminal responsibility and the difference between holding individuals responsible for their behavior and holding society responsible. Durkheim’s irony overlooks variations in the extent to which people may blame acts of human criminality on cultural and structural conditions rather than on specific individuals. In other words, his irony is based in part on an exaggerated assumption about perceptions of individual responsibility. In the presence of a very strong consensus accepting the idea of individual responsibility, the irony may hold. Where that consensus is weaker, however, the positive association between human sympathy and punitive attitudes may be neutralized or even reversed.

In his explanation of the law of qualitative variations, Durkheim ([1900] 1969) drew a distinction between collective and individual responsibility. He associated collective responsibility with simple premodern societies and described it as a moral climate in which both an offender and his or her family are held accountable for a crime: “[W]hen a crime has been committed, it is not the culprit alone who ‘owes’ the punishment or a reparation, but also his clan, either with him or in his place if he defaults” (p. 46). Conversely, individual responsibility is associated with social advancement and is said to be a characteristic of more highly developed societies. It involves a moral climate in which the offender alone is held accountable for his or her conduct. These two conceptions of responsibility have one thing in common: they do little or nothing to mitigate or deflect the intensity of punishment. By allowing for greater variation in public conceptions of responsibility, the scope of Durkheim’s irony can be reduced and its problematic implications moderated. Specifically, conceptions of criminal responsibility should be viewed as a variable with categories ranging from complete individual to complete societal responsibility.

A general conception of societal responsibility is maintained by people who attribute a substantial amount of crime to cultural and structural factors that are largely beyond the control of any particular individual. Applying Durkheim’s reasoning, if these people possess strong feelings of human sympathy, they will often respond to acts of human criminality by striking out more passionately at the
problematic social conditions (and perhaps the people who support them) than at individual "criminals." This position represents an important limitation of the human sympathy/punishment irony, a limitation that Durkheim neglected. Where the sentiment of human sympathy violated by an act of human criminality is exceptionally strong and where an individual is held fully responsible for the offense, the emotion generated may be very intense and may lead to a severe punishment. Where responsibility is extended to certain cultural and structural conditions of society, however, some of the emotion generated by the offense will be redirected at those conditions, and the punishment imposed on the offender will be moderated. In other words, human sympathy may tend to be related positively to the severity of punishment for acts of human criminality, but only where complete individual responsibility is assumed.

The suggestion that the average members of modern societies may accept conflicting conceptions of criminal responsibility seems to be consistent with Durkheim’s general theory of social development. On the one hand, the “religion of humanity” values individual freedom, and the development of the modern division of labor depends on individuation. The result is a tendency to view people as free and unique individuals who are responsible for their own actions. On the other hand, the “religion of humanity” prompts a desire to alleviate “all human miseries,” and its development is accompanied by the rise of the social sciences. The result is a competing tendency, which compels a search for causes of human suffering; this search can lead to the condemnation of particular cultural and structural conditions. In short, despite Durkheim’s neglect of this issue, it is possible to anticipate and explain conflicting conceptions of criminal responsibility in modern societies without straying far from his theory of social development.

With this simple revision of Durkheim’s irony, it is possible to explain why some truly compassionate people may be very punitive while others may aggressively oppose punishment. This explanation can be made without reference to an aggressive instinct that occasionally has an opportunity to express its impulses. Similarly, the revision restricts the prediction that modern people, after a certain stage of development, will tend to become more punitive as they become more sensitive to the suffering of others. It also restricts the suggestion that some modern democratic societies are more punitive than others because in fact they are more humane. In each instance, the issue depends on the extent to which a perception of individual responsibility predominates.
Issues Pertaining to Empirical Assessment

Because Durkheim placed heavy emphasis on empirical verification, I devote some attention to the testability of his human sympathy/punishment irony. Nonetheless, I do not share his optimism on this matter, for there is reason to believe that "empirical tests of major theoretical propositions can neither decisively refute nor substantiate these propositions" (Turkel 1979:736). In this connection, instead of attempting to provide a foundation for verifying or falsifying Durkheim's irony, I focus on clarifying the conditions under which the irony may apply, and on outlining some of the difficulties surrounding the measurement of key variables.

