

Sanction as a Moral Fact: A Contribution to the Study of the “Krimen”

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Now the term ‘unjust’ is held to apply both to the man who breaks the law and the man who takes more than his due, the unfair man.¹

ABSTRACT

The aim of this article is to revisit the transition from the individualization to the personalization of punishment. Systemic interactionism (delinquent–victim–judge) has indeed proven to be something of an impasse by structuring penal law around the criminal, whereas the focus should rather be the victim, and, through him or her, the values that underpin the being-together of the democratic sociopolitical pact or the very basis of the rule of law.

It is the latter, ultimately, which has made it possible to increasingly accurately characterize what is referred to as “criminal” action (*krimen*). That is to say, an act that may be designated and judged in the name of the equality of citizens toward one another.

The violation of this equality necessarily triggers the sanction, which must be applied to its fullest extent, because justice embodies that which enables one to be, and to be equal, together. Yet the crime as an injustice ruptures this equality. It is therefore this very rupture that is sanctioned.

1. REVISITING THE DURKHEIMIAN NOTION OF SANCTION

What is “crime”? That which is “revealed” through “punishment,” replies Durkheim, as others have noted,² and as though he were drawing literally upon the very etymology of the *krimen*:³ “It is not of course

1 Aristotle, *Nicomachean Ethics* (Cambridge, MA: Harvard University Press, 1956), 257.

2 Raymond Gassin, *Criminologie* (Paris: Dalloz, 2007), 8, 45; Denis Szabo, “La nouvelle criminologie et la délinquance,” *Délinquance juvénile au Québec* 8, no. 1-2 (1975): 179; Patrick Pharo, *Morale et sociologie: Le sens et les valeurs entre nature et culture* (Paris: Gallimard, 2004), 99.

3 “The word ‘crime’ derives from the Latin word *crimen* (-inis), which originally meant ‘legal decision.’ This word derives in turn from the Greek *krimen*, that is to say, ‘to judge,’ ‘to choose,’ ‘to separate.’ In classical Latin, the word *crimen* also assumed the meaning of ‘accusation’ or ‘charge’

punishment that causes crime, but it is through punishment that crime, in its external aspects, is revealed to us. And it is therefore punishment that must be our starting point if we wish to understand crime.”⁴ Why? Durkheim adopts the perspective of “the science of morals and rights,” which seeks to study “the moral and juridical facts ... consist[ing] of rules of conduct that have received sanction.”⁵ Thus the—universal—presence of sanction indicates that the violation of such a precept has been judged in such a way because it was a *moral* precept, i.e., a “rule of conduct” whose violation necessitates sanction. Put differently, the moral fact is a sanctioned rule of conduct; expressed in stricter terms, the sanction and the moral fact are in fact one:

To decide whether a precept is a moral one or not we must investigate whether it presents the external mark of morality. This mark consists of a widespread, repressive sanction, that is to say a condemnation by public opinion which consists of avenging any violation of the precept. Whenever we are confronted with a fact that presents this characteristic we have no right to deny its moral character, for this is proof that it is of the same nature as other moral facts. Not only are rules of this kind encountered in more primitive forms of society, but in them they are more numerous than among civilised peoples. A large number of acts which today are left to the discretion of individuals were then imposed compulsorily.⁶

The morality Durkheim speaks of here does indeed have the function of being a “rule of conduct that [has] received sanction.”⁷ Furthermore, it is applied “today,” Durkheim says, with still less social control since a “large number of acts” are “today left to the discretion of individuals,” whereas they were once “imposed compulsorily.” What is the reason for such a diminishment of social control, and, moreover, at the end of the nineteenth century? The reason, as Patrick Pharo announces, also referring to *Moral Education*,⁸ is that in Durkheim’s view “morality, ... at a certain level of understanding by the subject, could also be the object of a desire on his part, on the basis of his own moral autonomy.”⁹ It is not therefore a matter of

This means that, in its etymological sense, the word crime does not directly designate an action, an act, or a particular behavior, but rather the act of judging a behavior in the framework of an institutional process of a legal type.” Alvaro P. Pires, “La criminologie d’hier et d’aujourd’hui,” in *Histoire des savoirs sur le crime et la peine. Tome I. Des savoirs diffus à la notion de criminel-né*, ed. Christian Debuyst, Françoise Digneffe, Jean-Michel Labadie, and Alvaro P. Pires (Montreal: Les Presses de l’Université de Montréal/Brussels: De Boeck University, 1995).

4 Émile Durkheim, *The Rules of Sociological Method* (New York: The Free Press, 1982), 80.

