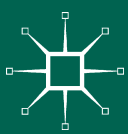
Durkheim

Durkheim and the Law

Edited by Steven Lukes
& Andrew Scull

Second Edition



Durkheim and the Law

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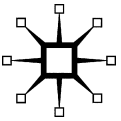

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Preface

The law was a central topic of innovative thinking by Emile Durkheim, yielding concepts and insights that have had a long-lasting and continuing influence on subsequent scholarship. This is a revised and expanded edition of a book we originally published in 1983. In the original edition, we gathered together key passages from his major works and posthumously published lectures, a seminal essay about legal evolution and newly translated book reviews from his remarkable co-edited journal, *L'Année sociologique,* as well as making available in English for the first time his celebrated debate with Gabriel Tarde over his provocative theory of crime and punishment. The aim of bringing these texts together was to help the reader to obtain a comprehensive view of Durkheim's distinctive contribution to the sociology of law.

This new considerably expanded and revised edition seeks to further that aim by adding to these original texts some further examples of Durkheim's thinking on the sociology of law. We have taken the opportunity to amend some of the translations of materials we originally reprinted, where this provided for a more accurate rendering of particular texts. To the materials we began with we have added several revealing further reviews and notes from the *Année*, as well as a major essay occasioned by the Dreyfus Affair. This essay, 'Individualism and the Intellectuals', was a polemical intervention into one of the most fraught political conflicts of the *fin de siècle* and was influential at the time. For present purposes, however, we contend that it has a more enduring importance for understanding Durkheim's ideas, prompting him to engage in some extremely provocative extensions and clarifications of his thoughts about the links between law, morality and social cohesion in modern complex, heterogeneous societies.

Revisiting this territory together has given us the opportunity to revise and expand our earlier introduction. We have incorporated further reflections on the continuing importance of Durkheim's ideas for the contemporary sociology of law, crime and punishment. Some of these were stimulated by responses to the original edition of this book, and others by scholarship that has appeared since its publication – a variety of work that has caused us to rethink as well as to clarify some of our original arguments. At our publisher's suggestion, we have also included as part of this new edition a set of short introductions to each of the nine chapters of the

book. These aim to provide non-sociological readers, and readers encountering Durkheim for the first time, with some additional background knowledge about both the man himself and the Durkheimian school of sociology. These introductory passages also seek to make clear the place each of the reprinted texts occupied in the evolution of Durkheim's thinking on legal matters.

Obviously, Durkheim's work continues to stimulate and engage us, as it does so many others, and we hope this new edition will contribute to a broader appreciation of his contributions to the sociology of law, and of the centrality of law and morality to his thinking about society.

Steven Lukes
Andrew Scull

Acknowledgements

It has been a great pleasure for both of us to have had the chance to work together again on this considerably revised and enlarged second edition of *Durkheim and the Law,* after an interval of almost three decades. On this occasion, we have had the inestimable advantage of the internet, which has greatly facilitated our collaborative work, living as we do some 3,000 miles apart. We are grateful to Frances Arnold of Palgrave Macmillan for her interest in and support for this project, and for soliciting a number of penetrating reviews of our original manuscript. Two of those anonymous reviewers, in particular, made some extremely helpful suggestions about how to strengthen the book, and we are greatly in their debt. We should also like to acknowledge David Garland's very close and generous reading of our introduction to the volume as a whole, which substantially improved the text.

Editors' Introduction to the Second Edition

Like other great sociologists Emile Durkheim addressed questions that, according to C. Wright Mills, typify the sociological imagination. Among these questions are: What is the structure of this society as a whole? What are its essential components and how are they related to one another? How does it differ from other varieties of social order? Where does the society stand in human history? What are the mechanisms by which it is changing? And how are we to understand the connections between 'personal troubles' that beset the individual 'within the range of his immediate relations with others' and 'the public issues of social structure' (Mills 1959: 6–8)?

Durkheim addressed such questions across a wide range of sociological fields, and his distinctive answers remain of compelling interest, even – perhaps especially – where we are led to qualify and criticize them. In these answers the law has a very central place. His first major work, *The Division of Labour in Society*, contrasts the 'organic solidarity' of modern, industrialized societies, consisting in ever-growing interdependence and functional differentiation of roles, with the 'mechanical solidarity' of clan-based and ancient, pre-industrial societies, unified by segmental structures composed of similar component units. The growing division of labour constituted the great transformation from homogeneity to heterogeneity and from collectivism to individualism, accompanying increasing volume and density of populations and involving the growth of cities and markets. The law both reflected and regulated this transformation. It was, he thought, an external index registering the nature of social solidarity: hence his early thesis that pre-modern societies were characterized by penal or 'repressive' law and modern societies based on the division of labour by 'restitutive law' of which the central example is contract.

