

Sick and Blamed

Criminal Law in the Chilean Response to COVID-19*

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Following Emile Durkheim, the criminal law is considered to express and strengthen social solidarity. By providing a space for the expression of collective outrage through punishment, the norms challenged by the crime are sustained and reinforced. At the same time, it is a well-known aspect of criminal justice that it configures groups of people who are both overpoliced and underprotected.¹ This configuration comes at the cost of criminal law's legitimacy,² and its capacity to serve solidarity.³ The Chilean use of criminal law as part of the response to the COVID-19 pandemic provides an interesting example of the tension between these two characteristics of the criminal law and of the importance of social context for the legitimacy and value of punitive practices.

As in most parts of the world, the Chilean government called upon ideas of social solidarity to fight the pandemic of SARS-CoV-2. Citizens were required to stay at home, use their masks, and later to get vaccinated, not just as a means to protect themselves but also to protect others. In order to secure compliance, the government relied heavily on the criminal law. However, because lockdown restrictions and prosecutorial policy did not take into account social background and people's ability to comply with the law, prosecutions soon created groups of people who were being both over-exposed to disease and death, and over-exposed to control, blame and punishment. This made it very clear that the sacrifices to be made out of

* This essay was written as part of the research grant *Fondecyt Iniciacion* 11180839 (Castigo, legalidad y pobreza). I am grateful to Luis Felipe Manques for his assistance in research, and to David Barker and the editors of this special number for valuable observations, editions and comments.

- 1 Kimberlé Williams Crenshaw, 'From Private Violence to Mass Incarceration', *UCLA Law Review* 59 (2012): 1418; Dorothy E. Roberts, 'Abolition constitutionalism', *Harvard Law Review* 133 (2019): 1; Judith Butler, *The force of nonviolence: An ethico-political bind* (Brooklyn: Verso, 2021); Tracey L. Meares, 'Charting race and class differences in attitudes toward drug legalization and law enforcement: Lessons for federal criminal law', *Buff. Criminal Law Review* 1 (1997): 137; Monica Bell, 'Police Reform and the Dismantling of Legal Estrangement', *The Yale Law Journal* 126 (2017): 2054-2150.
- 2 See for example, Antony Duff, *Punishment, Communication and Community* (New York: Oxford University Press, 2001), 179-197; Antony Duff, 'Blame, Moral Standing and the Legitimacy of the Criminal Trial', *Ratio* 23, no. 2 (2010): 123-140; Stephen. P. Garvey, 'Injustice, Authority, and the Criminal Law', in *The Punitive Imagination*, ed. Austin Sarat (Tuscaloosa: The University of Alabama Press, 2015), 42-81; Rocío Lorca, 'Punishing the Poor and the Limits of Legality', *2018 Law, Culture and the Humanities* (online first; Tommie Shelby, 'Justice, deviance, and the dark ghetto', *Philosophy & Public Affairs* 35, no. 2 (2007): 126-160.
- 3 Joseph E. Kennedy, 'Monstrous offenders and the search for solidarity through modern punishment', *Hastings Law Journal* 51 (1999): 829; David Garland, *Punishment and modern society* (Chicago: University of Chicago Press, 1993), 75-80; Henrique Carvalho and Anastasia Chamberlen, 'Why punishment pleases: Punitive feelings in a world of hostile solidarity', *Punishment & Society* 20, no. 2 (2018): 217-234.

a sense of social solidarity were actually to be borne primarily by society's most vulnerable members who were least able to bear them.⁴

In this article, I will claim that the configuration of this overpoliced and underprotected group became so visibly unjust and inconsistent with solidarity that it severely undermined the legitimacy of criminal justice as an appropriate tool to deal with lockdown violations. This lack of legitimacy was expressed in a strong opposition from the judiciary to some of these prosecutions, but also in an unheard-of change of prosecutorial policy which included an instruction to consider the offender's social background in the exercise of prosecutorial discretion. While the impact of these policies is yet to be seen, they are meaningful in crystallizing the importance of social context for the legitimacy and usefulness of the criminal law.

