

Concerning Durkheim's 1899 Lecture 'On Penal Sanctions'

Introduction, Translation Notes, and Comments

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Abstract: This article provides a critical introduction to the first English translation of Durkheim's Saturday, 2 December 1899, lecture that he entitled 'Course Outline: On Penal Sanctions'. It was written for the first class of the final year of his course 'General Physics of Law and Morality'. We provide some context to the lecture, a description of the four-year long course at Bordeaux of which it was a part, offer notes on our translation, and discuss the salience of its content. Of particular note is Durkheim's sociological reasoning, and the critical impact of antisubjectivism on the development of his special theory of sanctions and conception of morality as part of social reality.

Keywords: Durkheim, ethics, morality, punishment, sanctions, subjectivism, translation

This article provides an introduction to our translation of Durkheim's 1899 lecture entitled 'Course Outline: On Penal Sanctions'. A typescript French version of these lecture notes, handwritten by Durkheim, was prepared by François Pizarro Noël and prepared for this journal (see this volume). It lays out a variety of reasons for why Durkheimian studies in particular, and sociology in general, might find this lecture of interest. Below we provide some historical context for this lecture, discuss our translation protocols, and make some comments about the implications of the substance of Durkheim's lecture, a classic piece of Durkheimian reasoning.



The context

A few years ago, Professor Matthieu Béra 'found' handwritten manuscripts of Durkheim's *Leçons de sociologie* containing lecture notes for 'Physique des mœurs et du droit' (1950), published in English as *Professional Ethics and Civic Morals* ([1950] 1992). They were discovered at Eveline Halphen's house (Durkheim's granddaughter). The first page read: 'General physics of morals and law, 3rd year, 1st Lesson, Professional ethics, December 10, 1898'. While examining the full lot, Béra also discovered a series of unpublished manuscripts, including one with the following title: 'General Physics of Law and Morals, 4th year, 1st Lecture, December 2, 1899, Course outline – Penal sanctions'. Our translation of this lecture appears in this volume. The material contained in it has helped clarify the contents of Durkheim's famous Bordeaux course.

Durkheim's other major publications from this period pertinent to this lecture and the course to which it belongs are worth bearing in mind. These include: *Incest: The Nature and Origin of the Taboo* (1898), 'Individual and Collective Representations' (1898), 'Individualism and the Intellectuals' (1898, apropos of the Dreyfus Affair), 'Concerning the Definition of Religious Phenomena' (1899), 'Two Laws of Penal Evolution' (1899–1900), and 'Sociology and Its Scientific Field' (1900). Marcel Mauss stated that this course content has important links with Durkheim's first three major books, *The Division of Labor in Society* ([1893] 1984), *The Rules of Sociological Method* ([1895] 1982), and *On Suicide* ([1897] 2006), and with Durkheim's sociology of the family. Terms presented in the lecture, such as the 'special theory of sanctions' and crucially 'positive sanctions', are indicative of the growing sophistication of Durkheim's problematic of moral facts that had occurred since 1893.

The content, themes and organisation of the four-year course can be outlined as follows. The first year (1896–1897) served to introduce a sociology of morality in general by focusing on sanctions for methodological reasons. He also discussed the religious roots of morality. The second (1897–1898), third (1898–1899) and fourth (1899–1900) years deal predominantly with 'objective ethics' as manifested in the kinds of sanctions and responsibilities found in these institutional contexts. Morality and the family were the focus for the second year, and the professions and the state for the third year. The fourth year concluded the study of objective ethics by articulating a special theory of sanctions and a theory of responsibilities. This 'special theory of sanctions' was to cover negative penal and civil sanctions, and positive sanctions. In addition to 'objective ethics', Durkheim reserved the last part of the course in the fourth year for a consideration of 'subjective ethics' even though he thought it was not part of sociology proper. The study of subjective ethics meant discussing

the different ways that individuals internalise collective representations of morality for themselves, in addition to considering moral feelings or 'sentiments'.

The lecture is divided into two parts. The first part is a conventional 'course outline' delineating the range of topics to be covered during the year. The second part has substantially new material where Durkheim carefully elaborates his conception of, and approach to, sanctions, his main departure point. He dissects the limitations of approaches to law, morality, and penalty that emphasize the intentions of legislators or the effects of punishment on the subject (e.g., suffering). The sociological alternative to this kind of subjectivism requires studying the external and visible characteristics of negative, penal, civil, and positive sanctions. A clear contrast is made between the disorganised, spontaneous, and reflex-like qualities of social sanctions that one finds in public opinion for instance, and those of dedicated deliberative bodies like courts charged with that function. Both organised and disorganised sanctions are manifestations of what he calls 'objective ethics'. Durkheim's argument subtly demonstrates the limitations of legal discourse for analysing and explaining the constitution and societal effects of law, morality, and punishment as social phenomena.