5 Émile Durkheim, *Professional Ethics and Civic Morals* (Glencoe: The Free Press, 1958), 1.

6 Durkheim, *Rules of Sociological Method*, 79-80.

7 Durkheim, *Professional Ethics*, 1.

8 Émile Durkheim, *Moral Education* (New York: The Free Press, 1973).

9 Patrick Pharo, *Morale et sociologie*, 97.

interiorizing coercive stimuli; this type of "desire" can always in fact be explained by the search for "rules of conduct," without even waiting for the constraint of sanction "imposed by society," as Pharo stresses in his reading of Durkheim:

Durkheim first emphasized the role of diffuse or organized, positive or negative, sanctions. But if sanctions were the only cause of respect for the moral obligations of social life, they would not commit the subject to comply with them when he risks no sanction, (...). Yet the fact is that the members of society very often respect the rules and obligations, including when they do not risk being sanctioned.¹⁰

It is therefore possible to in a sense self-sanction, or, expressed differently, in Durkheim's language, to *self-moralize*, should the rule of conduct not be respected even in one's "own" eyes. This is also the question the criminologist Maurice Cusson asks of his colleague Raymond Gassin: what are the "reasons for and [the] functions of the prohibitions of violence and ruse"?¹¹ How is it that the majority of citizens rule out resorting to the latter, and, in their masses, ensure that they follow the rules of conduct? Is it fear of the police officer? That would be far too "instrumental,"¹² even though such a sentiment may exist. Is it not rather that sanction, as a "moral fact," Durkheim announces, reveals something other than a mere quantitative sentence aiming to instill conformity? Does it not also and no doubt especially designate a demand of sociability or that fundamental "need," that "required relation," as Joseph Nuttin states,¹³ to follow "rules of conduct" such that the moral sanction is self-evident if one falls short? To the point of proving on occasion, and indeed even in one's "own" eyes (those of "moral autonomy"), that one is not living in vain? Even if this sometimes means sacrificing oneself for the good of all? And does not this "need," which thus intertwines rule and sanction, reinforce a certain satisfaction at not only living together but in *being* together, i.e., sharing not only norms but also values¹⁴ that enable the rules of conduct and sanctions to be built

10 Pharo, *Morale et sociologie*, 99.

11 Maurice Cusson, *La criminologie* (Paris: Hachette, 2005), 12.

12 Raymond Boudon, *Le sens des valeurs* (Paris: Quadrige, 1999), 205-249.

13 Joseph Nuttin, *Théorie de la motivation humaine* (Paris: PUF, 1980), 215-216: "Even those who now rarely listen to 'the voice of their conscience' often have their code of norms and values that they cannot transgress without damaging their conception of their self. What is interesting to the psychologist is the need to recognize here a source of motivations that it is not sufficient to say is of external or social origin, as was noted at the beginning. We think that it is a 'required relation'—that is to say, a need—that takes root in the cognitive functions."

14 Raymond Gassin, *Criminologie*, (54), 44: "To escape from the *relativity* of legal notions, a contravention has thus been defined criminologically as a human and social reality, anterior to any incrimination, consisting in an aggression directed by one or several individuals against the most important values of the social group, those values residing either in elementary moral sentiments (Garofelo), either in collective emotions or passions (Durkheim), or in the nature of the means employed to achieve aims (Nuvolone, who points to the prohibition of recourse to fraud and violence");

in the least arbitrary, i.e. the most rational, way possible? Thus, it is arguably not a matter of merely *living* hidden by and in the multitude, but of *being* within it. Durkheim thus noted on the subject of sanction:¹⁵

Sanction is certainly a consequence of the act, but a consequence which results not from the act taken in isolation but from the conforming or not conforming to a rule of conduct already laid down.

It is the “laid down” character of rules of conduct that we will now explore.

2. THE NECESSARY COGNITIVE ROLE OF SANCTION

Let us first of all observe that the fact of being “laid down” acts as a cognitive function, i.e., that required relation of which Nuttin speaks, that *need* for a rule of conduct of which the morality described by Durkheim is the sanction. As Pierre Janet said: “it is not to debase it to consider it the finest result of the work of human intelligence.”¹⁶ Why? Because, if we continue to follow Durkheim, as well as Nuttin, the rule of conduct gives meaning to this effort of being, to that indispensable *sentiment* according to Janet, i.e., that transversal judgment at the conscience/body interface,¹⁷ which regulates action.¹⁸