Solidarity and the criminal law

In the Roman law of obligations, solidarity referred to contracts where each and all the debtors were individually liable to respond for the whole of what was owed (*in solidum*). The debtors formed a *solid* compact which acted as one entity, and this solidity provided assurance to the creditor who could demand the total sum of the obligation from any of the debtors.⁵ This technical concept of solidarity, still in use in many jurisdictions,⁶ gave way to both normative and descriptive ideals. In moral and political theory, for example, solidarity came to be understood as a principle that justifies duties of care, cooperation, and mutual assistance.⁷ This conception has appeared in the criminal law to sustain institutions such as the crime of failure to rescue⁸ and the justification of necessity.⁹

4 See Mauro Basaure, Alfredo Joignant and Aldo Mascareño, 'Between Distancing and Interdependence: The Conflict of Solidarities in the COVID-19 Pandemic', *Sociological Perspectives* 64 (2021): 706-725. At page 715, the authors describe this issue as a new *social question* that has been triggered by the pandemic.

5 See Soazik Kerneis, 'Solidaridad contractual, solidaridad orgánica. Aproximación histórica y antropológica,' in *Espacios del conocimiento: sujeto, verdad, heterotopías. Actas VIII Escuela Chile-Francia* 2014, ed. L. Gallardo and I. Pincheira (Santiago de Chile: LOM, 2016), 73-84. Solidarity also appeared in Roman *penal* law, but often in the shape of cumulative liability, *i.e.*, all the offenders were liable for the whole of the damage and the victim could get the full amount from each and every one of them. Reinhard Zimmermann, *The Law of Obligations. Roman foundations of European contract law* (Cape Town, Wetton and Johannesburg: Juta & Co. Ltd, 1990), 1020.

6 In civil law countries it is still called 'solidarity' while in common law it is known as joint and several liability, see Lewis A. Kornhauser and Richard L. Revesz, 'Joint and several liability', in *Encyclopedia of Law and Economics* (Edward Elgar Publishing Limited, 1998).

7 According to Kerneis, solidarity as a principle of political action took the space of both the republican ideal of fraternity and Christian charity, see Kerneis, 'Solidaridad contractual, solidaridad orgánica', 82.

8 A crime which is more common in civil than common Law countries, see Andreas von Hirsch, 'Criminalizing failure to rescue: a matter of "solidarity" or altruism', in *Crime, punishment, and responsibility: The jurisprudence of Antony Duff*, ed. Rowan Cruft, Matthew H. Kramer and Mark R. Reiff (Oxford: Oxford University Press, 2011), 241-253; and Liam Murphy, 'Beneficence, Law, and Liberty: The Case of Required Rescue', *Georgetown Law Journal* 89 (2000): 605.

9 While the justification of necessity is sometimes based on the lesser evils principle, solidarity has also been an influential explanation for this doctrine, see: Javier Wilenmann, *La justificación de un delito en situaciones de necesidad* (Madrid: Marcial Pons, 2017).

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In social theory, mostly due to the influence of Emile Durkheim's work, the concept of solidarity has been used to explain what keeps societies integrated.¹⁰ And according to the French sociologist, this is indeed the central function of the criminal law. In his account, punitive practices express, sustain, and strengthen mechanical solidarity, which consists of a shared morality and framework of meaning that integrates society.¹¹ Mechanical solidarity is not the only kind of solidarity that maintains social cohesion, but it is the one that pertains to punitive practices.¹²

In Durkheim's theory, the relationship between punishment and social solidarity is reflexive. Crimes are behaviours that violate norms considered sacred by the collective conscience of a society, triggering a shared outrage and 'passionate and vengeful' response.¹³ Punishment constitutes the expression of this response which in turn sustains and reinforces the norm that has been challenged by the offender. As a result, criminal law serves solidarity by providing the opportunity for a cycle of outrage and punishment that strengthens a society's normative order.¹⁴ This means that penal policy must speak to the real shared sentiments of a society.¹⁵ If penal policy is out of sync with these sentiments, it risks losing its force and authority and may end up creating more disruption than cohesion.¹⁶

