

## The Durkheimian Perspective

This chapter focuses on some of the more significant and controversial ideas that have come to form the Durkheimian perspective of legal sociology. The chapter begins with a discussion of Emile Durkheim's most important sociological concepts. Next, the chapter examines the correspondence that Durkheim sees existing between the types of social solidarity and the types of legal system and penal sanctions. Third, Durkheim's statements about the evolution of contract and his ideas about contract's role and place in society are closely analyzed. The chapter concludes with a discussion of the recent critiques that contemporary scholars have made in regard to Durkheim's thoughts on the relationship between law and morality, his ideas about legal evolution and the division of labor, and his methodological procedures and assumptions.

### Emile Durkheim: The Sociologist as Moralist

Of the three major problems that most occupied Emile Durkheim's attention—morality, religion, and law—law was the least important and morality the most important. For Durkheim, legal phenomena “were considered to be something rather like particular manifestations or types of moral and/or religious phenomena” (Vogt, 1983:177). It was his continuing interest in the moral elements of social life that strongly informed his views on law and society. Indeed, for Durkheim society itself is a moral phenomenon whose well-being depends on people's commitment to certain moral beliefs and sentiments. Law is simply a reflection of these moral beliefs and sentiments. For instance, if he were alive today Durkheim would probably attribute the success of civil rights legislation to the moral force that derives from the belief that it is wrong to favor one race over another.

Thus, largely as a result of his overriding interest in religion and morality, Durkheim (like Marx) did not articulate a systematic sociology of law. That notwithstanding, he did leave us with an expansive, albeit controversial, explanation of legal evolution. Indeed, as we shall soon see, Durkheim's “interest in law covered all human societies at all points in history and the evolutionary relations between them” (Clarke, 1976:346). In order to gain a better understanding of his legal

sociology, let us now briefly examine Durkheim's life and some of the major influences on his thought.

### Life and Influences

Emile Durkheim (1858–1917) was born in Epinal, France, to a Jewish family with a long line of rabbis. Shortly after deciding not to become a rabbi himself, Durkheim, at the age of nineteen was admitted to the prestigious Ecole Normale Supérieure in Paris, where he developed a general interest in philosophical doctrine. However, by the time of his graduation from the Ecole in 1882 Durkheim had shifted his intellectual interest to the scientific study of society. Five years later, a sociology course was created for him at the University of Bordeaux, thus giving Durkheim the distinction of being “the first French academic sociologist” (Coser, 1979:143). In 1893, Durkheim defended his doctoral dissertation, *The Division of Labor in Society*, at the University of Paris. Published as a book, the work had a significant impact. It annoyed the classical economists, and thus Durkheim found it difficult to obtain a professorship (Mauss, 1958:2). Later, he founded, edited, and wrote for the very successful and influential journal *L'Année Sociologique*. By 1913, Durkheim had attained the professorship of “Science of Education and Sociology” at the Sorbonne.

Durkheim's intellectual thought was heavily influenced by the Enlightenment thinkers Montesquieu and Rousseau and their ideas on the holistic view of society and the general will, respectively. Durkheim was also influenced by the German philosopher Immanuel Kant's conception of morality as a principle of social duty. From the titular “father of sociology,” Auguste Comte (1760–1825), Durkheim derived his positivistic approach to the study of society and his notion of the “collective consciousness.” From Herbert Spencer, he obtained much of his organismic and evolutionary views. German sociologist Ferdinand Tönnies' *Gemeinschaft und Gesellschaft* (1887) influenced Durkheim's ideas about the different types of social solidarity (i.e., cohesiveness or integration). Durkheim's emphasis on solidarity may have given his sociological theory what is now considered to be a conservative—that is, functionalist—bias. And while Durkheim may have “sympathized” with the socialism of the Marxists, “he never gave himself to it” (Mauss, 1958:3). To be sure, he considered Marxism nothing more than a collection of “disputable and out-of-date hypotheses” (Lukes, 1985:323).

As will later become evident, the intellectual influences noted above are at the core of the Durkheimian perspective. Before we can discuss his perspective, however, we must first deal with several of Durkheim's key concepts.

### Principal Concepts in Durkheim's Sociology

Two of Durkheim's pivotal works are *The Division of Labor in Society* (1893) and *The Rules of Sociological Method* (1895). It is in these groundbreaking books that Durkheim first introduces several of his most influential sociological concepts, which he subsequently employs in his later studies on suicide, religion, education, morality, and punishment. In *The Division of Labor*, Durkheim focuses on what

holds society together. In *The Rules*, his concern is with defining the subject matter of sociology. In what follows we shall discuss in some detail four of Durkheim's key concepts as found in the aforementioned books: *social facts*, *collective consciousness*, *mechanical solidarity*, and *organic solidarity*.

**Social facts.** Seeking to establish sociology as a distinct academic discipline, Durkheim's objective was to outline sociology's proper study. Trying to break away from the analytic individualism popular at the time, he attempted to distinguish sociology from other knowledge-fields (such as psychology, philosophy, and biology) that also, to one degree or another, attempt to explain human behavior. For Durkheim, sociology was to be a science similar in methodology to the natural sciences and thus rooted in the principles of positivism.

Durkheim postulates in *The Rules of Sociological Method* that the fundamental subject matter of sociology consists of the study of *social facts*. He defines **social facts** as those "ways of acting, thinking and feeling, external to the individual, and endowed with the power of coercion" (1966:3). In other words, according to Durkheim, social facts exist outside of the individual's physical body (and, at least initially, outside of his or her consciousness as well) and, yet, they exert an influence on the individual's behavior.

Durkheim acknowledges that social facts are not (usually) tangible, physical entities, as in the example of collective tendencies and passions. He argues, however, that social facts must be considered and treated as "things" because they are real. They are just as real as physical objects because they influence, inhibit, and constrain people's actions. In this sense social facts are part of an "objective," external, and demonstrable social reality. They are not, however, always easily observable.

Durkheim contends that social facts are phenomena *sui generis* (from Latin meaning "of its own kind"). This means that they have an autonomous and distinct existence of their own. Indeed, social facts cannot be reduced to anything else; they are not primarily molecular, biological, chemical, or even psychological in nature. Social facts are different from and more complex than any of these realms of nature. They are independent of the mere will or needs of individuals. States Durkheim: "the determining cause of a social fact should be sought among the social facts preceding it and not among the states of the individual consciousness" (1966:110). Accordingly, social facts can only be explained by other social facts.

Another "thing-like" quality that is characteristic of social facts is that they are resistant to change and thus persist from generation to generation. They were here before we were born, and more than likely will be here after we are gone. Examples of social facts include gender roles, norms, values, morality, all the social institutions (the family, the polity, the economy, religion, etc.), the suicide rate, the crime rate, and society itself.

For Durkheim, law is the preeminent social fact. As an institution it has been around for a long time and, because only a few people would desire a society without some kind of legal system, it will undoubtedly continue indefinitely. The law is *coercive* because it constrains people's actions by prohibiting certain behaviors like murder, theft, and prostitution. The law is *real* since its violation will almost invariably lead to very real consequences such as a fine, incarceration, or death.

The law is also experienced as *external* to the individual. People perceive it as being "out there"—an aspect of objective social reality—as, for example, when they talk about "breaking," "running from," or being "outside" the law. Finally, the law is *observable* because we can see legal rules written down in codes, constitutions, law books, and the like.

In treating social facts as things, Durkheim seeks to study these phenomena through positivism, or the application of the principles of the physical sciences. Consequently, he urges the sociologist to abide by the basic tenets of the scientific method, which include empirical investigation through observation and measurement. As we shall see presently, some social facts are extremely difficult to measure because they are nonmaterial in nature. Durkheim therefore proposes that certain indicators that are closely correlated with nonmaterial social facts be identified so that these social facts can be measured indirectly through them. One example of a nonmaterial social fact is the collective consciousness.

**Collective consciousness.** Durkheim defines the **collective consciousness** (or "collective conscience") as "the totality of beliefs and sentiments common to the average members of a society [which] forms a determinate system with a life of its own" (1984:38–39). A sort of "group mind," the collective consciousness serves as a general regulating moral force. It is the common morality of the community that tells people the difference between right and wrong and guides their behavior. In *The Division of Labor in Society*, Durkheim remarks that the collective consciousness is stronger and more precise in a society with mechanical solidarity than in a society with organic solidarity.

**Mechanical solidarity.** As an ideal type, **mechanical solidarity** is that cohesiveness existing when the members of a small, traditional, preindustrial community are attracted to one another because of mutual resemblances. In this case, *homogeneity*—or the fact that people are basically alike—creates a strong bonding force that holds this group together. Moreover, there is a consensus or a "communion of minds" as the members share similar beliefs, ideas, tendencies, and sentiments that are clearly placed within a religious framework. Because these people believe very deeply in the same moral system, theirs is a common way of life. Mechanical solidarity is based on the similarity of the consciousness of the members of this society and constitutes a direct link to their collective consciousness. In this context, it becomes almost impossible for any individual to think of himself as different from his fellows. Individual personalities disappear and the members become collective beings as they mechanically follow the commands of the group. Questioning the common way of life is not tolerated and nonconformity is regarded as a moral outrage that must be quickly and severely quelled. Thus, explains Durkheim, "we should not say that an act offends the common consciousness because it is criminal, but that it is criminal because it offends that consciousness" (1984:40).

There is a lower degree of **division of labor** in a mechanical solidarity. In the main, the members of such a community do not perform a wide variety of highly

specialized tasks or roles. To be sure, the division of labor is relatively undifferentiated and simple. The jobs that need to be done to sustain the community may be based on traditional expectations of age and gender. For instance, young people may be responsible for the household chores while the elderly may be expected to keep an eye on the children; the men are charged with hunting game and the women's job is to cook the meals.

Although mechanical solidarity generally typifies "primitive," "ancient," "pre-feudal," "feudal," and "postfeudal but preindustrial," societies (Clarke, 1976:249), features of this typology may also be found in certain contemporary religious subcultures. The Old Order Amish of rural Pennsylvania, Ohio, Indiana, and southern Ontario are one such example. The Amish community may be identified as a mechanical solidarity for a number of reasons. First, their uniform dress gives the Amish the appearance of homogeneity. "Many American people have seen Amish families, with the men wearing broad-brimmed black hats and the women in bonnets and long dresses" (Hostetler, 1980:3). Second, their division of labor is organized, very simply, along traditional gender roles. "In planting and harvest time one can see their bearded men working the fields with horses and their women hanging out the laundry in neat rows to dry" (Hostetler, 1980:3). Third, their collective consciousness is strong and well-defined. "Amish life is distinctive in that religion and custom blend into a way of life. The two are inseparable. The core values of the community are religious beliefs" (Hostetler, 1980:10). In short,

By living in closed communities where custom and a strong sense of togetherness prevail, the Amish have formed an integrated way of life and a folklike culture. Continuity of conformity and custom is assured and the needs of the individual from birth to death are met within an integrated and shared system of meanings. Oral tradition, custom, and conventionality play an important part in maintaining the group as a functioning whole (Hostetler, 1980:11).

In sum, mechanical solidarity is that cohesiveness that results from social homogeneity. In a mechanical solidarity, the division of labor is relatively undifferentiated and the collective consciousness is well defined. Let us now look at its counterpart, organic solidarity.

