

DURKHEIM ON LAW AND MORALITY: THE DISINTEGRATION THESIS

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A celebrated and much-discussed article by the distinguished English legal philosopher H. L. A. Hart entitled ‘Social Solidarity and the Enforcement of Morality’ (Hart 1967) presents a radically simplified account—a caricature, so to speak—of Emile Durkheim’s views on law and morality. Hart called this account ‘the disintegration thesis’ and identified the then eminent English judge, Lord Devlin and Durkheim as proponents of this thesis. We here seek to set out the disintegration thesis as formulated by Hart and also his helpful suggestions for rendering it into a set of empirical claims. We dispute his attribution of this thesis to Durkheim and present an alternative account of Durkheim’s views about law and its relation to morality. The critique of Hart’s characterization of Durkheim helps to identify what is distinctive about Durkheim’s views, and to explore various questions raised by Durkheim’s writings about the legal regulation of morality. We shall conclude by suggesting ways in which Durkheim’s answer is particularly relevant to our time.

Hart’s Caricature: the Disintegration Thesis

The specific context in which Hart’s article was written may appear rather quaint and outdated because it was written during a particular British controversy about sexual morals. However, the substantive arguments of this debate are especially prominent today. The central theme of the legal regulation of morality, especially where there is no specific harm to others, is alive today across a wide range of controversial issues. We argue, for instance, over whether the law should prevent or restrict prostitution, pornography, assisted suicide, euthanasia, stem cell research or, in a context close to the Hart-Devlin debate, gay marriage.

Hart’s article, written in the spirit of ‘John Stuart Mill and other latter day liberals,’ was published in 1967 in the wake of his debate with Lord Devlin (in Devlin’s *The*

Enforcement of Morals (Devlin 1967) and his own *Law, Liberty and Morality* (Hart 1963). The debate centered on the issue of whether homosexual acts between consenting adults in private should cease to be a crime (as recommended by the Wolfenden Report in 1957; a recommendation subsequently enacted into legislation). In his article, Hart takes up what he calls the *disintegration thesis* which he sees as forming a central part of Devlin's case justifying the legal enforcement of morality. The thesis essentially is that there is 'disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration.' (Devlin 1965: 13) Devlin's view was that 'the suppression of vice is as much the law's business as the suppression of subversive activities.' (Hart 1963: 16) This implies that it is appropriate to criminalize conduct considered 'immoral' even if such conduct does not directly harm anybody (i.e. it is a so-called 'harmless' wrong).

In the latter part of his article Hart discusses what he takes to be Durkheim's version of this thesis because Durkheim's variant of it is 'relatively clear and briefly expressed, and is also specifically connected with the topic of the enforcement of morality by the criminal law.' (Hart 1967:5) Hart offers what he calls a 'thumbnail sketch of Durkheim's theory' which 'presents its essentials.' (7) Hart's sketch summarizes the differences between mechanical and organic solidarity and Durkheim's argument for punishment as 'a passionate reaction of graduated intensity to offences against the collective conscience.' (7) He then notes two complexities. First, Hart observes, Durkheim allows for change in the following way: his theory

does not mean that it is necessary to conserve a penal rule because it once corresponded to the collective sentiments, but only if the sentiment is still 'living and energetic.' If it has disappeared or enfeebled, nothing is worse than to keep it artificially alive by the law.

Thus 'we must,' says Hart, be able to distinguish 'natural or nonmalignant change in social morality' from 'a malignant form of change from which society is to be protected.' And secondly, he stresses that (unlike Devlin) Durkheim sees punishment as sustaining

the common morality, not mainly by repressing the immoral conduct, but principally by giving satisfactory vent to a sense of outrage because if the vent were closed the common conscience would 'lose its energy' and the cohesive morality would weaken. (7-8)

In order to understand why Hart invokes the disintegration thesis and Durkheim in the debate we need to understand his overall scheme of argumentation. Devlin appears to argue that sexually permissive behavior, even when entirely private conduct, will contribute to social disintegration by attacking the cohesive morality. His opponent Hart seeks to establish that instead of contributing to social disintegration such permissiveness might make it easier for men to submit to restraints on violence which are essential for social life. Devlin, however, was rightly understood by Hart to claim that morality is a seamless web: he evidently thought that 'with permissiveness in the area formally covered by restrictive sexual morality, there would come increases in violence and dishonesty and a general lapse of those restraints which are essential for any form of social life.' (13) If, 'common morality' gives way to moral pluralism

once covered by a sexual morality which has decayed through the flouting of its restrictions, the thesis to be tested would presumably be that where moral pluralism develops in this way quarrels over the differences generated by divergent moralities must eventually destroy the minimal forms of restraints necessary for social cohesion.

To this Hart offers the counter-thesis that

plural moralities in the conditions of modern large scale societies might perfectly well be mutually tolerant. To many indeed it might seem the more cogent of the two, and that over wide areas of modern life, sometimes hiding behind lip-service to an older common morality, there actually are divergent moralities living in peace. (13)

The disintegration thesis derives from a conception of a moral core which cements society but itself changes over time. Once the core is not regulated by law, society may disintegrate (or in a softer version, lapse into disorder). Hart attacks Devlin by first

questioning whether the disintegration thesis can be rendered empirically testable. He asks Devlin to either provide empirical evidence for the disintegration thesis or admit that the claim that a common morality is necessary for the continued existence of society is a disguised tautology relying on a definitional truth, i.e., identifying society with its shared morality. In his article Hart goes on to argue that if it is not an empirical claim (which to be plausible must be supported by evidence), then the disintegration thesis simply collapses into either of two other theses. One is the *classical thesis*, found in Plato and Aristotle, that the law be used to punish vice and promote moral virtue, where these are given by a uniquely true or correct set of principles, accessed through reason or revelation. The other is the *conservative thesis* that ‘society has a right to enforce its morality by law because the majority have a right to follow their own moral convictions that their moral environment is a thing of value to be defended from change.’ (4)

If, Hart argues, the disintegration thesis is indeed to be an empirical one, then, first, we need to be more precise about which parts of a society’s moral code (assuming—a large assumption that Durkheim never questioned—that it has one overall moral code) are essential for the existence of a society and which are not. He offers two suggestions: either ‘those restraints and prohibitions that are essential to the existence of any society of human beings whatever;’ or, for any given society, the ‘central core of rules or principles which constitute’ its ‘pervasive and distinctive style of life.’ (9-10) He finds the first view in neither Devlin nor Durkheim, who are both of them concerned with moral rules that vary from society to society. And he finds traces of the second view in Devlin but not in Durkheim.

