

An Unpublished Manuscript by Durkheim

‘On the General Physics of Law and Morality, 4th Year of the Course, 1st Lecture, December 2, 1899, Course Outline: On Penal Sanctions’

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Abstract: This is the first English translation of Durkheim’s lecture for the first class of the fourth and final year of his course ‘On the General Physics of Law and Morality’. The content from the previous year’s course is contained in *Professional Ethics and Civic Morals* (Durkheim [1950] 1992). Durkheim discusses the importance of a special theory of sanctions and provides a typology of their negative and positive forms. He makes a case for the sociology of penalties and responsibilities, one based on the examination of their external and visible characteristics. Crucially, Durkheim displaces the ostensible causal importance of the intentions of juridical subjects, whether legislators or wrong-doers. The translation is accompanied by an extended critical introduction by R. P. Datta and Fr. Pizarro Noël.

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‘Course Outline: On Penal Sanctions’

(p. 1)¹ We have successively studied different moral precepts, namely those that determine the relations between a person and him/herself, meaning establishing what one’s conduct should be, even though it has no impact on anyone else, other than him/herself, next those that regulate people’s conduct as it occurs in the different groups of which they are a part; the family, the professional group, political society, human society in general. It thus appears that the study we started has come to its end. Nevertheless, however, there is a need for more, and an important research field is yet to be covered.



In any sphere of human activity to which moral rules are applied, these rules all appear with a distinct characteristic that defines them: sanctions are attached to them.² The sanction is not an integral part of the rule; it is an exterior manifestation of the different ways that collective sentiments react that in turn constitute the authority of the rule, in accordance with whether the accomplished acts conform to, or contradict, the prescribed [established]³ norms. They can thus be studied separately from rules and form a distinct research object. It remains for us to do this research.

To tell you the truth, at the start of the course,⁴ we had already touched on the problem of sanctions. But back then, we just classified them while showing what united them. [then] Now, the questions raised by this order of fact, for this reason, are not exhausted. Back then, we did not determine the role and purpose of each species of sanction, or follow each of them in their evolution, explain their current forms, or the form they are likely to take in the future. We only dedicated ourselves to showing (p. 2) that they all had historical roots in religious practices that were derived from certain ritual operations. In actuality, the real questions were not even touched. No doubt, this perfectly rational plan requires that all the problems of which sanctions may be the object be dealt with at the same time, and in some respects, it was preferable that the ideas we presented then be adjourned until where we are now, with the passing of time, meaning at the beginning of the end. But it seemed to us that there was an interest in not [leave you] waiting so long to give you the substance of such important facts, all the more so because this summary theory of sanctions allowed us to immediately highlight certain aspects of everything essential in moral life. This is how we were able to establish some fundamental propositions concerning notions of good and evil, of pure and impure morality, their fundamental unity and [~~to the religiosity inherent in mor~~] the direct kinship of religion and morality, etc. It was difficult not to have such explanations at the beginning of the course. This is the didactic and pedagogical justification for the plan we followed. To deal with these drawbacks, all we have to do is remember the results we have arrived at, as far as will be necessary for dealing with the remaining questions about sanctions. And we will not have to go back too often since these two orders of problems are basically quite different. The general theory of sanctions we have made (p. 3) is, in sum, quite distinct from the special theory of the same phenomena that we are going to undertake.

The part of the course that we are entering is therefore naturally divided according to the different kinds of sanctions we have identified. Now, we have seen that they fall into two major kinds: negative sanctions and positive sanctions. The first are tied to acts that [illegible]⁵ violate and negate the rule; therefore, we gave them that name. Such is the case with penalties, moral blame, [and] damages. The others are those related to the ones that are in accordance with the rule, that affirm it, such as having a good

reputation, the respect of the group, honours, dignity, distinctions that are bestowed for moral acts. It hardly needs to be said that this second type of sanction is much less important than the first.⁶

Now among negative sanctions, two variants need to be distinguished: they are repressive sanctions where repression is applied through the courts, or through public opinion;⁷ and restitutive sanctions, those that do not involve punishment but simply consist of restoring the relationship troubled by the immoral criminal act. The ideal type of the first variety is penalty, the ideal type of the second are damages, compensation for damages caused: it is the sanction of civil law. We therefore have to deal consecutively with the role of repressive sanctions; of the forces they exercised or received; then we will have to deal with restitutive sanctions or even for [illegible]; finally, to be complete, we will also have to talk about positive sanctions or, those that are remunerative. But to study them is very difficult.

