

LEGAL EVOLUTION AND THE DURKHEIM HYPOTHESIS: A REPLY TO PROFESSOR BAXI

RICHARD D. SCHWARTZ

State University of New York at Buffalo

At the outset, I wish to thank Professor Upendra Baxi for his critical reading of the Schwartz-Miller article. Several years ago, when we first talked, he expressed a lively interest in the issue to which his present comment is directed (Baxi, 1974). His observations, then and now, have helped me to understand some theoretical and methodological complexities in Durkheim's position which I had earlier missed. I acknowledge with gratitude his scholarly observations and also his courteous manner in presenting them.

A full reply to his comment should be fairly lengthy. He has raised questions concerning both the conceptual and the operational meaning of Durkheim's *Division of Labor* hypothesis. My response, after discussing Professor Baxi's remarks, will be to adopt a new index for repressive sanctions that may meet his main criticism and then to restudy the problem using the new index.

Professor Baxi is quite correct in asserting that our article was directed primarily toward a description of the evolution of legal roles rather than to a critique of Durkheim. In reporting our findings on legal evolution, however, we apparently conveyed (in one paragraph of text and a two-paragraph footnote) the impression that the article "refuted" Durkheim's *Division of Labor* thesis. Although we did not claim a refutation, we did indicate that our results "seem directly contradictory" to Durkheim's thesis. In the abstract preceding the article, we spoke (Schwartz and Miller, 1964: 159) of a "partial disconfirmation" of the thesis and later observed (1964: 166) that "Durkheim's hypothesis seems the reverse of the empirical situation in the range of societies studied here."

We stopped short of claiming disproof because we were not in a position to do so. Since the study had not been designed to test Durkheim's hypothesis, any finding that resulted in conclusive disproof would have been quite remarkable. A crucial test can generally be accomplished only if (1) the hypothesis is clearly laid out in advance and if (2) operational

specifications are given for each of the variables that permit reliable and valid empirical identification of those variables. Neither of those preconditions has yet been satisfactorily met in the formulation of the *Division of Labor* hypothesis. Nor, incidentally, will they be adequately fulfilled in the present exchange.

With all respect to Durkheim, he did not state his hypothesis in clearly testable form. Ambiguities are to be found particularly between the concepts and their operational specification. For example, Durkheim implied that restitutive sanctions could occur in very unspecialized (*i.e.*, simple) societies, but operationally he seemed to limit the exercise of such sanctions to

specialized . . . organs such as consular tribunals, councils of arbitration, administrative tribunals of every sort. Even in the most general part, that which pertains to civil law, it is exercised *only* through particular functionaries; magistrates, lawyers, etc., who have become apt in this role because of very special training. [Emphasis added.] (Durkheim, 1933: 113).

This passage, correctly described by Professor Baxi as contentious, is presumably a good example of the "overstatements and generalizations in chapters two, three, and four" which obscure Durkheim's true meaning (Baxi, 1974: 648).

I believe, as does Professor Baxi, that Durkheim really meant to say that repressive and restitutive sanctions may exist, in principle, in a wide range of societies and that the balance of restitutive/repressive sanction is an increasing function of the division of labor. Such a position would not be fully testable, however, if restitutive sanction were defined in such a way as to limit it to societies with "magistrates, lawyers, etc." Data drawn from other, simpler societies could not possibly disconfirm the Durkheim hypothesis. Such societies would be lacking in restitutive sanctions, not for the reasons Durkheim hypothesized, but by definition. What is true by definition cannot, of course, be confirmed or disconfirmed by data.¹

RESTITUTIVE SANCTIONS

As we weighed this problem, it seemed that our concept of mediation would be useful as a general, cross-societal indicator of restitutive sanction. We defined mediation as the "regular use of non-kin third party intervention in dispute settlement" (Schwartz and Miller, 1964: 161). To what extent

does this concept of mediation square with the idea of restitutive sanctions?

As I understand Professor Baxi, he does not object to our use of mediation as an index of restitutive sanction. Two interrelated concerns of his seem to be met by that step. First, he insists, that Durkheim really believed that restitutive sanctions could exist in simple societies. Our use of mediation, a practice which might in principle be found in the simplest societies, assumes that view. Second, Professor Baxi (1974: 650) apparently takes the position that Durkheim's hypothesis would be "impermissibly self-fulfilling" if, despite general statements that restitutive sanction can be found in simple societies, Durkheim failed to specify how restitutive sanctions would be organized in such societies. Our use of the concept of mediation attempts to specify an organizational form which might be found in simple as well as complex societies.