The same is true of the sentiment of justice. The morphology of the *krimein* can also draw upon the accepted anthropological claim that the notion of justice is already identifiable in all societies in the intuitive form of a sentiment, as analyzed by Raymond Boudon.¹⁹ This is what Wilson²⁰ also observed, drawing on Piaget’s work. Piaget did indeed analyze the presence of the notion of sanction, which correlates to the notion of justice within the moral judgment of the child.²¹ Piaget’s work remains unrefuted, despite certain appraisals judging the denunciation of cheaters and the notions of cooperation and mutual respect as being contradictory.²² Yet it is possible to sanction the cheater *and* to respect him when he begins to cooperate again, i.e., from the moment when he once again becomes *just*.²³

and 67-68: “The desire to kill in one case, and the desire to fraudulently take another’s possession in the other, thus reflect the content of the agent’s desire, and, beyond that desire, *to the world of values* outside and even before any penalization.”

15 Émile Durkheim, *Professional Ethics*, 2.

16 Pierre Janet, *L’automatisme psychologique* (Paris: Odile Jacob, (1889) 1989), 256.

17 Nuttin, *Théorie de la motivation humaine*, 43. “To look is to do something”

18 Pierre Janet, *De l’angoisse à l’extase*, vol. 1 (Paris: La société Pierre Janet, (1926) 1975).

19 Boudon, *Le juste et le vrai*, 220.

20 James Q. Wilson, *The Moral Sense* (New York: The Free Press, 1993), 91.

21 Jean Piaget, *Le jugement moral chez l’enfant* (Paris: PUF, (1932) 1969), 198.

22 Manuel Tostain, *Psychologie, morale et culture: L’évolution de la morale de l’enfance à l’âge adulte* (Grenoble: Presses universitaires de Grenoble, 1999), 84.

23 Jean Baechler, *Démocraties* (Paris: Calmann-Lévy, 1985), 271.

Thus, this statement by Paul Veyne, cited by Alvaro Pires,²⁴ can be refuted:

If I were to say that someone who eats human flesh genuinely does so, I would clearly be correct; but I would also be correct to claim that this eater would be a cannibal only in a cultural context, for a practice that (...) objectifies such a means of nutrition to find it barbarous, or, on the contrary, sacred, and, at any rate, to make something of it; in neighboring practices, the same eater, moreover, will be objectified otherwise than as a cannibal.

This quotation does in effect reduce the morphological necessity of the judged thing to its sole historical social moment, whereas certain acts are now considered as *krimein* because their reality contradicts the constituent values of human development, which transcend their contingent manifestation. This is the case with human rights, and women's rights too, whose morphological reality now transcends their historical social effectuations.²⁵

This intertwining of the meaning of justice as a cognitive function *and* kinesthesia has been perceived clearly by Husserlian phenomenology,²⁶ which is now reintegrated into neuroscience (for example, Alain Berthoz and Jean-Luc Petit²⁷). Janet had already stressed the neuropsychological²⁸ or cerebral substrate of the cognitive functions²⁹ (and therefore, consequently, the moral sense³⁰), which is aligned more exactly with those functions recently formulated by Antonio Damasio³¹ and

24 Pires, "La criminologie d'hier," 9.

25 Yves Roucaute, *La puissance d'humanité: Du néolithique aux temps contemporains ou le génie du christianisme* (Paris: François-Xavier de Guibert, 2011).

26 Edmund Husserl, (1936), 1976, 474: "Does meditation produce the 'categorical imperative,' is all meditation in general not *eo ipso* a form of knowledge, a willingness to judge and to arrive at the truth?"

27 Alain Berthoz and Jean-Luc Petit, *The Physiology and Phenomenology of Action* (Oxford: Oxford University Press, 2008), 15: "Perception carries with it a kind of anticipation, a claim or a demand that is as yet empty, but already formally articulated. This articulation of perception derives from the fact that it is a targeted act (*noesis*) and that there exists, as the purpose of this target, a target object (*noema*). (...) We can thus say of this perceived object that it works equally as well "in one's mind" (where it is a component of the perceptive target act: *its noema*) as "in the exterior world" (like an element that moves away from the horizon of the world we perceive)."

28 Piaget, in Jean-Claude Bringuier, *Conversations with Jean Piaget* (Chicago: The University of Chicago Press, 1980), 3: "I am convinced that there is no sort of boundary between the living and the mental or between the biological and the psychological ... logic, for example, originates in the general coordination of actions and ... the general coordination of actions is based on coordinations of the nervous system, themselves supported by organic coordinations."

29 Janet, *De l'angoisse à l'extase*, vol. 2, 3.

30 Jean-Pierre Changeux, *The Good, The True, The Beautiful: A Neuronal Approach* (New Haven: Yale University Press, 2012).