Organic solidarity could, however, also take pathological, or 'abnormal', forms, when, because of 'unjust contracts', it involved exploitation, or when, because of insufficient regulation, it led to *anomie*, or normlessness, whose victims are afflicted by an obsessive acquisitive drive. He was responding in this instance to the final question in the first paragraph above, which he explored further in his famous work *Suicide*. Here *anomie*, the 'malady of infinite aspiration' (which was manifest in both economic and sexual relations), together with what he called 'egoism', or

social isolation, are presented as distinctive pathologies of contemporary capitalist societies. The remedy, he thought, lay in legal reforms: in regulating contracts to render them more just; and in the development of secondary occupational associations, composed of workers and employers, with their own means of normative self-regulation. These would mediate between the individual and an interventionist state, which had a special responsibility to impose rules of justice on economic exchanges, to ensure that 'each is treated as he deserves, that he is freed of all unjust and humiliating dependence, that he is joined to his fellows and to the group without abandoning his personality to them' (Durkheim 1950: 87). Durkheim's writings on the family, the incest taboo, on divorce and on property also focus on the law, which he always saw as the entry point into the study of the messier subject matter of social norms, customs and practices.

In the mid-1890s Durkheim's thought took an interesting turn towards the study of religion, which in his great work *The Elementary Forms of Religious Life* he came to define as '*a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden—beliefs and practices which unite into one single moral community called a Church, all those who adhere to them*' (Durkheim 1995: 44). Notice that on this definition there can be 'secular religions', such as what he called the 'religion of individualism', which he saw as the unifying ideology of his own society, the French Third Republic. Reflection on religion thus understood led him to an ever-deeper set of reflections on the criminal law. The link between the two lay in what he came to call '*représentations collectives*' – collective beliefs and sentiments which crime violates and punishment re-animates. This led him to his paradoxical thesis that crime is a normal phenomenon, even a factor in social health, provided its incidence lies within 'normal' limits, by eliciting punitive reactions on the part of authorities, reactions that would express and thereby reinforce what is central, even 'sacred', within prevailing morality. The seeming relativism of this view was, however, mitigated by his idea that crime can also be a force for moral innovation, when the violation of anachronistic norms and values that are incompatible with society's 'conditions of existence' is the harbinger of an emergent moral code. These claims about crime and punishment led to an acrimonious debate with the magistrate and criminologist, Gabriel Tarde, with views sharply opposed to his, which we reprint in Chapter 5.

This view of punishment echoes Durkheim's earlier 'index thesis', for he saw the form of punishment, and thus the sanctions of the criminal law, as symbolic: as expressing and serving to reinforce prevalent *représentations collectives*. And so he supplemented his earlier account of legal evolution, from repressive to restitutive law, with a further thesis concerning the evolution of punishment. The earlier account had suggested that penal law had progressively declined with the recession of mechanical and the

advance of organic solidarity. He now argued that punishment becomes milder as one goes from less to more advanced societies, consisting increasingly of the deprivation of liberty. The central idea here was that in so-called 'less advanced' societies, crimes largely took the form of sacrilege against 'collective things', offending sentiments directed towards transcendent and superhuman beings and inspiring reverential fear. In modern societies, by contrast, typical crimes were offences against the new locus of 'the sacred', namely, the human person, injuring only individuals – offences such as murder, theft, violence and frauds of all kinds. As crime became more human and less religious, he ingeniously argued, punishment became generally less severe, for the intriguing reason that there is 'a real and irremediable contradiction in avenging the offended human dignity of the victim by violating that of the criminal' (this vol.: 98). Since this antinomy could not be removed, it could only be alleviated by alleviating the punishment as far as possible. Needless to say, this account of penal evolution has been widely and hotly contested, but, as we shall suggest, that discussion has been of real value for the understanding of punishment in our own time.

Much of Durkheim's writings about law, as well as those of his followers, has relevance for our own time. We here single out two grand themes that are central and fundamental today. These can, we suggest, be brought under two broad headings that correspond to the two phases of his thinking just outlined: namely, his account of the relations between law and social solidarity and his account of the symbolic dimension of the criminal law.

It was in the mid-eighteenth century that the idea of 'natural order' entered the field of political economy – the notion, in Bernard Harcourt's words, that 'economic exchange constitutes a system that autonomously can achieve equilibrium without government intervention or outside interference'. This notion 'made possible the belief in self-adjusting and self-sustaining markets' and enabled 'our contemporary perception of modern markets as free' (Harcourt 2011: 26). It was Durkheim, we contend, who provided the most compelling because the most far-reaching critique of that perception.