Notes on the translation

Our translation is based on the French typescript transcription of Durkheim's handwritten lecture notes prepared by Pizarro Noël (this issue). Durkheim routinely wrote his lectures in a rush at the last minute, just prior to class. As he wrote in a letter to Mauss in January 1900, 'Or cette année, depuis décembre, je commence à préparer ma leçon du samedi à deux heures pour cinq heures' (Durkheim et al. 1998: 250), and his handwriting is often quite difficult to decipher. Consequently, there are passages that are simply illegible, indicated by '[illegible]'. We have aimed to be faithful to the hurried quality of the lecture and have hence been quite literal, rather than 'free', in our translation. But this also means acknowledging that at times, Durkheim's sense is difficult to grasp or is simply wanting altogether. As a rule, we have respected the word order and phrase structure of the French. English words cognate with French ones have been used when possible rather than preferring derivatives from the Germanic, Anglo-Saxon lexicon. We have left the sparse punctuation as it is and have not, for example, inserted question marks in cases where Durkheim is clearly being interrogatory; in doing so, we have followed Pizarro Noël's preparation of the French text. On the whole, this has meant sacrificing a more readable and contemporary English rendition but the 'feel' of Durkheim preparing a lecture would be lost in a modern 'paraphrased' version.

The French *physique générale du droit et des mœurs* is translated as 'The General Physics of Law and Morality', but this may cause some objections. Referring to previously published Durkheim material containing the phrase *science ou physique des mœurs*, Hall (1993) suggests instead 'the natural philosophy of social norms' and translating *Physique des mœurs et du droit*, the original subtitle for *Professional Ethics and Civic Morals*, as 'The Nature of Moral Norms and Law' or 'The Natural History of Moral Norms and Law'. In our view, doing so distorts Durkheim's aim to follow in Henri Saint-Simon's footsteps and develop a well-grounded social 'physics' attendant to a complexity of 'forces' (see Durkheim, this volume) that transcend humans while also being immanent in them, constituting their capacity to act and be acted upon by social reality, others, and themselves (e.g., in ethical practices). The expression Durkheim himself says he used in teaching was the 'science or physics of mores'. He defines 'mores' as 'the morality which is effectively observed by men [*sic*] at any given moment of history, the one which has the authority of tradition' (Durkheim [1920] 1978: 201, 267n5). This strongly suggests that Durkheim was operating within the ontologically realist terms of the Modern *episteme*, as understood by Michel Foucault ([1966] 1994). In this respect, 'positive science' is defined by its attention to what can be rendered visible from a wide and complex array of forces generally hidden from perception (Foucault 1994; cf. Fields 1995: lxii, n. 27). Durkheim's sense of complex, fluid and spontaneous social forces, witnessed in strong reactions of public opinion to a wrong or a scandal, and continued use of the organic metaphor in this piece supports such an interpretation (see Durkheim, this volume, p. 53). This view contrasts with the earlier Classical *episteme* with its conception of 'Natural History' and commitment to the elaboration of a taxonomy of the tree of living things based only on what can be readily observed – Durkheim is certainly not the Linnaeus of the various manifestations of moral facts! Hence, we find that translating *physique* as 'nature' or 'natural history' is a distortion.

Befitting Durkheim's own conceptions, definitions, and conventional translations, we translate both *mœurs* and *la morale* as 'morality' since for him, *mœurs* (roughly 'mores' in English) refers to the collective representations and practices of moral norms that people actually follow, constituting the dynamism of how morals are enacted and lived in society (Durkheim [1920]1978: 201). We note too, that *la morale* in Durkheim's work has a quite broad but always social referent including the collective representations and social practices of morality and immorality (Fields 1995: lv), moral rules, moral norms, moral culture, customs, folkways, and mores. But, it also includes 'ethics' as an explicit set of collective representations, procedures, and problematisations of what people 'ought to do'.