**Organic solidarity.** An organic solidarity, by contrast, is characterized by an extensive and highly differentiated division of labor or *specialization* of occupational tasks. Relying on biological imagery, Durkheim describes this type of cohesiveness:

On the one hand each one of us depends more intimately upon society the more labor is divided up, and on the other, the activity of each one of us is correspondingly more specialized, the more personal it is. . . . This solidarity resembles that observed in the higher animals. In fact, each organ has its own special characteristics and autonomy, yet the greater the unity of the organism, the more marked the individualization of the parts. Using this analogy we propose to call "organic" the solidarity that is due to the division of labor (1984:85).

In Durkheim's view, the determining cause of the increase in the division of labor is an increase in the **dynamic density**, or amount of interaction that occurs among members of a society. Naturally, a sizable population will contribute to a greater degree of dynamic density. Hence, this type of solidarity is typically characteristic of large, modern, industrial societies.

The members of an organic solidarity do not share a common moral outlook; individuality, not community, rules supreme. The collective consciousness therefore weakens; that is, it becomes more general and abstract. In this case, it is their *heterogeneity*, or the fact that these people possess different talents and pursue different objectives, that contributes to social cohesiveness. This creates a situation of complementary differentiation. Indeed, the dissimilarities present in industrial society create a contractual exchange between autonomous individuals with distinct specialties. Durkheim tersely describes this contractual exchange as "a system of rights and duties joining [people] in a lasting way to one another" (1984:338).

U.S. society is an example of organic solidarity. The performance of a wide variety of essential roles or functions—such as those of cardiologist, judge, professor, meteorologist, writer, plumber—fosters a reciprocal reliance between people. For instance, even though a cardiologist may not agree with her plumber's political orientation she nevertheless needs the plumber to unclog her sink. Similarly, the plumber may not accept his cardiologist's views on say, abortion, but he needs her as a cardiologist to treat his anginal pain. To this extent, there exists a cooperative functioning between the individual members of society as they engage in different occupational specializations and depend on each others skills. In sum, the "social glue" that holds an organic society together is the members' *interdependence according to the division of labor*. By contrast, in the case of a mechanical society, the social bond is a *shared morality* that exists among the members.

Contrary to an organic society, the collective consciousness in a mechanical community is particularly intense because all its members share the same basic feelings concerning morality, values, traditions, and sentiments. They are of one mind. Behaviors that depart from these feelings are considered deviant and vehemently prohibited. Such aberrant actions are seen as an affront or assault on the collective consciousness of the community. Conversely, the collective consciousness of a large organic society is comparatively weaker in constraining and regulating behavior because the members of this "melting pot" hold diverse viewpoints. Because of this cultural diversity, a greater degree of deviance is tolerated. For instance, in general, urbanites are less likely than people living in small, rural areas to be shocked or scandalized by the prevalence of illicit drug use, the latest risqué fashions, or the high rates of violent crime. Indeed, German sociologist Georg Simmel (1971:324–339) characterizes individuals living in the modern metropolis as having a blasé attitude of indifference to many of the people and events around them.

Since they are ideal types, mechanical and organic solidarity are present in every real society, but in varying proportions. Historically, however, Durkheim tells us that there has been a general evolutionary movement from mechanical to organic solidarity. Thus, we may say that as a form of social organization, mechanical solidarity is most likely to be found in "simple," preindustrial communities with a strong collective consciousness and a negligible division of labor. By con-

trast, organic solidarity best characterizes differentiated, industrialized societies with a weaker collective consciousness and a highly developed division of labor. In the section that follows, we examine the correspondence that Durkheim makes between the forms of social solidarity and the forms of law.

### From Repressive to Restitutive Law

Durkheim's interest in law results from his belief, articulated in *The Division of Labor*, that societies develop from a form of organization based on mechanical solidarity to that based on organic solidarity. Durkheim recognizes that these solidarities are extremely broad and ephemeral typologies that do not easily lend themselves to scientific inquiry; that is, to empirical observation and measurement. Nevertheless, because Durkheim regards social solidarity as "a wholly moral phenomenon," and sees morality as the basis of law (law often reflects moral beliefs and sentiments), he concludes that codified law is the "external" and "visible symbol" by which to gauge society's level of integration. In other words, since social solidarity cannot be observed and thus measured directly, Durkheim uses law as a methodological indicator to measure it indirectly. In Durkheim's view, codified law is readily accessible to scientific observation and can be measured in regard to type and amount. For Durkheim, law is an excellent index of group solidarity. Just as the physicist measures heat through certain objectively observable and easily measurable phenomena such as the rise and fall of mercury in a glass tube (Merton, 1934:326), so Durkheim uses law as the "sociological equivalent of a thermometer" (Parkin, 1992:26) to gauge social cohesion. According to Durkheim, there exists a concomitant variation between the type and amount of law and the type and amount of solidarity.

"Thus our method is clearly traced out for us," Durkheim writes in *The Division of Labor*: "Since law reproduces the main forms of social solidarity, we have only to classify [and count] the different types of law in order to investigate which types of social solidarity correspond to them" (1984:28). Quite simply, Durkheim categorizes all legal rules into repressive and restitutive law. More specifically, *repressive (penal) law* encompasses all criminal law. *Restitutive (cooperative) law*, on the other hand, consists of civil law, commercial law, procedural law, administrative, and constitutional law. Durkheim then correlates repressive law with punitive sanctions but sees restitutive law as invoking reconciliatory measures. Moreover, he maintains that the greater the amount of repressive law in a society, the greater the indication of mechanical solidarity; and the greater the amount of restitutive law, the greater the indication of organic solidarity. We now discuss these two types of law in turn.

### Repressive Law

Durkheim argues that the laws of a mechanical solidarity as well as the sanctions associated with the violation of those laws are almost entirely repressive. **Repressive sanctions** are those severe punishments arising from the community's moral outrage toward acts that offend the heightened and pervasive collective

consciousness. The high degree of homogeneity (cultural similarity) in a mechanical solidarity will engender a harsh, passionate societal reaction since an offense against any one person is seen as an offense against the community as a whole.

Repressive sanctions inflict some suffering, loss, or disadvantage on the individual offender. Punishments imposed by penal law are the best examples of repressive sanctions. It is this highly emotional and vengeful attitude, Durkheim maintains, that makes blood-revenge, public tortures, and the execution of condemned criminals especially prevalent in premodern mechanical societies.

The law of retaliation, or *lex talionis*, articulated in the law of Moses in the Old Testament as "an eye for an eye, a tooth for a tooth," finds its expression in repressive punishments. Anthropologist A. R. Radcliffe-Brown describes the repressive punishment of retaliation in a premodern Australian tribe:

[W]hen one man has committed an offense against another, the latter is permitted by public opinion . . . to throw a certain number of spears or boomerangs at the former or in some instances to spear him in the thigh. After he has been given such satisfaction he may no longer harbor ill feelings against the offender or some member of his group. In regulated vengeance the offending group must submit to this as an act of justice and must not attempt further retaliation (1965:209).

In Durkheim's view there is a direct causal relationship between repressive law, with its concomitant sanctions, and religious morality. Such a relationship is especially evident in the societies of the ancient Egyptians, Hebrews, and Indians (1984:50). According to Durkheim:

every penal law is more or less religious, for what lies at its heart is the feeling of respect for a force superior to that of the individual, for a power in some way transcendental, regardless of the particular symbol whereby it impinges upon the consciousness, and this sentiment is at the basis of all religious feeling. This is why, in a general fashion, repression dominates the entire corpus of law in lower societies: it is because religion permeates all legal activity, just as, moreover, it does all social life (1984:94).

Thus, we may say with Durkheim that the type of law that characterizes a mechanical community is repressive law. The repressive sanctions attached to this type of law are punitive and serve as a retaliatory response to the offenses that assault the community's religious sentiments and strong collective consciousness. We now turn our attention to the type of law that characterizes an organic solidarity, restitutive law.

### Restitutive Law

In contrast to the repressive sanctions endemic to a mechanical solidarity, **restitutive sanctions** are prevalent in an organic solidarity, and are conciliatory, not punitive. Their goal is to restore to their previous, normal state the cooperative, reciprocal transactions (based on rights, duties, privileges, and immunities) between people. According to Durkheim, there is a preponderance of restitutive



law (i.e., civil law, commercial law, procedural law, administrative law, and constitutional law) in a modern organic society with its differentiated institutions, specialized occupations, and autonomous individuals. Restitution is illustrative of the redress that a plaintiff seeks in civil court litigation. Compensatory damages, usually in the form of a sum of money, are awarded as payment in a civil suit involving a tort such as breach of contract. In this case the injury (infringement of rights) is not against the morality of society but against the individual. Consequently, the state, as the representative of society, is only tangentially involved in the administration of civil remedies.

Because restitutive law is not deeply rooted in the collective consciousness of an organic solidarity (absent is a universal religious faith), its violation is not likely to evoke stringent measures. Durkheim contends that while "repressive law corresponds to what is the heart and center of the common consciousness. . . . restitutory law springs from the farthest zones of consciousness" (1984:69). As a matter of fact, in an organic society the collective consciousness "ceases to be a major component of the social bond because it comes to express a predominantly *individual ethos*" (Cotterrell, 1977:242). The division of labor gives rise to what Durkheim calls "the cult of the individual," and the secular moral values consist of human dignity, respect for the individual, and humanitarianism.

The primary tasks of restitutive law are dispute resolution, reconciliation, and restoration. In short, its function is to act as a social binding force by maintaining the harmonious equilibrium of interpersonal relations. Durkheim's image of law is similar to that held by the structural-functionalists who see the law as a mechanism of social integration (see Chapter 7).

To summarize, Durkheim uses law as an external and objective index for measuring the degree of social solidarity. Thus, one of his major theoretical contributions in *The Division of Labor in Society* is the idea that as society evolved from a simple mechanical to a complex organic form, the types of law and punishment corresponding to these solidarities evolved from repressive to restitutive.

To be sure, Durkheim's general thesis has its share of detractors (see Merton, 1934; Barnes, 1966; Clarke, 1976; Rueschemeyer, 1982; Lukes and Scull, 1983; and Garland, 1983) as well as a few defenders (Erikson, 1966; Cotterrell, 1977; and Pearce, 1989). And as we shall see later, several scholars have attempted to empirically test his ideas on legal evolution. In what follows, however, we look at what Durkheim has to say about the relationship between the evolution of punishment, social development, and the centralization of political authority.

## Penal Sanctions and the Law

As pointed out in the previous section, Durkheim advanced the idea that as the basic structure and organization of societies progressed from the mechanical to the organic type, repressive law would gradually be replaced by restitutive law. Later in his career he returned to the theme of penal law but came to see that the original thesis that he had presented in *The Division of Labor in Society* was inadequate and needed qualification. With the 1901 publication of his essay "Two Laws of Penal

Evolution," Durkheim restated his position but abandoned the original distinction between mechanical and organic solidarity as well as the sharp contrast he had made between repressive and restitutive laws. In this article, Durkheim proposes two interrelated principles relating the transformations in the kind and degree of punishment to social changes. It must be noted, however, that for Durkheim the evolution of punishment is not an uninterrupted, unilinear sequence.

Durkheim refers to the first principle as the **principle of quantitative change** and he looks primarily at the magnitude, severity, and intensity of penal punishment. In the second principle, the **principle of qualitative change**, he focuses on the historical shift from an emphasis on corporal punishment to incarceration. We now examine these two principles.

### The Principle of Quantitative Change

As he had done in *The Division of Labor*, Durkheim, in "Two Laws of Penal Evolution" correlates the severity of punishment with the level of social development. In this article he continues to maintain that punishment becomes less severe as societies become more advanced. This time, however, he introduces the idea of *political centralization* and thus contends that punishments are likely to be severe when a society more closely approximates a less advanced type and/or when a society's governmental power is centralized.