31 Antonio R. Damasio, *Le sentiment même de soi* (Paris: Odile Jacob, 1999), 15-16: "The man had not collapsed on the ground in a comatose state, and neither had he fallen asleep. He was at once both there and not there, seemingly awake, partially attentive, without doubt capable of displaying a behavior, corporally present, but personally absent, absent without leave ... Neurologically speaking, he had experienced an access of absence, followed by an automatism of absence, two of the

Jean-Pierre Changeux.³² Janet had studied the case of a certain Captain Zd, who had been injured by a bullet lodged in the occipital region of the brain, and, as a consequence, developed what Janet termed the feeling³³ of void, which expresses a disappearance of the cognitive judgments that give meaning to acts:

When I am seated in this armchair I no longer know, ... I no longer understand, I can no longer tell where is the bedroom door, the staircase, the road, in what direction Auteuil and my house might be I can name objects, I can clearly recognize them, if you like, but that's all, I do not think about using them, I do not situate them, I do not frame them. I cannot even turn to a map, I do not understand whether a direction is forward or backward, which, for an officer, is quite something.³⁴

Thus, the captain is unable to insert objects into a network of relations³⁵ that would make *sense* both as a given instrumental utility of norms of action, and, also, as an axiological utilization. Put differently, the use of such an object corresponds to immediately required *norms*, and, also, to more mediate *values* (including moral sense itself). Yet it turns out that the former overdetermine the latter in terms of the rules of conduct evoked by Durkheim. If instrumental reason defines the relationship to a given reality through technical and legal *norms*, axiological reason for its part hierarchizes these norms in relation to the values³⁶ of the moral

manifestations of epilepsy, an affliction caused by a malfunction of the brain.”

32 Changeux, *Neuronal Man: The Biology of Mind* (Princeton: Princeton University Press, 1997), 158: “It concerned the famous case of Phineas Gage, a railroad worker in New England ... Gage was twenty-five when, while filling a hole in a rock with gunpowder and tamping it with a pointed iron bar, the charge exploded and the bar was blown out ... in the frontal region near the sagittal suture ... Harlow described very precisely ... : ‘He is fitful, irreverent, indulging at times in the grossest profanity (which was previously not his custom), manifesting but little deference for his fellows, impatient of restraint or advice ...”

33 Janet, *De l'angoisse à l'extase*, vol. 2, 23: “[The dog in Goltz's experiment] that has remained viscerally innervated, but has had the cerebral cortex removed, no longer has emotions; the dogs whose spinal cord has been severed and that no longer have visceral sensitivity, but still have a brain, have retained all their feelings. The pupil continues to dilate with the facial expressions of anger when the dog is shown certain visitors, the same cat, or the same monkey that irritated it before. The animals have the same fears, the same disgust for dog's meat, and seem to have the same sexual instinct.”

34 Janet, *De l'angoisse à l'extase*, vol. 2, 3.

35 Nuttin, *Théorie de la motivation humaine*, 43.

36 Gassin, *Criminologie*, (56), 45-46: “Criminal Codes are in effect not arbitrary constructions by political power. They reflect a number of *values* that are held as essential by the society in which they are formulated. Specialists of special criminal law have always known this, accustomed as they are, in their teaching, and often following the Criminal Code, of grouping together violations according to the values being protected—life and physical integrity, human dignity, the reputation of individuals, property, etc.—and indicating their axiological foundation, at least for the most important among these. The preparatory work on the French Criminal Code of 1992-1994 is especially enlightening in this respect. There it is stated, regarding the functions [author's emphasis] of the Criminal Code, that ‘every criminal code must fulfill a dual function.’ The first is the repressive function that is fulfilled by the punishments it prescribes. But ‘the second function of criminal

sense upon which the being-together is predicated.

3. NORMS AND VALUES

This last appraisal in itself implies a difference between norms and values,³⁷ of a universal type,³⁸ and one beyond differences in cultural content. What that signifies is that this difference proves to *be* a mental *requisite*³⁹ that is termed *functional* in the Durkheimian, Mertonian, and Parsonian sense,⁴⁰ and

law is a more secret one. Every society is based on certain values recognized by the collective conscience. These values translate into interdictions. And these interdictions in turn generate punishments against those who disregard them. *Thus criminal law expresses the system of values of a society through the sanctions it prescribes.* This is the *expressive function* [author's emphasis] of criminal law."