Given the subject matter of the lecture, we have generally translated *conscience* as 'conscience' while aware that that the French *conscience* means

‘consciousness’ of one’s own existence and of the world external to our minds, and ‘conscience’ as interior moral sense (e.g., awareness of ‘right’ and ‘wrong’; mindfulness of one’s duties and obligations to others, etc.). But this is further complicated by how Durkheim sociologically compounds the meaning of *conscience* when it comes to moral and ethical reasoning since he aims to sociologically consider how we become ‘conscious’ that we have a ‘conscience’ (see Durkheim, this volume, p. 48). For instance, one’s conscience having been pricked, one becomes conscious of a moral or ethical dilemma. That Durkheim wished to conclude the course with an examination of ‘Subjective Ethics’ and the ‘Subjective Aspects of Morality’ is telling in this regard, suggesting that developing a ‘sociology of the individual’ to displace both psychologistic and utilitarian accounts, was a priority for him (cf. Durkheim [1898] 1953; [1898] 1973).

Throughout this lecture, Durkheim uses the word *patient* as his basic term for the kind of social actor he is referring to even though his examples deal with juridical rather than medical matters. In English, on the face of it, this is odd, and we have thus opted to translate *patient* as ‘subject’, as in ‘juridical subject’, or ‘subject to a tribunal or court proceeding’. ‘Juridical subjects’ are aware that they are moral agents, possessing a capacity for moral reasoning, including being able to consider the consequences of action and inaction, are imbricated in relationships where they have duties and obligations, and understand that they have responsibilities (Pearce 2001: 101–103, 114). But, Durkheim’s use of the medical analogy is also instructive. In the modern Western *episteme*, clinical and epidemiological medicine substantially shapes how humans have come to understand themselves both as knowing ‘subjects’ and as individual and collective ‘objects’ of knowledge and targets of intervention (Foucault [1963] 1975: 137). When sociologically considering laws, morality, sanctions, etc., just as with a medical ‘patient’, one is dealing with ‘cases’, with social actors that are both subject and object, individual and collective. In this respect then, using the French word *patient* sheds further light on Durkheim’s problematisation of ‘the individual’.

Throughout, and consistent with Durkheim’s usage, *peine* is defined as ‘penalty’, a general category of sanctions. However, we note that *peine* can also mean ‘punishment’, ‘penalty’, a ‘legal sentence’, or a ‘fine’. Consistent with convention, ‘restitution’ is contrasted with *répressif*, translated as ‘repressive’. But, it also connotes ‘crime-repressive’ or ‘penal’ (Traugott in Durkheim 1978: 263).

Absent a common English equivalent to *rémunératoire*, we have translated it as ‘remunerative’, a cognate of the Latin *remuneratio* meaning ‘remuneration’, ‘recompense’, a ‘reward’. The Latin root is *munus* meaning ‘gift’. An alternative we considered was ‘compensation’, as in a ‘compensation package’ that includes a salary and benefits but this misses the

sense of 'reward', or even 'prize money awarded for adjudicated merit', that Durkheim conveys with his use of the word in relation to 'positive sanctions'. His remark about rewards in *Moral Education* is worth bearing in mind: 'What a contrast between the laws, with their manifold prescriptions, with their carefully specified sanctions, and the few prizes, titles, and honorific insignia, which from time to time may reward some act of devotion' (Durkheim [1925] 1961: 205). Finally, we have made one significant change to Durkheim's language and that is to make it gender inclusive.

Comment: Classic Durkheim

Yash Nadan remarked that 'Durkheim never wrote an introduction in explication of historical sociology or [the] sociology of morals' (in Durkheim 1980: 474n4). However, this lecture, among other sources, indicates that Durkheim articulated both in this four-year course. An examination of his output from this period shows that he focused on analysing his trio of law, morality and religion as institutionalised domains of the social facts of morality (*la morale*) as distinct from the kinds of social facts considered by political economy ([1899] 2011: 90–91; [1900] 1961: 355). Durkheim also demonstrates sensibilities similar to those in his first major statement on religion published earlier that year where he discusses prohibition, crime, punishment, and excommunication ([1899] 2011). So, while Durkheim's specific conceptions of law, morality and punishment certainly changed between *The Division of Labour in Society*, this lecture, and 'Two Laws of Penal Evolution', his commitment to rendering a sociological account of them persisted.