Durkheim makes it clear that these two variables explaining the intensity of punishment—social development and political centralization—are wholly independent of each other; that is, society's level of social development is separate and distinct from its degree of political centralization (governmental absolutism). Because centralized absolute power is found among the simpler societies as well as the advanced, Durkheim argues that it is a historically contingent phenomenon independent of any particular type of social solidarity. Moreover, Durkheim "did not consider the two variables to bear equal explanatory weight. Consistent with his usual dim view of political agency, he held that the level of social development was the more decisive factor and that the form of state power was of secondary importance" (Parkin, 1992:35).

What Durkheim is saying in the principle of quantitative change is that the greater the centralization of political authority, the more repressive will be the punishment inflicted on the criminal offender. Conversely, the less centralized, or more differentiated (i.e., democratic), a society's political power structure, the less draconian its penal measures will be. According to Durkheim, governmental power is most absolute when it is concentrated in the hands of a single ruler—be that a monarch, an emperor, a tyrant, or a dictator—and there is a reliance on the more coercive forms of government.

Through an historical analysis of various premodern societies and the punishments they inflicted on the offender, Durkheim demonstrates the principle of quantitative change. For example, he notes that even though the Hebrews did not possess an advanced type of society, due to the fact that they were essentially a democratic people and never developed a tyrannical monarch, they did not use the cruel and aggravated forms of death employed by the Egyptians, Syrians, and

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Assyrians. These latter groups beheaded, stoned, crucified, burned, and hanged the offender.

The more advanced city-state of Athens had punishments that were even less harsh than those of the ancient Hebrews. In Athens, corporal punishments virtually disappeared. And, during the highly developed Roman Republic, there were fewer capital punishments in Rome than there were in Athens. Historians, for example, have pointed out that the Tarpeian Rock, located somewhere within the city limits of Rome, was used to execute only traitors and murderers. The accused were either thrown from it, (a distance of about eighty feet) or were forced to jump off it. In addition, there was the Tullianum which was a one-room jail. Its lower chamber was Rome's only execution cell, where the condemned were strangled to death. Notwithstanding these forms of execution, historian James Leigh Strachan-Davidson is quite correct in stating that "so far as citizens were concerned, the criminal law of the Roman Republic, in spite of abundant threats of capital punishment, became in practice the mildest ever known in the history of mankind" (1969:114).

However, by the time of Imperial Rome, when the emperors exercised autocratic rule, penal law carried greater punishments and torture and capital crimes increased. Historian Edward Peters tells about suspected traitors who were tortured under orders from four Roman emperors: Tiberius, Caligula, Claudius, and Domitian:

Suetonius (*Tib.* 61-2) details with great maliciousness the steps by which Tiberius sought out real and imagined conspiracies, so that "every crime was treated as capital," even to the point at which a friend of the emperor's, invited from Rhodes, was absent-mindedly put to the torture because the emperor assumed that he was simply a new informant. "While Caligula was lunching or reveling, capital examinations by torture were often made in his presence" (*Cali.* 32). Claudius "always exacted examination by torture" (*Claud.* 34), and Domitian, "to discover any conspirators who were hiding, tortured many of the opposite party by a new form of inquisition, inserting fire into their private parts, and he cut off the hands of some of them" (*Dom.* 10) (Peters, 1986:23).

Crimes of lese majesty, which were unknown in feudal times, appeared in fourteenth-century Europe with the development of monarchic absolutism and reached their zenith in the seventeenth century. Because these crimes carried the death penalty, executions grew in number during this period. Moreover, as European society became progressively differentiated, the administration of punishment was itself affected by the specialized occupations of inquisitor and executioner, occupations specifically charged with inflicting punitive sanctions. However, punishment became less cruel in the eighteenth century as the power of the monarchies declined and gave way to less centralized governments.

Thus, as we have already seen in Chapter 2, the eighteenth century witnessed a decrease in the number of offenses subject to the death penalty as well as the abolition of various forms of corporal punishment. We may say, in sum, that "the course of penology is toward progressive amelioration, and where significant ex-

ceptions take place in this trend they are to be accounted for by the changes in the allocation of power in the central government" (Tiryakian, 1964:263). Let us now examine Durkheim's second principle: the principle of qualitative change.

### The Principle of Qualitative Change

In the principle of qualitative change Durkheim states that the more brutal forms of punishment will give way to a more humane alternative, namely, *incarceration*. According to him, the deprivation of liberty through incarceration tends to become increasingly the preferred form of punishment as society progresses and becomes more secular. It is important to note that Durkheim is not saying that repressive law is going to disappear entirely. Although crimes would be punished more leniently in the future, they would be punished nevertheless. "There is not in reality, therefore, a general weakening of the whole apparatus of repression," declares Durkheim, "rather, one particular system weakens but it is replaced by another which, while being less violent and less harsh, does not cease to have its own severities, and is certainly not destined to an uninterrupted decline" (1983:131).

Durkheim further proposes that the social practice of incarceration passes through several stages of historical development. Originally, the earliest prisons were not used as places of punishment but only as places of temporary detention. This was the case, for example, in Athens, where the offender, like Socrates, was detained in prison only while awaiting trial. Although incarceration began to make an appearance during Socrates' time, it was never fully seen as the sole mode of penal sanction. Similarly, in Republican Rome jails were primarily used as temporary holding places for prisoners. The *Lautumiae* was a jail located on the outskirts of the Forum. Its cells, which could accommodate about fifty prisoners, were usually empty. Although lictors, or public servants, were recruited to stand guard duty, security was usually lax. Essentially, the idea of the prison was a foreign one to the Romans. Incarceration did not occur in premodern societies because criminal responsibility was seen as collective. In this case it is not just the offender who is considered guilty but the entire clan or family to which he or she belongs. It therefore becomes unnecessary to imprison the offender since in the case of flight others remain who can be punished in the offender's stead.

Gradually, prisons became institutions for the administration of penal sanctions where offenders were systematically subjected to all sorts of torments. The dungeons and torture chambers of the absolutist monarchs of seventeenth-century Europe are prime examples of this type of prison. Following the collapse of these authoritarian regimes, and their replacement by less-centralized governments, incarceration came to signify something different from the administration of direct physical cruelty on the offender. As society advanced, prisons lost their character of preventive custody and acquired their "pure" form as they became places of long-term confinement. Loss of liberty was considered a distinctive penal form and came to replace corporal punishments. As sociologist Frank Parkin correctly points out, "prisons were needed in order that punishment could be made less violent" (1992:37). Once loss of liberty became accepted as a penalty in its own right, the various types of torture and execution were abolished. "If locking offenders away

had not been available as an option," asks Parkin rhetorically, "how could penal law have evolved along more humane lines?" (1992:37).

By the eighteenth century, the penal nature of the prison had become accepted and incarceration became the model of punishment. Indeed, the prison became the "necessary and natural substitute for other punishments which were fading away" (Durkheim, 1983:120). At this time in the United States, for example, the death sentence had been abolished for almost all but a handful of offenses and a term in the penitentiary became customary. Opening in 1776, the Walnut Street jail in Philadelphia was the first prison in the United States. Others soon followed. Auburn State Prison and Sing Sing Prison of New York opened in 1819 and 1825, respectively. Eastern Penitentiary of Philadelphia and Charlestown Penitentiary of Massachusetts opened in 1829. In 1831, France dispatched the social observers Alexis de Tocqueville and Gustave Auguste de Beaumont to investigate the penitentiary system of the United States. Tocqueville and Beaumont wrote about American penologists: "they have caught the *monomanie* [craze] of the penitentiary system, which to them seems the remedy for all the evils of society" (1964:80).

Thus far we have seen that Durkheim advanced two principles in explaining the evolution of punishment in regard to type and severity. In the principle of qualitative change Durkheim tells us that as society progresses and becomes more secular, incarceration replaces corporal punishment as the preferred penalty. In the principle of quantitative change, he explains that punishments inflicted upon the offender will be especially severe when a society is relatively undifferentiated and/or when its governmental power is absolute. We now turn our attention to how Durkheim sees the evolution of quantitative punishment as corresponding to the evolution of two fundamental types of criminality.

### Types of Criminality

Durkheim identifies two types of criminality: religious crimes and human crimes. **Religious crimes** are acts directed against collective things having a transcendent or mystical character, while **human crimes** are acts injuring only the individual or his or her property. Sir Henry Maine made a similar distinction between types of crime when he wrote that there are "laws punishing sins" and "laws punishing torts."

**Religious crimes.** Religious crimes, which are offenses against religion, state authorities, traditions, and the like, are predominant in less-developed societies and seriously violate the collective consciousness of those societies. Because government leaders and deeply cherished moral values are seen as having a quasi-religious aura, the religious crimes committed against them are considered sacrilege and blasphemy. In this case the collective consciousness, or that shared framework of sacred moralities, is assaulted severely; the acts are regarded as reprehensible; and, as a consequence of the community's moral outrage, the punishments are particularly intense.

In these simple societies, where political power is monopolized by one individual like a monarch, that individual assumes the attributes of a deity and is

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elevated to a superhuman level. Consequently, crimes against the society are really crimes against the absolute sovereign who makes the laws. Crimes against the king are seen as acts against divinity and are considered an abomination. Thus, says Durkheim, wherever political power is absolute, violations of the law are always treated as religious criminality and punishment becomes an emotional act of vengeance.

Religious crimes provoke a strong punitive response because they are seen as more odious. Although many, if not most, crimes are committed by the public against their own kind and not against the despot or his functionaries, such crimes are nevertheless treated as if they were offenses against the state. This is because the laws of the land "are supposed to emanate from the sovereign and express his will, so the principle violations of the law appear to be directed against him" (Durkheim, 1983:129). Thus, any breach of the despot's laws—laws endowed with a divine quality—is interpreted as a religious crime and violently repressed. In this context, the function of punishment is to reaffirm group solidarity and restore the sacred collective consciousness violated by the criminal.

*Human crimes.* According to Durkheim, compared to religious crimes, society views human crimes (murder, theft, rape, fraud, and so forth) as less revolting because they involve only the private interests of the individual victim who is not seen as a religious or sacred entity. These types of crime predominate in more advanced, differentiated societies where the collective consciousness has lost its stern, religious character. Here the trend is away from the ethic of collective responsibility and toward what sociologist Steven Spitzer calls "the 'individuation' of the offended object" (1979:211). In modern legal systems, criminal and victim possess equal standing. Human crimes are not punished too heavily because one person's injury does not threaten the entire society. States Durkheim: "The offense of man against man cannot arouse the same indignation as an offense of man against God" (1983:125). As the coercive force of the collective consciousness grows weaker—that is, as society becomes increasingly secular—crime is no longer considered a desecration and an act of impiety against the collectivity. Consequently, the collective outbursts of anger, outrage, indignation, and irrational vengeance are delimited and tempered.

As noted earlier in this chapter, in an advanced society there emerges a secular morality—that is, a new collective consciousness—based on the values of human dignity, respect for the individual, and humanitarianism. Accordingly, there is an increasing sentiment of mercy and sympathy for the offender who suffers the pains of punishment. Durkheim tell us that the "sentiments protecting human dignity," which lead us to "respect the life and property of our fellows," arose out of "the sympathy which we have for man in general" (1983:124). Similarly, Michel Foucault points out that by the eighteenth century the masses could sympathize with the accused and "the people never felt closer to those who paid the penalty than in those rituals intended to show the horror of the crime and the invincibility of power [to punish] . . . exercised without moderation or restraint" (1979:63). By this time, reformers like Cesare Beccaria were calling for the abolition of excessive punishment and public executions. Because of this increase in public sympathy as well as the fact that crimes were no longer regarded as sacrilegious, punishments became progressively milder.