This reflexive nature of the relationship between punitive practices and social solidarity allows us to understand the importance of social context in criminal law's capacity to serve positive social functions.¹⁷ For punishment to express a common sense of justice and sustain solidarity, there must already be a bond that holds us together and allows us to identify a guilty offender against whom we can direct our outrage.¹⁸ When these conditions are not obtained, punitive practices are unlikely to contribute to social solidarity, at least not in the sense that Durkheim had in mind. For example, when repressive law falls heavily on the very group that is least protected by the social scheme, it becomes harder to find this guilty offender. In these cases, punitive practices may create a legal environment which is destructive

10 Roger Cotterrell, *The Sociology of Law* (London: Butterworths, 1984), 79-82.

11 Emile Durkheim, *La División del Trabajo Social*, trans. Carlos G. Posada (México D.F: Colofón, 2007), 79-120.

12 In modern societies the paradigmatic form of solidarity according to Durkheim is *organic* solidarity, whose source is specialization and the division of labour that determines the interdependence among individuals (See Garland, *Punishment and Modern Society*, 24-25).

13 Durkheim, *La División del Trabajo Social*, 95-99.

14 See Garland, *Punishment and Modern Society*, 29-33; and Kennedy, 'Monstrous offenders and the search for solidarity through modern punishment', 844-846.

15 Garland, *Punishment and Modern Society*, 28; 75-77.

16 As David Garland has argued, 'punishment can only protect and regenerate what is already well constituted by other means – it is ancillary to moral education, not its central part', see his *Punishment and Modern Society*, 42.

17 This relationship that has become very relevant in normative theory, under the influence of Antony Duff's theory of punishment. In the terms proposed by Duff's communicative theory, the criminal law calls people to answer as members of a community of fellow citizens. If that community has failed to treat them as such, then it must repair that relationship in order to claim a proper standing to call them to answer in a court of justice (See Duff, 'Blame, Moral Standing and the Legitimacy of the Criminal Trial').

18 Kennedy, 'Monstrous offenders and the search for solidarity through modern punishment', 848.

rather than supportive of social cohesion. In the terms proposed by Monica Bell, we can call this 'legal estrangement', *i.e.*, a process through which penal institutions signal to some people that they are not full members of a society, entitled to equal concern and respect.¹⁹

Criminal law as a tool to contain the pandemic: the Chilean case

The Chilean response to COVID-19 offers a good example of the way in which social injustice can undermine the capacity of punishment to sustain and express social solidarity.

In terms of social context, we could very briefly describe Chile as an exceptionally unequal society, compared both to other Latin American countries, and to other members of the Organization for Economic Cooperation and Development (OCDE) to which Chile has belonged since 2010.²⁰ Inequality in Chile is also extremely segregated, with most of the economic and political power of the entire country concentrated in a few neighborhoods within the city of Santiago.²¹

The levels of both poverty and inequality have grown significantly since the beginning of the pandemic. Before the pandemic, 16.5% of families reported 'not having enough' to cover their needs; in July 2020 the percentage had grown to 48.8%.²² The percentage of people living in poverty went from 8.6% in 2017 to 10.8% in 2020, and in Santiago, the most populous city of the country, it went up from 5.4% to 9.0%.²³ In terms of inequality, the difference in income between the 10% poorest and the 10% richest went from 39.1 in 2017 to 416.6 in 2020.²⁴

These high levels of inequality have been manifested in numerous ways during the pandemic. Here I would like to focus on how they configured a group which on the one hand had greater levels of morbidity and mortality from COVID-19 and, on the other hand, was being more controlled, blamed and punished.

19 Bell, 'Police Reform and the Dismantling of Legal Estrangement', 2083-2089.

20 See generally, PNUD, *Desiguales. Orígenes, cambios y desafíos de la brecha social en Chile* (Santiago de Chile: Programa de las Naciones Unidas para el Desarrollo, 2017). In the Region, for example, Santiago has one of the greatest gaps in life expectancy (8.9 years for men, 17.7 years for women), see Usama Bilal *et al.*, 'Inequalities in life expectancy in six large Latin American cities from the SALURBAL study: an ecological analysis', *The lancet planetary health* 3, no. 12 (2019): e503-e510. Regarding the position of Chile in terms of its GINI coefficient, see the 'Gini index (World Bank estimate)', The World Bank, accessed 22 August 2021, https://datos.bancomundial.org/indicador/SI.POV.GINI?locations=CL-OE&most_recent_value_desc=false.