Finally, he offers some thoughts about what would be needed to make this second idea empirically testable. You would, of course, need criteria to establish the existence of a single recognized morality and its central core. You would also need an empirically testable account of what would constitute disintegration. And then Hart makes two further suggestions. First, that we could ‘examine societies which have disintegrated and enquire whether their disintegration was preceded by a malignant change in their common morality.’ (11) Apart from the massive difficulties of establishing the causal

connections in question and establishing the relevant macroscopic generalizations across cases, he makes the acute observation that in Durkheim's case there is the specific difficulty of generalizing from 'simpler' to modern industrial societies and, in particular the question of 'whether he means that in advanced societies characterized by the division of labor the mechanical solidarity which would still be reflected in its criminal law could be disregarded or not.' (12)

Most interesting of all, he concludes with his second suggestion: that we could look for social-psychological evidence that would flow from two alternatives to the maintenance of a common morality. The first alternative is *permissiveness* in the area previously covered by the common morality. The second alternative to the maintenance of a common morality is *moral pluralism*, involving divergent sub-moralities in relation to the same area of conduct.

In sum, Hart's conclusion is one of skepticism with regard to the disintegration thesis. His focus, in the context of the Hart-Devlin debate, is on sexual, and more specifically still, homosexual morals, and he straightforwardly embraces the counter-thesis that permissiveness and moral pluralism in this domain are likely to be compatible with social integration.

Durkheim on Law and Morality

Hart's sketch of the disintegration thesis and how Durkheim fits into it is, in essence, a *caricature* of Durkheim's work on law and morality. But the question is whether it is a good or successful caricature—a successful caricature being indeed a simplified representation that captures, through exaggeration, the essentials of what it represents. It is our contention that far from being a good representation, Hart's version is a distortion and mis-application of Durkheim's views on the legal regulation of morality.

What Durkheim had to say about law and morality and the role of law in enforcing morality is, in the first place, more complex and more interesting than the simplistic

version presented by Hart. Secondly, as we shall argue, it is misleading to characterize Durkheim as an ‘integrationist,’ in Hart’s sense: that is, as one who claims that without the legal enforcement of the morals prevailing in society, social integration is weakened and will eventually collapse. In his search for a clear account of the disintegration thesis, Hart misleadingly selected only a few of Durkheim’s early writings and, moreover, did so out of the context of his entire work. We will first outline Durkheim’s views on morality and law before assessing these in the light of Hart’s account and observations.

Morality was for Durkheim, as Davy remarked, ‘the center and end of his work.’ (Davy 1924: 71) His conception of the moral domain was extremely broad: it ranges from the fundamental to the apparently trivial and, employing the French word *moeurs*, invokes no distinction between morality and custom¹. All moral rules, as Cotterell writes, ‘in one way or another, are constraining social facts. All have sociological significance as sanctioned rules of conduct.’ (Cotterell 1999: 60). Law is an important part of the empirical project for studying morality. Durkheim is aware that studying legal rules gives an insight only into certain aspects of morality but he chooses to study laws as these are empirically most visible. While legal rules constitute a subset of moral rules: law and morality are too intimately related to be radically separated.

¹ This is true of Durkheim’s writings about morality until the very end, when he did draw this distinction in the draft of the introduction to the book he proposed to write on *La Morale*. He envisaged this proposed work as recasting anew his work on morality. He was working on the introduction on his deathbed and one of the drafts contains the following passage:

Le mot de *moeurs* indiquant, dans notre pensée, la morale qui est effectivement observée par les hommes à chaque moment de l’histoire, celle qui a pour elle l’autorité de la tradition, par opposition à celle que le moraliste conçoit comme la morale de l’avenir. Mais l’expression n’est pas sans ambiguïté et, en fait, a donné lieu à des équivoques. Sans doute, la morale du temps se retrouve dans les moeurs, mais dégradée, mise à la portée de la médiocrité humaine. Ce qu’ils traduisent, c’est la façon dont l’homme moyen applique les règles de la morale, et il ne les applique jamais sans compromission ni reticence. Les mobiles auxquels il obéit sont mêlés : il en est de nobles et de purs, mais il en est aussi de vulgaires et de bas. Au contraire, la science dont nous esquissons le plan, se propose d’atteindre les preceptes moraux, dans leur pureté et leur impersonnalité. Elle a pour objet la morale elle-même, la morale idéale, planant au-dessus des actes humains, non les déformations qu’elle subit en s’incarnant dans les pratiques courantes qui ne peuvent la traduire qu’imparfaitement. (1920/1975: 330).

Durkheim’s notion here of ‘la morale elle-même, la morale idéale, planant au-dessus des actes humains’ is meant to draw the distinction between social ideals and social practices that fail to live up to them—a distinction important, as we shall see below, for his account of the ‘religion of individualism.’

The law and morality are not distinct domains. Legal rules are not distinguished from moral rules by their character: for example by their content or form or by the nature of the behavior they regulate, but rather by the way that the sanctions are administered. Moral sanctions are *diffuse* – ‘administered by everybody without distinction.’ Legal sanctions are, by contrast, *organized*—‘applied only through the medium of a definite body,’ ‘specially authorized representatives’ charged with the task of enforcement.’ (Cotterell 1999: 60) Law involves some institutionalized means for publicly declaring and enforcing norms. The organization and institutionalization of law renders it highly visible. Law “is nothing more than the most stable and precise element in this very organization....Thus we may be sure to find reflected in the law all the essential varieties of social solidarity.” Durkheim seeks ways to operationalize “social solidarity”. He says “....we must therefore substitute for this internal datum, which escapes us, an external one which symbolizes it and then study the former through the latter. That visible symbol is the law.” (Durkheim 1902/1984: 24).