Later in this chapter we shall discuss some of the criticisms made against Durkheim's principles of quantitative and qualitative change. For now, however, we turn our attention to another idea that makes up part of his legal sociology: the evolution of contract and contract law.

## The Evolution of Contract and Contract Law

Durkheim's thoughts on contracts and contract law were first articulated in *The Division of Labor in Society*. His most developed sociological insights into the evolution of the contract, however, are found in a series of lectures that he gave at the University of Bordeaux and, later, at the Sorbonne. These lectures were subsequently translated into English and published as a book under the title *Professional Ethics and Civic Morals*.

In what follows we will look at Durkheim's statements concerning the evolution of contract as found in *Professional Ethics*, and then we will turn once again to *The Division of Labor in Society* and examine his ideas about contract's role and place in society. However, before we engage ourselves in these issues, we must first identify those social arrangements giving rise to the juridical bond of contract.

### The Juridical Bond of Contract

Although the contract is a wholly social phenomenon, according to Durkheim, it did not develop as an institution until a very late date. To be sure, Durkheim's explanation of its evolution echoes Sir Henry Maine's idea of the progression of legal history from status to contract. As we saw in Chapter 2, Maine postulated that the idea of contract is buttressed by the fact that individuals enter into volitional agreements with each other. Such autonomous and free arrangements could only occur after a de-emphasis on the individual's ascribed status, which emanated from family and group ties. In a similar vein, Durkheim states that the juridical bond of contract derives from either (1) "a state or condition in being, of things or of persons" (for example, the slave who by virtue of social status is legally bound to the master), or (2) "a state not yet in being of things or of persons, but simply desired or willed on both sides" (1957:176).

In the first arrangement, the bond of contract, with its rights and duties, is a unilateral relationship. In antiquity, for instance, the master had rights over the slave but the slave had no rights over the master. By contrast, the second type of arrangement emphasizes the *willful* and *bilateral* rights and duties of the contracting parties. Here, the contractual bond is realized only after the traditional status of the thing or person in question is changed. For example, in modern industrial society the status relationship between master and slave is transformed into the contractual relationship between employer and employee. Within the contract of employment, the employee acquires certain rights and duties toward the employer, while the employer, in turn, acquires certain rights and duties toward the employee. Moreover, it is said that both parties enter this relationship of mutual obligations of their own free will. Thus, for Durkheim, the true contract arises only when there is a "declared agreement of the wills" between the two bargaining parties.

According to Durkheim, the true contract has its basis in the second type of arrangement. In this case there is no intermediary between the contracting parties. Durkheim defines contract, very simply, as "relations according to law having as their origin wills that are in agreement" (1957:177). We shall see that only after the individual achieves some degree of independence from the sacred force of the community's collective consciousness can he or she engage in this type of contractual relationship. As we noted in the previous sections, the force of the collective consciousness decreases as the division of labor increases. And, as will be explained later, the development of the contract is closely connected with the development of the division of labor. In addition, the contract evolves as society progresses from mechanical to organic solidarity. However, it is in mechanical solidarity where the sacred origin of contract is to be found.

### The Sacred Origin of Contract

Durkheim traces the origin of the juridical bond of contract—its rights and duties—to the sacred status of certain persons or things. As we have already seen, in a simple mechanical solidarity, where the force of the collective consciousness is especially intense, the community itself acquires a sacred aura. Indeed, Durkheim maintains repeatedly that divinity is only the symbolic form of the society. In this context, the individual, in awe of the group's supreme power, will invariably be obligated to the group as well as to the other members who engage in the common way of life. His or her relations with the community as a whole and with the members individually will be reverential and emotionally close. To be sure, this relationship is a unilateral one: the community as a sacred entity has certain rights over the individual but the individual has no rights over the community.

Durkheim explains the contract's evolution from a bond that is based on a unilateral, sacred, coerced, and unequal relationship to a bond based on a bilateral, secular, free, and equitable relationship between contracting parties. He considers five major types of contract in his analysis of its evolution:

1. The blood covenant
2. The *real* contract
3. The contract of solemn ritual
4. The consensual contract (or contract by mutual consent)
5. The contract of equity (or the just contract)

Together, these types comprise a sequence of historical stages delineating the progression from the "pseudo" contract of the past to the true contract of the present and beyond. We now turn our attention to a short discussion of each of these five types of contract.

**The blood covenant.** In the case of the blood covenant, members of a group with a strong collective consciousness have certain rights and duties toward each other because they share a common sacred quality. Literally or figuratively, they see themselves as being of the same blood. When these individuals wish to create relations with others outside their group, they simulate artificial bonds symbolizing



the natural ties they have with their kind. As an artificial bond, the blood covenant took several forms. It could consist, for example, of two individuals mingling their blood thus becoming "blood brothers." An illustration of this phenomenon is found in Mafia member Joseph Valachi's account of his induction into the Cosa Nostra. Valachi tells of being asked for his trigger finger at his initiation ceremony before forty members of the Cosa Nostra. His finger was pricked with a pin and squeezed until it bled. At this point the Mafia Don announced, "This blood means that we are now one Family" (Maas, 1968:98).

The Christian rite of communion, where the believers partake of the body and blood of Christ, is another form of blood covenant. This ritual sharing of the sacred blood symbolizes the contract made between God and the community of believers. In the Roman Catholic tradition, for example, Jesus' Last Supper is recreated in the sacrament of communion as the priest lifts the chalice and proclaims to the congregation: "Jesus took the cup and gave it to his disciples and said: 'Take this all of you and drink from it. This is the cup of my blood; the blood of the new and everlasting covenant which will be shed for you and for all so that your sins may be forgiven.'"

**The real contract.** The second type of contract, the *real contract*, occurs only with the actual transfer and delivery of a thing, thus giving rise to a duty of debt. For example, in the Roman loan called *mutuum*, the loan was concluded when its object (a sum of money or an amount of *fungibles*—goods that can be replaced in quantity and quality) was handed over to the debtor. In this contractual agreement, a buyer has the right to receive the thing purchased but also has the duty to pay for it. In later times, a symbolic article without value, such as a straw or a glove (in Germanic law), was substituted for the actual object of exchange.

**The contract of solemn ritual.** The third type of contract, the *contract of solemn ritual*, involved the declaration of an oath. The words of the oath, said in ritual form, were endowed with a sacred force that served to bind the participants. The contracting parties carefully uttered a specific phrase in accordance with a consecrated formula. The formal pronouncement of the oath made the words *sui generis*; that is, it gave them an identity of their own. This idea still exists today when people say they "give their word."

The oath in the contract of solemn ritual was said to invoke a divine being who served as intermediary or *guarantor* (one who answers for the performance of another's duty) of the promises made and exchanged. The deity was said to be offended if the participants failed to fulfill the terms of the agreement. Consequently, breach of the pact was considered a sacrilege and the retaliatory penalty inflicted on the offender was especially severe. An example of the solemn contract is found in the thirteenth-century practice of compurgation. **Compurgation** consisted of a gathering of twelve reputable people who were brought together by the accused and who would swear to his or her innocence. Supposedly, no one would think of lying for fear of being punished by God.

According to Durkheim, the participants in the solemn contract are bound by two duties. First, the bargaining parties are under an extreme obligation to fulfill

their promises because they have sworn an oath to the highest moral authority—the deity. Second, the promisor becomes closely bound to the promisee because the promisor's oath, by detaching his or her words and projecting them outwardly, enables the promisee to possess them as if they were tangible things. "Our word, once given," states Durkheim, "is no longer our own" (1957:196). Because of its strong binding force, the contract of solemn ritual is employed whenever the ties to be made are of supreme importance. This, for example, is the case with the marriage contract when it is forged in the context of a religious ceremony.

**The consensual contract.** The contract of solemn ritual diminished as society's religious traditions began to weaken and fade. A fourth type, the **consensual contract**, emerged when sales and purchases of commodities and property became more frequent. As these new demands of economic life increased, it became impractical and inexpedient to engage in the ritual formalities of the solemn contract.

Unlike the solemn contract, which relied on the backing of sacred forces, the consensual contract is legitimated by the sanctions of positive law. In this way, the consensual contract protects not only the rights of the community but also the rights of the individual. Further, the consensual contract creates a bilateral bond of reciprocal duties between the two transacting parties; that is, each party plays the dual role of creditor and debtor, promisor and promisee. "The two parties declare at one and the same time that they consent to the exchange on the conditions agreed between them" (Durkheim, 1957:200).

The consensual contract differs from the solemn contract in that not only is there an external element, an exchange of goods, but there must also be an internal element—a psychological agreement to the terms of the bargain. Durkheim considers the consensual contract the first "true" contract because the bargaining parties freely agree to the terms of the bargain. Indeed, its principal feature is the *declaration of wills*. Durkheim tells us that the transfer involved in the consensual contract is an *internal state of mind* as it pertains to the will or intention of the bargaining parties. If intention and will are absent, or if they are not freely given, the contract is considered invalid. The binding force of the consensual contract is thus internal or psychological and not based on a formal ritual or the transfer of a physical object. Neither **duress** (the coercion of a contracting person to act contrary to his or her will) nor an intermediary is involved in the bargaining relationship. It is a *bona fide* (from Latin meaning "in good faith") contract because the parties enter into it with an attitude of sincerity and through mutual consent.

**The contract of equity.** In addition to considering the internal state of mind of the transacting parties, the **contract of equity** also considers the *external consequences* of the agreement. Durkheim maintains that only by regarding both the internal and external aspects of the bargain can a truly equitable, objective, and just contract be realized. He states: "A just contract is not simply any contract that is freely consented to, that is, without explicit coercion; it is a contract by which things and services are exchanged at the true and normal value, in short, at the just value" (1957:211).

Even though an individual voluntarily enters into a contract, this does not necessarily mean that the transaction will turn out to be a fair one for him or her. Contractual consent can be obtained through **fraud** (an intentional act of deception used by one party to gain advantage over the other). Fraud prevents one of the contracting parties from fully knowing what they are agreeing to. Suppose that Smith purchases a racehorse from Jones based on the latter's statements that the horse is a thoroughbred with a pedigree from the Thoroughbred Owners and Breeders Association. Smith later discovers that the horse is actually a crossbred. In this case of fraud, Smith, as the deceived party, may engage in the legal **rescission** or unmaking of the contract and collect rescissory damages.

In the contract of equity the notion of constraint recedes into the background while the idea of exploitation becomes ever more important. Durkheim contends that the exploitation of one person by another rouses our indignation. He attributes the interest in exploitation to the organic solidarity's increased feeling of sympathy, or altruism, which we acquire for our fellow citizens. In "Two Laws of Penal Evolution," he had characterized this moral sentiment as "the sympathy which we feel of every man who suffers" (1983:125-126).

Durkheim argues that in order to ensure against exploitation in contractual transactions, goods and services should only be exchanged at a fair price. In other words, what one party receives must be equivalent to what he or she gives and vice versa. On the related issue of how to prevent contractual inequalities, Durkheim proposes a measure that, coming from him, seems quite radical: the abolition of inheritance. Durkheim considers inheritance to be the great culprit that upsets the balance of social equality because the individual who inherits wealth or property has the unfair advantage of imposing his or her will on the other party by forcing them to sell the goods or services being exchanged at a price below their real value. Thus, in Durkheim's mind, the idea behind the discontinuance of inheritance is that all parties will volitionally enter the contractual relationship on common footing. He believed that this reform would ultimately produce a truly just contract because it will transcend the inequities that derive from the accident of birth or from family status.

