# TESTING DURKHEIM: SOME THEORETICAL CONSIDERATIONS

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Empirical tests of Durkheim's legal theories can neither confirm nor refute their central hypotheses. Rather than serving to substantiate or refute theoretical propositions, empirical evidence is best conceptualized as providing for the specification and elaboration of a research program. In the case of Durkheim's legal theories, the programmatic effort is to use social science to help resolve the major social, moral, and legal tensions characteristic of modern society. In this light, Durkheim's legal theories are viewed as comparative and contextual, containing insights into the relationship between law and the social constitution of morality.

## I. INTRODUCTION

Empirical tests of holistic social theories can only be partial. While the evidence generated by empirical tests may serve as the observational basis for substantiating or refuting particular hypotheses associated with a holistic theory, tests in themselves are unable to assess the relationship between particular hypotheses and their underlying theories. This feature of testing is not a fault, but it is a limitation. Empirical tests are to be faulted and criticized, however, when seemingly disconfirming evidence is used to evaluate a theory apart from an effort to interpret the facts from the perspective of the holistic framework.

The gulf between the concreteness of empirical findings and the explanatory power of theory is itself a problem that requires elaboration and judgment. Indeed, a number of writers have argued that the image of science as an effort to test and disconfirm hypotheses is not only over-simplistic, but also an interpretation which seriously distorts the actual practice of science.[1]

In *The Structure of Scientific Revolutions*, Thomas Kuhn argued that the typical work of scientists is paradigm

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[1] For the background of the debate concerning the role of tests in evaluating theories among philosophers of science, see Sandra G. Harding, editor, *Can Theories be Refuted?: Essays on the Duhem-Quine Thesis* (1976).

maintenance rather than efforts to refute or disprove theories and hypotheses (1970a). According to Kuhn, practitioners of a science are typically engaged in elaborating the paradigm that they have been socialized into by the scientific community through an activity that is analogous to puzzle-solving. Instead of testing the paradigm, scientists set problems for themselves in which a solution is expected both to follow from the theories that are central to the paradigm and accord with examples of previous research. Given this tendency to accumulate hypotheses and facts within the boundaries of a puzzle-solving tradition, "to rely on testing as the mark of science is to miss what scientists mostly do and, with it, the most characteristic feature of their enterprise" (Kuhn, 1970b: 10). Indeed, anomalies that are generated through research as well as theories that are inconsistent with the dominant theoretical perspective of a paradigm may be held in abeyance for a long period of time, as the main thrust of the scientific community is to continue elaborating in those areas of inquiry where it is still productive.

In addition to the argument that the characterization of science as primarily a process of hypothesis testing does not conform to the way in which scientists typically go about their work, there are further criticisms of the idea that theories can be directly challenged by the evidence provided by tests. As Imre Lakatos has argued, the notion that theories can be overthrown by "hard facts" rests on two fundamental assumptions (1970: 97-100). First is the assumption that there is a firm demarcation between theoretical and factual propositions. Second is the assumption that if a proposition is factual, then it is true. Both of these assumptions are problematic. First, it is not the case that facts can rest their truth claims on pure observation or present themselves in some natural way that is theoretically neutral. Rather, the legitimacy of observation claims ultimately rests on psychological theories of observation and/or theories of instrumentation. Theories are never confronted by pure observational facts. On the contrary, facts themselves must be theoretically justified. Empirical criticisms of theories, then, are actually inconsistencies between theories of observation and explanatory theories—not "facts" and theories. Second, for facts to have some relevance for theoretical criticism, they must be put in propositional form; they must be rendered into theoretically meaningful statements. Thus, facts never appear theoretically unmediated.

While these arguments against simplistic testing suggest that the testing of theories cannot rest on pure facts but

require theoretical judgments, it is nonetheless possible to impose conventions on scientific investigation that make science itself a conventionally rule-governed activity. What cannot be accomplished through reason can be attempted by fiat. But even if science is conventionalized, there are compelling reasons for not restricting science to hypothesis testing.