He developed that critique (see the extract from *The Division of Labour* reproduced in Chapter 9) in opposition to Herbert Spencer's then influential articulation of that perception. Durkheim's central insight is succinctly captured in Talcott Parsons's phrase 'the non-contractual element in the contract'. Spencer's picture of social order in modern industrial societies was of a natural, pre-social order from which social order would supposedly result. But this would not be genuine social order, since, Durkheim argued:

> social solidarity would be nothing more than the spontaneous agreement between individual interests, an agreement of which contracts are the natural

> expression. The type of social relations would be the economic relationship, freed from all regulation, and as it emerges from the entirely free initiative of the parties concerned. In short, society would be no more than the establishment of relationships between individuals exchanging the products of their labour, and without any social influence, properly so termed, intervening to regulate that exchange. (This vol.: 182)

Such a society would be unstable, since 'every harmony of interests conceals a latent conflict, or one that is simply deferred' (185). Besides, in any case, the trend in industrial societies was towards ever more extensive public regulation of private contractual relations, so that '[w]henever a contract exists, it is submitted to a regulatory force that is imposed by society and not by individuals; it is a force that becomes ever more weighty and complex' (188). The role of society, he wrote, is not merely to ensure the contracts are carried out. It also has to determine 'in what conditions they are capable of being executed and, if the need arise, restore them to their normal form. Agreement between the parties concerned cannot make a clause fair which of itself is unfair. There are rules of justice that social justice must prevent being violated, even if a clause has been agreed by the parties concerned.' (191) Moreover, the 'rules of professional morality and law' play the same role, maintaining 'a network of obligations from which we have no right to disengage ourselves.' We are, however, ever more dependent on the state, for the 'points where we come into contact with it are multiplied, as well as the occasions when it is charged with reminding us of the sentiment of our common solidarity' (193).

There are two separable ideas here concerning the law and market-based exchange. The first is that the law serves to *constitute* market relations. It does so, for instance, by allocating property rights and by providing the techniques or instruments required to make markets work, through contract and tort law. Durkheim, however, went further than this, arguing, as Prosser puts it, that law and regulation generally 'provide the essential social underpinning of mutual trust and expectation which is necessary for markets to function' (Prosser 2006: 382). The second idea – of considerable contemporary relevance – is that Durkheim's conception of social solidarity can provide a rationale for regulating markets, and indeed for determining where market exchange is appropriate and where it is not. Such a rationale, unlike the usual case for regulating markets in terms of market failure, does not embody the default assumption that market allocation is best, unless shown otherwise, and directly raises the question of the ways in which market exchange can corrode and fragment social solidarity.

This points to a further respect in which this aspect of Durkheim's thought about law and regulation is relevant to our times: namely, his very conception of social solidarity. Cotterrell has rightly observed that

> for Durkheim and some writers in a renewed Durkheimian tradition, a pressing issue is how to symbolize social unity and create for modern complex societies a moral framework in which regulation is effective, and the regulated are able, in some way, to participate as moral actors in a solidary society which is more than an economic free for all. (Cotterrell 1991:936)

Durkheim's distinctive way of addressing this issue can be read as a significant contribution to the ramifying debates among political philosophers since the publication of John Rawls's *A Theory of Justice* about principles that are to define a 'well-ordered society' that is both liberal and socially cohesive. His view is distinctive in combining strongly defended features of both liberal and communitarian perspectives. This can be seen in his remarkable essay 'Individualism and the Intellectuals', reprinted in Chapter 7, written at white heat in the midst of the Dreyfus Affair. Here Durkheim argued that central liberal principles expressing respect for individual dignity, notably the protections of basic individual rights, are inseparably part of the 'religion of individualism', which has 'penetrated our institutions and our customs' and 'become the sole link which binds us one to another'. Thus, he wrote, 'the individualist, who defends the rights of the individual, defends at the same time the vital interests of society' (this vol.: 154, 160).

The second grand theme of Durkheim's work that is central and fundamental to our time relates to his later preoccupation with religion: namely, his focus on the symbolic dimension of the law, and in particular the criminal law. This has generated both disagreement and alternative developments from his central ideas. We turn to the discussion of this theme later in the course of this introduction, and, in particular, in its concluding section.

The Development of Durkheim's Ideas about Law

Law was, then, a topic of central interest to Durkheim, as it was to several of his followers. In his first major work, *The Division of Labour in Society*, as we have briefly indicated, Durkheim in effect advanced three bold and striking theses about law. The first was what we can call 'the index thesis': that law should be conceived as an 'external' index which 'symbolizes' the nature of social solidarity (this vol.: 57) – of which there were two broad types: 'mechanical solidarity', typical of simpler, relatively homogeneous pre-modern societies and 'organic solidarity', typical of more complex, differentiated and organized modern societies. The second was the thesis concerning law's evolution, summarized in Table 1, according to which societies developed from less to more advanced forms, from an all-encompassing religiosity to modern secularism, and from collectivism to individualism, alongside an overall shift from a predominantly