It is somewhat ironic that Durkheim, who "never gave himself" to socialism, would support one of socialism's central tenets—the abolition of inheritance—in order to arrive at a completely fair contract. This notion makes sense, however, only when we realize that for Durkheim, "inheritance goes against the whole spirit of individualism that inheres in a society marked by an extensive division of labor" (Milovanovic, 1988:34). Merit based on individualism, and not status based on membership in a collectivity, is what Durkheim sees as being important in a society with a highly developed division of labor. Furthermore, he asserts that this organic society must rest firmly upon contractual foundations. Let us now see what makes up these contractual foundations.

### The Division of Labor and Contractual Relationships

Durkheim contends that the main social function of contract is not to encourage the exchange of goods and services between parties, but to ensure their

regular cooperation and thus maintain the equilibrium of society. To be sure, because it gives rise to reciprocal obligations, the contract becomes "the supreme legal expression of cooperation" (1984:79). In Durkheim's view, the composite division of labor, or the specialization of tasks in organic society, depends on that form of cooperation that is best expressed by the contract.

Contracts, as symbols of exchange, help to harmonize those social relationships taking place between persons performing specialized and distinct functions. Some of these functions, for example, are manifest in the commercial code regulating such contracts specific to commerce as those made between agent and principal, between carrier and consignor, and between insurer and insured. In other words, each contracting party needs the other. But even in collaborations such as these, we find a certain amount of competition as each self-interested party "seeks to obtain at least cost what he needs, that is, to gain the widest possible rights in exchange for the least possible obligations" (Durkheim, 1984:160). If the solidarity between the competing parties is to be preserved, however, every contractual outcome must be the result of a compromise. Such a compromise must be a position of equilibrium; "one that steers a middle course between the interests that are in competition and their solidarity with one another" (Durkheim, 1984:160).

The purpose of contractual law is to maintain social equilibrium by regulating and determining the contract's legal outcome. It does this by constraining the bargaining parties to respect each others' rights and duties and, in the process, it helps to achieve a fair compromise by ensuring that the goods and services exchanged are of equivalent social value. Durkheim, however, makes it clear that the role of contract is not to abolish competition but only to moderate it. To be sure, he sees the contract as a precarious truce that can assuage disputes only temporarily. Nevertheless, Durkheim is quick to point out that contracts also express the general *consensus* existing in society. This consensus is reflected in the special ties that originate in the agreement of wills between contracting parties.

In sum, Durkheim sees the contract as having a pivotal, albeit limited, role to play in the maintenance of society. As Durkheim sees it, the law of contracts, through its authority to regulate, "constitutes the foundation of our contractual relationships" (1984:161). In light of the aforementioned statements, it is easy to see why Durkheim calls one of the important varieties of organic solidarity "contractual solidarity."

Thus far in this chapter we have seen that Emile Durkheim's sociology of law can be understood only when considered within the context of organic and mechanical solidarity and the division of labor. To be sure, Durkheim's interest in law holds only to the extent that he uses it, as a material social fact, to measure a nonmaterial social fact: the degree of social solidarity. As such, Durkheim correlates repressive law with mechanical solidarity and restitutive law with organic solidarity.

Later, as he analyzes the evolution of punishment, Durkheim abandons his distinction between mechanical and organic solidarity, as well as repressive and restitutive law, but retains the idea that an advanced society is characterized by a highly differentiated division of labor. In the essay "Two Laws of Penal Evolution," Durkheim introduces the notion of political centralization and states that punish-

ments are most severe when a society does not have a highly differentiated division of labor and when its governmental power is absolute. He further contends that the severity of penal measures also depends on whether the offense is an act committed against the private interests of the individual—human crime—or an act committed against collective things possessing a sacred character—religious crime. Religious crimes are more prevalent in less-developed societies, where political power is centralized. These crimes are punished harshly because they are seen as acts against divinity. By contrast, human crimes are predominant in highly advanced societies where the collective consciousness encourages mercy and sympathy for the offender.

Finally, in our analysis of Durkheim's legal sociology we examined his views on the evolution of contract and its role and place in society. We noted that Durkheim identifies five types of contract that make up a historical sequence tracing contract's evolution from the bond based on a unilateral, sacred, coerced, and unequal relationship to the bond based on a bilateral, secular, free, and equitable relationship between parties. Lastly, we discussed Durkheim's contention that the contract's main function is to ensure solidarity by encouraging social relations of cooperation and compromise between parties performing specialized and distinct roles. In sum, we may say that the whole of Durkheim's sociology of law is premised on the notion of contractual solidarity.

In the remainder of this chapter we look at how Durkheim's ideas concerning social solidarity, repressive and restitutive law, the functions and evolution of punishment, the division of labor, and contractual legal relations have been extended and criticized by contemporary legal scholars.

### Neo-Durkheimian Contributions to the Durkheimian Perspective

The previous sections of this chapter were devoted primarily to a discussion of the theoretical notions about law, crime, and punishment initially advanced by Emile Durkheim in *The Division of Labor in Society*. In the sections that follow, we return to many of those same themes but this time we will look at how they have been tested empirically by contemporary research. What follows, therefore, is a survey of those studies that have subjected Durkheim's legal sociology to the rigors of quantitative and qualitative research in an effort to evaluate its validity. We will see that the bulk of this research is extremely critical of his theses. In fact, social theorist Lewis Coser is quite correct when he states that criticism of Durkheim's theoretical work is so pervasive today that it has become a "minor cottage industry" (1984:xxiv). Be that as it may, it is hard to imagine that Durkheim, who spent much of his career arguing that sociology should be oriented toward empirical research, would have disapproved of the motivation behind these studies. Before we examine those studies that are particularly critical of the Durkheimian perspective, let us first look at those studies largely supportive of Durkheim's contentions about law and morality.

## Law and Morality

Durkheim sees morality as the basis of law because law usually represents the moral beliefs and sentiments of a community. In this section we examine Durkheim's ideas concerning law and morality by looking at three studies, one empirical, the other two more theoretical, supporting much of what he said about these ideas.

The first study, conducted by Lonn Lanza-Kaduce and his colleagues, bolsters Durkheim's contention that the violation of criminal law will invoke strong feelings of moral condemnation. The second study, by Yale sociologist Kai Erikson, builds upon Durkheim's thesis that punishing criminal law violators helps bring together the "upright" citizens of a community by giving them a common sense of morality. The third study, by Albert Bergesen, extends Durkheim's notion that crimes threaten the moral boundaries of a society and shows that crimes may also threaten its political boundaries. Let us begin by looking at the relationship between law and normative attitudes.

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### The Law and Normative Attitudes

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As noted previously, in an attempt to measure the type and amount of social solidarity, Durkheim distinguished between criminal law and civil law and their corresponding repressive and restitutive sanctions. Moreover, he distinguished between these two types of law on the basis of the kinds of *normative attitudes* (i.e., beliefs, feelings, sentiments, or opinions) they reflect.

According to Durkheim, criminal laws, which are abundant in a mechanical solidarity, "are inscribed upon everyone's consciousness; all are aware of them and feel they are founded upon right" (1984:34). Since criminal laws reflect the community's commonly held beliefs, when they are violated they will arouse strong feelings of anger and moral indignation in the community members. As a consequence, the community will demand that the offender suffer repressive measures. Civil laws, by contrast, "do not correspond to any feeling within us, . . . they have no deep roots in most of us" (Durkheim, 1984:69). Like criminal laws, civil laws also derive their authority from public belief, but it is not a belief involving widespread consensus; rather, it is "specific to certain sectors of society" (Durkheim, 1984:82). That is to say that the diverse specialized groups in an organic solidarity will not be acquainted with all of the laws but only those legal rules that directly impact upon them.

In short, we may say that criminal laws are pervasive in a mechanical solidarity and reflect a community's commonly held beliefs. These laws are known throughout the community and their violation will arouse strong feelings of moral condemnation. On the other hand, civil laws, which abound in an organic solidarity, have only selective interest for specialized groups, are not known throughout the society, and do not arouse strong feelings of moral condemnation.

In *The Division of Labor in Society*, Durkheim puts constitutional law in the same category as civil law. He stipulates that both types of law are characteristic of organic society and both involve restitutive sanctions. However, sociologist Lonn Lanza-Kaduce and his colleagues (1979) contend that the manner in which con-

stitutional law is conceptualized in the United States—as a body of law protecting citizens' civil liberties from government encroachment—makes it more akin to criminal law. Thus, they argue that virtually all of the features that are relevant to criminal law should apply equally to constitutional law. However, Lanza-Kaduce et al. maintain that repressive sanctions are inappropriate to violations of constitutional law because this type of law contributes to organic, not mechanical solidarity.

In the context of the aforementioned statements derived from Durkheim's theory of law, Lanza-Kaduce et al. formulate five sets of hypotheses:

1. There is a high degree of knowledge about criminal and constitutional laws and a lower degree of knowledge about civil laws across society.
2. Because there is a high degree of knowledge about criminal and constitutional laws, there is a high degree of legitimacy to be attributed to criminal and constitutional laws. Where there is a high degree of knowledge about certain civil laws, there will be a high degree of legitimacy attributed to those laws. Conversely, where there is a low degree of knowledge about certain civil laws, there will be a low degree of legitimacy attributed to those laws.
3. Violations of criminal and constitutional laws will evoke a high degree of moral condemnation from society. Violations of civil laws will evoke a relatively low degree of moral condemnation.
4. When criminal laws are violated, society will call for repressive sanctions to be inflicted on the offender. When civil or constitutional laws are violated, society will call for restitutive remedies to be imposed on the offending party.
5. When criminal laws prohibit behavior that is morally condemned by the public, the moral beliefs will remain unchanged. However, when those criminal laws are repealed, the moral beliefs will be moderated and legitimacy withdrawn. When civil laws prohibit certain behavior, the public will support their legitimacy and sanctions. When the civil laws are repealed, the public will stop supporting their legitimacy and sanctions.

In order to test these five hypotheses, Lanza-Kaduce et al. collected data from a group of students in junior high school, high school, and college. The students were presented with six vignettes describing behaviors associated with criminal, civil, and constitutional law. They were then asked to morally evaluate these behaviors, assess the law's legitimacy, and indicate the appropriate sanction for the behaviors. The researchers found that:

1. Fifty-six point four percent of the respondents had knowledge about criminal law; 66.4 percent had knowledge about constitutional law; and 39.1 percent had knowledge about civil law.
2. Fifty-eight point three percent of the respondents saw criminal law as legitimate; 76.2 percent saw constitutional law as legitimate; and 41.1 percent saw civil law as legitimate.
3. Fifty-two point two percent of the respondents considered criminal law violations to be very wrong morally; 63.9 percent considered constitutional law violations to be very-wrong morally; and 26.9 percent considered civil law violations to be very wrong morally.

4. Twenty-seven point two percent of the respondents advocated repressive sanctions in response to criminal law violations; 5.9 percent advocated repressive sanctions in response to civil law violations; and 5.2 percent advocated repressive sanctions in response to constitutional law violations.
5. Twenty-five point six percent of the respondents moderated their moral beliefs after being told that the conspiracy vignette of two persons making extensive plans to steal, but not acting upon those plans, did not violate the criminal law.

In general, the study's findings supported all five sets of the hypotheses that Lanza-Kaduce and his colleagues had deduced from Durkheim's legal theory. We now turn our attention to another study that not only supports Durkheim's theoretical notions about crime, morality, and punishment, but also builds elegantly on those notions.