In his search for the most visible external indicators of morality Durkheim focused on the law’s targeted effects evoked when laws are violated, namely *sanctions*. Distinguishing two broad types of sanction, he developed his idea of successive types of solidarity—mechanical and organic—sustained and revealed by distinctive types of law, namely: repressive law, focusing on punishing the offender, and restitutory law, focusing not on the infliction of suffering but rather on restoring the *status quo ante*, making the victim ‘whole’ again, as in contract law, administrative law and civil law generally. This was presented in *The Division of Labor* as the thesis that law is an index of the two kinds of solidarity, repressive law indicating the extent of mechanical solidarity and restitutory law the extent of organic solidarity. Hart, in passing, criticizes this idea, which we can call the *index thesis*, as somewhat fantastic, since it ‘opens formidable problems concerning the individuation and countability of legal rules.’ (Hart 1967: 6) Moreover, as Cotterell writes,

Legal provisions may be more or less detailed depending on the intentions or skill of the law creator, the extent to which common understandings governing circumstances in which the law is to apply can be assumed, and prevailing

attitudes to interpretation of law. He fails to note that repressive and restitutive sanctions may often be mixed and that their relation to particular rules may be indirect and complex. In short, the index thesis, as he explains it, seems to show the worst aspects of the positivist orientations of his sociology. (Cotterell 1999: 33)

Since we agree with Hart and Cotterell, we will not pursue the discussion of the index thesis any further. Similarly, we shall leave aside discussion of the coherence and plausibility of this way of conceiving of legal and social evolution. It involved making the awkward claim that 'rules where sanctions are restitutory either constitute no part at all of the collective consciousness, or subsist in it in only a weak state. Repressive law corresponds to what is the heart and centre of the common consciousness.' (Durkheim 1902/1984:69). It was to the latter that Durkheim turned his attention, while continuing in his more mature works to develop an evolutionary understanding of law based on an underlying change of morality, although he no longer used the kind of strictly binary and oppositional terms he used before. The penal aspect of law becomes more humane over time and becomes a means of strengthening the *conscience collective* by protecting the sanctity of the Individual. Later Durkheim refined this theory further by rejecting a rigid evolutionary trajectory for the change in nature of laws. But his work on the sanctity of the Individual suggests that he continued to think that a given society's law sustains and reveals its morality—that 'reflected in the law' are 'all the essential varieties of social solidarity' (Durkheim 1902/1984: 25) and, in particular, that modern law comes to enshrine a progressive idea of individualism.

Three ideas are fundamental to Durkheim's conception of morality. The first is that moral behavior is *disinterested*: that it is motivated by concerns other than an individual's self-interest. Morality, he wrote, 'begins at the same point at which disinterestedness and devotion also begin.' (Durkheim 1924/1974: 52) The second is that moral disinterestedness always has a social origin: that we think and act morally in ways shaped by 'society.' Thus 'disinterestedness becomes meaningful only when its object has a higher moral value than we have as individuals. In the world of experience I know of

only one being that possesses a richer and more complex reality than our own, and that is the collective being'. (Durkheim 1924/1974: 52). And the third is that that origin—what counts as the collectivity or 'society'—is a moving target. It is never precisely identified: its scope can vary from the narrow circle of the nuclear family to the all-encompassing wider society of the nation state. He never doubted that, although our moral life has multiple sources, the latter was the main shaping source of modern morality. He also assumed that it was unitary, issuing in a single and unifying moral system or code for any given such society, though he speculated that it (and in particular the French moral code) incorporated elements of an emergent trans-national and incipiently universal morality.

Now, given this conception of morality, his account of organic solidarity in *The Division of Labor* posed a serious problem. For, according to that account, as the shared beliefs, understandings and sentiments of the *conscience commune* recede, life, as Cotterell puts it, is 'varied and the role and positions that people occupy become increasingly specialized or distinct' so that 'the dominant form of solidarity in complex societies...arises through the effective integration of different social groups, reflecting different life experiences and values.' (Cotterell 1999: 28). The principal mechanism for achieving this integration, or co-ordination, is through contracts between individuals or collectivities, between workers and employers, professionals and their clients, between companies and generally between sellers and buyers of goods and services, each pursuing their respective interests. But this account of organic solidarity as interdependence of functions is purely instrumental: it lacks a moral dimension—in Durkheim's sense of 'moral' (hence his acknowledgement that the rules that regulate it 'do not form part of the common consciousness'). Contracts create and maintain reciprocal obligations between interested parties; but they leave no place for disinterestedness. They do not render the contracting partners any less interest-driven. Consider, for example, the labor contract. In *The Division of Labor* (Durkheim 1902/1984) organic solidarity, when functioning 'normally', is supposed to render capital-labor relations more just. There is, however, he writes in the chapter on 'The Forced Division of Labor', pervasive inequality and exploitation and thus 'unjust contracts' in advanced industrial societies. Where, then, does the impulse towards greater justice come from? His difficulty in answering this is

what led him from 1895 onwards to revise his view of the shrinking *conscience collective* and to turn his attention to the changing content and character of shared beliefs and sentiments—he now used the terminology of *représentations collectives*—and thus to the distinctive nature of the evolving morality of modern industrial societies. This posits an evolution realizing progressive moral principles.

The Religion of Individualism

The key text for examining this is his remarkable article ‘Individualism and the Intellectuals.’ Alongside this article, Durkheim also published at this time two much shorter pieces, on anti-semitism and militarism, that supplement its concern: namely, how to restore social solidarity in a fractured modern society

In ‘Individualism and the Intellectuals’ (Durkheim 1898/1973) Durkheim addresses the anti-Dreyfusard attack on intellectuals who ‘obstinately refuse to bend their logic before the word of an army general’ in the name of ‘individualism.’ To Ferdinand Brunetière’s argument that the unity, indeed the very survival, of the French nation, was being threatened by their campaign for one individual’s rights, Durkheim countered that it was individualism that was ‘henceforth the only system of beliefs which could ensure the moral unity of the country.’ (Durkheim 1898/1973: 50). Durkheim’s article is high-octane, written in the heat of political battle, but it articulates very clearly the thinking about law and morality in modern societies that pervades his post-1895 writings. Its argument can be briefly summarized.