Table 1 Mechanical and organic solidarity

	Mechanical solidarity based on resemblances (predominant in less advanced societies)	*Organic solidarity* based on division of labour (predominant in more advanced societies)
(1) Morphological (structural) basis	Segmental type (first clan-based, later territorial) Little interdependence (social bonds relatively weak Relatively low volume of population Relatively low material and moral density	Organized type (fusion of markets and growth of cities) Much interdependence (social bonds relatively strong Relatively high volume of population Relatively high material and moral density
(2) Type of norms (typified by law)	Rules with repressive sanctions Prevalence of penal law	Rules with restitutory sanctions Prevalence of cooperative law (civil, commercial, procedural, administrative and constitutional law)
(3a) Formal features of *conscience collective*	High volume High intensity High determinateness Collective authority absolute	Low volume Low intensity Low determinateness More room for individual initiative and reflection
(3b) Content of *conscience collective*	Highly religious Transcendental (superior to human interests and beyond discussion Attaching supreme value to society and interests of society as a whole Concrete and specific	Increasingly secular Human-oriented (concerned with human interests and open to discussion) Attaching supreme value to individual dignity, equality of opportunity, work ethic and social justice Abstract and general

Source: Lukes, *Emile Durkheim: His Life and Work*, p. 158.

penal law with 'repressive organized sanctions' to a prevalence of 'civil law, commercial law, procedural law, administrative and constitutional law' with 'purely restitutive' sanctions (60–1). The third thesis concerned law's functioning, above all in the context of crime and punishment, claiming that crime is a violation and punishment an expression of collective sentiments, and that punishment's 'real function is to maintain inviolate the cohesion of a society by sustaining the common consciousness in all its vigour' (113).

These theses were fundamental to Durkheim's early work but they raised deep and difficult theoretical and conceptual problems with which he later tried to grapple. In later writings, moving in important ways away from his earlier formulations, he eventually developed a more complex approach to understanding the relationship between law and morality, as part of a general attempt to move beyond the problems associated with the notion that modern societies were characterized by organic forms of social solidarity. Central to his thinking was a Durkheimian analysis of the development of individualism as a core element of modernity, a value system rooted in what was most characteristic of developed societies, and one that took on some of the characteristics of a religion. The interrelations of law, morality and individualism lie at the heart of this emerging perspective, which saw Durkheim pre-occupied with the role of these factors in creating symbols of social unity that reined in the tendency of modern societies to dissolve into an economic free-for-all. Freedom, for Durkheim, was the very opposite of anarchy. It could manifest itself only in the context of regulation. Liberty, he memorably wrote (Durkheim 1961: 54) 'is the fruit of regulation'.

This paradoxical claim expresses an insight central to his discussion of *anomie* in *Suicide* (Durkheim 1951), and developed further in 'Individualism and the Intellectuals' (reproduced in Chapter 7), and in his lectures on Moral Education. As he put it in those lectures, 'Morality… is basically a discipline. All discipline has a double objective: to promote a certain regularity in people's conduct, and to provide them with determinate goals that at the same time limit their horizons. Discipline promotes a preference for the customary, and it imposes restrictions' (Durkheim 1961: 47). Only in the context of limits can human beings achieve happiness and fulfilment, and regulation thus 'deserves to be cherished' (Durkheim: 1961: 54). In their absence, existential terror beckons, as nothing in our nature serves to moderate or contain our passions, to curtail our desires, or to allow us to restrain ourselves. Emancipation and freedom, even for individuals, require self-mastery and self-control: 'Like everything else,' Durkheim insisted, 'man is a limited being: he is part of a whole. Physically, he is part of the universe; morally, he is part of society. Hence, he cannot, without violating his nature, try to supersede the limits imposed on every hand.' (Durkheim 1961: 51) Discipline is thus not regrettable or

a necessary evil. Rather, gratification of our desires requires that they be held within some bounds. Social constraint is vital to a satisfying existence, even in contemporary society.

Yet under modern conditions, with society constantly in a state of flux and change, discipline can no longer involve 'a blind and slavish submission' to rigid rules (Durkheim 1961: 52). Necessarily, morality has to incorporate elements of reflection, and to be subject to criticism, so as to be flexible enough to change gradually, even while simultaneously retaining the authority, the ability to constrain, that Durkheim saw as the most central feature of *la morale*. Thus the problem of order in modern complex societies was, in essence, one of creating, to quote Roger Cotterrell (1991: 943), 'a moral framework in which regulation is effective and the regulated are able, in some way, to participate as moral actors in a solidary society…'. As various forms of traditional discipline weaken with the advance of modernity, social conditions 'may easily give rise to a spirit of anarchy… a common aversion to anything smacking of regulation' (Durkheim 1961: 54). That road leads, in Durkheim's view, to chaos, the breakdown of social order, the complete loss of liberty as we lose the capacity to govern ourselves. And if we are to avoid this fate, law and legal regulation will necessarily occupy centre stage.