(p. 4) But this study of the role played by sanctions, and the form of these sanctions, is in close solidarity with other research that surely needs to be [separated] singled out, but that cannot be radically separated from it. Each sanction is applied to its own subjects. But who should be the subject of the sanction? There are some special legal rules that answer this question, specifying who should be punished, who should be compensated, who should receive damages. They are the rules that determine responsibility. But responsibility varies according to the nature of the sanctions; the determination of subject of the penalty is not done in the same way as the determination of the subject of civil sanctions: it is quite different still when it comes to remunerative sanctions. Each particular species of responsibility must therefore be studied in accordance with the corresponding species of sanctions, and we thus obtain the following divisions in the course:

- Repressive sanctions and penal (and moral) responsibility
- Restitutive sanctions and civil responsibility
- Positive sanctions and corresponding responsibilities

When these problems are studied, the physics of morality and law will not yet be complete. The study of moral rules like sanctions starts from morality insofar as it exists and functions outside of each individual consciousness.⁸ This part of ethics can be called objective ethics. The rules, in effect, are not the work of each of us; we find them all ready-made for the most part, and what we can add to them in the course of life is infinitely little. Besides, it is not as an individual that we can modify them (p. 5) but as a member of the collectivity. It is the collectivity that establishes them, it is to collective ends that they respond, it is the collectivity that sanctions them. No doubt they would not exist without individuals but they do not present themselves in their entirety to any individual and hence they do not exist as a whole

for any individual. They exist in the totality, in society; since they come from society. Even though the rules are not the individual work of any of us, they are nevertheless represented in our individual consciences, and it is necessary to look at how such representations were made. Everyone is aware of a moral order; it is expressed in each particular mind; it would certainly be interesting to study the form it could produce there. From this point of view, morality is not structured from the outside but from within; not as it functions in society but as the product of individual design. Because everyone perceives it in his/her own way. Some exaggerate one part of morality, others will do so differently. According to some, the same rules are found by decrees, etc. [~~What are the factors according to which this representation of morality varies~~]. Of what does this representation of morality consist and according to what currents does it vary; these are the questions we will have to ask ourselves in this last part of the course where we will consider morality from its subjective aspect. There, we will have to deal with moral conscience, moral sentiments, how to explain these phenomena, under what conditions. [a dozen or so words crossed out] Then, we will start again with remorse and moral satisfaction, etc. These studies, that usually open moral treatises, should on the contrary, bring our research to a close. No doubt, [~~strictly speaking~~] it does not fall under sociology proper; but it touches it too closely to be able to be considered completely separate from it. (p. 6)

On Repressive Sanctions

First of all, let us determine the object of our study. Repressive sanctions are of two kinds. There are penalties properly speaking as they are applied by the courts, there is the blame opinion inflicts on those who have behaved badly. Since penalties are the easiest to determine because they are the most accessible to observation, let us define them first. The definition of the second one will follow naturally from this.

We call penalties all sanctions that deprive or destroy, whose nature and magnitude vary in proportion to the offence, and are fixed by a social body responsible for this function and [~~that are either exercised by the~~] whose application depends directly and exclusively on [only] the society or by [illegible] its authorised representatives.

First of all we notice [~~the abs~~] that in this definition we do not find a word that we generally think is associated with a penalty. It is the word suffering. Are not all penalties generally considered a means of suffering? But in order to define penalties in this way, the legislator would have to have the ability to produce pain at will. However, such power is [a bit] above human forces. No doubt, it is possible to subject people to the action of usually painful stimulus. But a thousand exceptions are always possible.

