

1957

Crime, Law and Social Structure Part I: Methodology

Clarence Ray Jeffery

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Clarence Ray Jeffery, Crime, Law and Social Structure Part I: Methodology, 47 J. Crim. L. Criminology & Police Sci. 423 (1956-1957)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

CRIME, LAW AND SOCIAL STRUCTURE

Part I: Methodology

CLARENCE RAY JEFFERY

The author is a member of the Department of Sociology and Anthropology in the Southern Illinois University at Carbondale, Illinois. His article on "The Structure of American Criminological Thinking" was published in this Journal, Volume 46, No. 5, Jan.-Feb., 1956.

The article which follows will be concluded in a later number.—EDITOR.

THE SOCIOLOGY OF CRIMINAL LAW

In a previous article attention was called to the fact that American criminology has paid little attention to the study of law and society.¹ The positivistic approach, which limits itself to the study of the criminal, has to be supplemented by an equally ambitious study of the sociology of law.

The differentiation of normative facts from non-normative ones, or legal norms from other social norms, of penal law from other legal rules provides the distinctive structure of criminology, that which denotes specific social data and establishes their significance for criminology. . . . But the major accomplishment is that Sociology of Law is unified by its ultimate reference to "actual" legal rules. Sociology of Criminal Law, is accordingly, that division of legal sociology which deals primarily with social phenomena relevant to the norms of penal law; hence Criminology, in this view, is synonymous with Sociology of Criminal Law.²

In his attempt to be scientific the criminologist has sought the "causes" of crime in the individual. Crime must be studied as an aspect of institutional systems. Institutions, not individual offenders, should be the subject matter of criminology. "When a social phenomenon is defined by law, convention, or any institutional procedure, we should not assume that it can be referred to any one set of causes lying outside of the institutional system itself."³

It is vain to seek the causes of crime, as such, or crime anywhere and everywhere. Crime is a legal category. The only thing that is alike in all crimes is that they are alike violations of the law. In that sense the only cause of crime is the law itself. . . . Crime, then, is essentially relative. It has no inherent quality or property attaching to it as such, attaching to crime of all categories under all conditions.⁴

There are two different but related problems in the sociology of law: (1) How law is differentiated from custom, and how the legal institution is interrelated with

¹ JEFFERY, CLARENCE R., *The Structure of American Criminological Thinking*, JOUR. OF CRIM. L., CRIMINOL. AND POL. SCI., January-February, 1956.

² HALL, JEROME, *Criminology*, TWENTIETH CENTURY SOCIOLOGY, ed. by GEORGES GURVITCH and WILBERT E. MOORE, New York: Philosophical Library, 1945, pp. 353-354.

³ MACIVER ROBERT M., *SOCIAL CAUSATION*, New York: Ginn and Co., 1942, p. 88.

⁴ *Ibid.*, p. 88.

other institutional structures;⁵ and (2) How criminal law is administered. The informal practices are as important as the formal legal procedures.⁶ This paper is concerned with the first problem.

Methodology

Methodology, as the term is used in contemporary sociology, usually refers to the statistical techniques which are used in the analysis of a given problem. At this stage in its development the sociology of law is not prepared for such quantitative analysis. The object of this study is institutions.

According to MacIver and Page there are three ways in which institutions may be studied: (1) historical analysis, (2) comparative analysis, and (3) functional analysis, or the way in which institutions are functionally interrelated in time and space.⁷ This functional interdependence of institutions is also labeled an "institutional complex" or "functional system".⁸ According to Timasheff, the functional approach "refers to the emphasis upon the integration of parts into wholes, or, what is almost the same thing, the interdependence of parts . . .".⁹ This idea is not new in social thought since it is found in one form or another in Plato, Aristotle, and, in the nineteenth century, in Spencer, Sumner, Durkheim, Pareto and Weber.¹⁰ Today functionalism is prominent in the work of the British school of social anthropology—Malinowski and Radcliffe-Brown—and in the writings of Talcott Parsons in this country.¹¹ The current emphasis on the study of whole cultures is seen in Margaret Mead's statement that "practices and beliefs can and must be evaluated in context, in relation to the cultural whole."¹²

Contemporary functionalism has two aspects which are not accepted *in toto* by this writer. First, it has turned the study of social systems and institutions into a study of individuals. Malinowski reduced functionalism to the biological and primary needs of the organism.¹³ Parsons reduces the social system to the actor-situation frame of reference. As Timasheff notes, it is not clear whether the focal point of Parsons' system is "actors" or social relationships.¹⁴ ". . . Parsons' recent theory has

⁵ JEROME HALL'S *THEFT, LAW AND SOCIETY* is an excellent example.