### Ritual Punishment and Moral Solidarity

In the previous section we reiterated the fact that Durkheim saw a close association between morality and the law. In this section we look more closely at Durkheim's contention that the function of punishment is to strengthen a community's moral solidarity.

Durkheim suggests in *The Division of Labor in Society* that the ritual punishments inflicted on law violators serve to bring together the "honest," "upright," and "respectful" citizens of the community and give them the opportunity to reaffirm their commitment to shared values and a common identity. In other words, rituals of punishment help tighten the bonds of social solidarity. This cohesiveness occurs as the anger generated by the criminal offense produces a dynamic density in the community, creating a situation in which the consciences of the individual members are integrated in a common sense of morality. Durkheim cogently describes this phenomenon:

Crime . . . draws honest consciousnesses together, concentrating them. We have only to observe what happens, particularly in a small town, when some scandal involving morality has just taken place. People stop each other in the street, call upon one another, meet in their customary places to talk about what has happened. A common indignation is expressed. From all the similar impressions exchanged and all the different expressions of wrath there rises up a single fount of anger, . . . anger which is that of everybody without being that of anybody in particular. It is public anger (Durkheim, 1984:58).

Kai Erikson agrees with Durkheim's idea that punishing criminal law violators contributes to the community's solidarity. Erikson, however, extends this thesis and suggests an interesting addendum: that a disruption of the community's solidarity will compel the community to seek out criminals to punish. Let us see how Erikson explains this notion and how it is premised on the concept of boundary maintenance.



**Boundary maintenance.** As we have indicated, in Durkheim's view, breaches of the criminal law reveal to people the interests they share in common and call their attention to the central values of their community's collective consciousness. Continuing with this argument, Erikson tells us that, besides occupying a geographical space (physical territory), all societies also occupy a cultural space (moral territory). A community's cultural space, he says, provides a meaningful reference point for its members since contained within its boundaries are the core moral values defining that community's "way of life" and giving it its particular identity. Thus, any challenge to these moral boundaries will be interpreted as a threat to the community's cultural integrity. States Erikson: "A human community can be said to maintain boundaries . . . in the sense that its members tend to confine themselves to a particular radius of activity and to regard any conduct which drifts outside that radius as somehow inappropriate or immoral" (1966:10). Thus, when deviants challenge the normative outlines of a society they are actually helping to highlight and accentuate those contours for the rest of the group. Through their actions, deviants provide a point of contrast that gives the norms some scope and dimension. It is ironic that only by having criminals occasionally test the outer edges of acceptable behavior can the "upright" citizens learn *where* the moral boundaries are figuratively located and, accordingly, they can also learn *who* they are as a community.

Penal rituals (e.g., criminal trials, excommunication hearings, courts-martial), in which the deviant offender is publicly confronted by the community's anger and indignation, act as boundary-maintaining devices because they demonstrate where the line between moral and immoral behavior is drawn. "Each time the community moves to censure some act of deviation, . . . and convenes a formal ceremony to deal with the responsible offender, it sharpens the authority of the violated norm and restates where the boundaries of the group are located" (Erikson, 1966:13).

Two related sociological insights may be derived from the foregoing remarks. First, we may say that when a community is engaged in the task of shaping its cultural identity—that is, of realizing its way of life—that community will need to produce deviants. The reason for this is that in the process of defining the nature of deviance, the community is also defining the moral boundaries of its new way of life. Second, when a community feels that a particular form of deviant behavior is threatening the security of its established cultural identity, it will impose very severe sanctions against that behavior and devote much time and energy to rooting it out. These two notions are aptly illustrated in Erikson's classic study in the sociology of deviance, *Wayward Puritans* (1966).

In a brilliant attempt at testing Durkheim's ideas about punishment and solidarity, Kai Erikson relies on a sociohistorical account of how the Puritans of seventeenth-century Massachusetts Bay Colony dealt with deviant conduct. In what follows we first examine some background characteristics of this community and its inhabitants. Next, we look at the three "crime waves" that took place during the first century of the community's founding and see how Erikson explains these episodes.

**The Puritans and their legal system.** The Puritans were a sect of English Protestants who sought to completely "purify" the Anglican Church of all Roman

Catholic influences. Unable to accomplish their objective, a group of about 1,000 of these Puritans left England in early 1630, intent on founding a model Christian community—a true Bible Commonwealth—in the uncertain wilderness of New England, or what was at that time known as Massachusetts Bay Colony.

During the first years of the colony's existence, its legal system consisted of a patchwork of rules brought together from two diverse and largely incompatible sources of law: the sacred authority of Scripture and the secular common law of England. Along with this hybrid of a legal system there existed a General Court composed of the ruling elite of the community: the ministers and magistrates. Indeed, it was the ministers who, acting in their capacity as accredited Bible scholars, settled most questions of law during the early years of the Massachusetts Bay Colony.

Erikson contends that three "crime waves" that took place during the first six decades of the settlement's founding helped the Puritans to define and redefine the moral boundaries of their community. These three crises were the Antinomian heresy, the Quaker persecutions, and the witchcraft hysteria in Salem Village.

*The Antinomian heresy.* The Antinomian heresy began in 1636, a mere six years after the Puritans first arrived on the bay and during a time when they were struggling to found a viable community in an ungodly and hostile land. Although the Puritans were never tolerant of differences of opinion concerning their way of life, their new environment created in them an even stronger conviction to protect their values against subversion by dissident forces. Accordingly, the Puritan magistrates and ministers believed that if they were to successfully establish a cultural identity for their community, it was necessary that a disciplined orthodoxy be tightly imposed on their congregations. This orthodoxy was in essence a new theology proclaiming that God had entered into a covenant with the Puritans as a community and was only ready to deal with them through their government leaders. And even though the ministers could not hold political office, they nevertheless wielded tremendous power since they played a leading role in determining who among the settlers had experienced a true religious conversion and so deserved the privileges of the community.

Presently, a woman from Boston, Anne Hutchinson, began to criticize the character and competence of the local ministers. An accomplished biblical scholar in her own right, Hutchinson felt that almost none of the colony's ministers were qualified to judge whether a person had been saved. She soon attracted a large number of followers who eventually formed a major partisan faction. A serious skirmish erupted between the Hutchinson faction and the community's ruling elite.

The church officials of Puritan Massachusetts saw Hutchinson's attempt to undermine their authority as a heresy that blurred the political outlines along which they were trying to establish their unique identity as a community. Believing that their righteous way of life was being jeopardized, the magistrates and ministers promptly accused her of heresy, tried, convicted, excommunicated, and banished her from the colony.

*The Quaker persecutions.* By the time that the Quaker persecutions began in 1656, a number of important changes had taken place in the Puritan Bay Colony;

changes that would help to resolutely secure the community's territorial identity. To begin with, a comprehensive legal code, *The Laws and Liberties of Massachusetts*, had been compiled in 1648 after critics accused the Puritan government officials of violating the laws of England (McManus, 1993:10). In addition, the Cambridge Platform had been adopted that same year to give the churches a formal constitution. But the most significant change was the fact that the Puritans of Massachusetts found themselves cut off from their brethren in England. Certain political transformations in that country had made the English Puritans more tolerant of other religious opinions. And because such tolerance was anathema to the Massachusetts Puritans, they became theologically isolated from the country that gave them birth.

In light of these changes, Erikson describes the colony's road to maturation during this period as he states that "the subjective principles of Puritanism slowly hardened into a solid network of institutions." And now that the Puritans had firmly established their community, a new generation of elders and leaders was charged with guarding its distinctive way of life against foreign intrusions and ensuring that its institutions were not disrupted in any way. Such intense vigilance and defensiveness, says Erikson, "is often associated with people who are no longer sure of their own place in the world, people who need to protect their old customs and ways all the more narrowly because they seem to have a difficult time remembering quite who they are" (1966:114). Thus, it is at this point that the community, if it is to continue to survive, needs to renew and reaffirm its moral boundaries, to recreate its cultural identity.

One way in which a community can recreate its cultural identity is by seeking out and severely punishing offenders who threaten the security of its group life. Thus, according to Erikson, it is understandable why just at the time when they were trying to find a new sense of their own identity, the Puritans should discover heretics in their midst. These heretics came as an unwelcomed religious sect known as the Quakers. Because the Quakers did not show any commitment to the Puritan spirit of theocratic discipline (they lived apart from the rest of the community) and refused even to abide by the community's most trivial conventions (they would not remove their hats in the presence of magistrates), the Puritans quickly instituted a campaign of persecution against them.

The first Quakers to "invade" the Massachusetts Bay Colony in 1656 were two housewives who, once discovered, were quickly deported. As other Quakers entered the colony and converted some of the settlers, the Puritan authorities began to administer harsh penalties. That same year, a law against "that cursed sect of heretics lately risen up in the world" was enacted by the colony's General Court. It ordered: "that what person or persons soever shall revile the office or persons of magistrates or ministers, as is usual with the Quakers, such persons shall be severely whipped or pay the sum of five pounds." These punishments seemed only to spur the Quaker missionaries into ever more vigorous activity. The Puritans, therefore, made penalties for infringing the law even more severe by including ear cropping, imprisonment, hard labor, mutilation, beatings, banishment, and execution. Nevertheless, the greater the cruelties inflicted on the Quakers, the more they increased their level of lawbreaking. Indeed, legal historian Edgar J. McManus charges that the Quakers actually provoked persecution and glorified in the repri-

sals they suffered (1993:184). He further contends that the Quakers were clearly a force of social destabilization intent on undermining the group cohesion of the Massachusetts Bay Colony. In any event, the Puritan violence against the Quaker heresy reached a fevered pitch until 1661, when King Charles II of England intervened and prohibited the use of either corporal or capital punishment in cases involving the Quakers.

*The witches of Salem Village.* Between the end of the Quaker persecutions in the mid 1660s and the beginning of the witchcraft hysteria in 1692, the colony experienced a series of unprecedented political calamities. These trying times can be characterized as a period of apprehension, alarm, and impending doom—with the settlers growing more and more pessimistic about their future. Their uncertainty concerning the colony's fate stemmed from several factors. First, a series of harsh arguments took place in 1670 between the magistrates and ministers of the colony. This strife threatened to tear the alliance, which, forty years earlier, had been indispensable in creating the community's unique way of life. Second, in 1675, a brutal and costly war broke out with a confederacy of Indian tribes. Third, in 1679, Charles II ordered that an Anglican Church be established in Boston. Fourth, in 1686, the King revoked the charter that had given the colony its only legal protection. Finally, and most significantly, the Puritan community, which depended on a high degree of harmony and group feeling, was being racked by internal dissension in the form of legal disputes, personal feuds, and open political bickering. It was while the people of the colony were preoccupied with their internecine fighting that the witches decided to strike.

The witchcraft frenzy began in early 1692 when a group of teenage girls in Salem Village began to scream uncontrollably, suffer convulsions, grovel on the ground, and fall on their hands and knees and make noises like the barking of a dog. The girls were said to be bewitched, and, encouraged by the Puritan ministers, began to identify the witches who were allegedly tormenting them. They named three women in the village and accused them of practicing witchcraft, the devil's conspiracy against the colony. Further accusations were made and more suspects were arrested, so that by spring the Salem jail was overflowing with people awaiting trial. That summer the first criminal trials were held as panic and fear spread throughout the colony. By autumn, scores of persons had been condemned and twenty-two had been executed: nineteen were sent to the gallows, one was pressed to death under a pile of rocks, and two died in prison. Not one of the suspects brought before the court was ever acquitted.