We might even say, moving beyond the three hypotheses about law he had propounded in his earlier work, and that we have outlined above, that Durkheim in this later work put forward a fourth provocative hypothesis which is really an extension of the third) about law's place in society: law, he contended, functions indispensably 'as an instrument and expression of community and social solidarity, given the diverse modern milieus of modern societies' (Cotterrell 1991: 943); its rituals, its interventions, its occasions for debating and authoritatively resolving moral issues, and ultimately its invocation of penal force, all serve to reaffirm and to reinforce the sorts of flexible yet firm regulation essential to the preservation of social order. Even under modern conditions of existence, deviance threatens to demoralize society, for such violations of societal norms, left unpunished, sharply call moral authority into question, indeed will eventually cause it to collapse. Or as Durkheim (1961: 167) himself put it, in *Moral Education*, 'punishment does not give [moral] discipline its authority, but it prevents discipline from losing its authority, which infractions, if they went unpunished, would progressively erode'. Our commitment to the moral order, our sense of its power to constrain and to order our existence, and thus our very ability to trust others – the foundation of the complex relations that make up modern society – are at stake: 'the law that has been violated must somehow bear witness that despite appearances it remains always itself, that it has lost none of its force or authority despite the act which repudiated it. In other words, it must assert itself in the face of the violation and react in such a way as to demonstrate a strength proportionate to that of the attack

against it. Punishment is nothing but this meaningful demonstration … the palpable symbol through which an inner state is represented; it is a notation, a language … which … expresses the feeling inspired by the disapproved behaviour' (Durkheim 1961: 166, 176).

Both Durkheim's early theses about law and its evolution, and his later attempt to resolve the difficulties they raised, have been influential among his followers and raise important questions for the sociology of law. Among modern sociologists, particularly in the English-speaking world, it was the three earlier claims that long received the most attention, and for a time were broadly influential. Yet they were vulnerable to important criticisms, as we shall spell out in the discussion which follows, and as Durkheim implicitly acknowledged by grappling with a more complex account of law's place in modern societies in his later lectures and writings. Partly because those ideas were advanced in less than obvious places – a polemical essay written as an intervention into the Dreyfus affair; a series of essays ostensibly about the sociology of education and the moral upbringing of children; a review in the *Année sociologique* of Lucien Lévy-Bruhl's *La Morale et la science des mœurs* – it is only in more recent decades that Durkheim's later reflections on law and modern societies have begun to attract sustained attention, most notably, as we shall see, in the innovative and probing work on the problem of penality in the late twentieth and early twenty-first centuries that has appeared over the last quarter-century.

Characteristically, though his thinking on the sociology of law evolved in other respects, Durkheim never ceased to see law *systematically*: 'the diverse juridical phenomena,' he wrote, 'are not isolated from one another; rather there are between them all manner of connections and they are linked with one another in such a way as to form, in each society, an *ensemble* which has its own unity and individuality' (Durkheim and Fauconnet 1903). He devoted a special section of his journal, the *Année sociologique* (twelve volumes, 1898–1913), to 'the analysis of works where the law of a society or social type is studied in its entirety', and always in such a way as to reveal principles of social organization and collective thinking. Similarly, he pursued his evolutionary inquiries, particularly into the law against suicide (Durkheim 1951) and into the development of punishment (Durkheim 1901b) and of property rights and contract (Durkheim 1957).

These inquiries gained an added dimension after Durkheim's turn from 1895 onwards, towards the study of religion and the ethnography of 'primitive' societies, which was governed by his preoccupation with the religious origins of all social phenomena.[1] In line with this, in 1896, Durkheim's nephew, Marcel Mauss, published his seminal article 'La Religion et les origines du droit pénal', in which he advocated studying the origins of law through the use of ethnographic data.[2] This approach strongly influenced other Durkheimian works in this field, notably Paul

Fauconnet's (1920) study of penal responsibility, Georges Davy's (1922) study of the potlatch and the origins of contractual obligation, the writings of Paul Huvelin (1907) on magic and the law, and Emmanuel Lévy's (1899) work on responsibility and contract. Finally, Durkheim stated his distinctive theory of crime and punishment in such a striking way that, as we have noted, he provoked a most interesting and illuminating debate with Gabriel Tarde, of which more below.

The *study* of law, then, was central to the Durkheimian enterprise. As he claimed in 1900, 'Instead of treating sociology *in genere*, we have always concerned ourselves systematically with a clearly delimited order of facts: save for necessary excursions into field adjacent to those which we were exploring, we have always been occupied only with legal or moral rules, studied in terms of their genesis and development' (Durkheim 1900: 648). Legal practices, institutions and systems were, for him, social facts (Durkheim and Fauconnet 1903; Durkheim 2013b, Ch.1) revealing wider social developments and processes, and eminently worthy of study in their own right, both historically, in the quest for their 'origins' and sociologically, in the examination of their functioning. Two sections of the *Année* (the introductions to which we include here) were devoted to these tasks: that on 'Legal and Moral Sociology' mainly to the former; that on 'Criminal Sociology and Moral Statistics' to the latter. A mass of contemporary work was analysed in these sections, to which over half (24) of the Durkheimians contributed (Vogt 1983).[3] Taken together with the original works mentioned in the previous paragraph, this represents a substantial and distinctive contribution to the sociology of law.

What, then, was distinctive about the Durkheimian view of the law – on what did it focus, and what did it neglect? What is its lasting contribution, in light of the contemporary study of law and legal phenomena? In offering some answers to these questions, we shall first consider Durkheim's own writings on law, gathered here (in Chapters 2 to 4), on the three initial theses indicated above and on Durkheim's attempt to resolve the problems they raise.

