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CRIMINOLOGY AND BEHAVIORISM

Rustem Vambery¹

It was Rafaele Garofalo, nicknamed by Lacassagne the "reasonable anthropologist," who first pointed to the legal definition of crime as a fundamental difficulty in criminological research. His suggestion, however, to substitute for the legal definition, the "natural crime" may be a wishful thought and a useful hint for the legislator, but unfortunately what he termed "natural crime," an act which offends the average measure of pity and probity in a community, does not necessarily coincide with what law really considers a crime.

The issue whether such thing as natural crime and, indeed, natural law exists, is certainly not a new one, but has gained some momentum through the widening of the gap between American and European criminological methods. In view of the lack of a definite method it seems doubtful whether we may speak of a recognized method of research at all. At any rate it is perhaps not inexact to say that in the U. S. the case study of crime seems to prevail whereas in the European etiological research the statistical method predominates. This divergence may be partly due to the more recent development of Judicial Statistics in this country whilst in France for example, since more than a century, most

elaborate crime statistics were available.

Whatever the reason is, the fact remains that various attempts have been made to bridge over the incongruence of the legal concept of crime and its explanation as a social and psychic phenomenon. All these attempts revert in one way or the other to bygone ages when the frontier between law and other rules of social conduct were blurred and indistinct. It took a long time to clarify the line that divides legal and moral rules. *Hugo De Groot* by his memorable remark: "*intelligi jus naturale potest, etsi fingatur Deus non esse*"—has laid down the foundations of a natural law irrespective of the close connection between religious and legal rules in past centuries. Legal philosophers of the "century of enlightenment," like Thomasius, stressed the difference between law and ethics or, misinterpreting Kant's "*Legalitaet und Moralitaet*," insisted on the separation and even on the contrast of the two sets of rules.

This general tendency found a particularly eager response both in the theory and practice of criminal law which since Voltaire and Beccaria stood under the influence of the reaction to the arbitrariness of bygone centuries. However, as Professor Roscoe Pound explained,² "we are not so sure of this

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² *Law and Morals*, 2nd ed. 70.

opposition of law and morals with respect to application as we were in the 19th century. . . . Today the rise of administrative tribunals and the growing tendency to commit subjects to them that were once committed to the court, bears witness to the demand for individualized application at many new points. It will not do to say that our regime of administrative justice is not part of the law." How little the progress may be which in the relation of law to morals since the Greek philosophers of the fifth century B. C. has been made, it cannot be ignored that the attempts nevertheless arrived at some practical result.

Legal, like other rules of social conduct, are supposed to control human behavior. Law, however, is insofar different from other normative rules that being a self restraint of the supreme power in a human community, it offers some guaranty against the abuse of this power. If, as the so-called "totalitarian" theory assumes, life, liberty and property of the citizen were at the mercy of the omnipotent state, law would lose its *raison d'être*. As it lacked, indeed, its essential value during all those centuries when the individual was the defenseless victim of the state or government despotism. One of the moving forces of the French Revolution was the system of the *lettres de cachet*, blank warrants by which courtiers could have "undesirable" elements imprisoned for an indefinite term.

In revolt against this arbitrary use of judicial authority in pursuance of interests, dislikes or revenge by those

in charge of the government, the Declaration of the Rights of Man, on August 26, 1789, proclaimed that no one must be punished but by virtue of a law established and promulgated prior to the perpetration of the crime. Until recently, on the European continent, the legal adage *nullum crimen sine lege* was the foundation of the Penal Code and the Code was, indeed, the Magna Charta not only, as Prof. v. Liszt has put it, of the criminal, but moreover of the lawabiding citizen. Current revolutionary movements directed against liberal democracy gave up consciously this first defense line of civil liberty. In contrast to the Penal Code of 1871 the German Law of June 28, 1935, pronounced that, "Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of a penal law and a sound popular feeling, should be punished." This "law," in fact itself a promulgation of the dictators will, is a logical sequence to the revolutionary dictatorship. It implies that any act may become a crime provided the Court by way of analogy expresses the "sound" popular feeling that it should be punished. Professor Hall, in his valuable paper on the above quoted adage,³ reminds us how much the German law of 1935 resembles the *Constitutio Criminalis Theresiana* (the Penal Code of the Austrian Empress Maria Theresa), declaring that, "cases not set forth in the Code should be decided according to the principles laid down in the Code." It seems, however, that the recent German law, by refer-

³ Yale L. J. 1937, 165.

ing to the "sound popular feeling" which depends on a merely subjective valuation, leaves a larger scope for arbitrariness than the analogy based on objective rules of the Austrian Code.