21 Claudio Agostini *et al.*, 'Segregación residencial de ingresos en el Gran Santiago, 1992-2002: una estimación robusta', *Eure (Santiago)*, 42, no. 127 (2016): 159-184; Manuel Antonio Garreton, 'City profile: Actually existing neoliberalism in Greater Santiago', *Cities* 65 (2017): 32-50.

22 'Encuesta social Covid-19', Observatorio Social, Ministerio del Desarrollo Social y la Familia, accessed 25 August 2021, <http://observatorio.ministeriodesarrollosocial.gob.cl/vizdata/covid19/index.html>.

23 'Encuesta Casen en Pandemia 2020', Ministerio de Desarrollo y Protección de la Familia, accessed 23 August 2021, <http://observatorio.ministeriodesarrollosocial.gob.cl/encuesta-casen-en-pandemia-2020>.

24 *Ibid.*

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In early March 2020, the first cases of COVID-19 were detected, mostly in the richer neighborhoods of Chile, presumably imported by Chileans who were returning from summer vacations in Europe.²⁵ Within a few weeks, the outbreak was out of control, hitting most neighbourhoods of Santiago, rich and poor alike.²⁶ The Chilean authorities quickly ordered the suspension of all school classes and imposed a national curfew as well as a series of ‘dynamic lockdowns’.²⁷ As soon as these sanitary policies were implemented, both the government and the media started focusing on individual behaviour, attempting to convey a sense of outrage against those who were not complying with the ‘stay-at-home’ regulations.²⁸

For this purpose, the Chilean National Prosecutor (*Fiscal Nacional*) instructed prosecutors to use Article 318 of the Penal Code against non-compliant people.²⁹ This statute criminalizes behaviour that endangers public health, and while not long before this the *Fiscal Nacional* himself had interpreted the norm as requiring the creation of actual danger, he now argued that the mere violation of lockdown restrictions was enough to constitute commission of the crime.³⁰ This broad punitive strategy was assisted by the legislature, which passed a law that enhanced the punitive enforcement of sanitary restrictions.³¹ Prosecutions skyrocketed. Between January and March 2020 only 51 cases related to Article 318 were brought to Court; in the period between April and June, the number grew to 5,932, and between July and September it reached 68,154 cases.³² The criminal law became, in this way, a central part of the Chilean strategy against COVID-19.

In the beginning this might have been an effective way of sustaining sanitary rules as well as of shifting responsibility towards individuals,³³ but it soon became evi-

25 See the first epidemiological report from the Ministry of health (30 March 2020): ‘Informe epidemiológico. Enfermedad por Covid-19 Chile’, Departamento de Epidemiología del Ministerio de Salud, accessed 23 August 2021, https://www.minsal.cl/wp-content/uploads/2020/03/INFORME_EPI_COVID19_20200330.pdf.

26 See the epidemiological report from the Ministry of Health (14 April 2020): ‘Informe epidemiológico. Enfermedad por SARS-CoV-2 (COVID-19) Chile 13-04-2020’, Departamento de Epidemiología del Ministerio de Salud, accessed 24 August 2021, <https://www.minsal.cl/wp-content/uploads/2020/04/Informe-EPI-13042020.pdf>.

27 See Resolución 860 Exenta, Ministerio de Salud, 16 March 2020. Dynamic lockdowns have been to date the main policy to restrict mobility in Chile. They consist of different degrees of restrictions imposed in each municipality on a weekly basis. The most intense level is *quarantine* which entails an absolute prohibition on circulating in public space; this was first declared on 25 March for seven neighborhoods of the City of Santiago, and by 15 May it was imposed all over the metropolitan area.