The Durkheimian View of Law

We should first note that the object of the *sociologie du droit* or *sociologie juridique* was, indeed, *droit* and that this is only imperfectly translatable as 'law'. As H.L.A. Hart (1955: 442) has written, *droit,* along with the German *Recht* and the Italian *diritto*

> seems to English jurists to hover uncertainly between law and morals, but they do in fact mark off an area of morality (the morality of law) which has special characteristics. It is occupied by the concepts of justice, fairness, rights and

> obligations (if this last is not used as it is by many moral philosophers as an obscuring general label to cover every action that we ought to do or forbear from doing). (Hart 1955: 178)

This linguistic fact combined with Durkheim's lifelong preoccupation with morality and its scientific study (to which *The Division of Labour* was intended to contribute) to focus his attention upon the linkages, analogies and parallels between legal and moral rules. He tended to see law as derivative from and expressive of a society's morality. 'Moral ideas,' he wrote, 'are the soul (*l'âme*) of the law' (Durkheim 1987: 150). Indeed, one way to state the central thesis of *The Division of Labour*, of a great transition from mechanical to organic solidarity, is in the form of a three-fold claim: that the integrative functions once performed by 'common ideas and sentiments' were now, in industrial societies, increasingly performed by new social institutions and relations, among them economic ones; that since 'social solidarity is a wholly moral phenomenon' (Durkheim 2013a: 52), this social change involved a major change in morality; and that this was best observed through observing changes in the law. But, as we shall see, this last claim was at the heart of the difficulties his early thesis posed.

In his early work Durkheim not only linked law and morality in these ways, he also focused on certain aspects of law, above all its constraining or what has been called its 'negative, obligatory and prohibitive aspects' (Vogt 1983: 180). One general reason for this can be traced back to the very definition (in his *Rules of Sociological Method* of 1895) of social facts, of which he saw legal rules as paradigmatic, in terms of normative *constraint*, controlling, giving direction and setting limits to individual action. Laws *command*, and are a pre-eminent demonstration of Durkheim's favourite theme, the force and power of the social: 'the individual finds himself in the presence of a force which dominates him and to which he must bow' (Durkheim 2013b: 97). Hence his particular focus on the sanction, which he defined as 'the consequence of an act that does not result from the content of that act, but from the violation by that act of a pre-established rule' (Durkheim 1974: 43) and in the study of penal law. After the mid-1890s his view of social facts broadened; he came to stress their power of attraction, attaching individuals, through allegiance and commitment, to social goals and values.

He distinguished law from morality by pointing to its 'organized' rather than 'diffuse' character and its dependence upon specific persons or agencies who interpret legal rules and apply sanctions according to recognized procedures. He always tended, however, to regard these persons and institutions as in turn embodying and applying '*représentations collectives*', collective beliefs and sentiments of 'society' as a whole; he never treated them as having distinct interests and goals that might conflict both with one another and with the wider social consensus. Vogt (1983: 183) is right

to notice that Durkheim and the Durkheimians 'had a (largely unwitting) tendency to be 'statist' in their definition of law', but we should further note that the Durkheimian view of the state was as 'a special organ whose responsibility it is to work out certain representations which hold good for the collectivity. These representations are distinguished from the other collective representations by their higher degree of consciousness and reflection' (Durkheim 1957: 50). Only once, and briefly, did Durkheim attempt to come to terms with the independent role of political action and political structures: in 'Two Laws of Penal Evolution', he allows that governmental authoritarianism could influence the intensity of punishment, but he saw this as secondary to the influence of social-structural factors and without wider implications. So he did not investigate further the impact upon the functioning of law of politics, or even that of legislators, judges, the police and the courts.

In short, Durkheim's distinctive view of law focused upon its links with morality, deriving from it and expressing it, initially upon its constraining or negative aspects, and upon its organized character, but without examining the independent explanatory role of the actors and institutions that combine to influence, create, interpret and apply it. Max Weber's emphasis on the impact on the law of the specialist bearers of legal tradition and their characteristic modes of recruitment and training, his lengthy examination of the relationships between law and the economy (Weber 1978: Vol. 1, Part 2, Ch. 1; and Vol. 2, Ch. 8), are all domains of inquiry which are not merely absent from the Durkheimian corpus, but are indeed fundamentally incompatible with Durkheim's most basic meta-theoretical assumptions.

Assessing Durkheim's Sociology of Law

Law and social solidarity

The most general line of criticism of Durkheim's view of law has been that it is remarkably narrowly focused. In taking social solidarity to be 'a completely moral phenomenon', and the law to be an 'external index which symbolized it', he closed off a number of important sociological questions about law.