Modern industrial society, Durkheim argued, like all societies, needs a religion, in the sense of ‘a system of collective beliefs and practices that have special authority.’ Individualism is such a religion, deriving from Christianity, in which the human person becomes its sacred focus: it has ‘penetrated our institutions and our customs’ and become ‘part of our whole life’ (47), so that it was the anti-Dreyfusards who, by attacking it, were threatening the nation with moral anarchy.

Durkheim drew a sharp contrast between ‘the narrow utilitarianism and utilitarian egoism of Spencer and the economists’ reducing ‘society to nothing more than a vast apparatus of production and exchange’ and the individualism he was seeking to describe. This was the individualism of ‘Kant and Rousseau, that of the *spiritualists*, that which the Declaration of the Rights of Man, sought, more or less successfully, to translate into formulae, that which is currently taught in our schools and which has become the basis of our moral catechism.’ (45) It is egalitarian, since ‘the only ways of acting that are moral are those which are fitting for all men equally, that is to say, which are implied in the notion of man in general.’² It was not ‘the glorification of the self but of the individual in general.’ Thus

this human person (*personne humaine*), the definition of which is like the touchstone, which distinguishes good from evil, is considered sacred in the ritual sense of the word. It partakes of the transcendent majesty that churches of all time lend to their gods; it is conceived of as being invested with that mysterious property which creates a void about sacred things, which removes them from vulgar contacts and withdraws them from common circulation. And the respect which is given it comes precisely from this source. Whoever makes an attempt on a man’s life, on a man’s liberty, on a man’s honor, inspires in us a feeling of horror analogous in every way to that which the believer experiences when he sees his idol profaned. Such an ethic is therefore not simply a hygienic discipline or a prudent economy of existence; it is a religion in which man is at once the worshipper and the god. (46)

Individualism thus understood has as its motive force ‘not egoism but sympathy for all that is human, a wider pity for all sufferings, for all human miseries, a more ardent desire

² When Durkheim writes of ‘the individual’ he means, not actual, empirical individuals, but the shared idea or *representation collective* of the individual. Louis Dumont has sought to clarify this Durkheimian distinction as follows:

When we speak of ‘individuals’ we refer to two things at the same time: an object external to us and a value...on the one hand the *empirical* subject that speaks, thinks and wills...on the other the *moral* being that is independent, autonomous and thus essentially non-social....Seen from this point of view, there are two kinds of society. There where the individual is the highest value, I speak of individualism; in the opposite case, where value rests in society as a whole, I speak of holism. (Dumont 1983: 37).

to combat and alleviate them, a greater thirst for justice.’ It is ‘cult of man’ that has ‘for its first dogma the autonomy of reason’ and for its first rite ‘freedom of thought.’ It is,, moreover, henceforth the only system of beliefs which can ensure the moral unity of the country. For with ever-greater social complexity and diversity, traditions and practices adapt to social change by become ever more plastic and unstable: social and cultural differentiation has developed almost to a point at which the members of a single society retain only their humanity in common. Society was evolving, he wrote, towards a state in which ‘the members of a single group will have nothing in common among themselves except their humanity, except the constitutive attributes of the human person in general.’ Thus the ‘idea of the human person,’ given different emphases in accordance with the diversity of national temperaments, is ‘the only idea which would be retained, unalterable and impersonal, above the changing torrents of individual opinions.’ (51-52) This Durkheimian approach is very much the reasoning offered today for a universal human rights law project.

In Durkheim’s distinctive approach to morality and the law: outrages against the human person, he writes, against the rights of the individual

cannot remain unpunished without compromising the national existence. Indeed, it is impossible for them to occur freely without weakening the feelings they transgress against. And since these feelings are the only ones we hold in common, they cannot be weakened without disturbing the cohesion of society. A religion which tolerates sacrilege abdicates all dominion over men’s minds (*consciences*). The religion of the individual therefore cannot let itself be scoffed at without resistance, under penalty of undermining its authority. And since it is the only tie which binds us all to each other, such a weakness cannot exist without a beginning of social dissolution. Thus, the individualist who defends the rights of the individual defends alt the same time the vital interests of society, for he prevents the criminal impoverishment of that last reserve of collective ideas and feelings which is the very soul of the nation. (53-4)

And it is on these grounds that, in his short contemporary article about anti-Semitism, Durkheim called for repression of ‘all incitement of hatred of citizens against one

another.’ Such punishment, he recognized, would not by itself ‘change people’s minds,’ but it could strengthen and reinvigorate public revulsion against such incitement.

In *Suicide* (first published in 1897) Durkheim offers a similar reason for why legal and other kinds of intervention are required in order to prevent suicides: the human person—the individual in general—is sacred and has to be preserved. Durkheim connects suicide to the conceptual structure of morality. He observes that by ‘calling the evil of which the abnormal increase in suicides symptomatic of a moral evil, we are far from thinking to reduce it to some superficial ill which may be conjured away by soft words.’ (Durkheim 1897/1951: 387). He distinguishes a greater harm to society from the smaller harm to the individual. Thus,

A man who kills himself, the saying goes, does wrong only to himself and there is no occasion for the intervention of society; for so goes the ancient maxim *Volenti non fit injuria*. This is an error. Society is injured because the sentiment is offended on which its most respected moral maxims today rest, a sentiment [that is] almost the only bond between its members, and which would be weakened if this offence could be committed with impunity. How could this sentiment maintain the least authority if the moral conscience did not protest its violation? From the moment that the human person is and must be considered something sacred, over which neither the individual nor the group has free disposal, any attack upon it must be forbidden. No matter that the guilty person and the victim are one and the same; the social evil springing from the act is not affected merely by the author being the one who suffers. If violent destruction of a human life revolts us as a sacrilege, in itself and generally, we cannot tolerate it under any circumstances. A collective sentiment which yielded so far would soon lose all force.” (337)