28 See for example, Press Room, ‘Subsecretaria de Salud Pública anuncia drásticas sanciones por incumplimiento de medidas para contener Covid-19’, *Department of Health of Chile*, 6 May 2020.

29 It is important to note that the Chilean Office of the Prosecutor is an extremely hierarchical institution, where prosecutors must obey the *Fiscal Nacional*’s instructions when they exercise their own prosecutorial discretion.

30 See Instrucción General, Fiscal Nacional, 57-2020 and also see note 48.

31 Ley 21.240 of 20 June 2020.

32 Data obtained directly from the statistical webpage of the Judicial Power, see: ‘Poder Judicial en números’, Poder Judicial, accessed 15 August 2021, www.numeros.pjud.cl.

33 According to Ulrich Beck, institutions often shy away from responsibility and shift it to the individual. See Ulrich Beck, *Risk society: Towards a new modernity* (Sage, 1992,) 48-49.

dent that lack of compliance was not necessarily expressive of indifference, but was largely determined by economic need.³⁴ Mobility studies showed that after the introduction of the lockdown regulations, richer neighbourhoods were able to reduce their mobility by more than 50%, while the poorest ones managed only a 30% reduction.³⁵ As usual, the impact of social and economic conditions was not taken into consideration by the police or prosecutors.³⁶ An example of this can be found in the celebratory way in which the government and the media presented a series of collective detentions of 'street vendors'.³⁷ All this meant that by the end of May 2020, the less privileged members of our society were not only having a harder time protecting themselves by staying at home, but were also the ones receiving more punishment.³⁸

This created awareness of the fact that individuals were not always being rightly blamed for failing to comply with stay-at-home regulations, and that responsibility also fell on the government for not providing conditions that made lockdowns feasible.³⁹ Quickly, the impact of inequality became more pronounced as we learned that inequality and poverty not only imposed a greater vulnerability to prosecutions and punishment, but also entailed a greater degree of COVID-19 morbidity and a much higher rate of mortality.⁴⁰

- 34 Monica Gerber *et al.*, 'Taking Care of Each Other: How Can We Increase Compliance with Personal Protective Measures During the COVID-19 Pandemic in Chile?', *Political Psychology* 42, no. 5 (2021): 863-880.
- 35 'El impacto de las dos primeras semanas de cuarentena masiva en la Región Metropolitana', Instituto de Sistemas Complejos de Ingeniería COVID-19, accessed 25 August 2021, <https://isci.cl/wp-content/uploads/2020/06/Reporte-3-ISCI-movilidad-11-de-junio.pdf>. Other studies have determined the difference is 61% against 40%. See Ayesha S. Mahmud *et al.*, 'Socioeconomic status determines COVID-19 incidence and related mortality in Santiago, Chile', *Science* 372(6545) (2021).
- 36 To the contrary, both police and prosecutors clearly displayed their regular bias against the poor. See Duce, Mauricio, and Ricardo Manuel Lillo, 'Controles de identidad realizados por Carabineros: Una aproximación empírica y evaluativa sobre su uso en Chile', *Revista de Estudios de la Justicia* 33 (2020): 167-203; and Fundación Paz Ciudadana and Fundación San Carlos de Maipo, 'Estudio sobre los niveles de exclusión social en persona privadas de libertad' (Santiago de Chile, 2016).
- 37 Ignacio Guerra, 'Operativos policiales dejaron más de 100 detenidos tras jornada de intensas fiscalizaciones en la Región Metropolitana', *Emol*, 25 June, 2020, Web Edition.
- 38 After the first couple of months of the pandemic, Puente Alto, which is one of the poorest neighbourhoods of Santiago, had the highest rate of prosecutions in the capital, almost double the rates of richer areas such as Vitacura and Las Condes. See Sebastián Labrín and Fredi Velásquez, 'Quiénes, cuándo y dónde rompen la cuarentena', *La Tercera*, 20 June 2020, Coronavirus section, online edition.
- 39 There were big protests in some areas of Santiago to denounce people's inability to comply with lockdown due to hunger. See, for example, Drafting Staff, 'Coronavirus en Chile: las imágenes de las protestas en Santiago por la difícil situación económica creada en Chile por la pandemia de covid-19', *BBC News Mundo*, 19 May 2020, online edition. Mayors also protested against the government for not providing conditions for compliance, see, for example, Editorial Staff, 'Alcaldes reaccionan al anuncio de cuarentena total en Santiago', *ADN Radio*, 13 May 2020, online edition.
- 40 Mahmud, 'Socioeconomic status determines COVID-19 incidence and related mortality in Santiago, Chile. Before the publication of this article, these estimations were already part of public knowledge due to the active vigilance over the pandemic that Chilean scientists had and shared through social media. See, for example, one of the reports made periodically by Think Tank Espacio Público: Camila Arroyo *et al.*, 'Informe sobre la evolución de la epidemia de covid-19 en Chile', *Espacio Público* (3 July 2020): https://www.espaciopublico.cl/wp-content/uploads/2021/06/CoVid_Chile_23072020_vf.pdf.