First, there are, it is true, significant links between morality and law: laws *often* reflect moral beliefs and sentiments and can serve to revive and reinforce them; and there is *often* a moral commitment to conform to what the law enjoins. Durkheim, however, wanted to go further than this. He recognized that 'social relationships can be forged without necessarily taking on a legal form' (this vol.: 58) but then hastened to assure us that this is essentially irrelevant for sociological analysis, since '*normally*

customs are not opposed to law; on the contrary they form the basis for it' (58). Deviations from this state of affairs are no more than temporary (and 'pathological') aberrations. Since custom is 'secondary' and law 'essential' to the constitution of social solidarity, law may be safely treated as an undistorted reflection of society's collective morality:

> social life, wherever it becomes lasting, inevitably tends to assume a definite form and become organized. Law is nothing more than the most stable and precise element in this very organization. Life in general within a society cannot enlarge in scope without legal activity similarly increasing in a corresponding fashion. Thus we may be sure to find reflected in the law all the essential varieties of social solidarity. (57–8)

For all Durkheim's dialectical skill, this whole line of argument rests exclusively on *a priori* assertion. He begs, in a characteristically Durkheimian fashion (Needham 1963: xv), the very question at issue, and at once seeks to distract attention from this manoeuvre by proceeding directly to an empirical analysis of the changing forms of social solidarity as reflected in the legal system. Nor does his subsequent work on law bring any modification of this basic assumption.

Thus, as Vogt (1983: 184) has well said, the Durkheimians 'slighted the importance of conflict: between moral principles, between laws, and … between legal and moral rules'. This was an underlying feature of Durkheim's thought as a whole: he assumed that 'normally' the elements of a social order were integrated and 'solidary' and he saw conflict as pathological and transitory. He was certainly aware of such conflicts: witness his comments (at the end of Chapter 9 of this volume) on class exploitation and conflict and the injustice (relative to prevailing morality) of inherited property. He also argued, as we shall see, at the time of the Dreyfus Affair that outrages against an individual's rights, such as the court had committed against Dreyfus, could not 'be freely allowed to occur without weakening the sentiments they violate: and as these sentiments are all we have in common, they cannot be weakened without disturbing the cohesion of society' (160). Notwithstanding such periodic acknowledgments, however, he never focused as a sociological analyst upon moral conflicts within societies, or on the various ways in which the law and prevailing morality can come into conflict with each other. This constitutes a crucial and highly damaging deficiency, and yet, as we shall suggest below, to have taken such conflicts seriously would have been to question the basis of the Durkheimian vision of the human sciences, undermining his own way of conceiving 'a sociology that is objective, specific, and methodical' (Durkheim 1913b: 6).

Second, Durkheim's initial focus on the negative or constraining aspects of law, on sanctions and obligations, precluded any systematic inquiry into

its positive or enabling aspects, as a set of procedural rules, permitting individuals and groups to act in certain ways, and constitutive rules, defining practices and relationships (for example, drawing up a will or forming a company), and, despite the subsequent broadening of his conception of social facts and morality, he never explored these aspects of law (Hart 1961: Chs. v and vi). There is no doubt, however, that these are aspects of the law which he recognized. Consider his (rather obscure) discussion, not reproduced here, of the ways in which, as the division of labour, and the necessary functional interdependence of individuals, grows in societies, regulative norms (including laws) arise which in turn facilitate the further growth of the division of labour (Durkheim 1913a, Book III, Ch. 1, Section III). But it is noteworthy that his interesting discussion of property and contract law (the latter reprinted as the first part of Chapter 9 below), focuses entirely on genetic explanations of their obligatory force and not at all on their enabling consequences. (The characteristic absence of concern with such matters contrasts sharply – and unfavourably – with Weber's (1966: passim, esp. 201ff.) rich and detailed discussion of the influence of legal systems in facilitating or retarding the development of modern capitalism (see Cartwright and Schwartz 1973).)

Third, as we have already indicated, Durkheim (and the Durkheimians followed him in this) was curiously blind to the sociologically explanatory significance of *how* law is organized – that is, formulated, interpreted and applied – of the role of the 'intermediaries' between 'society' and 'its' legal rules and practices. (Again, Weber's approach to these issues is far more sophisticated and suggestive: compare, for example, his analysis of the dominant role of the organization of the English legal profession, in the context of early political centralization, in the preservation and development of a unique common law system of 'a highly archaic character', in the face of 'the greatest economic transformations' (Weber 1966: 202; see also Hunt 1978; Trubeck 1972).) For Durkheim, the State, as the instrument through which collective morality finds durable expression and the organ 'qualified to think and act instead of and on behalf of society' (Durkheim 1957: 48), is the agency through which the 'passionate reaction' of the community finds organized response (see Clarke 1976). Although, in many instances, within the state apparatus 'power was held by a privileged class or by special magistrates … [and] although the feelings of the collectivity are no longer expressed save through certain intermediaries, it does not follow that these feelings are no longer of a collective nature just because they are restricted to the consciousness of a limited number of people' (this vol.: 68). On the contrary, these 'special officials' constitute the executive committee, not of a ruling class, but of the moral consensus of the society as a whole; they are the authorized 'interpreters of its collective sentiments' (68).These 'interpreters' add nothing distinctive in the process of translating 'social

representations' into law. Indeed, Durkheim even wrote that 'a legal rule is what it is and there are no two ways of perceiving it' (Durkheim 2013b: 47) – a claim with which most modern legal scholars would take great issue. As Roger Cotterrell (1999: 33–4) has remarked, Durkheim failed to see law through lawyers' eyes, in terms of the practical problems of interpretation and application that make it hard to treat law as an unproblematic datum.