This is because pain does not only depend on an objective cause but also on the subject's condition. What is pain for one individual can be felt quite differently by another. In fact, do we not see vagabonds striving every day for the happiness of being imprisoned? Ferri⁹ was even able to state (p. 7) based on statistical data, that food shortages locked prison doors more securely than the most frequently used locks; because when prisoners know that misery awaits them on the outside, they have no desire to escape. As freedom for us is the most precious asset, it seems to us that by taking it away from those we punish we are striking them without ceasing. But it may well be that they do not feel the effect of the penalty like we do. For cultivated people, imprisonment for a few days is a very cruel punishment, especially because of the ignominy that results. But in some social circles, public opinion has neither these delicacies nor these reservations; a short sentence is not considered to be anything shameful. It is reduced to a slight discomfort that is barely felt. If Lombroso's observations are correct – and if they err on the side of generalization they are not radically false – the callousness of the great criminals would make them almost insensitive to the punishment inflicted on them. Moral rapture can produce the same effects. Not only did the Christian martyrs accept their torments with resignation; but they did not feel the suffering. It is their insensitivity that explains the abnormal composure they probably demonstrated in the midst of torment. So if we make suffering the characteristic element of penalties, we would only have a very approximate definition, very rough, that would risk making us miss what is essential in the phenomenon we are studying.

But if all pain is not actually and effectively felt suffering can we not say that it always has this characteristic in the intention of the legislator? One could say then that the purpose of the penalty (p. 8) is to cause suffering. But supposing that this intention has really [happened] and in all cases presided over considerations of the penalty, it cannot be entered into our definition. Because, in general, a social phenomenon cannot be defined by the intention that inspires it.

A definition, in fact, must express the characteristics of the thing to be defined;¹⁰ however, it may be that there is no relationship between a social fact and the intention that was its more or less occasional cause. Because intention by itself does not create anything. It can only prompt us to implement such and such causes from which we believe we can expect the desired result. But oftentimes the causes produce effects quite different from those we thought and that are useful, however. And so, because they serve some vital purpose, they last; but we see that they have only a very coincidental relationship with the intention that inspired us. Therefore, the latter does not express anything that characterises the thing, and cannot be used to define it. What clearly shows how these two orders of facts are independent is that intentions can change without the phenomena that they

are related to changing at the same time. The Jesuits, several centuries ago, instituted a pedagogical system with a certain intent: a few years ago, we still followed the practical exercises, in our high schools and our colleges, before we justified them for completely different reasons.¹¹ Our intention in keeping them was quite different from the one that had initially determined the penalties and institutions.

This distance between the intention and the resulting act is noted all the more frequently since very often the intention is not the real or determining cause of the act. In fact, the intention is the reason (p. 9) through which we explain to ourselves the way we behave, but this reason is not always the real one. It is because, in fact, the real motives of our acts largely escape us, they are not so apparent that we can immediately grasp them by introspection. We are driven by all kinds of feelings, habits, preconceptions, active in the conscious and unconscious regions, that are obscure. [*the way in which these various elements*] [*combine*] What these elements are, what combinations they form, we do not see any of this; sometimes we hardly even have an obscure impression of them. All we clearly feel is that we are inclined to act in such and such a way and then we seek to justify in our own eyes the tendency that manifests itself in this way. We therefore seek among the possible motives known to us the one that can best confirm us in our emerging resolution, and we believe that it was the one that determined us when in reality our decision was made for completely different reasons. Any reason that renders intelligible the conduct we adopt, allowing us to think of it as reasonable, is thus construed as a determining motive, when in reality it may have had no influence on us, or, at least, more commonly, only has a secondary impact on our determinations. But it is enough that it is more visible, more readily apparent for us to see that we only see it and we believe that it is alone, that it is the whole story.

We can therefore see how loose the link is between an agent's intention and the steps s/he takes. But, some could say, can we not grasp the true intention, the one that is hidden in the unconscious, the actual goal being pursued, even if in a confused way. Honestly, we can actually do that after a lot (p. 10) of research, but not at the outset. Since many facts are perhaps only understood by induction. They can only be found at the end of the science, not at its departure point. They cannot enter into an initial definition such as the one we are looking for because it obviously cannot be taken into account to be constructed only from immediately observable, visible characteristics because the research has not yet started.