From these statements it is clear that Durkheim believes in legal and other kinds of regulation of suicide because of harm to ‘the individual,’ because of the need to protect the sacredness of the Individual as it permeates the collective conscience, rather than because of particular harm to particular, actual empirical individuals. When discussing

the legal prohibition of suicide, Durkheim writes that the harm consists in suicide's subversion of human individuality. Durkheim's evolutionary perspective on why suicide is regulated is that 'Suicide is thought immoral in and for itself, whoever they may be who participate in it. Thus, with the progress of history, the prohibition, instead of being relaxed, only becomes more strict.'(333). Earlier a person who commits suicide was viewed as an 'unscrupulous debtor to society.' Now the act of suicide is treated as a graver offence because

today he has acquired a kind of dignity which places him above himself as well as above society. So long as his conduct has not caused him to forfeit the title of man, he seems to us to share in some degree in that quality *sui generis* ascribed by every religion to its gods which renders them inviolable by everything moral. He has become tinged with religious value; man has become a god for men.

Therefore any attempt against his life suggests sacrilege. Suicide is such an attempt. No matter who strikes the blow, it causes scandal by violation of the sacrosanct quality within us which we must respect in ourselves as well as in others. Hence, suicide is rebuked for derogating from this cult of human personality on which all our morality rests." (334).

It is this cult of the Individual which is a feature of modern morality and which Durkheim considers needs protection. In the case of suicide, such protection is afforded not just by laws, but also by religious traditions and popular sentiment. But Durkheim sees such protection taking multiple forms in various contexts. In the economic and industrial sphere, he so regarded policies favoring social justice and reducing exploitation. His conception of socialism was that it would alleviate 'the functioning of the social machine, still so harsh to individuals, to place within their reach all possible means of developing their abilities without hindrance, to work finally to make a reality of the famous precept: "to each according to his labor".' (Durkheim 1924/1974: 56) And in the sphere of education he saw, and sought through his teaching to encourage, the development of what he called individualism, through moral education and enlightened pedagogy in the schools (see Durkheim 1925/1961). In that discussion punishment—in the form of class discipline—reappears, but alongside a raft of other methods and practices. And it is

relevant to note that Hart, to whose discussion we now return, limits his account of Durkheim's propounding of the disintegration thesis to his early writings on punishment.

Durkheim and the Distintegration Thesis

Is Hart's account of Durkheim version a successful caricature? Does it identify its essential features? Durkheim's version in the essay on 'Individuals and Intellectuals' is, as we have suggested, highly polemical and written at white heat. But that essay does not stand on its own. It is consistent with his other works such as *Suicide*, *Professional Ethics and Civic Morals* and *Moral Education* and it builds upon and, as we have seen, significantly modifies, his early theorizing in *The Division of Labor*. We have sought to show that Hart's sketch of Durkheim's account of law, crime and punishment—which supposedly offered a 'relatively clear and briefly expressed' version of Devlin's view—captures neither its letter nor its spirit.

But now we must ask: is Hart's correct to characterize Durkheim as a disintegrationist? It is our contention that this characterization is seriously misleading. Durkheim is not a disintegrationist in the Hartian sense, in the first place, because he does not claim that a disintegration of society simply follows if legal regulations enforced by punishment are removed. He does maintain that social integration is, in part, sustained by a kind of moral cement and that the latter is, in part, created and maintained by the enforcement of the law. But there are, taking his various writings together, a range of factors contributing to social integration of which legal regulation (through punishment) is but one of the means of rendering that regulation effective. The framework of *Suicide*, for examples, rests on the multiple layers of integration and regulation of a person within society (religious, occupational, familial, and political). The weakening of any (or some) of these layers of protection would not by themselves cause a disintegration of society. *Suicide* can be viewed as a work that demonstrates empirically that in many circumstances disorder does not accompany the weakening of regulative norms and integrative institutions. After all, because of the multiple layers of integration, even when several changes take place,

suicide still remains a deviant act. Anomie and egoism are entirely compatible with, even essential accompaniments of, the social order in modern industrial societies.

What Durkheim has introduced is a theory of legal and, as set out explicitly in *Suicide*, other forms of social regulation, that combine to provide some protection from the social causes of social disintegration. We can call this a *prophylaxis thesis*, according to which the criminal law can provide protection against the socially disintegrative consequences of the violation of core norms central to a society's morality. (This label is appealing, given Durkheim's tendency to use diagnostic terminology in his social scientific work). Contrary to Hart's contention that Durkheim's views on the legal regulation of morality cannot be empirically tested, we submit that a plausible, empirically sustainable argument can be extracted from his work in *Suicide*; indeed, empirical verifiability was the core project of that work, in which Durkheim collected data on suicide rates in order to test his theory. While categorizing different kinds of suicide (thus viewing the most intimate and individual of acts as a social fact), Durkheim also reasons why suicide needs regulation. The sanctity of the Individual is distinct from but not independent of the way society deals with the suicides of particular individuals. Moreover, it needs to be protected, just as particular individuals need protection against the 'suicidogenic currents' of anomie and egoism. For example, Durkheim's data show that married men are less likely to commit suicide than unmarried men. This indicates that married men are more 'protected' against suicide. However, this does not mean that the breakdown of a marriage is (by itself) a push towards suicide. Similarly, a degree of protection by the enforcement of regulation (legal or otherwise) is a particular factor (amongst many others) that makes a certain event less probable by its very presence. This does not mean that if a particular protection is removed, society collapses (or disintegrates); it just becomes more vulnerable (or less protected). This is, in short, a probabilistic theory that links punishment of moral violations to effects on social integration.

But, we must now ask, 'integration of what?' What did Durkheim understand social integration to be? Hart evidently thought that Durkheim's version fails to pass the empirical tests he proposed for making the disintegration thesis empirical and so

collapses into either the classical or the conservative thesis. He claimed that Durkheim offers us no account of what the ‘central core’ of a society’s morality might be, though he found traces of such an account in Devlin. Devlin’s answer, however, was simply to assume this to be the morality that prevails at any given time, referring to the supposed views of ‘the reasonable man...the man in the Clapham omnibus’ (Devlin 1965:15).. Nor, Hart claimed, does Durkheim offer us a way of distinguishing malignant from non-malignant moral change.