We should also ask whether Durkheim himself would have accepted the concept of mediator as an index of restitutive sanction. The answer to that question must be somewhat more complex. Durkheim's basic definition of restitutive sanction seems at first appearance to be very close to the function of mediation as we have defined it. His words (1933: 69) are as follows:

[Restitutive sanction] does not necessarily imply suffering for the agent, but consists only of *the return of things as they were*, in the re-establishment of troubled relations to their normal state, whether the incriminated act is restored by force to the type whence it deviated, or is annulled, that is, deprived of all social value. [Emphasis Durkheim's.]

In his effort to settle disputes, the mediator is almost by definition seeking ways of restoring troubled relations to their normal state. While he may not be able to secure the return of "things as they were," his ordinary efforts may be expected to follow this approach.

Our concept of mediation may nevertheless lack an element that would seem essential to Durkheim, namely, the element of organization. In his discussion of *repressive* sanctions, he insisted — as will be seen below — that he wanted to study organized, rather than diffuse sanctions. By organized repressive sanctions he meant punitive reactions to norm violations by someone assigned to enforce specific norms. Although I can find no comparable statements regarding restitutive sanctions, his examples all point in that direction. Had he developed the

parallel idea of organized *restitutive* sanctions, he might have specified restitutive reactions to norm violations by someone assigned to re-establish troubled relations to their normal state, or some such. To that extent, mediation may be insufficiently organized to provide an exact rendering of Durkheim's view.

Nevertheless, we will continue to use the concept of mediation in this paper, for several reasons. First, it is acceptable to Professor Baxi, to whom this paper is a reply. Second, mediation is very close to the core concept stated by Durkheim, even though it might not accord fully with his operational preferences. Third, its presence or absence has already been determined in the sample of societies studied in the original article and restudied here.

REPRESSIVE SANCTIONS

While the use of mediation as an indicator of restitutive sanction seems acceptable to Professor Baxi, that is not his reaction to our attempts to operationalize the concept of repressive sanctions. He makes a valid point in charging us with committing the same error, in reverse, as that of which we accused Durkheim. Although we tried to specify comparable structures for repressive and restitutive sanctions, Professor Baxi may be correct in suggesting that the role of "police" requires a higher degree of specialization than "mediator." If so, the presence of mediators, but not police, at an earlier stage may not indicate a greater tendency toward restitutive sanction at that stage; it may simply reflect the greater organizational complexity of police, as compared with mediators.

In the course of his criticism, Professor Baxi suggests ways in which repressive sanction should be operationalized. In urging that repressive sanction not be limited to police, he makes it necessary for us to consider the essential elements in the concept of repressive sanction. First, he asks, is there any reason why repressive sanction must involve coercive implementation by specialized personnel at all? Second, if there are to be coercive specialists, must they be distinct, as police are, from those who adjudicate norm violations? Third, if coercive specialists are a necessary index of repressive sanction, must they be non-kin? If the object is to test Durkheim's thesis, then my answers to these three questions, respectively, are for reasons that follow, (1) yes, (2) no, and (3) yes, with a qualification to be discussed below.

1. Specialization

On the first point, Professor Baxi may be questioning two elements: (a) coercion and (b) specialization for coercion. If he were questioning coercion as a necessary element in the operational definition, I think he would be departing too far from the original and common meaning of the term repressive sanction. Durkheim (1933: 69) put it this way:

[Repressive sanctions] consist essentially in suffering or at least a loss, inflicted on the agent. [These sanctions] make demands on his fortune, or on his honor, or on his life, or on his liberty, and deprive him of something he enjoys.

I believe that Professor Baxi would include coercion or the intentional infliction of deprivation in any definition of repressive sanction, although some of his statements leave that interpretation open to question.²

His real doubt, I believe, has to do with whether the definition of repressive sanction should include "formal execution" of some deprivation by "a specialized agency of enforcement" (Baxi, 1974: 647). Durkheim (1933: 69) discusses this problem, almost immediately following the passage given above, in these terms:

It is true that those [repressive sanctions] which are attached to rules which are purely moral have the same [deprivational] character, only they are distributed in a diffuse manner, by everybody indiscriminately, whereas those in penal law are applied through a definite organ; they are organized.