⁶ The American Bar Association is now sponsoring a five-year study of the administration of criminal justice in the United States. This study will give us a more complete answer to this question.

⁷ MACIVER, ROBERT M., AND PAGE, CHARLES H., *SOCIETY*, New York: Rinehart and Co., 1949, p. 17.

⁸ *Ibid.*, p. 494 ff.

⁹ TIMASHEFF, NICHOLAS S., *SOCIOLOGICAL THEORY*, New York: Doubleday and Co., 1955, pp. 219-220.

¹⁰ This observation led John Gillin to comment: "It is an ironic fact that most of what modern anthropology has absorbed from the functionalists it could have learned decades earlier from American sociology had it chosen to listen." *For a Science of Social Man*, ed. by JOHN GILLIN, New York: Macmillan Co., 1954, p. 19.

¹¹ The British anthropologist was made to realize that societies are functional wholes because of the experiences the British had in administering a colonial empire.

¹² *CULTURAL PATTERNS AND TECHNOLOGICAL CHANGE*, ed. by MARGARET MEAD, New York: Mentor Book, 1955, p. 13.

¹³ GILLIN, *op. cit.*, pp. 194-195.

¹⁴ TIMASHEFF, *op. cit.*, p. 240. See also ROSCOE AND GISELA HINKLE, *THE DEVELOPMENT OF MODERN SOCIOLOGY*, New York: Doubleday and Co., 1954, p. 57 ff.

been described as being as much psychological (and in some measure, psychoanalytical) as sociological."¹⁵ Parsons has stated that "in a personality considered as a system there is an internalized culture, while in a social system the counterpart of internalization in the personality is institutionalization."¹⁶ Such a basic distinction between groups and institutions must be made. Individuals belong to groups, not institutions.¹⁷ If we discuss the influence of the Industrial Revolution on the family system we are focusing attention on institutional relationships; we are not talking about the group to which John Doe belongs. If we make a basic distinction between socialization and institutionalization then a great deal of the confusion which exists in sociological theory, especially criminological theory, can be averted. The one approach studies the individual; the other studies the social system or institutional patterns. This paper is concerned with institutions and institutional history, not with the social psychology of individuals. The writer makes the assumption that the study of institutions need not and cannot be reduced to a study of the psychology of individuals.

Second, the study of functional systems has been ahistorical.

Logic and cultural history were separated, and logic became a substitute for history. Cultural history became irrelevant to an understanding of cultural origins.¹⁸

This substitution of logic for history, as seen in Malinowski and Parsons, is as characteristic of American sociology as is its individualism.¹⁹

American sociology has been generally ahistorical in its approach to the study of society. It has concerned itself extensively and intensively with the "contemporary" realm of events... most American sociologists are ahistorical and have been little concerned with the historical perspective.²⁰

Robert Bierstadt recently stated that the source of substantive sociological theory is history.²¹ Pauline Young, in commenting on Rice's book, "Methods in Social Science," observed "it is of interest that this book includes historians as scientists."²²

Causation

The search for the cause of social change has been as frustrating as the search for the cause of criminal behavior. The cause of social change has been located in biological, geographical, technological and cultural factors.²³ If one accepts a functional approach to the study of society and social change, as outlined above, then the con-

¹⁵ *Ibid.*, p. 242.

¹⁶ GILLIN, *op. cit.*, p. 71.

¹⁷ MACIVER AND PAGE, *op. cit.*, p. 15.

¹⁸ BIDNEY, DAVID, *THEORETICAL ANTHROPOLOGY*, New York: Columbia University Press, 1953, p. 226.

¹⁹ See the HINKLE's book, cited above.

²⁰ MCKINNEY, JOHN C., *Methodology, Procedures and Techniques*, to be published in a symposium on the HISTORY OF SOCIOLOGY, ed. by HOWARD BECKER, and published by Dryden Press, p. 57.