In this light, Lakatos has maintained that a theory ought not to be considered falsified unless there is an alternative theory that (1) yields excess and novel facts; (2) explains the success of the theory being falsified, including the explanatory success of theory; and (3) corroborates some of the "excess content" of the theory (1970: 116). In this formulation of science, the thrust of scientific criticism is not the refutation of theories by facts, but rather the competition of theories as alternative "research programmes" that, on the one hand, must defend themselves from theoretical and empirical criticism and, on the other hand, must have a positive potential for generating new perspectives on existing empirical evidence and yielding new facts. The conception of the scientific enterprise must go beyond the vision of empirical hypothesis testing (1970: 137):

> Which problems scientists working in powerful research programmes rationally choose, is determined by the positive heuristic of the programme rather than by psychologically worrying (or technologically urgent) anomalies. The anomalies are listed but shoved aside in the hope that they will turn, in due course, into corroborations of the programme.

The effort to go beyond the model of science as hypothesis testing is especially important in the social sciences. The constriction of social science knowledge to that range of facts constructed through empirical procedures proscribes knowledge that is reflective of everyday experience and concerned with issues that emerge from everyday reality.[2] Instead of an effort to critically analyze the actions and meanings of those engaged in the construction of a social world, there is a tendency to rely on procedures that are deemed scientific and neutral to the objects of inquiry. Instead of the progressive growth of knowledge about society, which would require historical and interpretive sensitivity, there is a concern with the perfection of instruments, procedures and the predictability of outcomes. The distance between social science and society grows, and the possibility of studying the actual processes and structure of social life diminishes.

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[2] The criticism of objectivism in the social sciences has been forcefully made by Egon Bittner (1973) and Aaron Cicourel (1964). A leading Neo-Marxian criticism is developed by Jürgen Habermas (1971).

Despite the criticisms and alternative perspectives of science alluded to above, there is a marked tendency in social science to try to disprove general theoretical statements by specific observational statements. Problems with this approach can be best demonstrated by analyzing particular efforts at empirical testing.

In varying degrees, related tests of Durkheim's legal theories conducted by Schwartz and Miller (1964), Wimberley (1973), and Spitzer (1975), either abbreviate or neglect core features of Durkheim's theoretical perspective so that sight of the overall explanatory power of the theory is lost. In particular, features of Durkheim's theory that provide a critical perspective on the development and constitution of modern society are left unattended in the effort to evaluate the theory in empirical terms. In what follows, my purpose is to restore these critical features of Durkheim's theory to their central explanatory position so that a more adequate assessment of his perspective is possible. I will first present a review of these empirical tests and then develop those features of Durkheim's theory that they neglect.

## II. THE TESTS

The research conducted by Schwartz and Miller was not originally designed as a test of Durkheim. Rather, it began as an effort to empirically determine the relationship between legal and societal complexity in an evolutionary perspective. Attention was first drawn to Durkheim because of the relevance of the findings for Durkheim's perspective on restitution.

Schwartz and Miller maintained that their findings gave "support to the belief that an evolutionary sequence occurs in the development of legal institutions" (1964: 168). As the complexity of society increases, so does the complexity of the legal system. In contrast to Durkheim, however, they found restitution to be characteristic of societies that lack "even rudimentary specialization" (1964: 166). Instead of being associated only with societies in which there is a highly developed division of labor, restitution could be found in relatively simple societies. Thus, a central Durkheim thesis regarding the development of legal institutions as society moves from simple

to complex division of labor seemed to be disconfirmed.[3]