One year after it began the witchcraft hysteria came to a abrupt halt as the governor and the other leading men of the colony began to doubt the teenage girls' accusations. A new session of the Superior Court of Judicature acquitted many of the suspects. The governor signed reprieves for those had been condemned, released many others who were in prison, and issued a general pardon to all persons still under suspicion.

Erikson convincingly argues that the three "crime waves" that besieged the Massachusetts Bay Colony—the Antinomian heresy, the Quaker persecutions, and

the witchcraft hysteria in Salem village—helped the Puritans to define and redefine the moral boundaries of their community. Had these crimes not taken place, and had the Puritans been less vigilant in seeking out criminals to punish, it is doubtful that the colony would have maintained its cultural identity as long as it did.

By building on the work of Durkheim, Erikson has advanced a most persuasive argument in *Wayward Puritans*. He tells us that deviants perform a needed social function by patrolling the outer edges of a community's moral territory. Further, as they violate the law and are subsequently subjected to ritual punishment (in the form of excommunication, banishment, public execution, etc.), these deviants provide a contrast that gives the community members some sense of their own cultural identity. Finally, in having their cultural identity renewed and reaffirmed, the community members experience a greater sense of solidarity. In the next study we see how Albert Bergesen extends Durkheim's and Erikson's theoretical ideas and uses them to formulate his own thoughts about political witch-hunts.

### Political Witch-Hunts

Basing his ideas on the Durkheimian tradition of understanding crime and ritual punishments in maintaining social solidarity, sociologist Albert Bergesen (1984) proposes a general explanation of political witch-hunts. His specific focus is on those individuals who are said to have committed political crimes and their persecution by the state. The types of political crimes examined by Bergesen are those subversive activities involving "accusations of *plotting* to overthrow the government, *conspiring* with *foreign agents* and *disloyal elements* to 'deliver the nation into the hands of the enemy,' and engaging in *sedition* and *treasonous* activities of all kinds" (1984:141). "Crimes of this sort," writes Bergesen, "are accompanied by a sense that the society is in some way *contaminated* and *polluted* [from within] . . . and that a *collective cleansing* is required to *purify* the fabric of social life" (1984:141–142). The processes of cleansing and purifying society of subversive elements involve the ritual persecution of political criminals; that is, the witch-hunt. Historical examples of these types of witch-hunts are illustrated in the public persecutions conducted by the Jacobins during the French Revolution, the Soviets during the Stalin purges of the 1930s, the Chinese during the Great Cultural Revolution, and the Americans during the era of McCarthyism.

Bergesen identifies four common characteristics shared by all political witch-hunts:

1. Political witch-hunts have a sporadic nature to them because subversive activities seem to come in certain dramatic outbursts. Accordingly, there does not exist a steady rate of political crime. This suggests that when the society experiences a crisis—some threat to its collective identity—there is a sudden increase in the discovery of political criminals (i.e., "traitors," "counterrevolutionaries," "subversives," and other imaginary enemies of "the Republic," "the Revolution," or "the Nation").
2. Because there exists a general fear that the goals and interests of the society are being undermined by criminals from within, political witch-hunts are charac-

terized by a great sense of severity and pressing urgency—a feeling that some action needs to be taken immediately in order to protect the cultural and physical existence of the society as a whole.

3. Political witch-hunts have a hysterical nature about them. During upsurges in political crime waves, the most diverse and seemingly nonpolitical acts are defined as criminal. Innocent groups and persons are accused, tried, and punished for crimes allegedly committed against the collective purposes of the society. In short, the hunting of subversives gets “out of control” in the witch-hunt.

4. Political witch-hunts make full use of public ritual. They dramatize—through “show trials,” printed confessions, investigating committees, and other degradation ceremonies—the danger of conspiratorial plots to national security as well as the apprehension and punishment of subversives. We may say, then, that the defining characteristics of witch-hunts are their ritual, pomp, hysteria, drama, and terror.

In formulating his explanation of when and why political crimes and their subsequent witch-hunts occur, Bergesen relies on the theoretical ideas of Durkheim and Erikson and proposes a theory of political crime.

### Bergesen's Theory of Political Crime

As previously noted, Durkheim and Erikson see crime as an attack on the moral boundaries of a community. However, in his analysis of political witch-hunts, Bergesen differs from Durkheim and Erikson in two important respects. First, he maintains that the boundaries in question are not just moral, they are also political. Second, he asserts that the boundaries constitute the identity of the community, not just as a cultural entity, but as a sovereign political entity—that is, as a *nation-state*. Thus, according to Bergesen, political crimes, or any acts seen as a threat to the collective existence, attack the moral and political boundaries of the nation-state. Furthermore, the collective existence of the modern nation-state is represented in its political parties. Bergesen classifies contemporary nation-states as being multiparty states, two-party states, or one-party states. Let us briefly look at each of these in turn.

**Multiparty states.** Found throughout Europe, *multiparty states* abide by “proportional representation,” an electoral procedure ensuring that there exists a correspondence between the proportion of votes a party receives and the number of legislative seats it is awarded. Proportional representation, therefore, gives the constituent interests of the various political parties in that society a formal role in the making of collective decisions. In this case, the national legislature represents a wide variety of political interests.

**Two-party states.** The electoral arrangement of *two-party states* (which characterizes the party system of the United States, with its Democratic and Republican parties), is based on plurality or simple majority vote. This means that, in order to win an election, a political party is required to obtain more votes than its nearest

competitor. In a two-party state, the party that loses the election does not have its constituent interests fully represented in the national decision-making process (in the office of the president and in Congress).

**One-party states.** In *one-party states* (e.g., Nazi Germany, Russia during the Soviet era, North Korea, China), a single party acts both as the representative of the interests of the nation as a whole and as the agency for carrying out those interests. According to Bergesen, the more the national interests are represented at the expense of specific constituent interests the more a society becomes politicized; that is, *more areas of moral life are infused with ultimate political meaning*. Bergesen hypothesizes that, in terms of party systems and electoral arrangements, "this means that we should expect multiparty states to be, on the average, the least politicized and one-party states the most, with two-party systems somewhere in between" (1984:160).

How the criminal act is defined depends to what degree the moral boundary that has been attacked is infused with transcendent political meaning. The more politicized a society (e.g., the one-party state) the more likely that "ordinary" crime (e.g., theft) is seen as an act against the values and purposes of the state (e.g., "sabotage"). In another society, with a lower degree of politicization, where the boundaries are not infused with political meaning (e.g., multiparty states), the violation of the same moral boundary is seen as an ordinary crime and not as a threat and danger to the collective existence of a nation-state. Bergesen states: "What is experienced as an ordinary nonpolitical crime versus a political crime therefore has less to do with what was actually done than with whether the moral boundary in question was infused with political meaning" (1984:164). On the basis of the aforementioned comments, Bergesen surmises that it is expected that one-party states have the highest volume of political crime (engage in the most political witch-hunting), followed by two-party and then multiparty states.

Elaborating on the Durkheimian notion that an individual violation of the moral order creates crime, Bergesen stipulates that the violation of a *politicized* moral order creates *political* crime. And building on the Eriksonian thesis that in order for a community to renew and reaffirm its cultural identity, it needs to engage in the ritual persecution of imaginary enemies, Bergesen generates three propositions:

1. The more politicized a society, the more political crime is manufactured, and the greater the frequency of political witch-hunts.
2. The more a society's moral order is infused with political meaning, the more "ordinary" crime is defined as political.
3. Given a boundary crisis, the more politicized a society, the more ritually manufactured political crime will be found in more areas of social life, including those areas that have nothing to do with the real interests of the state.

By extending and amplifying Emile Durkheim's theoretical ideas, Bergesen and Erikson have shown us how the cumulative development of sociological knowledge takes place. More generally, in this section we have seen how the evidence provided by Lanza-Kaduce et al., Erikson, and Bergesen has largely

simple societies. Rather, says Baxi, Durkheim uses relative terms—"proportions" and "preponderances"—when speaking about the amount of punishment found in the various types of social solidarity. Thus, finding some restitutive sanctions in simple societies does not disconfirm Durkheim's thesis, since restitutive sanctions and repressive sanctions are not mutually exclusive.

Finally, Baxi claims that the Schwartz-Miller criticism regarding Durkheim's inconsistent application of the criterion of organization to repressive and restitutive law is basically irrelevant. Baxi posits that Durkheim did not introduce any criterion of organization because his concern "is not at all with *how* the sanctions are organized but with *why* they are organized" (1974:651). Baxi concludes by stating that the Schwartz-Miller study does not in any way refute the Durkheimian thesis.

*Durkheim's theory of punishment revisited.* Utilizing a list of cross-cultural sample societies similar to that used by Schwartz and Miller, Suffolk University sociologist Steven Spitzer (1975) reexamines the relationship that Durkheim claimed to exist between a society's level of complexity and the type of punishment on which it relies. Spitzer distinguishes several types of punishment based on their degree of severity and classifies the sample societies according to which type they used.

Extending his analysis beyond what Schwartz and Miller had done in their study, Spitzer also attempts to test the hypotheses that Durkheim advances in the principles of quantitative and qualitative change. These hypotheses are:

1. The greater a society's degree of political centralization (governmental absolutism), the more severe its punishments will be.
2. The variable of political centralization is separate and distinct from the variable of social development.
3. The more advanced a society, the greater is the preponderance of human crimes to religious crimes.
4. The more advanced a society, the less harshly it will punish human crimes.
5. As society develops, the deprivation of liberty through incarceration tends to become the preferred form of punishment.

Spitzer's findings reveal the opposite of Durkheim's hypotheses *at almost every point!* Spitzer arrives at the following conclusions:

1. Severe punishments are found more frequently in advanced societies, while simple societies are more likely to be characterized by milder punishments.
2. Although political centralization does indeed produce severity of punishment, the level of social development is also associated with the degree of political centralization, which appears to be associated in turn with greater reliance on repressive sanctions.
3. While it is true that religious crimes are punished more severely, religious crimes are more common in advanced societies.
4. More advanced societies are generally characterized by more severe punishments coupled with a greater preponderance of religious crimes.
5. Even though incarceration has emerged as an alternative form of punishment along with the development of society, other deprivations of liberty,



such as banishment and punitive slavery, have also emerged as repressive measures in advanced societies.

Notwithstanding the shortcomings of Durkheim's thesis on punishment, Spitzer rightly credits him for making explicit what too many investigators had previously ignored: the fact that punishment is deeply rooted in the structure of society. To be sure, Durkheim may be credited for inspiring many students of punishment (Rusche and Kirchheimer, 1939; Hay et al., 1975; Ignatieff, 1978; Foucault, 1979; and Linebaugh, 1992) to seriously consider social structural factors like the economy, ideology, and culture in explaining the historical development of penal methods.

Like the studies that we have discussed thus far, the next study we look at also attempts to test Durkheim's notion about the type of social solidarity determining the type of legal system and penal sanctions to be used. This time, however, Durkheim's thesis is tested, not by comparing societies varying in size and complexity, but by comparing two modern Israeli settlements.

*Law and punishment in two Israeli settlements.* English sociologist Michael Clarke (1976) attempts to test Durkheim's ideas about legal evolution. Clarke does this by using Schwartz's (1954) study of two Israeli agricultural settlements that have a similar population size but have very different systems of social control.