I assume that Durkheim's two terms "applied through a definite organ" and "organized" are close enough to Professor Baxi's concepts of "formal execution" and "specialized agency of enforcement" to serve as equivalents. If so, Professor Baxi appears to be asking whether repressive sanction can only be indexed by what Durkheim calls "penal law." I submit that Durkheim's answer to this question was "yes."

In the first edition of his book, Durkheim (1933: 69) attempted to clarify the two uses of repressive sanction, in what he described as "a complete classification of all obligatory rules of conduct," through the following table:

Obligatory Rules of Conduct	
With repressive sanctions	{
	Diffuse (common morality without juridical sanctions)
	Organized (Penal Law)
With restitutive sanctions	

In the text and first-edition footnote, Durkheim recognized the very distinction with which we are confronted. Did he mean, in his use of repressive sanctions, to limit the hypothesis to the organized sanctions of penal law or would he have included diffuse sanctions as well? I think that he intended to restrict the working hypothesis, at least, to the organized sanctions of the penal law.

His primary reason for so doing appears to have been methodological. He was trying to substantiate the presence of alternative modes of social solidarity, mechanical and organic. These he recognized as intervening variables, not directly observable. The theory may be summarized as follows:

Independent Variable A	Intervening Variable B	Dependent Variable or Index C
<i>Division of labor</i>	<i>Social Solidarity</i>	<i>Sanction (law)</i>
Simple	Mechanical	Repressive (penal)
Complex	Organic	Restitutive (civil)

In order to demonstrate the relationship of social solidarity to division of labor, he described in theory the relationship as $A \rightarrow B \rightarrow C$, although he did not rule out the reverse direction. At all events, since B could not be directly observed, he felt it necessary to show an empirical relationship between A and C. For that reason, he had to have a visible, external index of C. In his words (1933: 64),

. . . social solidarity is a completely moral phenomenon which, taken by itself, does not lend itself to exact observation nor indeed to measurement. To proceed to this classification and this comparison [of types of social solidarity], we must substitute for this internal fact [solidarity] which escapes us, an external index which symbolizes it and study the former in the light of of the latter. This visible symbol is law.

He went on to discuss the question of whether custom (*i.e.*, common morality without juridical sanction) would be a satisfactory index, as an alternative to law. It would be unnecessary to use custom, he said, because law and custom tend to correspond. Where they diverge, it is exceptional and these cases are "rare and pathological." Otherwise, customs diverging from law "lack importance and continuity." And to use custom rather than law as the index in such cases would be misleading. Summarizing, he declared (1933: 66):

If, then, there are types of social solidarity which custom alone manifests, they are assuredly secondary; law produces those

which are essential and they are the *only* ones we need to know.
[Emphasis added.]

While Durkheim's primary concern was methodological we should note that his methodology was based on his tenaciously-held conception of social phenomena. He saw society as constituting a reality *sui generis*, existing as an emergent phenomenon above the level of individual psychology. To the extent possible, he preferred to work with variables that were society-wide, overt, palpable, organized.³ Law to him was one such. Custom, to the extent of its divergence from law, seems to have struck him as diverse, covert, ephemeral, and diffuse.

At all events, Durkheim clearly indicated, for this variable, his operational preference. In studying repressive sanction, he wanted the index to consist of an organized system, *i.e.*, the penal law, rather than common morality or custom. A direct test of his hypothesis should, in my view, respect that operational preference.

2. A Separate Police

On the second point, however, I agree with Profesor Baxi. Like him, I can see no basis in Durkheim's thinking for requiring that repressive sanctions be exercised only by functionaries separate from those who enunciate the norms. There seems to be good reason, therefore, to accept Professor Baxi's criticism by dispensing with specialized police as the prime index of repressive sanction. To be sure, we must insist in light of the foregoing discussion that repressive sanctions be organized — but we cannot require that those functions be performed by police, *i.e.*, a force specialized for norm enforcement alone.

Some data are at hand that permits us to describe repressive sanctions that are organized but without the specialization of police. They will be presented after the discussion of Professor Baxi's criteria is completed.