The problem of the conceptual adequacy of the Schwartz-Miller study as it relates to confirming or disconfirming Durkheim emerged forcefully in Schwartz's exchange with Baxi (1974). First, Baxi criticized some central operational definitions of the study. By restricting norm enforcement to the specialized agency of the police, for example, Schwartz and Miller have made a specific type of formal organization the criteria for norm enforcement. Just because societies lack these particular formal organizations does not imply that the society lacks norm enforcement. Rather, penal law may be enforced by other agencies that are not observable because of an over-restricted definition. Second, Baxi pointed out that Schwartz and Miller misconstrued the implications of Durkheim's theory of repressive and restitutive law. Durkheim was not making the claim that restitutive law was absent only in simple societies and present only in complex ones, or that repressive law was a feature only of simple societies and not of complex societies. Rather, Durkheim's theory is that repressive law would be dominant in societies characterized by mechanical solidarity and restitutive law would be dominant in societies characterized by organic solidarity. Thus, finding elements of restitutive law in simple societies would not refute Durkheim's theory, since restitutive law and repressive law are not mutually exclusive. Finally, Baxi made the crucial point that the organization of sanctions was not Durkheim's major theoretical problem. Durkheim was concerned not so much with detailing the organizational features of society as with the underlying determinants of organization. The core issue for him was *why* societies are organized in particular ways rather than *how* they are organized.

In his reply to Baxi, Schwartz (1974) essentially reaffirmed the methodological posture of the original Schwartz-Miller study. In the face of conceptual criticism, data was presented to further support the empirical critique of Durkheim, i.e., that the division of labor is a necessary condition for punishment, but not for mediation.

This empirical criticism of Durkheim was continued by Steven Spitzer (1975). Compared to the above studies, Spitzer showed greater sensitivity to the theoretical and conceptual

[3] Howard Wimberley (1973) has extended this research to include the courts as a specialized agency of norm enforcement. His findings tend to support a partial refutation of Durkheim.

underpinnings of Durkheim's hypotheses. While Spitzer placed Durkheim's laws of penal evolution in the context of Durkheim's general perspective on social evolution and the moral constitution of society, the main thrust of his study was to present evidence disconfirming major features of Durkheim's theory of penal evolution.

Specifically, Spitzer argued, in contrast to Durkheim, that simple societies are more likely to be characterized by lenient forms of punishment than are complex societies. Also in contrast to Durkheim, he argued that society and political structures are not independent. While Durkheim considered political institutions to have independent effects on punishment, Spitzer maintained that such independence is illusory, since changes in the political structure are directly rooted in social change. In further disagreement with Durkheim, he stated that "undifferentiated societies are likely to punish infractions more severely, while more developed societies generally reserve extreme punishments for collective crimes" (1975: 629). And finally, "controls involving social and geographic segregation are not represented by incarceration alone, and are not peculiar to advanced societies" (1975: 631).

While the above studies offer partial empirical refutations of Durkheim's hypotheses, Schwartz and Miller have identified a number of methodological limitations that apply to them (1964: 161-163). First, while attempts were made to make the samples as inclusive as possible of societies from different cultural areas and at different stages of technological development, the samples are not representative of the world's societies. Moreover, the societies that were selected had been studied ethnographically and were, therefore, open to anthropologists. Thus, societies in the sample may have different patterns of development in comparison to societies that have not been open to researchers. Moreover, there is no systematic way of determining whether or not some aspects of social organization or culture crucial to understanding the variables under analysis have been unreported. In addition to these problems, the kinds of comparisons that are being made may neglect the effects of rapid transitions within societies as well as the influence of extensive cultural contact.

In addition to these methodological problems, more profound difficulties have been raised by Stanley Udy (1965). He pointed out problems that arise when cross-sectional data are used to test what are essentially developmental

hypotheses. In attempting to make "dynamic conclusions from static data" it is extremely difficult to separate out characteristics along a time dimension. Because there is no way of determining the conditions that have led to a change from time to time, $t_1$ to $t_2$, " . . . no inferences concerning developmental sequences can be made without recourse to dynamic historical data" (1965: 627).