In mysterious fashion, the law's interpreters constitute 'a mere cipher without effects' (Garland 1983: 53). Thus, as admirably stated by Henri Lévy-Bruhl (1961: 113), the Durkheimians embraced the curious position that 'for the sociologist, the true author of a legal rule' is much less the individual who writes it and much more the 'social group'; the legislator merely 'translates the aspirations' of the social group. It is probably not too much to say that, in making this assumption of 'immediate and unambiguous translatability' (Vogt 1983: 185), Durkheim and the Durkheimians closed off most of the questions that have been central to the modern sociology of law, criminology, and the study of deviance.

The evolution of law

This is not the place to discuss Durkheim's overall evolutionary scheme relating the less advanced to the more advanced societies, though it should be noted that his picture was less simplistic and unilinear than that presented by many other nineteenth-century thinkers. Nor can we discuss here his later assumption that contemporary 'primitive' societies, as observed by travellers, missionaries and ethnographers, embodied both (structural and cultural) simplicity and evolutionary priority, and could thus provide evidence of the 'origins' of social institutions. Nor, again, can we examine Durkheim's grand substantive hypothesis of the great transition from pre-industrial to modern industrial societies consisting in a shift of the principles of social integration from mechanical to organic solidarity. As far as law is concerned, the chief criticism to which his evolutionary thesis has been subject is two-fold: (i) that he vastly overstated the role of repressive law in pre-industrial societies; and (ii) that, in developing a model of social change that lacks any consideration or 'conception of intermediate stages between primitive and modern society … he misses many of the distinctive features of modern legal evolution' (Hunt 1978: 72–3). Plainly, Durkheim erred in 'crushing all pre-industrial societies into one category' (Clarke 1976: 249). The error was, arguably, a profoundly damaging one, since it left his analysis bereft of more than passing attention to historical developments crucial to the understanding of the nature of modern legal systems. As for his thesis about the changing role of repressive law, let us examine in turn each of the claims he makes.

Pre-industrial societies

Consider first the ethnographic record. According to Durkheim (2013a: 108), 'As far as we can judge of the state of law in very inferior societies, it appears to be entirely repressive.' As Sheleff (1975) has noted, Malinowski's research in the Trobriand Islands (Malinowski 1922) stressed the reciprocity of their social relations and the secular basis of their legal system. Malinowski (1966: 51) himself wrote that these societies 'have a class of obligatory rules, not endowed with any mystical character, not set forth in the name of "God", not enforced by any supernatural sanction, but provided with a purely social binding force'. 'The rules of law,' he wrote, 'stand out from the rest in that they are felt and regarded as the obligations of one person and the rightful claims of another' (Malinowski 1966: 55). Hoebel (1954) argues similarly with regard to the reciprocal and restitutory features of primitive law, as do Gluckman (1955), Bohannan (1957) and others. Schwartz and Miller (1964: 167; but for criticism on the relevance of Schwartz and Miller's indicators to Durkheim's thesis, see Cotterrell 1977), on the basis of a survey of 51 societies, conclude that 'restitutive sanctions – damages and mediation – which Durkheim believes to be associated with an increasing division of labour, are found in many societies that lack even rudimentary specialization'. Indeed, they add that, by stipulating that 'restitutive law exists only with highly complex organizational forms, Durkheim virtually ensured that his thesis would be proven' (Schwartz and Miller 1964:166). In short, it is hard to disagree with Barnes's (1966: 168–9) conclusion that 'the ethnographic evidence shows that, in general, primitive societies are not characterized by repressive laws' and that 'it is governmental action that is typically repressive'.[4] As Barnes (1966: 168–9) further remarks, at this stage, Durkheim 'took his evidence on legal order from Classical Antiquity and early Europe' which perhaps give proof of 'some historical progression of the kind he had in mind'. In order to discover if this is so, we should look more closely at the evidence Durkheim relied upon.

Sheleff has noted that Durkheim appealed to Biblical evidence, arguing that in the Pentateuch there are very few non-repressive laws, and even these 'are not so far remote from the penal law as at first sight one might believe, for they are all marked with a religious character' (Durkheim 1973: 110). This was intended to illustrate the religious basis of the early penal law, oriented to a transcendent power, symbolizing the collectivity. A number of scholars have, however, argued exactly the contrary: that the Torah basically embodied religious and moral exhortations devoid of punitive backing, and existed alongside a legal system distinct from religious affairs and invoking restitution for secular offences (Sheleff 1975, citing the work of Julius Wellhausen, Yehezkel Kaufman and A.S. Diamond).