3. Non-Kin Coercive Specialists

Professor Baxi's last criticism of police as the index of repressive sanction concerns the designation of non-kin specialists. It is not clear to me whether his brief reference to the kin issue concerns a kin relationship between sanctioners and (a) the victim, (b) the norm violator or (c) the head of government. I assume, at all events, that Durkheim's repressive sanction concept referred to an activity undertaken on behalf

of the society as a whole, to enforce its normative standards. By that criterion, neither (a) nor (b) can easily be included as repressive sanction. If the victim is always kin, that should be ruled out as a true repressive sanction, since it may involve the pattern of feud in which one segment of the society reacts out of retributive motives against another segment.⁴ Similarly, if the kin relationship exists per force between the sanctioner and the violator, those cases should probably be excluded on grounds that they might be normatively segmental. If so, such sanctions would not reflect the reaction of the society as a whole. If the kin relationship is with the head of government, however, it should be accepted as one mode of choosing a repressive sanction specialist for the society as a whole.

My position to this point may now be briefly summarized. A fair test of Durkheim's hypothesis should compare repressive and restitutive sanctions over a range of societies having various degrees of division of labor. The two forms of sanction should be formally organized, and the specification of organization for each type of sanction should be equivalent. These organizational specifications should be broad enough to permit the location of each type of sanction in a wide range of societies. To ensure that the sanctions examined relate to the solidarity of the entire society, both forms of sanction should be socially supported and should be exercised by functionaries who are not required to be kin of the parties.

We are about to go forward with an examination of restitutive and repressive sanctions on the basis of particular operational definitions of those concepts. We have settled on mediation to operationalize restitutive sanction and will use what we consider to be a parallel concept, "punishment," for repressive sanction. A word of caution is appropriate here.

While operations are always necessary to identify concepts empirically, they cannot be perfect. One can argue that mediation is insufficiently organized to parallel our operational definition of penal law. One could insist that repressive sanction should include feud, where it is socially supported. It is always possible for a scholar to propose alternative operational definitions as providing better indices of the concepts in question.

Disagreements over operational specifications should not, however, obscure the basic theoretical question. In the case of Durkheim's hypothesis, we should remember that the key

questions are whether a division of labor is necessary to promote substantial use of restitutive sanction and whether, with a growing division of labor, there is a substantial decline of repressive sanction. The data which we are about to present — whatever the operational alternatives — seem relevant to these questions, although by no means conclusive concerning them.

EMPIRICAL RESULTS

To meet the key objection raised by Professor Baxi, I have tried to locate an index of repressive sanction which omits the objectionable characteristics of police, namely, specialization for norm enforcement alone. The measure sought is one that calls for organized repressive sanctions, exercised on behalf of the society as a whole, against norm violators. Fortunately, an index which comes very close to these characteristics is available for most of the societies in the original sample.

In their article, entitled "Societal Complexity," (1957) Freeman and Winch examined, in virtually the same sample of societies, a characteristic which they called "punishment." Punishment was considered present when "[c]rimes against person or property [are] punished through government action" (1957: 463). Part of the problem with using punishment, thus defined, as an index is that "government" may entail a degree of organization which would, like police, impose too stringent an organizational criterion on repressive sanction. As used by Freeman and Winch, however, the term government in this definition does not appear to be highly complex. It does not mean "full-time bureaucrats unrelated to the head of government."⁶ Exactly what kind of government is meant in their definition is unclear. It is clear, however, that they intend a degree of organization which is society-wide and which does not depend for the avenging of crimes on "the person wronged, his kin group, or the gods" (1957: 463). Their criterion apparently consists of any penal sanction more societal and more organized than to depend on private, kin, or magical-religious retribution. This corresponds moderately well to Durkheim's concept of organized repressive sanction or penal law.

Punishment, thus defined, may now be located in the sample of societies studied in the Schwartz-Miller article. Table 1 shows the three original characteristics: mediation, police, and counsel. In addition, we have added the characteristic of punishment.

Judgments regarding the presence of punishment were

made by Linton Freeman for all but those six societies in which the Freeman-Winch sample did not overlap with ours. In four of these,⁶ however, the presence of police indicates that punishment would have been practiced. Pending an independent assessment, the presence of punishment in these societies may be assumed. In the only other cases, the Comanche and the Trobrianders, I have made judgments based on ethnographic reports by Hoebel (1940; 1954) and Malinowski (1926). Since all judgments should be made independently by two or more readers who are unacquainted with the theoretical issue, these two judgments must also be considered tentative.