37 Boudon, *Le sens des valeurs*, 171; Pascal Engel, *Philosophy of Psychology* (Basingstoke: Palgrave Macmillan, 2014).

38 Dan Sperber, "Remarques anthropologiques sur le relativisme moral," in *Fondements naturels de l'éthique*, ed. Jean-Pierre Changeux (Paris: Odile Jacob, 1993), 323: "If I turn to a chemist to gain a better knowledge of the composition of a substance, it is not because the truth in this matter seems to me to be of another order than the truths I am able to ascertain for myself directly; it is out of a cognitive modesty that recommends itself to me in every way. A believer who defers to his keeper of conscience for a moral decision may, by the same token, act out of modesty, and think that the keeper of conscience reasons with a particular skillfulness on the basis of nonetheless universal principles. Similarly, public opinion or the socially accepted norm may be invoked because they are held as indicative of the good, without the good necessarily being defined as that which opinion or the social norm approves. The recourse to different forms of justification, therefore, is not the proof of different conceptions of the good."

39 Nuttin, *Théorie de la motivation humaine*, 214-215: "Without underestimating the importance of social factors in the construction of the scale of objective values, it is not enough to say that they are external in origin and imposed by society. Indeed, that which exists at the social level cannot be 'interiorized,' unless there exists, at the personal level, some initial latent need and some potential 'opening' for the social entity in question. An element that is alien to the personal psyche is neither accepted nor 'interiorized.' If a tendency to join the reality of things and establish objective values did not exist within the network of required relations that unites a human being to his world, one would have difficulty explaining some people's revolt against the scale of values established by society, and, above all, their activity to build another one."

40 Émile Durkheim, *The Division of Labour in Society*, Simon & Schuster: The Free Press, 1984, 11: "The word *function* is used in two somewhat different ways. Sometimes it designates a system of living movements, divorced from their effects; at other times it expresses the relationship existing between these movements and certain needs of the organism ... It is in this second connotation that we intend the term."

The term is studied at length in Robert K. Merton, *Social Theory and Social Structure* (New York: The Free Press, 1968), 105, and Robert K. Merton, *On Social Structure and Science* (Chicago: The University of Chicago Press, 1996), 83: "*Functions* are those observed consequences which make for the adaptation or adjustment of a given system; and *dysfunctions*, those observed consequences which lessen adaptation or adjustment of the system." "Embedded in every functional analysis is some conception, tacit or expressed, of the functional requirements of the system under observation."

Lastly, in Talcott Parsons, *Toward a General Theory of Action: Theoretical Foundations for the Social Sciences* (Cambridge, MA: Harvard University Press, (1951) 2005), 173, the term is associated with the idea of an imperative: "The evaluation of all the strategically significant categories of the object

also in the Aristotelian⁴¹ sense of *necessity*,⁴² i.e., the—entelechia⁴³—virtue of that which *cannot not be* (quiddity).⁴⁴

Let's thus observe that this—functional—foundation, the *need* for values (this desire for morality, as Durkheim puts it), is the *morphological* bedrock of norms and, consequently, of conduct. It does not, however, prevent the cultural overlay of that which is announced as good or just proving to be in contradiction with the true—understood here as an apodictically measurable teleological exactitude and not as the eschatological truth of an extra-sensible revelation. This conflict, moreover, is not behind “us,” given the rise of identity-related consumption—an evident source of conflicts between conceptions of the good—beyond what is truly the case from the point of view of the exact. In these conditions, the content of the categories norms and values admittedly remains determined in the last instance by the conflictual sociopolitical constitution of their delimitations. However, this situation, which is in contradiction with the morphological refinement of the law, cannot remain thus in *ahistorical* weightlessness, since, today, many acts are absolutely not or can no longer be permitted, or, inversely, may be universally and morphologically admitted as freedoms to think and undertake as a *function of*.

This last observation is not at a significant remove from designating certain

world is a *functional imperative* of a system of moral standards.”

41 Jacques Merchiers, in Pharo, *Morale et sociologie*, 70; Berthoz and Petit, *Physiology and Phenomenology of Action*, 14.

42 Aristotle, *Parts of Animals, Movement of Animals, Progression of Animals* (London: William Heinemann, 1961), 79: “Here is an example of the method of exposition. We point out that although Respiration takes place for such and such a *purpose*, any one stage of the process follows upon the others *by necessity*. Necessity means sometimes (a) that if this or that is to be the final Cause and purpose, then such and such things must be so; but sometimes it means (b) that things are as they are owing to their very nature.”