## III. THEORETICAL CONSIDERATIONS

These criticisms of the tests of Durkheim's legal theory illustrate some problems in testing holistic theories. Not only are the procedures through which the evidence is generated faulty, but the problem of conceptual adequacy is raised. The necessity of operationalizing concepts so that they can be subjected to empirical tests does not necessarily serve the purpose of refuting the concepts. Rather, the conceptual simplification required by the evidence may distort main features of the concepts. Reasserting the need for more evidence and greater operational specificity, as Schwartz does, may serve to exacerbate rather than resolve theoretical issues.[4]

If we are to adequately assess a theory, we must view it as a theoretical problem, specifying its internal contradictions as well as the problems for which empirical study is essential.

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[4] Reinhard Bendix (1964: 12-13) has pointed out some of the major problems in comparative studies that stray from the details of historical evidence in the effort to formulate general laws:

> There is a cosmopolitan awareness of the diversity of cultures and great tolerance for the unique qualities of each people. Yet this awareness and tolerance are also associated with a scientific spirit that tends to conceive of complex societies as natural systems with defined limits and invariant laws governing an equilibrating process. As a consequence there is a strong tendency to conceive of a social structure and its change over time as a complex of factors that is divisible into independent and dependent variables. The search is on for the discovery of critical independent variables. . . Ultimately this imagery is derived from the model experiment in which all factors but one are held constant in order to observe the effects that follow when one factor is varied deliberately and by degrees subject to exact measurement. It is readily admitted, of course, that in the social sciences we are far from approximating this model, but hopefully this deficiency will be overcome in time. . .

The following is an example of the difficulties that may result (1964: 388):

> In many European countries the franchise was extended rather slowly, while in many new independent countries universal suffrage has been adopted all at once. Such a difference is ignored where countries are merely ranked at one point in time in terms of the degree to which the franchise has been extended to adult members of their populations. The matter is not necessarily improved by the addition of another index, say that of literacy, because such data—even if it were reliable—would not reveal the level of education attained by the population. More generally, checklists of attributes of modernization are not likely to yield reliable inference, if—without regard to sequence and timing—their several items are interpreted as indices of approximation to the Western model.

The tests of Durkheim's legal theories discussed above short-circuit this assessment by categorizing a sample of the world's societies according to stages of development without elaborating the rationale for this categorization. Based upon the simplicity or complexity of these societies, as operationalized in the studies, Durkheim's laws are subjected to empirical tests appropriate to a theory that claims to make universal laws. This presumption about the mode of Durkheim's legal theory distorts the meaning of his concepts and the role played by empirical evidence.

Central to Durkheim's legal theories is the concern that modern society faces a potential for moral crisis that cannot be resolved through a return to either religious doctrine or ethical systems that are based in speculative philosophy. The modern potential for moral crisis, while it may be experienced as a spiritual anxiety that pleads for some extra-societal solution, is itself rooted in social organization and requires a social solution. To rationally formulate a social morality that can serve as a guide for the reconstruction of society, it is necessary to have a knowledge about society based upon the recognition that society is a moral entity analyzable through scientific concepts and evidence.

Grounded in this concern, Durkheim's research program is normative and scientific within the context of a general evolutionary framework. Durkheim formulated logically coherent models of law and legal organization that are normative in the sense that they reflect exemplary types of social integration. These ideal models have a greater coherence than the actual societies on which they are based. The models serve empirical investigation in that evidence can be used to show how particular societies embody elements of these models and how they depart from them. Proceeding in this way, one can raise questions about problems of moral integration in concrete societies.

Given the normative and scientific thrust of Durkheim's theories, the debate is not fully joined by bringing evidence to bear on the question of the universality of his models; even if these models diverge from the majority of the world's societies, their inherent normative prescription and their logical consistency are not disproved. If some societies are deemed to conform to the ideal types, and if the conditions under which the moral solidarity and legal organization of these societies were created can be empirically specified, then the models can serve

as guides for projects both of social reconstruction and of empirical specification and elaboration.

These features of Durkheim's theories do not conform to a strict version of science as a search for universally applicable propositions that can be refuted by tests. Rather, Durkheim's theories can be best understood as clinical in the sense that a condition of moral health is formulated and made the basis for comparing societies, so that conditions which are conducive to moral integration can be isolated. Methodologically, the focus is on particular cases and careful comparisons, and not on broad generalizations. Scientific rules and criteria are to be maintained, but in a manner that facilitates comparative studies. Indeed, scientific standards are needed to prevent visions for the moral reconstruction of society from lapsing into unrealizable speculations and purely subjective projections.