In view of current European events the importance of the legal aspect of crime has undoubtedly increased. Even the all-powerful State, indeed, as Professor Hall stresses, "especially the all-powerful state, must use the regular channels of due process before any individual can be punished." In a revolution legal rules prove as a defense line apparently no more impenetrable than the Maginot line did. But this is exactly the reason why in constitutional countries increased importance should be attached to guaranties of personal liberty. Any endeavor, therefore, to dim or blur the frontier between the legal concept of crime and other more or less vaguely defined rules of conduct has to be energetically rejected. Little it matters that a revolution terms itself euphemistically a "totalitarian" form of government, no matter that revolution clads its pronunciamiento-s in the traditional legal form.

Revolution and law are incompatible. What Carlyle wrote is still true: "Revolution, like jelly sufficiently boiled, needs only to be poured into shapes of the constitution and consolidated therein—could it indeed contrive to cool." Since this country thus far was fortunate enough to escape the current dangers of war and revolution it is her duty for self-preservation to keep watch over the valuable ideological guaranties of civil liberty.

I had to enlarge upon the *nullum crimen sine lege* principle in order to expound why, in my view, it would be dangerous to give a vague crime concept, to which law has closed its gates, an entrance by the backdoor of criminology. Professor Robert H. Gault is, no doubt, right that to haggle over definitions at the outset is to invite stagnation even with regard to the term "crime." "Crime is both a social and individual phenomenon." Certainly, but nonetheless it is a legal phenomenon, too, and to ignore the legal aspect of crime is to invite confusion in the etiology of crime as a social and individual phenomenon. Not only the majority of American criminologists but the most prominent ones are not jurists. They are as a rule, sociologists or psychiatrists. This might account for their underrating of the legal definition of crime and the endeavor to facilitate the research work by substituting a *social* concept to the *legal* concept of crime.

Such an endeavor becomes manifest in quite a number of recent textbooks. May I quote one for many, the valuable "*Criminal Behavior*" by Professor Walter C. *Reckless* who, following Professor Thorsten Sellin's attempt "to escape the superficial legalistic definition" declares: "While criminologists have studied primarily the infractions of the criminal code of modern states and hence have traditionally narrowed their field of investigation to illegal behavior, crime, sociologically speaking, is fundamentally a violation of conduct norms which contain sanctions, no matter whether found in the crim-

inal law of the modern state or merely in the working rules of special groups."

There is, however, a profound difference between the norms of criminal law and the working rules of special social groups: the definiteness of the first and the indefiniteness of the latter. To obscure this difference seems to invite danger from both the constitutional and the criminological viewpoint.

Sharp and severe sanctions may impel the observation of the moral and professional rules of a social group. Various reasons account, however, for not having made the transgression of these rules a *crime* as the legislator has done in other cases where moral and legal rules, indeed, coincide. Charity is a moral precept, but it would be impossible to determine by law when the violation of this rule should become liable to punishment. A certain vagueness of moral rules seems desirable, but the vagueness of the legal definition is inconsistent with the guaranty which law is supposed to offer to personal liberty. *Removing these guaranties in an epoch in which champions of violence dominate a considerable part of the world means a support to those who would undermine the very existence of law.* Even Lothrop Stoddard who is certainly not biased against the ideological foundations of the Third Reich admits in his recent book⁴ that no safeguards exist under this system for the individual citizen.

I do not feel competent to test the statements of Mr. Raymond Moley⁵ but what we learn about the close rela-

tion of criminal justice and politics, about politics "embodied in the prosecutor administering the criminal law, for its own objectives and its own image," makes it even in a true democracy as the U. S. all the more important to adhere resolutely to the strict legal concept of crime. Though this adherence may be no safeguard against the political abuse of criminal justice yet the obliteration of the frontiers between crime and not-crime not only facilitates such misuse but increases the indifference of the public to law as a guaranty of civil liberties.

However, it remains doubtful whether the sacrifice of the legal concept of crime made even only with regard to criminology would be, indeed, helpful to criminological research. If we stick to what is being derided "the legalistic vein of thought" and limit research by the legal concept of crime the research work is facing unquestionable difficulties. Its scope may, indeed, prove partly too narrow, but on the other hand it may prove partly too broad. Assuming that prevention of crime is the ultimate objective of criminological research the etiology of murder or burglary is probably of greater practical interest than the research into the violation of traffic laws though both are crimes in the legal sense of the term. It remains questionable, however, that by extending the range of research to the violation of non-legal rules of social conduct, this means by broadening the scope of criminology instead of restricting it the incongruity of acts, labelled

⁴ *Into the Darkness*, 1940, p. 270.

⁵ *Politics and Criminal Prosecution*, New York, 1929.

crime by the law, would be really eliminated.