We are now in a position to present the findings. Table 1 shows the original scale of legal characteristics, with the information on punishment added. The fifty-one societies have been reordered, following standard Guttman-scale procedure, to exhibit maximum scale structure. Changes made for this purpose occur predominantly in the original scale type 1, consisting of societies with mediation but without police. These societies are now divided into two categories, those with mediation alone and those with mediation and punishment. Because the earlier ordering within the old scale type (mediation alone) was arbitrary, the changes create no new errors. On the contrary, they strengthen the scale by adding a fourth characteristic and, thus, a fifth scale type.

One additional change in scale order involves the Crow Indians. The Crow society had provided one of the two errors in the original scale, because of the presence of police and the absence of mediation. With the absence of punishment, as well, Crow would yield two errors if maintained in its former position. Accordingly, we must, following the least-error principle, move it to the lowest scale position, where it supplies a single error.

TABLE 1: REVISED SCALE OF LEGAL CHARACTERISTICS

Society	Coun- sel	Police	Punish- ment	Me- dia- tion	Errors	Free- man- Divi- sion		
						Legal Scale Type	Winch Scale Type	of Labor
Cambodians	X	X	X(+)	X		4	*	*
Czechs	X	X	X	X		4	6	3
Elizabethan English	X	X	X	X		4	6	3
Imperial Romans	X	X	X	X		4	6	3
Indonesians	X	X	X(+)	X		4	*	*
Syrians	X	X	X(+)	X		4	*	*
Ukrainians	X	X	X	X		4	6	3
Ashanti		X	X	X		3	5	3
Cheyenne		X	X(+)	X		3	*	*
Creek		X	X	X		3	5	3
Cuna		X	X	X		3	4	2
Hopi		X	X	X		3	5	3
Iranians		X	X	X		3	6	3
Koreans		X	X	X		3	6	3
Lapps		X	X	X		3	6	3
Maori		X	X	X		3	4	2
Riffians		X	X	X		3	6	3
Thonga		X	X	----	1	3	2	0
Vietnamese		X	X	X		3	6	3
Azande			X	X		2	2	0
Balinese			X	X		2	4	2
Cayapa			X	X		2	2	0
Lakher			X	X		2	2	0
Lepcha			X	X		2	3	1
Mbundu			X	X		2	3	1
Navaho			X	X		2	5	3
Venda			X	X		2	5	3
Woleaians			X	X		2	2	0
Andamanese				X		1	0	0
Chagga				X		1	4	2
Formosan aborigines				X		1	0	0
Hottentot				X		1	0	0
Ifugao				X		1	0	0
Menomini				X		1	0	0
Ossett				X		1	4	1
Siwans				X		1	1	0
Trobianders			(+)	X		1	*	*
Tupinamba				X		1	0	0
Yakut				X		1	1	0
Aranda						0	0	0
Buka						0	0	0
Chukchee						0	0	0
Comanche			(+)			0	*	*
Copper Eskimo						0	0	0
Crow		X			1	0	0	0
Jivaro						0	0	0
Kababish						0	3	1
Kazak						0	0	0
Siriono						0	0	0
Yaruro						0	0	0
Yurok						0	1	0

(+) Tentative designation pending study by independent analysts.

* Not included in Freeman-Winch sample.

The scale which emerges contains five scale types with the following distribution:

TABLE 2: NUMBERS AND ERRORS BY SCALE TYPE

	<u>Scale Type</u>	<u>True</u>	<u>Error</u>	<u>Total</u>
0	No legal characteristics	11	1 (Crow)	12
1	Mediation only	11	0	11
2	Mediation and punishment	9	0	9
3	Mediation, punishment, and police	11	1 (Thonga)	12
4	Mediation, punishment, police, and counsel	7	0	7
	<u>Total</u>	<u>49</u>	<u>2</u>	<u>51</u>

Coefficient of reproducibility = $1 - 2/204 = .997$ $P(X^2) < .001$

This distribution exhibits a remarkable regularity of pattern, whose probability of occurrence by chance is well below one in a thousand.

All of the inferences made in the earlier paper, concerning the probability that these characteristics reflect a temporal pattern of evolution, may be applied to these findings. That is, if the earlier scale pattern is accepted as indicating a probable evolutionary pattern, then this paper suggests that evolution goes through one additional step, with punishment following mediation and preceding police.