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The judiciary, however, objected to this broad prosecutorial policy, which was rapidly configuring a group of citizens estranged from concern and protection. The first cases that proved unsuccessful in court were proceedings against homeless people, where the judiciary basically argued that curfew and stay-at-home regulations could not apply to those who did not have a home. In these cases, the Supreme Court even declared that by being detained their rights had been violated, because instead of prosecuting them the police should have offered them protection.⁴¹

Regarding non-homeless offenders, the Public Defender's Office made a strong case showing that controls and prosecutions were too clearly biased against people who were not engaging in risky behaviour, but merely violating regulations in order to sustain themselves and their families.⁴² Scholars denounced the inappropriateness of a punitive strategy that focused on individuals who violated curfew or lockdown restrictions instead of on public officers or employers who failed to fulfill their duties, although the latter had much greater impact on public health.⁴³ This view was later endorsed by the Supreme Court, who declared that only people who were engaging in behaviour that was effectively risky were in violation of Article 318 of the Penal Code.⁴⁴ And while the Supreme Court did not make an explicit declaration on the question of social and economic background, it did make it harder to prosecute those who were violating lockdown restrictions out of economic need.⁴⁵ Even the Constitutional Court followed the trend by declaring Article 318 unconstitutional.⁴⁶

Throughout the first year of the Pandemic, the *Fiscal Nacional* had to react to both growing social awareness of the impact of inequality and the resistance of the judi-

41 See the decisión of the *Corte Suprema* in Case 16913-2021 Amparo, 4 March 2021. See *Corte de Apelaciones de San Miguel* in Case 546-2020 Penal, 5 March 2021; *Corte de Apelaciones de San Miguel* in Case 353-2020 Amparo, 31 July 2021. Protection instead of detention was indeed the instructed policy ordered by the Ministry of Social Development see *Protocolo para el Resguardo de las Personas en Situación de Calle en Estado de Excepción Constitucional de Catástrofe*, 20 March 2020, Ministerio Desarrollo Social y Familia.

42 Santiago's chief Public Defender, Víctor Providel: 'Detenciones y formalizaciones por cuarentena no consideran urgencias de personas vulnerables', *Defensoría Penal Pública*, accessed 25 August 2021, http://www.dpp.cl/sala_prensa/noticias_detalle/10427/detenciones-y-formalizaciones-por-cuarentena-no-consideran-urgencias-de-personas-vulnerables.

43 Fernando Londoño, '¿Responsabilidad penal para los infractores de la cuarentena? Revisión crítica de la Ley N° 21.240: más micro que macro', *Revista de Ciencias Penales* 57, no. 1 (2020): 428.

44 The instruction established that the mere violation of curfew was not enough for criminal prosecution under Article 318, see *Oficio FRM N°2378/2021*, 7 May 2021, and *Oficio FRV N°196/2021*, 6 May 2021. See also the press release in Víctor Rivera, 'Efectos del fallo de la Suprema: Carabineros cambia criterios para detenciones durante toque de queda', *La Tercera*, 11 May 2020, section La Tercera PM).

45 See the decisions by the Chilean *Corte Suprema* in Cases 125436-2020, 25 March 2021; 149239-2020, 20 April 2021; and 131966-2020, 23 April 2021.