In view of the law of quantitative variations and the proposed revision, Durkheim's irony suggests that a positive relationship will tend to exist between sentiments of human sympathy and the intensity of punishment if the following conditions are present: (1) human criminality is the predominant form of criminality in a society, if not the only form; (2) the concentration of governmental power is moderate to low; and (3) there is a strong consensus that offenders are individually responsible for their unlawful conduct. In other words, the presence of religious criminality, a more or less absolute government, and/or a substantial public perception of societal responsibility would generally neutralize or reverse the impact of human sympathy on the severity of punishment. Thus, to test Durkheim's irony, we need accurate measurements of at least five different variables: human sympathy, the severity of punishment, the predominance of human criminality, the concentration of governmental power, and public conceptions of criminal responsibility. Unfortunately, it is difficult to construct plausible measures of these variables at a societal level.

Human Sympathy. Although human sympathy can be reduced to a feeling of pity for human suffering that includes a desire to combat and alleviate such suffering, it is difficult to imagine how this variable could be estimated convincingly with anything less than a relatively complex composite measure. It requires estimates of both the range of human suffering commonly acknowledged and the average

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17 Turkel's (1979) contention is based primarily on the work of Kuhn (1970) and Lakatos (1970). His inquiry is particularly noteworthy because he refers specifically to Durkheim's legal theories and includes a critical review of research by Schwartz and Miller (1964) and Spitzer (1975).

18 Although tests of the human sympathy/punishment irony may use units of analysis ranging from individuals to societies, the present discussion focuses on societies, the unit of analysis preferred by Durkheim in his studies of crime and punishment.
intensity of the pity experienced. Moreover, because human sympathy is a feeling and thus cannot be observed directly, its measures will always include an explicit element of speculation. For instance, it would be a mistake to propose that a single monetary indicator, such as the proportion of a society’s gross national product channeled into national and international assistance programs (e.g., public health, education, housing), is necessarily an adequate representation of human sympathy. This apparent concern for the welfare of others may be motivated largely by self-interest. Such assistance may be offered or supported to improve an organization’s public image, to create new markets, or perhaps even to pacify certain “problem” populations. Similarly, with regard to survey measures, it would be an error to assume that all respondents will be completely honest in their expression of feelings about the various forms of suffering. In a society where human compassion is valued at all, many people may be inclined to exaggerate their degree of sympathy for the suffering of others.

Severity of Punishment. Estimating the severity of punishment is equally problematic. As interpreted here, Durkheim’s use of the terms severity and intensity is not limited to the concreteness of the pain inflicted and the loss suffered; these terms also represent the accumulation of chronic and abstract consequences over time. With this point in mind, the severity of punishment for a society may be viewed as a combination of the average amount of pain inflicted, the average loss suffered, and consideration of the most severe punishment administered by its penal system. Clearly, given the wide range of differences in individual sensitivities and needs combined with the qualitative differences in forms of punishment, estimates of the degree of pain inflicted and loss suffered can be no better than gross approximations.

Similarly, and contrary to Durkheim’s suggestion, it is difficult to defend a particular ranking of the general forms of punishment in terms of their punitive intensity. For example, simple death and mutilations without death sometimes may be less severe than life imprisonment augmented by additional hardships and perhaps even life imprisonment “alone.” Beccaria ([1764] 1963:48) acknowledged this possibility over 200 years ago: “To anyone raising the argument that perpetual servitude is as painful as death and therefore equally cruel, I will reply that, adding up all the moments of unhappiness of servitude, it may well be even more cruel.” Further, the suffering and losses caused by imprisonment, especially long-term imprisonment, are rarely limited to deprivation of liberty (Foucault 1979; Newman 1995; Sykes 1958).
Human Criminality. Similar problems will affect measurements of the three remaining variables. When estimating the predominance of human criminality in a society, one must examine the cultural milieu carefully, because repressive laws prohibiting injuries to individuals can bear an imprint of religion proper. In other words, rather than focusing exclusively on the laws, one also must examine how far religion proper penetrates the beliefs and practices of the general public. The greater its overall influence, the more closely the law may be associated with a superhuman entity and, accordingly, the greater the presence of religious criminality. In short, estimates of the intensity of religion proper are necessary, and they should draw on many different indicators. In Judaeo-Christian societies, the indicators may include the proportion of the population who believe in God and pray regularly, the proportion who believe in heaven and accept the idea that the Ten Commandments are God's commandments, the degree of separation between church and state, reference to God in criminal justice proceedings, and public reference to God by government officials.