Durkheim, however, explicitly addresses these very questions. In essence, he lays out a Kantian universal human rights perspective in which a progressively re-interpreted conception of the Individual lies at the core of what constitutes the ‘*conscience collective*.’ When Dreyfus is denied the right to a fair trial it is ‘the *conscience collective*’ that is violated. More generally, Durkheim’s idea is that, in modern differentiated and plural societies, there is a range of increasingly humane core moral norms which progressively instantiate the cult of the Individual or sacralization of the person (see Joas 2008b). These are evident in various spheres of social life, both private and public. When violated, as they often are, they need to be reaffirmed by being enforced. Failing to do so can, under certain conditions, have the consequence that social practices and relationships become less humane. We claim, moreover, that Durkheim’s version of this idea is potentially empirical: that, when suitably elaborated and specified, it can meet Hart’s tests for being an empirical thesis. In particular, we think that there are in Durkheim implicit answers to the questions: what constitutes the core, what does disintegration consist of, and what distinguishes malignant from non-malignant change.

We shall come to these answers, but first we should note the gaps and weaknesses in Durkheim’s argument as set out in ‘Individualism and the Intellectuals’ and elsewhere. For one thing, as already observed, that article is highly polemical and so we should discount phrases like ‘putting national existence into jeopardy’ and the like, and look for a more precise, less inflated account of what constitutes disintegration. Second, we should note the obvious inadequacies of Durkheim’s account of the structure of modern industrial societies and, in particular, of the sources of the complexity and diversity that

renders the so-called ‘religion of individualism’ the sole surviving common link. Durkheim focuses entirely on the division of labor and occupational specialization and leaves it to us to fill in the rest of the picture—with ethnic, religious, regional and other cultural differences, the effects of intra and international migration, and many other factors. And third, the phrases ‘religion of individualism’ and ‘cult of man’ are more rhetorical than analytical, for, as Hans Joas has pointed out,

This ‘religion’ lacks a cult in the sense of special rituals of a genuine church, a community of the faithful. This is not because this individualist ideal has no need of such practical and institutional supports. Durkheim himself had no real answer to the question of which institutions might undergird it...the democratic state and professional associations, revitalized on the model of the guilds...cannot be the last word on this.

We agree with Joas that ‘his solution was overly abstract’ and that we need ‘to grapple far more concretely with existing religious and national traditions and historical experiences, if we wish to do justice to the interplay among state, civil society and values in the history of human rights’ (Joas 2008a: 144).

What, then, are the empirical claims that can be discerned in Durkheim’s argument? What did he think constitutes the ‘moral core’ of ‘advanced societies’ and how did he conceive (or, better, allow us to conceive) of ‘social dissolution? We suggest that the answers to these two questions are interdependent: that the core moral norms are precisely those whose relaxation can weaken the protection of certain ways of acting and thinking. And we suggest that he answers the question: ‘which ways are disintegrative, or malignant?’ by drawing on his evolutionary conception of the progressive humanization of the ‘institutions and customs’ of our societies as they have become ‘more advanced.’

Durkheim worked out this conception in his ‘Two Laws of Penal Evolution’ (Durkheim 1901/1983) in which, incidentally, he offers the fullest and clearest account in his writings of the collective psychological forces underlying the religion of ‘individualism.’ Here he goes beyond the evolutionary thesis of *The Division of Labor*. To cite Joas once more, he had ‘a strong interest in how the role of punitive justice had changed on the way

to modernity.’ (Joas 2008a: 141) In pre-modern societies, sacrilege, blasphemy and regicide were the worst crimes and crimes against the person mattered less. Moreover, not only the evaluation of the gravity of crimes but also of what counts as acceptable punishment has shifted. Thus

[t]orture as a means of producing confessions or as punishment in public is increasingly experienced as incompatible with the dignity of man, including criminals. The whole system of punitive justice changes, becoming more oriented towards imprisonment or resocialization: it undergoes a process of humanization. (Joas 2008a 141)

Durkheim conceived of this humanization as pervading our social mores; and one can develop this idea by exploring all the ways in which it is manifest in a wide variety of social contexts. Joas points to norms of politeness in everyday life, to changes in doctor-patient relations, ‘for example patients’ entitlement to information and to participative management of therapies’ and to the ‘growing public alertness to sexual harassment in general and paedophilia in particular.’ (Joas 2008b: 170) There has undoubtedly been a continuing expansion of the limits of moral concern since the eighteenth century, progressively embracing the mentally ill, the mentally and physically handicapped, and now, increasingly the sufferings of animals. In the course of the twentieth century the open expression of racist, ethnic and caste-based hostility has ceased, in more and more places, to be respectable. In Europe the death penalty has been abolished and elsewhere, such as the United States, its practice has had to be withheld from the public gaze and ‘humanized.’ With the abolition of slavery and successive, increasingly expansive declarations of the ‘rights of man’ and then human rights,’ the logic of humanization has in these and other ways unfolded. Most optimistically, Durkheim thought that such humanization of norms and values was a universal and inevitable accompaniment of advancement toward modernity. Thus he anticipated ‘socialism’ as a way of ‘completing, extending and organizing individualism.’

Specifically, he argued in ‘Two Laws of Penal Evolution’ that the criminal law displayed a long-run tendency for ‘punishments to become milder as one goes from less to more

advanced societies,' not because collective sentiments recede but because 'the sentiments protecting human dignity' are themselves at work in alleviating the harshness of punishments. They 'drive us to punish and to moderate the punishment,' for there is a real and irremediable contradiction in avenging the human dignity offended in the person of the victim by violating it in the person of the criminal. The only way, not of removing the antinomy (for that is strictly insoluble), but of alleviating it, is to alleviate the punishment as much as possible. (Durkheim 1901/1983:126)

Durkheim is thus making two claims here: that there is a causal nexus linking (probabilistically) punishment and the functioning of humane norms; and that the dignity-protecting collective sentiments that explain and justify the norms alleviate the harshness of the punishments which in turn contribute to their continuing strength.