43 Aristotle, *Nicomachean Ethics*, 89-95: “It must then be premised that all excellence has a twofold effect on the thing to which it belongs: it not only renders the thing itself good, but it also causes it to perform its function well. For example, the effect of excellence in the eye is that the eye is good **and** functions well; since having good eyes means having good sight ... If therefore this is true of all things, excellence or virtue in a man will be the disposition which renders him a good man and also which will cause him to perform his function well ... Now of everything that is continuous and divisible, it is possible to take the larger part, or the smaller part, or an equal part, and these parts may be larger, smaller, and equal either with respect to the thing itself or relatively to us; the equal part being a mean between excess and deficiency ... In the same way then an expert in any art avoids excess and deficiency, and seeks and adopts the mean—the mean that is not of the thing but relative to us ... Virtue, therefore is a mean state in the sense that it is able to hit the mean.”

In another work (*On the soul*, Book II, Part 1), Aristotle writes: “Suppose that the eye were an animal—sight would have been its soul, for sight is the substance or essence of the eye [note 6: sight is to the eye as soul is to the body] ... consequently, while waking is actuality in a sense corresponding to the cutting and the seeing, the soul is actuality in the sense corresponding to the power of sight and the power in the tool; the body corresponds to what exists in potentiality.”

44 “The quiddity of a thing, as Ravaisson (*Essai sur la Métaphysique d'Aristote*, 512) has expressed so excellently, is not all that it is, but only all that it cannot not be; it is the whole of all the permanent and unalterable, primitive and non-derived, elements that remain, regardless of accidental modifications.” Jules Tricot, *La métaphysique* (Aristotle, vol. 1) (Paris: Vrin, 1981), 23, note 3.

international acts as *krimin*, in the sense that the nature of the delimitations, and their conflict especially, is based upon free processes of accreditation of meaning and not on a mechanistic, or indeed solely (historicist-type) environmentalist, causality. In effect, although the various examples above (Changeux, Damasio, Janet) certainly mention a collapse in the conditions of the formation of meaning (including moral sense) due to accidents, the more exact focus here will nevertheless consist in the study of the *voluntary* foundation of the conditions of the formation of meaning. This enables, for example, a collapse of strategically constructed meaning (of a socio-moral type, according to Roger Mucchielli⁴⁵) in order to *intentionally* collapse the cognitive referencing mechanisms, with a view to making it easier to take action. It is this aspect that will assume increasing priority here.

4. ON THE VOLUNTARY COLLAPSING OF MEANING

The very fact of sanctioning, in this second context, which is therefore the most appropriate here, cannot concern itself solely with the ultimate causality⁴⁶ of this intentionality, which aims for voluntary strategic collapse—as advanced, for example, by the theory of new social defense.⁴⁷ This is the case because of the very *voluntary* possibility of the collapsing of the rules of conduct. Why? Because in these conditions of cognitive freedom, or “moral autonomy,”⁴⁸ sanction also acts as a need or required relation, not only for the person but also for the individual. It acts in effect as a *necessary* mental function, not, it should be reiterated, in the sense of an interiorized coercive force of a behaviorist type, but in the sense of a moral fact, and one that is desired, Durkheim stresses. Put differently, it would be *unjust* to voluntarily act to contravene the equality of all before the law, especially when the latter is legitimate and not merely legal, *and* it would be unjust to avoid or diminish the sanction that *regulates* the law. Moreover, from the cognitive point of view, it is not true, aside from in cases of pathological dysfunction, that a “primacy of the unconscious over the conscious”⁴⁹ exists *a priori*, one that would see “occult forces”⁵⁰ seize the individual conscience, even if it were a *person* (thus, the refusal to obey an unjust or immoral order). Quite the contrary, according to Lionel Naccache:⁵¹ “Where received ideas on the subconscious often

45 Roger Mucchielli, *Comment ils deviennent délinquants* (Paris: Les éditions sociales françaises, 1965), 117: “[W]e assert that cases of true delinquency are not due to an alteration in reflective control but to an alternation in socio-moral conscience.”

46 Even one that is interactional in type.

47 Philippe Robert, “Un regard critique sur trente années de ‘Déviance et Société.’” Proceedings of the conference organized by the International Centre for Comparative Criminology, Montreal, December 5-7, 2007.

48 Pharo, *Morale et sociologie*.

49 Elisabeth Roudinesco, *Histoire de la psychanalyse en France*, vol. 1 (Paris: Fayard, 1994), 232.

50 Boudon, *Le juste et le vrai*, 43.

51 Lionel Naccache, *Le nouvel inconscient: Freud, Christophe Colomb des neurosciences* (Paris: Odile

emphasize the influences that the latter is argued to exercise over our conscious life, we are now discovering the opposite phenomenon: some of our subconscious processes undergo the effects of our conscious psychological postures.” This aspect is the foundation and the distinguishing feature of the human species in that it is free, and therefore can subsume (itself) to the point of sanctioning (itself)—that is to say, the moral fact.