But there is more, something that must make us resolute in excluding suffering from this definition: (1) It is that there are a certain number of sanctions that are obviously criminal, and that, even in the legislator's intent, could never have been considered to have suffering as their objective; (2) There are sanctions involving suffering that are clearly not penalties.

In the first place, there are punishments where the subject is an inanimate object and therefore incapable of feeling. Thus, the instrument of a crime is very often destroyed. When propaganda favouring idolatry was found in a town, the Bible prescribed the complete destruction of everything that was there, not only the people, but also things (Deuteronomy 13:16).¹² The habitual practice of razing the house of the condemned is of the same nature: such destruction is painful neither for the man who has already been penalised who is no more, nor for the house itself. All of the complementary penalties that are applied to the dead body of a culprit are of the same substance, but also to let his/her body rot on the gallows, or if he is burned, or to throw his/her ashes to the wind or to drag his/her corpse under the chariot, etc. Indeed, the executions, that use a simple effigy, do no harm to anyone. In other cases, when it is an animal that has committed the crime, it is the animal that is struck. 'If a bull gores a man or woman to death (p. 11), the bull is to be stoned to death, and its meat must not be eaten' (Exodus 20:28).¹³ It is true that the animal can feel pain, but what it shows is that its destruction is not simply intended to make it suffer; it is rather this prescription: one cannot eat its meat. It is not a question of torturing a living being, but of removing an impure being from exchange.¹⁴

Even though punishment strikes a person, it does not always aim to make him/her suffer, nor is it always the result. When the Church excommunicates the heretic or the atheist, that is to say the one who has excluded him/herself from communion,¹⁵ it was a satisfaction the Church agreed to itself, rather than a suffering it imposed. When our Code abolished the obligation of military service for some convicts, it constitutes what in the eyes of many people could pass for a privilege. Similarly, by withdrawing the enjoyment of their family rights from certain culprits, they are exempted from duties as much as they are deprived of certain rights.

Conversely, there are sanctions that are suffering and yet are not punishments. Anyone who loses a purely civil lawsuit who is ordered to pay his/her opponents high damages [and] high interest can be hit as harshly as by a criminal or correctional conviction. S/he can suffer. However, there is no criminal sanction but a purely civil one.

But if all penalising is not suffering, it [always consists] [in one] always involves [~~the domination of the subject~~] an alteration of the subject that ranges from pure and simple destruction to deprivation. Either we (p. 12) we [*sic*] destroy the subject, or we destroy one of his/her means of action, or we destroy one of the things that belongs to it, in all of these cases we deprive the subject of many of these things be it the freedom of its movement or the property it possesses. We therefore have penalties that are deprivatory sanctions. Civil sanctions do not have this character. They do not alter things; on the contrary, they restore them to their normal state, as they were prior to their being disturbed. I have been unjustly dispossessed

of my status as a son, the court returns it to me; I am bound by a contract without legal or moral value, the court annuls it. I have [illegible] suffered unjustified damages, the court awards me compensation. It is true that the reparation due me is inflicted on others, namely the author of the damage who is struck by it, who loses something that belonged to him. But in reality, the sanction does not reside in the deprivation imposed on him/her but in the remedy granted to me. But s/he is not punished, because the sum s/he is obliged to pay to erase the results of the harmful act, in reality, no longer legitimately belongs to him/her because of that act. [There is] A new right arose for my benefit at the source of the [damage/harm] loss that I have unjustly suffered; and the court merely acknowledges, recognizes and punishes this right. It does not impoverish the one it condemns, it {seeks} {s}ø restores what belongs to me. We will therefore say that the penalty is a sanction of deprivation or of destruction.