Among modern societies, not only may the United States be one of the most punitive (in view of its use of the death penalty and its incarceration rates, two simplistic indicators), it also may be among the most religious, and perhaps is becoming more religious. Survey research indicates that "the U.S. is distinguished from most other advanced industrial democracies by the persisting strength of religious beliefs and of organized religious practice" (Ladd 1993-1994:58). Moreover, despite "many substantial shifts" in American religious life since the eighteenth century, "the long movement over time in the U.S. seems clearly to be toward religion, not away from it" (Ladd 1993-1994:60). In the context of Durkheim's theory, if punitive intensity in fact has increased in the United States over recent decades, the increase may be due in part to a reassertion of religion proper rather than to growth in sentiments of human sympathy. Similarly, the severity of punishment in Islamic societies such as Iran and Saudi Arabia may be explained largely in terms of the predominance of religious criminality represented by traditional Islamic law. In any event, Durkheim's perspective calls for a careful examination of these possibilities.

Governmental Power. Regarding the concentration of governmental power, Durkheim ([1900] 1969:33) implied that a government can be "called absolute" where its power is not constrained "by statute or customary law." This may be a useful indicator for identifying clear and extreme concentrations of power, but an exclusive emphasis on legal constraints draws attention away from the possibility of
hidden and largely unrecognized concentrations of power. The idea that a "ruling class" or "power elite" exists in many (if not all) modern societies is quite old; yet it persists. Several decades ago, Mills (1958:38) concluded that "(t)he top of modern American society is increasingly unified, and often seems willfully coordinated: at the top there has emerged an elite whose power probably exceeds that of any small group of men in world history." More recently, Domhoff (1998:1) argued that "the owners and top-level managers in large income-producing properties are far and away the dominant power figures in the United States."

Such conclusions should not be dismissed without careful examination. Specifically, the concentration of governmental power should be examined in terms of at least three rather elusive indicators suggested by Durkheim: the extent to which other social institutions (e.g., religion and tradition) can limit or counterbalance the exercise of governmental power, the extent to which the average person is reduced to property of the governing elite, and the proportion of the population (or the variety of social sectors) that exerts a substantial influence on the directive functions of society.

The concentration of governmental power is a variable for which conflicting estimates are likely to persist. Nevertheless, it cannot be ignored when the human sympathy/punishment irony is examined. Durkheim's law of quantitative variations proposes that high concentrations of governmental power result in more intense punishments; this effect can obscure the relationship between human sympathy and punishment. In general, Durkheim's perspective supports careful studies of governmental power; it implies that such studies may help explain the severity of punishment in societies ranging from those of "petty barbarian kings" to the People's Republic of China and the United States.

Public Conceptions of Criminal Responsibility. One difficulty in measuring this variable is that a wide variety of qualitatively distinct categories lie between the extremes of complete individual responsibility and complete societal responsibility. These include not only the collective responsibility described by Durkheim in his law of qualitative variations, but also forms of individual responsibility mitigated by factors such as mental illness, age, and various situational, cultural, and structural conditions. In short, the process of conceptualizing and ranking the various categories of criminal responsibility is itself likely to give rise to disagreements, and these disagreements are bound to increase as actual measurements are made.
**Social Advancement.** In addition to the above list of variables, another may be judged important for a thorough empirical test of Durkheim's irony, namely the level of social advancement. On the basis of Durkheim's law of quantitative variations, one may conclude that a positive relationship between human sympathy and the intensity of punishment can emerge only in modern societies. This appears to be the contention, but it is unnecessary and creates additional problems. It is unnecessary because social advancement influences punishment indirectly through the development of human criminality and the decline of religious criminality (see Figure 1). In other words, the predominance of human criminality, not social advancement itself, is the key variable. Moreover, the variable of social advancement is problematic in at least two senses. First, among the components of Durkheim’s theory of punishment, the proposed relationship between social advancement and the intensity of punishment is perhaps the most vulnerable to criticism (see Malinowski [1926] 1989; Sorokin [1937] 1962; Spitzer 1975). Second, the inclusion of social advancement makes Durkheim’s irony even more difficult to test in accordance with contemporary social scientific standards.

