Emilie Durkheim
- One of the founders of sociology
- Started off in philosophy
- Studied punishment from a sociological perspective
  - Asked why we punish?
    - Possible justifications: retribution, rehabilitation, deterrence, incapacitation
    - Answer: paradox of higher utility—the purpose of punishment is not preventative it is instead a way to increase solidarity and strengthen social bonds
- Functionalism: (Durkheim was a functionalist)
  - Society is a system (law is like the nervous system)
  - Organic
  - Equilibrium
  - Consensus—we kind of agree
    - Ignores conflict—on the other end of the spectrum then Marx who emphasizes conflict
  - Societies thus consist of material forms of life, which are understood, sanctioned, and sanctified through cultural categories to which they give rise
- Tragic quality of punishment: politically necessary for the maintenance of power and psychologically limited in its ability to control crime
- Main Ideas:
  - Punishment is a group phenomenon of great intensity. It is propelled by irrational emotive forces, which sweep up society’s member in a passion of moral outrage. Its procedures are depicted as ceremonial rituals undertaken to reaffirm groups solidarities and restore the sacred moral order violated by the criminal
  - Punishment’s purpose:
    - Straightforward embodiment of society’s moral order and an instance of how that order sustains, represents, and reinforces itself
    - Reassertion of the moral order
    - Cannot produce authority—can only reinforce moral order
    - A failure to punish can undermine the sovereignty and authoritativeness of a particular legal and moral order and the ruling powers which support it
  - Type of society is related to the type of punishment
    - Pre-modern society(simple)—mechanical solidarity—repressive law (punishment is harsh)
      - Mechanical—everyone does the same thing
        - The conscious of the individual perfectly aligns with the conscious of society
sovereigns power; body of criminal was screen which power of sovereign was projected on to → scaffold was central prop of sovereign power

- 18th cent. Reform movement—motivated by self-interest; the development of the capitalist economy brought about new and stricter attitudes on the part of the middle classes towards the non-observance of law and illegalities of lower classes → called for a more rational and certain system of justice and elimination of arbitrary power of sovereign (ie. Rise of retributive justice)

- Late 18th century reformers → called for visible punishments that would be a sign of public morality, leniency is a ruse for power → led to development of prisons which was not the intended consequence

  o Why did prisons develop? Role of political technology in penal development
    - The development of discipline in various institutions → through discipline bodies were subjected to strict regimes in order to become docile, efficient, useful machines, programmed to carry out function for which it had been trained
    - Normalization → convicts rather punitive concerned
      - Assessing and writing of criminals—measuring how far or closest from the norm
      - Leads to systematic knowledge of individuals → human sciences (psychology etc.)
    - Panopticon—structure of the building induces self-control; power relations become automated and objective → technique became generalized throughout society
    - The generalization of discipline made the generalization of democratic constitutions and expansion of liberal forms of freedom possible; coexistence of legal freedom and habitual domination
    - The prison fabricated the delinquent: created conditions for recidivism and created category of criminal

  o The failure of the prison:
    - Fails at its penological ends like reducing crime so why does the prison persist?
      - Deeply rooted in society
      - Unintentional side effect of the prison is that delinquency was a useful strategy of political domination—separated crime from politics, divided working class against themselves to enhance fear of prison, guaranteed authority of the powers of police

- Criticisms:
- Common law—derived from British system; based upon precedent
  o **Legitimization**—authority
  o **Coercion**—power
  o Irrational (no formal rules); rational (formal rules); formal (differentiated—autonomous entity); substantive (not differentiated)

- Garland’s Case Study of Transition of Punitive System to Rationalized one
  o Increased centralization
  o Increased uniformity
  o Division of labor → increased specialization and professionalization of tasks
  o All of the above lead to increased bureaucratization
  o Organizations become dehumanized
    ▪ Penal professionals orient themselves to achieving managerial goals rather than socially derived punitive ones
  o Now penal professionals are able to shape penal policy and redefine the social meaning of punishment
    ▪ Reduce the immediacy with which popular sentiments or political concerns can be expressed explicitly in the penal system—and decreased the direct knowledge and experience that the public has of this process
  • Not necessarily a good thing, because with the public unaware easily misinformed and may use its influence badly
    o Emergence of powerful penal bureaucracy has done much to remake punishment in its image
    o Transparently punitive actions are represented in more positive instrumental terms
    o Rationalization does not displace emotions or values—they may be muted or displaced but don’t disappear

- Relationship to Foucault and Marx
  o Emphasis on increasing rationality of modernism like Foucault
  o Does not see penological matters as reductive to economic issues like Marx
    ▪ Many of the dependent variables of Marx’s theory like religion, are labeled important independent variables by Weber

**Garland and the Importance of Culture**
- Culture is inextricably bound up with material forms of action, ways of life, and situational conditions
- Culture develops a dialectical relationship with social patterns of action, each supporting and facilitating the other
- Cultural phenomena divided into:
Types:
- Charismatic—authority issued by the influence of a single extraordinary individual
- Traditional—accepted because ruling order is in line with pre-existing norms
- Legal rational—authority derived from within the law
- **in the first two law is legitimated by something exterior to itself

**Main Idea:** Rational-legal law and capitalism rose and reinforced each other

**Issue:** English system presented a problem for Weber’s theory because England was capitalist but there was a law system that wasn’t totally rational-legal—it was based on precedent rather than codex
- Wasn’t calculable but aided capitalism by providing justice to lower classes
- Unique cases
- Wasn’t calculable but those making decisions were bourgeois so worked in much the same way

- Sether—Law and Social Justice in the Thought of Max Weber
- Social justice is actually a component of Weber’s theory of law
- He does not actually advocate for the ascendency of rational formal over substantive rational as the two are in a dialectic with each other
- Characterized by constant tensions
- Anti-formalism is a natural reaction against the rule of specialization and legal rationality
- Lawmaking and law finding are substantively rational if the decision made focusing on the concrete features of the facts can be justified by general principles
- Productive force within the law—maintaining balance between the two ensures is important b/c insistence on some principle of material justice can destroy the legal framework just as exaggerated formalism can undermine confidence in the legal system
- Openness forces the law to respond particular social and economic needs as well as the to general extra-legal postulates of ethics and justice

- This reading allows us to preserve the role of culture in making sense of the law