But these sanctions have this other peculiarity that it is good to retain now in the definition because we will have to use it in the discussion [that will follow] of doctrines. This is indicated (p. 13) by the following words in our definition. Wherever we encounter penal sanctions, the manner they are applied to each particular act varies proportionately with the importance the moral gravity of that act. Wherever there are penalties there is a corresponding scale to a parallel scale of repressed offences, destruction, graduated deprivation. The same does not hold for purely restitutive or civil sanctions. They do not include degrees since they only aim at restoring the previous state of affairs. However, when a brother usurps the right of the first born son, civil redress simply consists in removing it. There are not different ways to annul a contract regardless of the gravity of the pronounced reason for the cancellation. [*the offence that constitutes significant harm to others*] The remedy I owe to others for the damage I caused is entirely independent of the moral characterisation of the harmful act. I must compensate for the loss I unrightfully inflicted, whether I was led to act as I did by unintentional error or by immoral considerations.

No doubt there is indeed a variation of the sanction here; but this variation does not depend on the moral value of the act committed, or, by the same token, its intrinsic moral nature, but on its material consequences. I have contracted a debt; I have to pay it but I do not have to pay out more or less depending on how I contracted this debt. The penalty is quite different if I am a rich person or a poor person, whether it is a large or a small amount, in principle the penalty is the same. We therefore have a characteristic feature of the penal sanction. It is true that this principle of proportionality between the fault and the punishment has been challenged. We will have to examine the criticisms that have been directed at it. But what is certain is that it exists, that it is the basis of all referenced species known so far.

(p. 14) But all of the preceding characteristics apply [as well] equally to the punishments pronounced by the courts and to those decreed by public opinion when the [illegible] causes us a reprimand, withdraws its esteem from us because it disapproves, when, as a result, the people with whom we are in contact deprive us of their company or those displays of kindness to which we were accustomed, there is a deprivatory sanction. And these sanctions vary in importance depending on their moral importance, depending on the degree of the immorality of the reprimanded act. The difference is that legal punishment is administered only after it has been determined by a special body responsible for this function, which is commonly referred to as a court. It does not matter what this court is. On the contrary, the reaction exerted by public opinion does not emanate from any defined body, everyone contributes to doing it. There is not even a moment when we deliberate the sanction, you apply it. But they attach themselves as they are applied, by accident, without preliminary deliberations. Everything is happening here in a less reflective, less concerted way, precisely because there is no organization. Moral facts differ from legal facts in that they are determined [from] a lesser effort. This is expressed in our moral obligation to justice: its nature and its magnitude are determined by a social body responsible for this function.

We still have to explain the last of the elements that is part of our definition. It is intended to separate the penalty from a number of pure sanctions but are not called such but must be distinguished from them. In some societies, in fact, there are kinds of sanctions that have all the preceding characteristics. The crimes are abandoned (p. 15) at the free disposal of free individuals. It is up to them whether or not to exercise a destructive or deprivatory reaction, as pronounced by the court, or to be the object of a compromise. With the *Talion*¹⁶ in Rome, the same applied for fines for simple theft. It was the one who was robbed who received the cash from the fine imposed. There were deprivations, but it was an individual who benefited from them. But it is not the same for honour; for clandestine theft. Here the victim or his/her family [we] do not exert control over the penal reaction; they cannot freely decide to waive it or exercise it. Only society has that right. So here we thus have two kinds of sanctions that may be very different. We will not confuse them by using the same designation. There is no doubt that the word penalty should be reserved especially for public penalties. The private character of the other kind is closer to civil sanction that, like those kinds of penalties, are left to the discretion of individuals.

That is the justification for our definition. We thus see that at the same time, to define both penalties and moral norms, meaning diffuse repressive sanctions, the magnitude of which is fixed and applied in a more diffuse way by the collectivity and not by a defined organ.

Not only do these definitions not take into account the intentions of the legislator, the goal that s/he pursues or believes s/he is pursuing by crafting these penalties, but we have not even considered the end or its outcome, i.e., the subject. We defined penalty without determining who was being punished. One might think, it is true, that the question is not fully understood: is it not clear that the [eu] subject is the culprit. It seems (p. 16) to involve the notion of the subject in our definition; it is enough just to add a word to it. But this word would not teach us anything because it is a question of who is being considered guilty. According to what rules does the society proceed with this designation. However it is not necessary to be very familiar with the history of penal law to know how many ideas have varied on this point: whether it is clans, or families, the individual alone, divine beings, etc. It is therefore this problem of determining in a general way who must suffer the penalty. But it turns out that this problem does not need to be solved in order for the penalty to be defined. The finding is important because it implies that the penalty is not determined primarily by the feelings of the person who suffers it; it does not have its origins in certain subject-specific characteristics; it comes from another source. The subject's emotional state can only secondarily affect it. We think we therefore have the duality of these two often-confused questions: penalty and responsibility.