Durkheim ([1900] 1969:32) concluded that “[i]t is relatively easy to know whether one society is more or less advanced than another.” Yet he explicitly and repeatedly rejected the idea of unilinear social development ([1893] 1984:100n; [1895] 1982:64; [1900] 1969:32-33). According to Durkheim, social development should not be viewed as following a simple linear pattern; instead it should be conceived as resembling a “bushy tree” with many different branches of different heights extending in different directions. The different heights, directions, and forms are analogous to the kinds of variation that may exist between different societies. This conception of social development makes Durkheim’s evolutionary theories all the more difficult to test, despite his conclusion to the contrary.

Because the variable of social advancement is unnecessary, the human sympathy/punishment irony can be separated from its evolutionary context and examined as an independent theory. This represents a substantial departure from Durkheim’s general theory of penal evolution, but it makes the framework of his irony more plausible and more versatile. This revision, for instance, makes it unnecessary to maintain that relatively simple premodern societies generally impose the most severe punishments. Indeed, without abandoning Durkheim’s reasoning entirely, one can account for an absence of extremely intense punishments in such societies. Even
if religious criminality is the predominant form of criminality, punishment should not be extreme if the spiritual entities offended by criminal behavior do not possess the status of exceptionally powerful gods and if governmental power is not highly concentrated. The spirits acknowledged by some of the earliest religions, particularly the animistic religions, may have been viewed as only moderately superior to humans. Similarly, some hunting and gathering societies do not have a clear political leader; where such leaders are found, they often have remarkably little authority (Noland and Lenski 1999). If these descriptions are accurate, they may help explain why punishment has been observed to be less severe in some simple premodern societies than in the more complex premodern societies examined by Durkheim (e.g., Egypt, Athens, Rome, and various European societies before the Enlightenment).

Other issues pertaining to the empirical assessment of Durkheim's irony concern the distinction between "the normal" and "the pathological," the need for both qualitative and quantitative information, and the possibility of curvilinear relations. In brief, because Durkheim ([1895] 1982) distinguishes between "normal" and "pathological" social conditions, it is important either to establish the "normality" of the societies under investigation or to examine a very large sample of societies. Establishing the normality of today's premodern societies is especially difficult because few (if any) societies are untouched by industrialization and modern political influence. Even the normality of the Trobriand Islands' Melanesian society studied by Malinowski ([1926] 1989) can be questioned, for he refers to offenders being "put to prison" and "put into jail . . . by the magistrate." Do normal "primitive" societies typically possess prisons, jails, and magistrates (not to mention the presence of a "modern anthropological explorer")?

In addition, because the process of measuring variables such as human sympathy and the severity of punishment necessarily involves an effort to examine feelings, quantitative survey research and existing official statistics are bound to be inadequate in themselves and should be accompanied by qualitative inquiries. Field research and case studies seem particularly important for the development of an adequate understanding of the pain caused by imprisonment and other forms of punishment.

Finally, the possibility of curvilinear relations between the variables of Durkheim's theory should be explored, especially because his rejection of a simple unilinear pattern of social development suggests an openness to such relations.
The list of assessment issues could be extended further. Among those which have not been mentioned, the "other things being equal" condition of Durkheim's irony is especially noteworthy. The irony, as described here, should not be viewed as a comprehensive account of the relationship between human sympathy and punishment relationship. The potential impact of additional variables on this relationship should be addressed, including (among others) social conflict, surplus labor, scientific discourse (particularly in the human sciences), and bureaucratic organization. The predominance of human criminality, the concentration of governmental power, and public conceptions of criminal responsibility represent important variables suggested by Durkheim, but they are not a complete list.

Even though the goal of decisively refuting or substantiating Durkheim's irony seems somewhat utopian, his argument should not be ignored. His irony offers an alternative standpoint for interpreting penal phenomena and draws attention to several important possibilities, including the idea that imprisonment is rooted in part in contradictory emotions and that truly compassionate individuals and societies can support severe punishments.