Yet Durkheim's commitment to an evolutionary theory of social and legal development complicates and, to some extent, contradicts, the comparative features of his theory. By attempting to contain evidence of societal moral development within a model of unilinear progress from simple to complex societies characterized, respectively, by repressive and restitutive law, the theory becomes conceptually abstract and distant from actual processes of social change. The comparative thrust of the theory, which calls for attention to detail and specification, is contravened by the effort to fit societies into stages of unilinear evolution. Moreover, this comparative-evolutionary tension tenders the evaluation of evidence ambiguous. If a given society departs from the models as they are presented in evolutionary sequence, does this serve to discredit the theory, or does this present an occasion for a closer analysis of that society's moral constitution?

It is the evolutionary features of Durkheim's theories rather than its comparative components that have been the object of empirical criticism. Empirical tests are predicated on the idea that a case may serve to disconfirm the theory, thus stressing the evolutionary elements of Durkheim's formulation. Yet, as we pointed out earlier, this assumption does not seem especially fruitful or decisive. For this reason, it is appropriate to offer an interpretation of Durkheim's legal concepts that stresses their comparative thrust and their systematic, contextual use in studies of social constitution. In this light, we will consider core features of Durkheim's typology and his theory of the state.

**Durkheim's Typology**

Durkheim's typology was part of his effort to bring social science knowledge to bear on the crisis of morality and social disintegration that he viewed as central to modern societies. His typology grew out of criticism of the dominant forms of contemporary theoretical work: utilitarianism, which viewed individualism not only as the basis for social life within existing modern societies, but also as both universal and natural; and positivism, which made a scientific absolute out of existing social relations by not looking for the underlying moral sources of social facts. Because Durkheim's typology begins with theoretical criticism and not with empirical generalization, and because the problem that he sets for sociology originates in prior criticism rather than in facts, there is a clear element of idealism in it. As such, Durkheim's typology begins with the logically prior idea that society has continuity and identity over time on the basis of a shared morality among its members. In the absence of a shared morality, society faces a loss of cohesion, regardless of the organizational and constitutional forms that characterize it at a particular time.

In this light, Durkheim's typology of mechanical and organic solidarity is best seen as a framework for the comparative analysis of social morality. The purpose of the typology and the forms of legality associated with it is *not* to present a theory of development that is universal for all societies but rather to allow for the comparison of societies so that particular problems of moral integration can be pinpointed.[5] For example, if a specific society departs from the model of organic solidarity, do the elements of mechanical solidarity in it enhance its cohesiveness? If they do not, then the society has anomic features and is crisis-prone.

Durkheim made this point very clearly in his criticism of Comtean and Spencerian evolutionism. In *The Rules of Sociological Method*, he argued that the social scientist would be mistaken to consider societies in terms of a purely sequential ordering of stages of complexity in which each and every society could be located by its properties at a particular development stage. This simplistic view would neglect and distort the very facts that were to be explained, i.e., the diversity and uniqueness of human groups:

[5] For a critical discussion of Durkheim's typology as an ideal type theory, see William J. Chambliss and Robert S. Seidman (1971: 30-35).

> A group which succeeds another is not simply a prolongation of the latter with some newly acquired characteristics; it is qualitatively different from it, having gained some properties and lost others. It constitutes a new individuality; and all these distinct individualities, being heterogenous, cannot be juxtaposed in the same continuous series, and surely not in a single series. For the succession of societies cannot be represented in a single plane; it resembles, rather, a tree with branches extending in divergent directions (1938: 19).