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Notes

1. Translators' note. The original sequence of manuscript pages for the lecture is indicated throughout by pagination in round brackets.
2. Translators' note. Durkheim's conception of morals and sanctions is much the same as he had articulated in the previous year's opening lecture (i.e., 'Professional Ethics' in *Professional Ethics and Civic Morals* [1950] 1992: 2–3).
3. Translators' note. Struck-through in the original manuscript. All subsequent struck-through content is indicated in this manner.
4. Translators' note. That is, three years prior in the 1896–97 academic year.
5. Translators' note. Throughout, '[illegible]' refers to illegible script in Durkheim's original handwritten lecture notes.
6. Translators' note. Durkheim makes similar remarks in *Moral Education* ([1925] 1961: 205).

7. Translators' note. Here and subsequently, the French reads '*opinion publique*' and not '*conscience collective*' or '*représentations collective*' as might be implied given other translations (cf. Fields 1995: lv).
8. Translators' note. The argument Durkheim presents here anticipates that of the 'Preface to the Second Edition' of *The Rules of Sociological Method* (Durkheim [1901] 1982: 45).
9. Translators' note. Durkheim is referring to Enrico Ferri (1856–1929), the Italian socialist and sociological criminologist, disciple of the founder of the Italian school of positive criminology, Cesare Lombroso (1835–1909).
10. Translators' note. As Durkheim states in *The Rules of Sociological Method*, 'To be objective the definition clearly must express the phenomena as a function, not an idea of the mind, but of their inherent properties' (Durkheim [1895] 1982: 75).
11. Translators' note. Cf. Durkheim's argument in *The Rules of Sociological Method*:
The religious dogmas of Christianity have not changed for centuries, but the role they play in our modern societies is no longer the same as in the Middle Ages. Thus words serve to express new ideas without their contexture changing. Moreover, it is a proposition true in sociology as in biology, that the organ is independent of its function, i.e., while staying the same it can serve different ends. Thus the causes which give rise to its existence are independent of the ends it serves. ([1895] 1982: 121)
12. Translators' note. This verse reads: 'You are to gather all the plunder of the town into the middle of the public square and completely burn the town and all its plunder as a whole burnt offering to the Lord your God. That town is to remain a ruin forever, never to be rebuilt' (*NIV Study Bible*, 1985). We have chosen the NIV translation because it is closer to the ancient Hebrew as written.
13. Translators' note. The instructive full passage, verses 28–32, reads:
²⁸ If a bull gores a man or woman to death, the bull is to be stoned to death, and its meat must not be eaten. But the owner of the bull will not be held responsible. ²⁹ If, however, the bull has had the habit of goring and the owner has been warned but has not kept it penned up and it kills a man or woman, the bull is to be stoned and its owner also is to be put to death. ³⁰ However, if payment is demanded, the owner may redeem his life by the payment of whatever is demanded. ³¹ This law also applies if the bull gores a son or daughter. ³² If the bull gores a male or female slave, the owner must pay thirty shekels of silver to the master of the slave, and the bull is to be stoned to death. (*NIV Study Bible*, 1985)
14. Translators' note. Cf. Durkheim's admonitions to Henri Hubert and Marcel Mauss in 1897 and 1898 about considering the punitive aspects of sacrifice (Ptacek 2015: 78–79).
15. Translators' note. 'Communion' can refer specifically to receiving the Eucharistic Sacrament, or to its more general meaning as the edifying experience of full fellowship with other believers and thus benefiting from the mutual support, encouragement and guidance, i.e., moral life, of church membership.
16. Translators' note. That is, the basic juridical principle of 'an eye for an eye' such that the perpetrator of a wrong or harm should be subject to being wronged or harmed in the same way as was his/her victim, this being counted as a just form of punishment.

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