Anyone, brought up in European jurisprudence, cannot easily comprehend Professor Sutherland's subtle argument that "crime and not-crime are not very distinct types of behavior, but constitute a continuum" because "the status of the wrongdoer and the attitudes of the influential part of the public toward his actions are highly important in determining whether his actions are or are not crimes."⁶ Are we to understand that in the great American Democracy the "influential part of the public" determines, regardless of the law, whether the act of the defendant is a crime or not, and are laws, indeed, merely outlets of public emotion as Professor Park, quoted by Professor Sutherland, wants us to believe? However this may be, it is hard to be in harmony with Professor Sutherland's conclusion that "in general the criminal law is not implemented to punish the somewhat subtle kinds of fraud." No matter whether this regrettable fact is due to the incomprehensibly faulty wording of the law or to the unwillingness of the legislator to penalize the "subtle kinds of fraud" the result is the same i.e., that these unpunished frauds are no crimes of fraud unless we are prepared to return to "natural" law discriminating *malum in se* and *malum prohibitum*.

Quite so, but Professor Sutherland further implies that the view "we would have no crime if we had no laws . . . is logomachy because the

behavior would remain essentially the same. "I am not so sure about this. Without overrating the value of the penal sanction its lack, too, may have some effect on behavior. In Professor Sutherland's view "Stealing would not in a legal sense be a crime but it would still be stealing and the public would react to it by public disgrace." Not even this reaction is necessarily presumable as it appears from the medieval German adage: "*Rauben und stehlen ist keine Schande, das thun die Besten im Lande*." "May be public opinion nowadays would be less lenient in the moral valuation of robbery and larceny yet it can be scarcely said, without risking hypocrisy, that bootlegging if it ever was is still a disgrace after the repeal of the Liquor Prohibition Amendment. No evidence is needed to prove that the rules of criminal law do not always coincide with other norms of social conduct. For arguments sake let us assume, however, that the nondescript crimes would provoke the same resentment and censure as crimes—in a legal sense—do, and disregarding the aspect of personal liberty let us agree to the conclusion that "crime and not-crime are not two distinct types of behavior."

From the watch-tower of behaviorism, a belated child of the materialistic philosophy, this argument is unassailable. Without challenging the value of the behaviorist doctrine, as an American contribution to our scanty knowledge of psychology, to which no less man than John Dewey has turned⁷

⁶ *Principles of Criminology*, 3d ed. 18.

⁷ *The Philosophy of J. D.* by P. R. Schilpp, 1939, p. 33.

its generalisations are not necessarily helpful to criminological research. Not only because of the instability of behaviorism the Watsonian ideal of which, according to Horace M. Kallen, "is in the air and a shift in the ruling doctrine whether in Russia or in the U. S., may give behaviorism over to the same fate that befell associationism." Not only because thus far all attempts to pigeonhole manifestations of the human personality in its relation to social environment into formulae of natural science have not contributed much to a better understanding of the etiology of crime. There is a further reason dissuading the substitution of criminal behavior to crime. The behavior system, as we are told, is more than an aggregation of individual crimes. In this respect it resembles somehow professional crime which in its legal definitions by recent European laws presupposes a unity of determination to make of crime a living. However, there is a difference, too. It is the law the rules of which decide whether a number of criminal acts constitutes professional crime or not. Nothing short of a judgment of the competent Court is to decide whether an act is part of a legal unit which at the same time is a sociological unit, too.

Fully admitting the soundness of the fundamental idea that in order to make progress in the explanation of crime not the legal label should matter and as Professor Sutherland wrote: "it is desirable to break crime into more homogeneous units." Very well, but as "a sociological unit need not be

confined to the legal prescriptions, "who is to delimit the subject matter of criminological study? Thus far no suggestion has been made except that the criminologist can define his own units and does not need to accept the decision of courts and legislatures.

This is, no doubt, a very convenient method. The criminologist may easier find an explanation if he depends merely on his own judgment as to determine what amounts to criminal behavior. But the method has its drawbacks nonetheless. First of all where is the criminologist going to get his facts which are reliable enough to conclude herefrom a criminal behavior? If we assume the establishment of a criminological Dies Committee, investigating such criminal activities which are no crimes, I don't think its declaration that someone's behavior is criminal would represent the spirit of the American Constitution and of its heart, the Bill of Rights.