But societies can be logically ordered and analyzed, though not on the basis of an abstract, metaphysical view of evolution. Rather, societies have typical adaptations to internal and external stresses. Without denying the uniqueness of particular societies, it is possible to formulate a logic of development based on typical forms of adaptation to external stress. The basis for a theory of developmental stages, then, is the manner in which divergent societies typically respond and adapt to their environments. This is at the heart of Durkheim's notions of social fact, normality and development. Above all, it is essential that the characteristics of a particular society be given scientific status and attention. In Durkheim's words,

> A social fact can, then, be called normal for a given social species only in relation to a given phase of its development; consequently, to know if it has a right to this appellation, it is not enough to observe the form it takes in the generality of societies belonging to this species; we must also take special care to consider them at the corresponding phase of their evolution (1938: 57).

The comparative framework developed by Durkheim serves to bring into relief those features of particular societies that may yield disharmonies and crises resulting from inadequate adaptive change. For this reason, it is necessary to analyze those features which a society shares with similar societies facing similar external pressures, since these may indicate typical patterns of adaptation. But it is also necessary to consider deviations from what is generalizable about similar and similarly located societies as possible adaptations following from the individual history and peculiarities of a society's unique development. Thus, Durkheim's comparative typology and method call for the analysis of the particular society as much as for the analysis of similarities. The implication for empirical sociology is that statistical procedures can be employed to identify the generality of conditions which yield typical structural adaptations as well as to clarify differences in adaptation by individual societies. The universality of conditions and patterns of general adaptation combined with individualized features can thus be analyzed.

The models of mechanical and organic solidarity were generated in order to contrast two broad forms or conditions of social morality. Mechanical solidarity denotes a form of social

morality in which the same rules of action are shared by all members of society because their conditions of life are the same. In the absence of a division of social labor, and of geographical and social mobility, the likelihood of a shared world view and shared rules of action are enhanced. Shared everyday experiences assure an interpenetration of perspectives as well as firsthand understanding of a common stock of knowledge. This tends to yield a consensus around notions of "right and wrong" that is deeply affective and taken for granted. Breaches in this consensual morality tend to be equally deep, penetrating, and often traumatic. This is true for the community as a whole, because of the visibility of offenses and the violation of taken-for-granted moral expectations, and for the offender as well, because of deep cognitive and emotional dependence on other community members. Repressive sanctions, given this social and moral milieu, are to be scientifically judged by their effects on the community and on the offender, and not through abstract comparisons across societies. It is the meaning of the "evil eye" banishment or ostracism for the community and the offender that make them repressive sanctions rather than simply how they compare in severity to more enlightened penal codes.[6]

The form of social morality denoted by organic solidarity is quite different. The conditions for moral consensus in modern societies are based on a social division of labor and a mobility that generates a plurality of meanings which are differentially distributed among members. In this context, the individual ego emerges and faces the possibility of autonomous construction of biography as well as a whole array of other privatized forms of social interaction and experience. For the private individual, the social structure is internalized as a particularized set of opportunities and constraints in which members tend to have little or no direct contact except through exchange, formal roles, and other instrumental and strategic interaction. For these reasons, criminal offenses tend to lose their general affective moral power. Rather, they are increasingly viewed as disruptive to the instrumental and private activities of individuals. The orientation of the private individual is to have his situation restored to what it was prior to the criminal offense rather than

[6] The importance of the meaning actors attach to norms and their enforcement is demonstrated by Joseph R. Gusfield (1963) in his study of the temperance movement in the United States. In distinguishing between "assimilative" and "coercive" reform in the development of the temperance movement, support was found for Durkheim's theory. When norms appeared "threatened, coercive reform was more likely, with its hostile and angry tones" (1963: 113).

to seek vengeance on an unknown, and probably anonymous, perpetrator. What is desired above all else is compensation for private loss rather than participation in the affirmation of a socially shared morality. For it would further serve to disrupt the victim in his rounds of everyday life and in the conduct of everyday business to be involved in a process of legal vengeance. Thus, the role of the law tends to become restitutive: to formalize and maintain conditions of everyday life rather than to serve as a source of moral gratification.