This result is trivial in one regard, but interesting in other ways. It is trivial in that the presence of punishment in all societies which have police is virtually certain by definition.⁷ If a society has correctly been determined to have a specialized armed force used at least in part for norm enforcement (*i.e.*, police), it would thereby be punishing crimes against person or property through government action.

It is not trivial, however, that nine of the societies have punishment without having police. This finding indicates the empirical validity of Professor Baxi's argument that police require a degree of organization which exceeds what is necessary for organized repressive sanctions.⁸

It is also important that, with the sole exception of the Thonga, all societies which have punishment also have mediation. Unlike the police-punishment relation, the presence of punishment does not require, by definition, that mediation be present. Conceptually, the punishment of crimes is independent of the effort to solve conflict by third-party mediation. Accordingly, the relationship between mediation and punishment is a matter for theoretical discussion and empirical examination.

The final finding to be noted is that eleven societies have

mediation which do not have punishment. If mediation is a necessary condition for punishment, it clearly is not a sufficient condition. That it can exist independently of punishment is demonstrated by these eleven instances.

These findings provide us with information relevant to Durkheim's hypothesis. Let us assume for the purpose of this analysis that mediation will serve as a proper operational definition of organized restitutive sanction and that punishment will similarly serve as the index of organized repressive sanction. On that assumption, these new results seem directly contradictory to Durkheim's hypothesis, since they show mediation occurring in simpler societies and punishment in more complex ones.

Moreover, data are available which permit a direct examination of the proposition that division of labor diminishes repressive and promotes restitutive sanction. By examining the Freeman-Winch scale in conjunction with the revised scale of legal evolution, we can approach a direct test of this proposition.

In their index of societal complexity, Freeman and Winch discerned a pattern which suggests the following order in which societies become increasingly complex: money, punishment, full-time priests, full-time teachers, full-time officials, and writing. It is fortunate that three forms of specialization were included in their study, since they give us an independent basis for ascertaining the division of labor in these societies.

TABLE 3: DIVISION OF LABOR AND FORM OF SANCTION

Scale Type	Societies with the following number of specialists*					Total
	Not known	0	1	2	3	
0 No legal characteristics	1	10	1	0	0	12
1 Mediation only	1	8	1	1	0	11
2 Mediation and punishment	0	4	2	1	2	9
3 Mediation, punishment, and police	1	1	0	2	8	12
4 Mediation, punishment, police and counsel	3	0	0	0	4	7
Total	6	23	4	4	14	51

* According to Freeman and Winch (1957).

At first glance, the Freeman-Winch data seem to support Durkheim. Punishment is seen to appear on the scale before any of the three forms of specialization. Closer examination reveals, however, that some degree of specialization is found among several of the societies with punishment. As shown in Table 3, there are five societies in legal scale type 2 (mediation

and police) with a considerable degree of specialization. The Lepcha and the Mbundu each have priests, the Balinese have priests and teachers, and the Navaho and Venda have priests, teachers, and officials. Thus a majority (five out of nine) of that legal scale type have some division of labor.

If one takes the broader sample of societies, the results are even more striking. Of all 24 of the societies in which punishment is present, some division of labor is found in 19 of the 24 societies they studied. Of these, 14 of the 19 had all three forms of specialization. By contrast, some division of labor was found in only three (Chagga, Ossett, and Crow) of the 21 societies in which punishment was not present.

Turning to the converse hypothesis, we can ask whether mediation emerges only with a division of labor. Those societies with mediation alone (legal scale type 1) show some division of labor in only two instances out of ten. If a division of labor were necessary for restitutive sanction, one would expect that it would be found in more of the societies in this category. Instead, the results seem to show that division of labor is a necessary condition for punishment, but not for mediation. In other words, the findings run exactly contrary to those projected by Durkheim.

Much more remains to be said on this subject. Durkheim's hypothesis should be examined in a broad range of societies. We must probe the significance of division of labor, broaden it to include any diversity which creates the potential for reciprocity, and ask what other conditions contribute to the implementation of restitutive sanctions and their predominance over repressive ones.

For the present, however, I have had to confine myself to an answer to Professor Baxi's critique. The data seem to me to show cause for concern over the validity of Durkheim's hypothesis, at least for the methods used and for the range of societies studied. It is time for the defenders of the Durkheim hypothesis to step forward.