5. THE NECESSITY OF SANCTIONING VOLUNTARY INJUSTICE

The morphological role of the mental function that is sanction can admittedly be distinguished from its relative content. The latter in effect remains subject to historical social transformations. At least to a certain extent, since crimes such as murder are always punished, and other crimes such as war crimes, crimes against humanity, rape, harassment, and indirect (rather than unintentional) homicide, under the influence of a substance, are even more harshly sanctioned at present. This clearly shows, moreover, that sanction is targeted in an increasingly morphological manner at any violation of the integrity of the person, a violation increasingly considered as unjust.

This accentuation of the law in this universal direction, one that now places the victim at the center of the sanction, makes it possible to obviate the legal relativism that still posits the “transformation”⁵² of the criminal as the “essential”⁵³ organizing principle of criminal law. Yet this place accrues, by *law*, to the victim, and, therefore, to the values (of moral sense) violated by the criminal act;⁵⁴ to do the contrary, as is currently the case (and as is reiterated in Isabelle Dréan-Rivette’s remarks), proves to be deeply unjust, the very term that Cusson employs.⁵⁵

It would in fact be heuristically wise to return to the Durkheimian acceptance of sanction as the sign of a transhistorical moral necessity. This reversion, far from being a regression to the hypothetical golden age of a “tradition,” proves to be

Jacob, 2006), 185, 209.

52 Isabelle Dréan-Rivette, *La personnalisation de la peine dans le code pénal* (Paris: L’Harmattan, 2010), 22: “[T]he punishment becomes a means at the service of the person’s development”; it is no longer “constraint that characterizes this work but rather suppleness and flexibility, thereby making it possible to best modulate the punishment depending on the individual needs of the offender. Various criteria are used to perform this complex task: the subject’s life history, but also his biographical trajectory, his identity dynamics and the contravention understood both as a process of transformation of the self and appeal to the law ...”

53 Dréan-Rivette, *La personnalisation*, 96: “[T]he person of the criminal becomes the essential element of criminal law.”

54 Gassin, *Criminologie*, (78/2), 69: “Such is the case, for example, with respect for freedom, respect for privacy. There are many ‘values’ that benefit, for that matter, from a legal protection.”

55 Cusson, *La criminologie*, 63: “It is not possible to overlook the evidential character of the distinction between good and evil in respect of a serious crime. It is not possible to be unaware that violent theft or unprovoked aggression are experienced as an injustice by the victims and that any impartial observer will be in agreement with the victim on this point.”

not only desirable from a practical perspective, but theoretically possible. This is the case solely because sanction can now take its place as a mental function identifiable by neuroscience and scientific psychology. But, above all, because sanction, posited as a truth, makes it possible to combat *injustice*: breaking the law (where it is legitimate, and not only positive⁵⁶) is in effect to commit an injustice.

The unjust man, says Aristotle,⁵⁷ is

... both ... the man who breaks the law and the man who takes more than his due, the unfair man.⁵⁸

Aristotle then adds:

“The just” therefore means that which is lawful and that which is equal and fair, and “the unjust” means that which is illegal and that which is unequal and unfair.

This analysis is taken up in contemporary analysis of “the spirit of the law” (to borrow the title of the book series edited by François Terré). Thus, in an issue devoted to the thought of Michel Villey, Stamatios Tzitis recalls that Villey had taught Aristotle on this very point, i.e., of injustice conceived as action against equality before the law, in the sense that, justice, for its part, is argued to be “total virtue”:

According to Aristotle, the law must seek the achievement of justice as total virtue, that which comprehends the other virtues and which concerns relations with others evaluated by a *dikaion-ison* [fair distribution]. That is why, for the Stagirite, all that is according to the law is a right, and he who by his action violates the law, the *paranomos*, is *adikos*, that is to say, unjust, and, therefore, a *pleonectic*: he who takes more than is necessary, who violates the equal right.⁵⁹

And, as this is injustice proper, Aristotle defines some of its traits, which are even more morphological than they are empirically identifiable:

Again, as the unjust man is one who takes the larger share, he will be unjust in respect of good things; not all good things, but those

56 “Political Justice is of two kinds, one natural, the other conventional. A rule of justice is natural that has the same validity everywhere, and does not depend on our accepting it or not.” Aristotle, *Nicomachean Ethics*, 295.