It is an ambitious set of claims. Clearly, for them to be convincing some further questions need to be addressed. First, there needs to be specification of the conditions—economic, social, political and so on—under which these relations hold. We need to know under what conditions we should expect to see a decline in the severity of punishment, on the one hand, and, on the other, when to expect a growth in the strength of 'these sentiments that centre on man, the human being,' promoting a 'means of fulfilling and developing human nature' as 'the supreme object of collective sensibility.' (Durkheim 1950/1957: 112). Durkheim himself took a small step in answering the first of these questions, by suggesting in 'Two Laws' that political democracy is one such condition: according to the first law, the 'intensity' of punishment, or quantity of severe punishments, is greater 'insofar as the central power has an absolute character.' In other words, the 'hypercentralization' of political power and the lack of countervailing power 'regularly organized to moderate it,' render the decline of penal severity less likely. (In failing to exploit this insight, it has been argued, Durkheim missed the chance to develop an account of modern authoritarianism).

Secondly, and importantly, we clearly need a non-rhetorical account, relating to specific contexts, of when norms and laws are properly to be characterized as 'humane,' After all,

referring back to the examples cited at the beginning of this article, people can, in the name of ‘human dignity,’ both attack and defend laws against prostitution, pornography, assisted suicide, euthanasia, stem cell research, gay marriage and also abortion and indeed homosexual practices. Indeed, the language of ‘human rights’ has become a common discourse available to all parties in politically controversial legal cases, so that, for example, both the opponents and the proponents of the wearing of the veil by Muslim women argue for their positions in terms of the women’s human rights. These are indeed formidable difficulties to be addressed but they are not, we believe, insurmountable

Let us suppose these questions resolved. We can then ask: what, following Durkheim’s, or let us say this durkheimian, argument, are the sorts of consequences which can flow from the deregulation or non-regulation of core humane norms? Recall that we can identify them as occupying the core by observing the consequences of their weakening. We can agree with Hart that the weakening of regulation of such norms may consist generally in *permitting* their violation and sometimes in the ensuing development of a *plurality*, or co-existence, of norms that neglect their requirements or indeed contradict and violate them. This makes society potentially more vulnerable to disintegrative consequences.

Hart’s suggestions offer a promising start in helping to identify the relevant disintegrative consequences: namely, ‘increases in violence and dishonesty and a general lapse of those restraints which are essential for any form of social life’ and the rise of ‘quarrels over the differences between divergent moralities’ that threaten to ‘destroy the minimal forms of restraints necessary for social cohesion.’ (Hart 1967: 13) We need, however, to weaken these suggestions, since the mere survival of social cohesion--the mere avoidance of total social breakdown--sets too low an empirical standard that too many situations will satisfy. We should speak instead of losing the protections for ‘restraints essential for any form of *humane* social life’ and ‘the minimum restraints necessary for *humane* social cohesion’, in the sense indicated in the previous paragraphs.

The case of torture

Consider the legal prohibition of torture. What are the consequences, in liberal-democratic societies, constitutional democracies with broadly humane social norms, of rendering the practice of torture legally permissible, in the face of insurgencies abroad and world-wide terrorism? The permission will be indirect (for instance through silent approbation rather than explicit affirmation or else official legal redefinition of what counts as torture), or in the case it is direct, it will be hidden and kept secret from the general public (for example, the memos sanctioning torture prepared by Justice Department lawyers during the Presidency of George W. Bush) and it will of course be extremely difficult both to trace the causal chains and to track the possible effects. But the two major recent examples of periods of such permissiveness in liberal democratic states—France during the Algerian War and the Bush Administration’s ‘War on Terror’—offer comparable case studies for empirical investigation into the question. Anecdotal evidence suggests, for instance, that on the ground in Iraq, the excesses revealed at Abu Ghraib were far from abnormal: that comparable acts of cruelty and humiliation were meted out across the country, out of sight, in the backs of humvees and in other hidden places.

The durkheimian hypothesis suggests that the legal prohibition of torture and its resolute punishment when exposed can contribute to protecting society from the potential unraveling of humane social bonds (see Lukes 2005a). Of course, torture is already in most countries prohibited by the criminal law and that prohibition co-exists with and is reinforced by the widely diffused message, in mass media and in educational and religious contexts, that it is beyond the civilized pale. It is significant that the Bush administration’s efforts to render its practice permissible required resorting to circumlocutions such as ‘enhanced interrogation methods’ and excluding invented categories of persons such as ‘enemy combatants’ from constitutional protection. These ploys lend credence to Durkheim’s suggestion that torture violates a widely shared collective sentiment: that it is viewed as degrading the Individual. The upshot of the exposure of torture in the United States, and in particular the Abu Ghraib photographs, has been quarrels over what constitutes torture, whether national security interests can

ever justify it and how far constitutional protections extend, as well as anxiety and concern within the legal community. The durkheimian hypothesis is that the criminal condemnation of acts of torture was and is needed to stem these quarrels and perhaps wider social tensions (over immigrants versus citizens, racial profiling issues, etc.) resulting from them.

The hypothesis raises, of course, a host of further questions. Criminal condemnation of whom? How high up the chain of command? To what extent are such alleged unraveling effects reversible by subsequent exposure and punishment? And, more troublingly, to what extent is the alleged protective effect of legal enforcement itself dependent upon the state of public opinion that is in turn manipulable through the framing of issues and the inducing of fear and insecurity? To what extent is it true that the idea of the sacredness of the Individual as expressed, for instance, by a general revulsion against the cruelty of torture, has ‘penetrated our institutions and our customs’ and how deep does such penetration go? In the United States today some have proposed a ‘Truth Commission’ as a necessary preparation for the eventual possible punishment of those who rendered the torturing permissible. But do we have good grounds for supposing that the more people know about what went on in the torture chambers and in the decision-making chambers, the greater will be their revulsion against torture? Perhaps more knowledge and understanding through greater transparency would lead to more quarreling over what is morally required. Nonetheless, as we have suggested, the response to the claims of torture of detainees in Abu Ghraib and Guantanamo indicates that the sacredness of the Individual is present conceptually in modern western societies. Military personnel protested against the non-application of the Geneva Conventions to these detainees and there was widespread outrage at torture of the detainees during interrogations.