NOTES

¹ On the principle of falsifiability, see Popper (1959). Seeking to demarcate scientific propositions, Popper asserts (41) "it must be possible for an empirical scientific system to be refuted by experience."

² For example, ". . . the term 'enforcement' can be employed in a variety of senses. The use of a particular meaning of the term should be guided, above all, by its appropriateness to the context and by its heuristic fruitfulness. There appears to be no compelling reason why the term 'enforcement' should not mean, simply, the crea-

tion, invocation and application of norms in decision-making (whatever specific form the latter may take). A norm may thus be enforced even if there has been no formal execution of decision or judgment" (Baxi, 1974: 647). Or again (Baxi, 1974: 648) ". . . in some social systems authoritative decision-making may, without more, just as effectively constitute 'enforcement' as coercive implementation by specialized personnel."

- ³ The most explicit statement of this point of view is found in his *Rules of Sociological Method* (1938). Discussing "social facts" as the proper domain of sociology, he declares (10), "A social fact is to be recognized by the power of external coercion which it exercises or is capable of exercising over individuals, and the presence of this power may be recognized in its turn either by the existence of some specific sanction or by the resistance offered against every individual effort that tends to violate it."
- ⁴ Where revenge by kin becomes a societally supported method for punishing norm violators it enters the category of repressive sanction. To distinguish that state of affairs from a pattern of unremitting feud is a difficult problem both conceptually and empirically. If one wishes to examine organized repressive sanction in segmental societies, it may be necessary to enter that thicket. I am grateful to my colleague, Ronald J. Allen, for stressing this point.
- ⁵ The term "government" is used differently in the definition of punishment and in its own right as a scale attribute. The scale attribute "government," defined by the presence of full-time bureaucrats unrelated to the head of government, is shown on the Freeman-Winch scale to be absent in many of the societies which have punishment. Accordingly, it is obvious that "government" is used differently in the definition of punishment and cannot be taken to mean full-time bureaucrats, etc. in that context. (Freeman and Winch, 1957: 463-465).
- ⁶ Cambodians, Indonesians, Syrians, and Cheyenne.
- ⁷ To the extent that part of the scale results from a definitional relationship between punishment and police, the reproducibility coefficient should be somewhat discounted. This is a problem that needs attention which, unfortunately, I cannot give it in this context.
- ⁸ Another problem which needs attention is the relationship between the evolutionary position of courts, as discerned by Wimberly (1973), and the revised legal scale presented here. The correspondence between courts and punishment is considerable, with six societies in our new scale type 2 (mediation and punishment) also having courts, according to Wimberly. Only two of the nine (Cayapa and Navaho) have punishment but not courts and the Venda are not included in Wimberly's sample. Only three societies (Chagga, Formosan aborigines and Hot-tentot) have courts but lack punishment. These results suggest that courts and punishment tend to emerge at about the same stage, although the societies with one and not the other should be examined as interesting cases of variation.

REFERENCES

- BAXI, Upendra (1974) "Durkheim and Legal Evolution: Some Problems of Disproof," 8 *Law & Society Review* 645.
- DURKHEIM, Emile (1933) *The Division of Labor in Society*. New York: Macmillan. Paperback edition, 1964. The Free Press of Glencoe. Translated by George Simpson.
- (1938) *The Rules of Sociological Method*. Chicago: University of Chicago Press. Paperback edition, 1964. New York: The Free Press. Translated by Sarah A. Solovay and John H. Mueller.
- FREEMAN, Linton C. and Robert F. WINCH (1957) "Societal Complexity: An Empirical Test of a Typology of Societies," 62 *American Journal of Sociology* 461.
- HOEBEL, E. Adamson (1954) *The Law of Primitive Man*. Cambridge: Harvard University Press.
- (1940) *The Political Organization and Law-Ways of the Comanche Indians*. 54 *Memoirs of the American Anthropological Association*.
- MALINOWSKI, Bronislaw (1926) *Crime and Custom in Savage Society*. London: Routledge & Kegan Paul, Ltd.

POPPER, Karl R. (1959) *The Logic of Scientific Discovery*. New York: Basic Books.

SCHWARTZ, Richard D. and James C. MILLER (1964) "Legal Evolution and Societal Complexity," 70 *American Journal of Sociology* 159.

WIMBERLY, Howard (1973) "Legal Evolution: One Further Step," 79 *American Journal of Sociology* 78.