57 Baechler, *Démocraties*, 251: “We can, with assurance, follow in the footsteps of two guides, Aristotle (*Nicom. Eth. V*) and Thomas Aquinas (IIa, IIae, Q. 57-61, 79-80, 120-122).”

58 Aristotle, *Nicomachean Ethics*, 257.

59 Stamatios Tzitis, “Logos et nomos. L'éthique juridique d'Aristote vue par Michel Villey,” in Michel Villey, *le juste partage*, ed. Chantal Delsol and Stéphane Bauzon (Paris: Dalloz, 2007), 13.

on which good and bad fortune depend ... Indeed, he lacks a sense of equality and is thus guilty of greediness, a highly common fault.⁶⁰

The morphological approach, which adduces the *krimein* as an injustice (justice, in contrast, will be “total virtue,”⁶¹ as Tzitis notes above), can draw all the more inspiration here in that the distinctive traits are accentuated in *excess* (in the Aristotelian sense linked to the notion of virtue). This has the consequence of thereby sketching a behavior that is polarized into a precise *status*, that of the *criminal*. The criminal thus pushes the traits of the unjust to *excess* when he seizes hold of that which is not his, and, to do so, uses force and wile,⁶² which demonstrates his cognitive and motivational capacities, and also his charismatic capacity,⁶³ when he attracts those who also choose injustice, that is to say, inequality.

This theoretical dovetailing is not accidental; it enables us to *understand* (in the sense of explicating and not only describing) that the act termed criminal can be perceived as the most complete (the most “serious”⁶⁴) form of injustice, whereas an offense or contravention are lesser degrees of it, which is on the whole in accordance with the provisions of article 111-1 of the Criminal Code.⁶⁵

6. SANCTION AND RESOCIALIZATION OF THE CRIMINAL

The sanction that punishes the unjust act thus evolves as time goes by. But it is worth emphasizing the fact that this evolution does not mean that the very idea of sanction or even its full realization may one day be abolished. It is only the content of the sanction that evolves, not its full necessity: thus, though the act of stealing must no longer necessarily entail the act of cutting off the thief’s hand, or sending him to a penal colony, it does not follow that the very idea of sanction remedying the double injustice toward victim and society should disappear or be rendered negligible by unduly lightened sentences.

In this sense, the shift from the individualization to the personalization of punishment via an interactionist interpretation of article 132-24—section II of Title III of Book First of the New Criminal Code—entails a confusion between the fact of sanctioning with respect to a set of values and the idea that the offender must be helped in their resocialization. Why? Because what counts, first,

60 Aristotle, *Nichomachean Ethics*, 257.

61 Aristotle, *Nichomachean Ethics*, 259: “‘In Justice is all Virtue found in sum.’ And Justice is perfect virtue because it is the practice of perfect virtue; and perfect in a special degree, because its possessor can practise his virtue towards others and not merely by himself”

62 Raymond Gassin, *Essai de théorie générale de la ruse en criminologie* (Paris: Presses universitaires d’Aix-Marseille, 2009).

63 Alexandre Dorna, *Le leader charismatique* (Paris: Desclée de Brouwer, 1998), 20-21.

64 Cusson, *La criminologie*, 7.

65 Book First, General Provisions, First Title. - On criminal law, chapter I. - Some general principles (1998-1999), 25.

is the *necessity* of sanction or the moral fact, states Durkheim, as was recalled at the beginning; this implies that it is *judged (krimein)* proportional, and, above all, fully applied. We should therefore not confuse the necessity of sanction and its full application, which remedies the injustice suffered, and the content of the sanction, which for its part may change, while the offender may be supported in his process of resocialization—without however giving the impression of seeing the gravity of the act diminished.

Thus, to say that the necessity of sanction is more enduring than its content does not indicate that the sanction should not be fully applied, at least if one adopts the very point of view of the notion of injustice. In effect, if one adopts the point of view of the criminal, one will be tempted to modulate the punishment depending on their individual case and on his amending his conduct in a given period of time. But, in this case, the victim will consider such support deeply unjust. We must thus not confuse the possible redemption of the criminal and the fact that he has to answer, even in his “own” eyes, for his act, even if he amends his ways, and even if society ensures he is given this possibility, since the idea is not to replace one *excess with another*.

In this sense, the analysis of criminal action as *krimein* can neither be reduced to a psychology of the criminal nor to his redemption. It is a matter of his resocialization, aiming at the acceptance of values that are not arbitrary but rather morphological, and which form the foundation of the being-together, i.e., the sharing of a moral fact, sanction, and not the mere cohabitation of an undifferentiated living-together.

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