The settlement "that most approximates Durkheim's mechanical solidarity" (Clarke, 1976:252) was a collective, or *kvutza*, where there was no private property, everything was shared equally, and many activities were subject to public observation. Members shared a common way of life, living in community-owned housing, eating together in a communal dining hall, using communal washing and showering facilities, and placing their children in communal nurseries and schools. In short, virtually all social relations were the subject of general public knowledge. Perhaps what is most significant from a Durkheimian point of view is that the *kvutza* was characterized by a shared division of labor; that is, the farming and maintenance jobs were rotated so that everyone had the experience of working at all jobs.

In Schwartz's study the other community was a semiprivate property settlement, or *moshav*. Here the members had a high degree of autonomy in farming their own land. Thus, work was usually conducted alone. In addition living arrangements were private, and many activities—showering, washing, child rearing, reading, listening to the radio, and the like—were carried out in the privacy of the *moshav* home. Moreover, there was a great degree of social isolation as each family's separate house was often set quite far from other farms.

Aside from these differences, the two settlements were very similar in terms of their superficial characteristics. Both were founded by Eastern European settlers in 1921, and both were engaged in cultivating the same kinds of crops on about the same amount of land (about 2,000 acres) with roughly the same population (about 500 members).

The legal systems of these two communities were not similar, however. To resolve disputes, the *moshav* developed a formal system of legal control that was centered around its Judicial Committee—a specialized agency charged with enforce-

ing the community's rules. The committee was given the authority to hear complaints by members against each other and to enforce rulings by invoking punitive sanctions such as fines and even banishment from the community. Moreover, the committee operated according to written procedures and enforced a set of codified rules. Hence, we may argue, following Durkheim, that the moshav's member's interdependence—premised on the specialized and autonomous division of labor in which they engaged—is what prompted the emergence of formal legal regulation in that settlement.

The kvutza, by contrast, had no counterpart to the moshav's Judicial Committee. On the kvutza, the members' intense and frequent face-to-face interaction provided an effective means of informal, nonlegal control, based on public opinion. In other words, the constant intimate contact that occurred between members during the course of their daily regime is what prevented undesirable behavior. Since kvutza life meant engaging in continuous interaction with others, each member could be subjected to a wide variety of subtle and not-so-subtle forms of negative public opinion. Such social disapproval was communicated by the ways in which members glanced at an individual, spoke to them, passed them a requested tool or dish of food, assigned them work, gave them instructions, and so forth. Because public opinion was the major informal sanction for which members developed a great sensitivity and respect, no special committee or set of written rules or procedures was needed.

Clarke's contention is that Schwartz's study of the two Israeli settlements provides empirical evidence disproving Durkheim's thesis concerning legal development. According to Clarke, the study shows that "penal sanctions, let alone harsh ones, were irrelevant to the case that most approximates Durkheim's mechanical solidarity (the Kvutza), *precisely because of the nature of that solidarity*" (1976:252, emphasis added). We may continue Clarke's reasoning and argue, conversely, that in the moshav—the settlement that Clarke, comparatively speaking, considers as being more approximate to Durkheim's organic solidarity—penal sanctions were regularly employed by its Judicial Committee.

While Clarke's arguments against Durkheim may not be entirely persuasive, it is worth noting that his critique is one more in a long line of attempts to debunk Durkheim's theory of legal evolution. Thus far we have examined those studies that have attempted to test Durkheim's ideas about legal development and societal complexity. We now turn our attention to a study that considers the relationship between legal invocations and the division of labor.

***Legal invocations and the division of labor.*** Premising their study on the Durkheimian view of legal invocations, sociologists B. C. Cartwright and Richard Schwartz (1973) examine those mechanisms that influence the invocation of legal norms. They also look at how widely these norms are invoked, as well as how their invocation is related to social situation and legal experience.

The Durkheimian view of legal invocations implies that laws will be widely called upon because the general public requires normative regulation in its day-to-day conduct. Correspondingly, people actively seek and adopt laws for the purpose of reducing the tensions of stressful situations.

Durkheim tells us that in complex urban areas with a high population density and a well-developed division of labor, conflictual relations will arise from the social exchanges that take place between persons performing specialized and distinct functions. In this case, contract law is called upon to help resolve these conflicts by regulating the transactions. This is especially true, says Durkheim, as regards the disputes that exist between labor and management in large-scale industrial firms.

Social situations in which the division of labor is highly differentiated and specialized—i.e., large-scale industrial firms and cities with a high population density—create relations that can only be described as conflictual because each self-interested party “seeks to obtain at least cost what he needs” (Durkheim, 1984:160). Thus, the law is called upon to harmonize these relations and ensure a pattern of regular cooperation between the transacting parties. Cartwright and Schwartz formulate a proposition that encapsulates Durkheim’s general view on the invocation of legal norms in large-scale industrial firms located in cities with a high population density: “since the rates and costs of exchange transactions and the occasions for potential conflict are greatly accelerated in large firms and urban areas, the invocation of legal norms will also be accelerated in large firms and urban areas” (1973: 342). In other words, the Durkheimian view postulates two causal chains: the first chain links firm size to legal invocation, and the second chain links urban areas to legal invocation.

Cartwright and Schwartz attempt to test the Durkheimian view of legal invocation by using empirical data derived from their research on the legal regulation of labor-management relations in two Indian jurisdictions (urban Bombay and rural Mysore). These data deal with the labor-management disputes heard before India’s quasi-judicial, regulatory agencies known as the Industrial Tribunals. (The dispute-resolution process has two other stages that precede and follow the tribunal hearings: conciliation before a labor commissioner and an appellate hearing before the supreme court.)

Most of the disputes that arose in industrial firms with an extensive and highly differentiated division of labor revolved around labor-management negotiations for union contracts. The object of the tribunals, then, was to resolve labor-management disputes through arbitration by getting both parties to agree to the terms of the union contract.

Cartwright and Schwartz measured the concept of *legal invocation* by the number of times that firm managers involved in labor-management negotiations made reference to decided cases (court decisions). In looking at the two causal chains that the Durkheimian model postulates, Cartwright and Schwartz discovered the following. In the first chain they found that *firm size* (measured by the total number of firm employees) is related to the *division of labor* in the firm (measured by the total number of unions in the firm); the division of labor is related to *contractual complexities* (measured by the total number of labor-management agreements); and the variable of contractual complexities is related to legal invocations. In the second chain they found that *population density* (measured by the population of the urban area where the firm is located) is positively related to legal invocations, but the intervening variable of *industrial conflict* (measured by the number of strikes and

written complaints made by employees) had a relatively weak influence on the relationship. Cartwright and Schwartz also found that the division of labor in a firm does not seem to produce industrial conflict; and when controlled for population density and contractual complexity, no causal link appears to exist between industrial conflict and the frequency of legal invocations.

Simply put, the results of the second causal chain reveal that: (1) if a firm is located in a large urban area, this does not mean that there will be more strikes and complaints in that firm; (2) because a firm has a high level of differentiation and specialization, this does not mean that there will be more strikes and complaints in that firm; and (3) because strikes and complaints occur in a firm, this does not mean that court decisions will be cited with greater frequency during labor-management negotiations. It is significant to note that these results seem to clearly negate Durkheim's contentions that, (a) social situations characterized by a highly developed division of labor and great population density will create conflicting social relationships, and (b) in situations of conflicting social relationships the law will be called upon to help regulate, harmonize, and integrate those relationships.

Cartwright and Schwartz then propose that industrial conflict need not be limited to strikes and complaints. Rather, *litigation activity* (measured by the total number of appearances before the labor commissioner, the Industrial Tribunals, or the appellate courts) is another means by which to consider labor-management disputes. Taking this variable into consideration, Cartwright and Schwartz discover that there is a significant causal link from both population density and the division of labor in a firm, to the presence of litigation activity. And litigation activity is directly related to the invocation of decided cases. This revised model, then, seems to confirm the Durkheimian view of legal invocations.

In this section we examined those empirical studies that evaluate Durkheim's notions about the relationship between legal evolution and societal complexity, and the relationship between legal invocations and the division of labor. We noted that those studies aiming to test Durkheim's first notion reveal several shortcomings in his theoretical claims. Moreover, the study seeking to verify Durkheim's second notion provided only weak support of his hypothesis. While these studies were largely concerned with Durkheim's *theoretical ideas*, in the next section we look critically at the shortcomings of his *methodological procedures and assumptions*.

### Methodological Procedures and Assumptions

Sociologist Joseph Sanders (1990) has recently argued that some of the weaknesses of longitudinal studies on trial courts stem from these studies' excessive macrolevel view of litigation. Sanders states that this macro focus, which considers social structural factors, has been emphasized at the expense of the micro focus, which considers individual behavior. He further claims that the procedures and assumptions of Durkheim's methodology have been responsible for skewing this focus in the macro direction.

According to Sanders, Durkheim's methodology has had a greater influence on the longitudinal study-of-courts than on any other area of sociolegal studies. However, as we have already seen, most of Durkheim's work concentrates on macrolevel social facts. Sanders says that the problem with this concentration on social facts is

that Durkheim pays little attention to the microlevel individual behaviors through which the social facts produce their effects. \*

Durkheim's methodological procedure is to compare *social rates* of various phenomena (i.e., crime, suicide, etc.). One assumption underlying this methodological procedure is that the effects of social change can be observed without looking closely at the microprocesses of individual behavior. Durkheim's procedure has been employed in the longitudinal study of courts because it is there that the litigation rate, as a dependent variable, demands explanation. As a result, researchers have looked at how a number of independent variables (urbanization, economic changes, social development, cultural changes, religious orientations, etc.) have influenced the litigation rate.

Sanders points to several problems that are inherent in employing Durkheim's methodology. First, there is the problem of *vagueness*. Sanders maintains that because most of the longitudinal studies make their arguments at the macrolevel, there is ambiguity about how the independent variables affect the dependent variable (the litigation rate). Related to the vagueness problem is the problem of determining what is an independent variable, what is a dependent variable, and what is "only" an indicator. Adding to the ambiguity of the longitudinal studies is the choice of a rate for the dependent variable of litigation—the dispute rate, the litigation rate, the trial rate, or the appellate rate?

The problem of *validity* is associated with these rates because they are measured by indicators. For example, the dispute rate has been estimated by measuring, among other indicators, population, business activity, and automobile accident rates. Unfortunately, it is not known how well any of these indicators actually measure the rate chosen to constitute the dependent variable.

Sanders calls for an alternative line of analysis that remedies the problems of vagueness and validity that are inherent in Durkheim's macrolaw focus. His suggestion is to pay greater attention to the interplay of macro- and microlegal processes that exists in litigation disputes. Sanders sees the dependent variable of litigation not as a rate but as "an aggregation of individual behaviors." Therefore, instead of looking at macrolevel litigation *rates*, Sanders argues that we should really be looking at microlevel litigation *behaviors*.

Sanders proposes a theory for the longitudinal study of courts that begins at the macrolevel of organizational structure, moves down to a microlevel of individual behaviors, and then goes back up again. Such a theory explicitly explains how microprocesses transform macroeffects to individual behaviors and connects microbehaviors to macrochange. This macro-to-micro link becomes evident only when we begin to see litigant behavior as behavior that occurs within the courts as *organizations*, and litigant behavior as altering the courts' organizational structure by bringing about changes in the substantive and procedural legal rules. Thus, instead of following Durkheim's methodology, which focuses only on macrolevel litigation rates, Sanders recommends that researchers doing longitudinal studies of courts consider the relationship between macrolevel organizational structures (the courts) and microlevel litigant behavior (court decisions, bargains, disputes, etc.). Sanders's alternative line of analysis leads us to study the fundamental sociological question of how one set of organizational structures is transformed by individual behavior into another set of organizational structures.