**The State**

These features of Durkheim's typology suggest a comparative method and a sensitivity to the moral constitution of particular societies. Legal phenomena must be understood as the culmination and expression of relations internal to society rather than as objects that can be analytically abstracted from their social and moral context. Nowhere is this more important than in Durkheim's conception of the state.

Durkheim argues that the state emerges as an agency of central control and administration when the social division of labor reaches a level of complexity that precludes the coordination of social functions directly by the groups that make up society. The state is an agency of specialized control that overviews society's divisions. The coordination that the state provides is essentially benign and restitutive, provided that the social division of labor itself is harmonious. In short, a state that coordinates through restitutive law does so because of an underlying solidarity of society. Although the complexity of society may call for a specialized agency of control and organization, the control and coordination that is provided is not independent of society but expressive of its internal coherence and stability:

> Such is the internal solidarity which not only is as indispensable as the regulative action of higher centers, but which is also their necessary condition, for they do no more than translate it into another language and, so to speak, consecrate it (1933: 360).

The state loses this benign, restitutive quality, however, when the underlying solidarity of society breaks down. Included in Durkheim's view of legal development is the idea that complex society has a tendency toward disequilibrium, which gives rise to anomic individualism, unregulated economic production, and greater centralized state control. In ways similar to Marx, Durkheim considers the possibility of the state filling

a vacuum of social power with political and administrative power.[7] In the absence of moral cohesiveness and consensus, the state has the potential to rule over society with repressive sanctions that originate in its own control over instruments of coercion rather than from the shared morality of social members.

The tendencies for the state to gain domination over society and for repressive law to emerge from political agencies are rooted in society's condition of deteriorating solidarity. Beyond a certain point, which Durkheim does not specify but suggests as part of a general trend, the division of labor becomes overcomplex and generates a situation of extreme disassociation both among sectors and individual members of society. In this situation of disharmony, society has no internal regulative principle. The state assumes the form of an outside agency that maintains order and control through repressive law.

These considerations indicate that it is not enough to simply locate a society at a stage of development if one is to determine the degree of autonomy of its legal organization. The degree to which the state is autonomous and independent of society, as well as the repressive or restitutive character of the law, must be analyzed from the standpoint of the constitution of a particular society. Ultimately the character of the state and its law is rooted in a society's condition of moral and social solidarity.

This contextual approach to the analysis of legal phenomena suggests that the rigid evolutionary dichotomy attributed to Durkheim in tests of his theory is not a fruitful line to pursue, since it takes our attention away from the changing social relations that yield changes in legal constraints. Instead of applying rigid concepts to shape phenomena for analysis, it is more worthwhile to use concepts to bring out the actual moral and legal regulations of particular societies. It is fruitful to analyze moral and legal relations as actively constructed in the maintenance of social order.

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[7] Durkheim's perspective on the state is similar to Marx's analysis of state and society in *The Eighteenth Brumaire of Louis Bonaparte* (1972: 436-525). Here Marx points out that the state can come to dominate society when social classes lack the organization, the will, and the experience to exercise political power. In a situation of social turmoil, Bonaparte organized and enhanced his dictatorial power by exploiting the antagonisms and conflicts among social classes, playing one class against another and creating a mass base out of lumpen social elements. In this analysis, Marx demonstrates the possibility of state power not coinciding with social power but, rather, using an absence of social power for its own advantage.

An excellent example of this approach is provided by Douglas Hay's analysis of how the criminal law served to maintain the moral authority of the rural gentry in 18th-century England (1975: 17-64). Hay begins with the seeming paradox that while more and more laws were passed throughout the 18th century mandating capital punishment for property crimes, there was no increase in the number of executions. This is explained by the fact that the landed gentry was opposed to the centralized state administration that would have been required to mete out such punishment, and by the even more important fact that the gentry's maintenance of local power was facilitated by a form of legal administration that allowed for a maximum of discretion.

