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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 transcendental 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 irremedia-
ble 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**

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