²¹ BIERSTEDT, ROBERT, *The Source of Substantive Sociological Theory*, paper read at the 49th annual meeting of the American Sociological Society, 1954.

²² YOUNG, PAULINE, *SCIENTIFIC SOCIAL SURVEYS AND RESEARCH*, New York: Prentice-Hall, Inc., 1949, p. 99.

²³ MACIVER AND PAGE, *op. cit.*, p. 531 ff.

cept of cause is no longer valid. MacIver and Page reject the deterministic approach when they note that they are interested in interaction, not reaction.²⁴ Kingsley Davis, following MacIver's analysis of causation, views the "A causes B" notion of causation as a fallacy, and he substitutes for it a functional, or what he terms an "equilibrium", approach to a causal analysis.

The functional-structural approach to sociological analysis is basically an equilibrium theory. It is usually phrased in static terms, but as soon as the element of time is added it alludes to a moving equilibrium.²⁵

Criminologists have been content to use the "A causes B" notion of cause in their analysis of criminal behavior.²⁶ The fallacy of this approach is that it views certain factors as independent factors, other factors as reactors. It locates the cause of X in a single factor or in multiple factors. If the factors in a situation are mutually interdependent, then no one factor can "cause" X. Oxygen does not "cause" water, neither does hydrogen. In this study of institutions emphasis is placed on interaction and interrelationships among institutions.

PART II: LAW AND SOCIAL CHANGE

Theories of Social Change

In the nineteenth century theories of social change had one thing in common; they viewed social change as a transition from the tribe to the State; from simple organization to complex organization; from homogeneity to heterogeneity. This view of change was in line with the evolutionary concept of change which predominated nineteenth century thinking. MacIver and Page summarize this theme when they state that the primitive fusion of institutional functions in the kinship group gave way to differentiated institutional functions in which separate political, economic, religious, family and ecological units emerged.²⁷ The kinship system passed into a state system. "Custom passes into law."²⁸

As was pointed out above, these institutions are historically interrelated and interdependent. They form a "functional complex."

The quickest way to envisage the total social order of a society is to understand its major social institutions and the relations between these institutions. Thus if a person can grasp the basic economic, political, religious, familial, and recreational complexes in the culture of the United States and can see how they are mutually interdependent, he has mastered the most salient feature of our social organization.²⁹

In order to understand the topic "law and society" we must understand how the legal institution is related to the other social institutions which make up our social

²⁴ *Ibid.*, p. 572.

²⁵ DAVIS, KINGSLEY, *HUMAN SOCIETY*, New York: Macmillan Co., 1949, p. 634.

²⁶ See MACIVER, *SOCIAL CAUSATION*, *op. cit.* See also PETER LEGINS, *Pragmatic Etiology of Delinquent Behavior*, *SOCIAL FORCES*, March, 1951, pp. 317-320.

²⁷ MACIVER AND PAGE, *op. cit.*, pp. 594-598.

²⁸ *Ibid.*, p. 591 ff.; p. 630 ff.

²⁹ DAVIS, *op. cit.*, p. 72.

order. Jerome Hall made use of institutional legal history in his study of theft, law and society.

Every legal problem arises within the framework of a particular set of social institutions. The interrelations of these institutions and the interaction between them and the body of legal sanctions existing at any given time create innumerable problems, in the solution of which the materials of legal history are made.³⁰

Historians have recently broadened the scope of their inquiry to include thorough considerations of social, economic, political and religious conditions. This approach is based upon (a) the alleged fact that the behavior of people is, by and large, uniform, standardized, and habitual, and that, as a result, social life may be thought of in terms of "institutions" which denote such behavior; and (b) that social change is . . . to be explained as a result of conditions determined by and rising from a large network of institutions which are closely interrelated and the impact of these institutions upon each. An institutional interpretation of history does not ignore human factors but emphasizes common and recurring, rather than infrequent or individual, modes of behavior.³¹

Many concepts have been used in an effort to comprehend the nature of social change. Spencer viewed change as from homogeneity to heterogeneity. Simple organisms changed into complex organisms with special organs which performed special functions. Durkheim contrasted mechanical solidarity and organic solidarity. Redfield uses the terms "folk society" and "urban society". Tonnies talked about *Gemeinschaft* and *Gesellschaft*. Weber saw the change in terms of traditionalistic versus rationalistic modes of human behavior. Cooley used the terms "primary group" and "secondary group." Becker uses the terms "sacred" and "secular." Sorokin uses the terms "familistic" and "contractual."