The rural gentry was not primarily concerned with retribution or, for that matter, with compensation; it was interested in maintaining its authoritative control over the rural poor and household servants on the basis of morality and reverence. Criminal law served to consolidate this authority position. This was accomplished, first of all, through the majesty of the law. "The assizes were a formidable spectacle in a country town, the most visible and elaborate manifestation of state power to be seen in the countryside, apart from the presence of a regiment" (Hay, 1975: 27). This spectacle was a dramatic enactment of righteousness in which legal force and legal language were impressed upon the rural population. Second, the law presented itself as just. The reliance on procedure, on evidence, and on principles that applied both to the most honored and the most humble members of society served to make the law appear impartial. This appearance of impartiality was enhanced by calling attention to "French tyranny, the occasional punishment of a great man, and the limited protection the law gave to the poor" (Hay, 1975: 38). Third, and perhaps most important for the maintenance of rural authority relations, was the quality of mercy characteristic of legal administration. As Hay points out:

> Pardons were very common. Roughly half of those condemned to death during the eighteenth century did not go to the gallows, but were transported to the colonies or imprisoned. In many cases the judge made the decision before he left the assize town, but if he did not intend to recommend mercy, it was still possible to petition the king, through the Secretary of State, up to the moment of execution (1975: 43).

While the pardon could be invoked for many reasons, it almost always had the effect of creating a greater sense of dependency and loyalty on the part of felons to members of the community who were rich, influential, and powerful. To get a pardon, the felon had to get someone of wealth or influence to

intervene on his behalf. Often, members of the felon's family beseeched a wealthy landowner on his behalf. Since authority in rural counties was local, face-to-face, and personal, a pardon served to increase the sense of obligation and trust of the felon and his family to the locally powerful. Because the law was organized hierarchically, it also served to increase the solidarity of the ruling class. If a local person of wealth could not get a pardon for a convict, he could ask someone with more influence. Thus, the criminal law served to cement authority relations throughout the social hierarchy and to maintain privileges of property.

In this example, we see that the law expresses both the differential power of social groups and the relations that bind them together. The solidarity of social groups serves to weaken the repressive character of legal codes. The inequality of the social order is stablized through authority relations and the possibilities for discretion in the application of the law. Trust and dependence, which are the central sources of solidarity in a society ordered through authoritative personal relations, are secured and strengthened. While the repressive power of the state is available to secure the social order through force, the operation of the law serves to solidify those personal relations which maintain everyday social life.

## IV. CONCLUSIONS

I have argued that empirical tests of major theoretical propositions can neither decisively refute nor substantiate these propositions. To maintain that social science concepts can be refuted by an appeal to "hard facts" ignores their programmatic content as well as the need to legitimate factual claims theoretically. It seems more fruitful both for the scientific enterprise and the restoration of social vision to treat theories not as strictly empirical generalizations, but rather as critical and insightful programmatic interpretations of societal development and constitution that can be elaborated through empirical research and specified for particular historical and social locations. Instead of viewing social science theories as metaphysical ideas which can be refuted by confrontation with facts, theoretical statements are best viewed as sources of illumination for the comprehension and explanation of social-legal issues.

In bringing this perspective to bear on Durkheim's legal theories, I have maintained that empirical tests of these theories not only have serious conceptual and methodological

problems which make them questionable on their own terms, but also that, more importantly, the methodological posture of these tests diverts the major explanatory focus from the concern with the moral basis of law which is central to Durkheim's theory.

Durkheim's legal theories are rooted in a concern with tendencies toward moral crisis inherent in the structure of modern society. The law and legal organization both reflect these tendencies and independently affect social structure in ways that intensify the central problems of solidarity, regulation, and belief. To treat law and legal organization apart from these fundamental concerns, as the empirical critics of Durkheim have been prone to do, serves to sever his theory from its original purpose.

For Durkheim, the scientific comprehension of society and legal organization goes hand-in-hand with the vision of social reconstruction. While there are difficulties with the evolutionary component of Durkheim's theory, the main thrust of his work is aimed at the problem of social constitution highlighted by comparing different types of societies. In evaluating his efforts, our critical perspective must be as inclusive as his theory.

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