The mobilization of lawyers for the detainees in Guantanamo is another instance where this is exemplified. Lawyers across the spectrum of political beliefs (left to liberal to libertarian and conservative) and playing quite different professional roles (solo practitioner, NGO lawyer, law firm counsel) took up habeas petitions on behalf of detainees from divergent cultures. Sometimes they did not even speak the languages of

their clients but represented them because of their faith in the principle that every individual should have access to justice. Detention without trial was just unimaginable to these lawyers, who could identify with their clients on the basis of common humanity and became their voice for a wider world.

An American military defense lawyer, Lieutenant Colonel David Frakt, argued a case before a military commission on behalf of a Guantanamo detainee named Mohammed Jawad. He made an impassioned appeal to human rights before the Military Commission in his closing argument for a pre-trial dismissal in this case on grounds of torture. This closing argument was subsequently published in the *Harvard Human Rights Journal*. In it he expresses the military lawyer's commitment to his client and to his professional role, but also, and unmistakably, commitment to what Durkheim meant by the sacredness of the Individual.

..... at the time that I drafted the argument, I thought that Mohammed would be in the courtroom to hear it. The argument was really for him. I wanted him to know that I really did care about him, and that I would fight for him without regard to the personal consequences for my military career. I also knew that there would be several human rights observers from various NGOs present, including Human Rights Watch, Human Rights First, Amnesty International, and the ACLU. I knew that many of these observers still harbored doubts about whether military defense counsel would be willing to be as aggressive and zealous in defending detainees as would a civilian defense counsel.....I did not want to deliver the typical motion argument, focusing on the specific facts of the case and the relevant legal precedents. I felt I had already adequately briefed the court on the facts and law. Rather, I wanted to put the torture of Mohammed Jawad into the larger context of the Global War on Terror and the extreme lawlessness that characterized the administration's response to the perceived threat of terrorism. What I had learned about the treatment of the detainees shamed me deeply. Conscious that the world would be watching and judging the commissions, I wanted to prove that someone in the U.S. military was willing to stand up for real American values and the Constitution. (Frakt 2009)

Conclusion

Hart criticized Durkheim for offering us a simplistic picture of society unified around a common morality and for claiming that without legal enforcement of its morals through the criminal law, there would be moral and thus social disintegration. Hart saw this ‘disintegration thesis’ either as empirically unprovable or else, when rendered empirical, as likely to be false. As we have seen, however, Durkheim’s claims are less sweeping, more complex and more interesting. What we have called his ‘prophylaxis thesis’ consists in the claim that the legal enforcement of morals provides protection against disintegration only in the context of a wide range of integrative factors. We further argued that the integration and disintegration in question refer to the effects of core moral norms distinctive of modernizing societies that embody respect for the Individual or human person as such, which, in the absence of enforcement through the criminal law, are in danger of losing their grip. We concluded by adducing one telling example—the practice of torture—where it is plausible to claim that criminal sanctions can serve as a protection against a kind of moral unraveling: where, in short, defining certain activities as criminal and punishing them accordingly, amongst other measures, may make a significant contribution to the survival and further development of humane norms across the social order.

Durkheim can, of course, be criticized for his use of a very broad brush in painting his pictures both of the evolution of law and of the development of individualism. This latter is far from a universal phenomenon and only very partially effective in shaping behavior even in Western industrialized societies. In the US today there is, for example, not even a consensus about the closure of the Guantanamo base. His work could further be criticized (though we reject the criticism) for promoting one very ‘Western’ version of moral universalism, and thus being a kind of cultural imperialism. It can also be charged with being too committed to a unilinear temporal evolutionary trajectory. Nevertheless, there is something compelling about his notion that what he called ‘individualism’—a set of

principles centering on the idea of the sacredness of the human person—has ‘penetrated our institutions and our customs’ and become ‘part of our whole life.’ There is, of course, room for endless debate over what political and economic policies and social practices these principles allow and exclude, and yet there are some fixed points of agreement. Slavery is excluded; and human rights are proclaimed (if differently interpreted) as binding everywhere. Some principles—such as protecting minorities from majorities in a democracy, non-arbitrariness, fair procedure and the umbrella principle of the rule of law, have become part of the modern moral framework. These may be challenged in practice but hardly so in principle. Racism, too, despite its survival in countless forms in modern societies, is no longer publicly defensible.

It is striking that Durkheim’s writings about individualism were penned at a time of heightened persecution of the Jewish minority in France. Both the essays on individualism and the intellectuals and on anti-Semitism contain practical suggestions on how to combat racial prejudice. Durkheim viewed anti-Semitism as a thermometer for measuring the pathology of society. He recognized that punishment for incitement was not going to change people’s minds by itself, but he argued that it would strengthen and reinvigorate public revulsion for such behavior. Opponents of racism must condemn it in both theory and practice, and the government had to take responsibility for enlightening the masses. Durkheim viewed this moral education as a means of repairing social disorder.

These suggestions and call to action are, of course, applicable to other social prejudices than the racial and ethnic varieties. In particular, the anti-Semitism Durkheim combated is a prejudice in many ways analogous to the homophobia faced by minority gays in Britain in the 1950s. Certainly, the subsequent decriminalization of gay sex and the rendering illegal of discrimination in employment on grounds of sexual orientation fully bear out Hart’s eloquently argued liberal case against Devlin, and, in particular, his claim that social solidarity would be compatible with permissiveness and pluralism. When Hart responded to Devlin’s case for the legal enforcement of morals, the time had finally come in Britain to treat homosexuals as human persons rather than as a persecuted minority.

What is hard to doubt is that in that debate, Durkheim would have sided with Hart against Devlin.

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