For those well acquainted with his major works, the lecture may very well seem like 'classic' Durkheim in that we see how he makes a social scientific argument for sociological analysis. We certainly see his 'scientific rationalism' on full display. Of particular note in this regard are the specialised concepts that Durkheim creates and uses to analyse subject matter associated with morality, ethics, and law. These include terms like 'objective ethics', 'subjective ethics', and crucially, a new category: 'positive sanctions' (see Pizarro Noël this volume). His handling of these terms demonstrates his rationalism. But, his method is not that of a pure dialectician since it is not the logic of his own 'clear, distinct notions' that concerns him, nor predominantly the work of subjecting other positions to critique, but the extent to which his definitions are grounded in social reality such that they can explain the things to which they refer (Durkheim [1901] 1982: 36; Durkheim, this volume, p. 49). Durkheim is thus no nominalist about his terms, creating them as a matter of heuristic or pedagogical convenience. Furthermore, true to his ontological naturalism, he stresses that

social *cum* moral reality is ‘objective’, something external to the individuals dealing with it and puzzling through moral action. As he states in his distinctive idiom, ‘the rules, in effect, are not the work of each of us; we find them ready-made for the most part’. He continues, ‘No doubt they wouldn’t exist without individuals but they don’t present themselves in their entirety to any individual and hence they don’t exist as a whole for any individual. They exist in the totality, in society’ (see Durkheim, this volume, p. 47). Durkheim is articulating a moral realism rooted in social dynamics and in the workings of social institutions, such as one finds in the administration of law and punishment. His scientific rationalism thus goes beyond strict ‘consequentialism’, because specifying the societal conditions under which moral effects are produced while also being able to clarify the abstract principles of ‘right’ found in any particular society, in turn displacing Kantian deontology, the philosophical rival to utilitarian consequentialism. Methodologically then, Durkheim’s social ontology serves to justify the examination of the external and visible characteristics like codified sanctions that are empirically apprehensible to social scientists instead of speculating about people’s intentions or state of mind. Durkheim is thus able to articulate a sociological alternative to moral philosophy with its debates about inherent human ‘goodness’; individual subjects are not its source and hence theological and romantic (e.g., Rousseauan) approaches are out.

The displacement of subjectivism

Durkheim is unequivocal in displacing what we would today call an individual ‘rational-actor’ model from centre stage in this lecture. Doing so challenges ideas central to modern Western law and jurisprudence with its emphasis on the individual’s *mens rea*. ‘Two Laws of Penal Evolution’ similarly challenges beliefs in the powers of politicians and governments as capable of simply doing as they will (Durkheim [1899–1900] 1978). So, while arguments for ‘theoretical antihumanism’ have gone out of fashion, and notwithstanding Susan Stedman Jones’s (2001) well-made case about Durkheim’s humanism with which we concur, Durkheim’s lecture troubles any simple endorsement of humanism in its guises as methodological individualism, utilitarianism, and nominalism. Here we find the earlier arguments made by Paul Q. Hirst (1975: 144–149) and Frank Pearce (2001) about the importance of Durkheim’s ‘antihumanism’ worth reconsidering. Durkheim rejected a psychologistic and anthropocentric view of human existence and its powers and potentials (Durkheim [1901] 1982: 46). Indeed, as shown in this lecture, he clearly believes that unconscious powers are complex and affect human behaviour in complex ways. This demonstrates continuity with his subtle but often missed point in *On Suicide* that psychic life, far from being immediately knowable, has, on the contrary, profound

depths that cannot be penetrated by ordinary perception and can only be reached gradually by complex, roundabout procedures, comparable to those used by the sciences of the external world. The nature of consciousness is thus far from being an open book ([1897] 2006: 345). And, *contra* the utilitarians, he is well aware of the human penchant for making *post factum* 'rationalisations' of one's behaviour or intentions that may have nothing at all to do with why anyone commits an act. As he puts it, 'We know that human deliberations when they reach the reflective consciousness are often just purely formal and have no other object except to corroborate a decision that has already been taken for reasons unknown to the conscious mind' (Durkheim [1897] 2006: 329; see also Durkheim this volume, p. 50).

Conclusion

One can imagine how scandalous this sociological displacement of the image of the rational individual might have been to law students trained to consider the individual's intent and *mens rea* as central principles of modern jurisprudence. In broader terms, Durkheim shares the same critical sensibility as Marx when it comes to the subject's self-presentation. In his famous 'Preface to a Contribution to the Critique of Political Economy', obliquely targeting Hegel's account of the nationalist ideology of the Prussian state, Marx poignantly states that 'our opinion of an individual is not based on what he thinks of himself' (Marx [1859] 1978: 5). Durkheim for his part reflexively applied such sensibilities to himself and was well aware of the opacity of his own personal state (Durkheim et al. 1998: 508). In short, in this lecture, we see classic Durkheim, a Durkheim who knew the limits and ruses of human self-understanding and grasped why we cannot base social science on what individuals themselves claim their reasons and intentions to be. Hence, we conclude, the need for a rigorous sociological rationalism for dealing with the fundamental questions of 'right'.

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