46 On its first declaration related to Article 318, the *Tribunal Constitucional* declared Article 318 unconstitutional only in the sense that the sanction of prison was considered a disproportionate punishment (Case 8950-2020, 5 January 2021). Later, in April, the tribunal changed its view and held that it was completely unconstitutional as it did not satisfy the requirements of the principle of legality (*Tribunal Constitucional*, Case 10296-2021, 1 July 2021). It is important to note that these declarations of unconstitutionality do not have general effects but only apply to the specific case that is brought to the Court.

ciary by changing its prosecutorial policies several times.⁴⁷ A salient example of this was the decision of the *Fiscal Nacional* instructing prosecutors to consider social and economic context in exercising their prosecutorial discretion.⁴⁸ By 2021, the *Fiscal Nacional's* prosecutorial policy was officially re-oriented from a very wide conception of what constituted blameworthy behaviour (which included mere violation of lockdown by individuals) to a restricted focus on what has been called 'top-down' risky behaviour, such as that of employers who do not follow sanitary regulations or people who hold illegal super-spreader events.⁴⁹

Some conclusions

The criminal law can only serve what Durkheim called mechanical solidarity if there is a real sense of outrage against individual behaviour and a social context that sustains that outrage. When lawbreakers appear to be forced to act against the social order, partly because the social order shows no concern for them, it is hard to find a sufficient basis for the mechanisms of solidarity through punishment. While a focus on individual guilt or blame can at times effectively disguise the importance of social context, in the case of the Chilean response to COVID-19, this was prevented by a broad prosecutorial policy against lockdown violations that amplified the impacts of underlying conditions of inequality.⁵⁰ This policy created a group of people who were being very clearly underprotected and overpoliced. The impact of inequalities was so great, and the configuration of this group so visible, that calling upon ideals of social solidarity to justify the criminal enforcement of sanitary restrictions became almost insulting. This forced the *Fiscal Nacional* to develop a 'socially sensitive' prosecutorial strategy, something that we have not often seen despite Chile's inequalities. The changes in policy by the *Fiscal Nacional* suggest that the legitimacy of the criminal law was being challenged to a point that made it hard to sustain, and that perhaps, at times, penal institutions can be made accountable for acting in ways that create estrangement rather than cohesion.

There is one last aspect of this case that merits being noted here. If the *Fiscal Nacional* was forced by social awareness and evidence to consider social background in the case of Article 318, this could have an impact in other areas of the criminal

47 The *Fiscal Nacional* delivered a series of instructions to Chilean prosecutors, constantly altering the approach that they were to take against lockdown violators. These were all done through email. And while they are public documents, they have not yet been duly published. To the best of my knowledge, the first instructions came on 19 March 2020, when the *Fiscal Nacional* went against his own previous understanding of Article 318. See above note 31. After this, there are instructions dated 26 March, 20 June and 31 August 2020. Then in 2021, changes in prosecutorial policy continued to take place in reaction to Court's decisions, in instructions delivered on 30 March and 4 May.

48 On 20 June 2020, the *Fiscal Nacional* delivered an instruction to all Chilean prosecutors through email, ordering them not to prosecute lockdown violations done in order to get basic resources to survive. This instruction has been publicly acknowledged by the *Fiscal Nacional* on his *Cuenta Pública* 2020-2021, see 'Cuenta Pública 2021. Fiscal Nacional, Jorge Abbott', Ministerio Público, accessed 25 August 2021, http://www.fiscaliadechile.cl/Fiscalia/quienes/discursos_2021.pdf.

49 Fiscal Nacional, 'Cuenta Pública 2021. Fiscal Nacional, Jorge Abbott'.

50 Fundación Paz Ciudadana and Fundación San Carlos de Maipo, 'Estudio sobre los niveles de exclusión social en persona privadas de libertad'.

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law, such as crimes against property committed by extremely poor offenders. Perhaps the pandemic has altered the way in which we perceive our current social scheme such that the inequalities that it made so visible, may continue to demand policy changes into the future.