Apart from this reflection it cannot be ignored that criminology is interested in the etiology of crime and in the psychology of the criminal. These are legal concepts, no matter how different the social manifestations covered by the same legal label, might be. I need not enlarge upon the reason why and how various social precepts differentiated, but the fact remains that they are different from each other in many ways. Not only the sanctions attached to them are different, but partly the rules themselves. The violation of a criminal law is not necessarily a transgression of an other "conduct norm" of a social group and vice

versa. If criminology aims at exercising an intentional influence on a more reasonable use of criminal law and punishment as effective weapons in struggle against crime, as it does, it cannot draw its conclusions from a research based on human behavior which becomes manifest in non-crimes strongly disapproved though they may be by any other normative group but the State.

A behavior system, according to Professor Sutherland, "should be defined as a way of life . . . similar to a disease which is differentiated from other diseases by the causal, process common to it regardless of the person in whom it occurs." I think the simile is not very fortunate. Since Virchow we know that a disease cannot be considered as a causal process regardless of the patient, but moreover if in investigating behavior sequences we do not discriminate between crimes and non-crimes this would amount to studying typhoid by taking into consideration paratyphoid cases, too, which in many of its symptoms resembles the typhoid fever.

Although it would be certainly convenient if in criminological research we would not need "to know positively the specific causation of crime," the substitution of the research relating to behavior to the etiological study of crime is neither unobjectionable nor entirely satisfactory. Not merely because all crimes do not fit into behavior systems for, as the most prominent advocate of the system Professor Sutherland admits, "certain crimes stand somewhat isolated and outside of systems," but because of its arbitrariness

in selecting the subject matter of research work. However, it has its undeniable merits as well. Certainly no objection can be raised against substituting behavior for crime in the case of juvenile delinquency, at least not in countries where the Children's Court is supposed to deal with the personality of the delinquent of which the crime is but one of several indications. Dean Kirchwey significantly termed the procedure of the Juvenile Court as based on the principles of equity jurisdiction. In establishing Children or Juvenile Courts the law in most countries made allowance for the presumption that juvenile delinquents are less likely to be victims of that arbitrariness against which the principle *nullum crimen sine lege* wants to protect the citizen. Investigations of criminal careers in the masterful studies of Professor Sheldon and Eleanor Glueck supply sufficient evidence of fairly reliable results without reducing the individualities to behavior patterns.

By pointing to the dangers which the merging of the etiology of crime with criminal behaviorism imply do not want to minimize the shortcomings of the present methods of criminology. The general label "crime" or as for that the legal labels of specific crimes cover various kinds of behavior. Whilst the law discriminates according to the gravity of the act it ignores the possible sociological diversities in which criminology is mainly interested. However, the correlation between crime as a legal, a sociological and a psychological phenomenon is undeniable.

When criminology is aiming at the etiological explanation of crime as a manifestation of the individual it must not disregard the legal aspect of the social and psychic phenomenon either. It would be a misconception of reality if we ignored that the etiology of murder or arson, on account of its greater dangerousness, rouses more interest than the violation of traffic regulations. Therefore in attempting to improve the methods of criminological research it would be more promising to restrict the research work to certain kinds of crime the social and individual background of which is presumably similar and permanent in certain areas.

I am afraid it is a current mistake to presume that a distinctly outlined legal definition of crime, or rather of crimes, is a bar to an adequate dealing with crime as a social phenomenon. Various recent penal codes as for instance the new Swiss Federal Code or

the ingenious Draft Criminal Code for Cuba by Dr. Fernando Ortiz (*Proyecto de Codigo Criminal Cubano, 1926*) furnish ample evidence that the results of criminology can be adequately utilized within the frame of the law. In a reverse manner the "legalistic vein" or rather the reluctance to return to medieval witch-hunting is likely to prove a less insurmountable obstacle on the way of criminological research than the still obvious lack of a research method which could harmonize the study of crime as a mass phenomenon and the case study of the individual criminal. And before all let us give up the enticing illusion that the study of crime and criminals could ever produce exact results such as arrived at in natural science. If we renounce these unattainable certainties we shall much more appreciate the probabilities which criminology thus far offers.

Essence of Practical Criminology:

"Whatever theories one may hold about the general causes of criminalism or whatever the measures that may be undertaken to combat deteriorating economic or environmental conditions, alcoholism, or the inheritance of defect, it must not be forgotten that it will always remain for the courts to deal with the individual as such and, if he is convicted of crime, for other public officials to administer subsequent treatment to him as a human individual. It follows, then, that whatever methods of study will aid toward understanding what is best to be done for given offenders will prove to be the essence of a practical, applied criminology. The crux of the problem may be stated as not what 'the criminal' in general is, but rather what has brought about this given individual offender's career. To this concrete knowledge there is no royal road."—William Healy: "The Problem of Causation of Criminality."

It seems to me significant that the two outstanding achievements of American criminal justice—the juvenile court and PROBATION—have to do primarily with preventive justice—with individualization.—Roscoe Pound.