CONCLUSION

Two issues remain: the overall relevance of the critiques of Durkheim's work, and the reasons for criminologists' neglect of his human sympathy/punishment irony. Regarding the first issue, Durkheim's perspective on crime, punishment, and penal evolution has been criticized on a variety of grounds (see Coser 1984; Garland 1990; Hunt 1978; Lukes and Scull 1983; Malinowski [1926] 1989; Sheleff 1975; Sorokin [1937] 1962; Spitzer 1975). In fact, it is now commonly accepted that he neglected several important issues, overstated his case, and made a number of factual mistakes. The criticisms include the following: Durkheim's work neglects the conflicts and power differentials that exist between different segments of society, and disregards their effects on conceptions of crime and systems of punishment; it overstates the degree of consensus supporting repressive law; it exaggerates the extent to which the severity of punishment is governed by the strength and nature of the collective sentiments offended by crime; it neglects the degree to which punishment may be used to deter political threat and to generate collective sentiments that reinforce particular political regimes; and it overestimates the severity of punishment in simple premodern societies while underestimating it in modern societies.
All of this may be true to some extent, but it does not follow that nothing of interest can be taken from Durkheim’s work. Despite these and other criticisms of his perspective, his account of the relationship between human sympathy and criminal punishment should not be rejected offhand. As noted above, his argument can be abstracted from his general theory of penal evolution and assessed independently. Similarly, even though he may have overstated the association between the strength of various collective sentiments and the severity of criminal punishment, a significant relationship may well exist between these two variables. Does the public approach legal issues in a purely rational and utilitarian manner? Is the public indifferent to the content of the criminal law and the punishments administered by the criminal justice system? The emotional battles waged around issues such as abortion and the death penalty vividly illustrate the role of sentiment in the legal sphere. In any event, insofar as a positive relationship exists between the strength of the collective sentiments protected by the law and the severity of punishment, Durkheim’s irony seems plausible.

Moreover, it is possible to deal with some of the above-mentioned criticisms in the context of Durkheim’s general perspective, provided that his work is interpreted so as to emphasize its liberal and radical elements. As Taylor, Walton, and Young (1973:87) contend, Durkheim can be interpreted as “radical in his approach to social order.” Durkheim ([1893] 1984) regarded the tradition of inherited wealth as a source of unjust inequalities; he implied that many different common (group) consciousnesses can exist within a single society ([1893] 1984); he argued that social conflict in the form of crime is inevitable and is fundamentally related to social development ([1895] 1982); and, as stated above several times, he maintained that high concentrations of governmental power can influence the severity of punishment ([1900] 1969). In other words, he did not completely overlook issues concerning inequitable distributions of wealth, social divisions, conflict, and power differentials, although he did not bring these ideas together sufficiently, nor did he pursue them far enough.

Regarding the second issue, the neglect of Durkheim’s account of the relationship between human sympathy and punishment, several explanations are possible. To begin with, his account was presented in the context of his law of quantitative variations, which appears, as an evolutionary theory, to be a “gross approximation” at best and simply wrong at worst. Many social scientists tend to abandon an “old” theory completely when one or more of its main
contentions has been "falsified." The two core propositions of Durkheim's law of quantitative variations have been seriously challenged; as a result, many readers may ignore some of his more subtle lines of reasoning.

Second, in his discussion of this law, Durkheim referred to both a negative and a positive association between human sympathy and the severity of punishment. He described the association as negative when observed historically, but as positive in cases of human criminality, all else remaining the same. Because conventional wisdom endorses the idea of a negative relationship, many readers may have overlooked or misunderstood the positive relationship because of a paradigm-induced constraint on understanding.

Third, by implying that compassion can incite cruel punishments, the human sympathy/punishment irony has conservative implications that many liberal and radical scholars may find threatening. Thus, even if Durkheim's contention is understood, some readers may be inclined to ignore it, especially because Durkheim sometimes is classified as a liberal, if not a radical, humanitarian (see Sorokin [1937] 1962). His work often is an uneasy integration of conservative, liberal, and radical arguments.

Finally, in one of his earlier works ("Crime and Social Health"), Durkheim suggested a negative relationship between human sympathy and criminal punishment; he did not refer to a positive relationship until his later work.

The main purpose of this article has been to draw more attention to Durkheim's account of the relationship between sentiments of human sympathy and the intensity of criminal punishments. I have attempted to frame his account as an irony deserving some recognition, especially for furthering our understanding of the persistence of imprisonment and punitive attitudes. This irony offers an understanding of how compassion can be cruel. It frames human sympathy as an emotional force that can do more to incite punishment than to restrain it. Moreover, even if the testability of Durkheim's irony is questionable, it represents an interesting line of reasoning that may be used to complement some perspectives and challenge others.

REFERENCES