Loomis and Beegle, using Weber's ideal type method, or the method of constructive typology, arrange the modes of human interaction on a continuum from familistic *Gemeinschaft* to contractual *Gesellschaft*.³² By *Gemeinschaft* Tonnies meant community, group interaction dominated by natural will, custom and tradition, as seen in rural communities. By *Gesellschaft* he meant society, group interaction dominated by rational will, deliberate choice, formal interaction. A familistic *Gemeinschaft* system is characterized by social interaction with these characteristics: involuntary, primary, sacred, traditional, emotional, personal authority, unlimited rights and unlimited responsibilities. A contractual *Gesellschaft* system is characterized by social interaction with these characteristics: voluntary, secondary, secular, rationalistic, impersonal authority, rights and responsibilities limited to station.³³ According to this scale the Amish rank high on the *Gemeinschaft* side of the continuum, whereas a government bureau and a military organization rank high on the *Gesellschaft* side.

Legal Theories of Crime

Textbooks in criminology ignore the legal theories of crime. Sir Henry Maine viewed the transition in authority as a change from status to contract, "from a condition of society in which all the relations of Persons are summed up in the relations

³⁰ HALL, THEFT, LAW AND SOCIETY, *op. cit.*, p. 3.

³¹ *Ibid.*, p. 13.

³² LOOMIS, CHARLES P., AND BEEGLE, J. A., RURAL SOCIAL SYSTEMS, New York: Prentice-Hall, Inc., 1950, p. 9 ff.

³³ *Ibid.*, pp. 18-25.

of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of individuals."³⁴ This transition in authority is also a transition from tort law to criminal law.

Now the penal code of ancient communities is not the law of Crimes; it is the law of Wrongs, or, to use the English technical word, of Torts. . . . This peculiarity, however, is most strongly brought out in the consolidated laws of Germanic tribes. Without exception they describe an immense system of money compensations for homicide, and with few exceptions, as large a scheme of compensations for minor injuries. . . . If therefore the criterion of a delict, wrong, or tort is that the person who suffered it, and not the State, is conceived to be wronged, it may be asserted that in the infancy of jurisprudence the citizen depends for protection against violence and fraud not on the Law of Crime, but on the Law of Tort.³⁵

This shift from tort law to criminal law is likewise a shift from family law to state law. Lowie, in commenting on the problem of the origin of law, states:

This brings us to the very core of our problem, for what Maine means is that in archaic jurisprudence it is not the State that is the aggrieved party, but the individual offender and his kindred. In other words, it is the old question of personal versus territorial relations.³⁶

Emile Durkheim, following Maine's distinction of penal law and restitutive law, made a distinction between mechanical solidarity, as found among primitive peoples, and organic solidarity, as found among modern peoples with a complex division of labor. He views a violation of mechanical solidarity as a crime, since punishment takes place. A violation of organic solidarity leads to restitution rather than punishment. The legal system restores to the individual that which has wrongfully been taken from him.³⁷ It should be noted that Durkheim regarded the law of tort as characteristic of modern society, whereas Maine regarded tort law as characteristic of primitive societies.

Max Weber had a three-fold classification of social action: (1) rational-legal, (2) traditional, and (3) emotional. Each of these modes of conduct had its counterpart in the social structure. Rational-legal conduct is expressed in a bureaucratic structure; traditional conduct is expressed in a patriarchal structure; emotional conduct is expressed in a charismatic structure.³⁸

Weber's discussion of the sociology of law is based on the various forms which institutionalized authority may take. Law represents a system of formal rules and regulations enforced by a bureaucratic structure. Weber makes a clear distinction between law, custom, and convention. A conduct code is a law if there exists in the social structure a group which has the authority to use force. "It is only with regard to the sociological structure of coercion that they differ. The conventional order lacks specialized personnel for the implementation of coercive power."³⁹ This authority is vested in one institution, the State.

³⁴ MAINE, SIR HENRY, *ANCIENT LAW*, New York: Henry Holt and Co., 1888, p. 163.

³⁵ *Ibid.*, p. 250.

³⁶ LOWIE, ROBERT, *PRIMITIVE SOCIETY*, New York: Liveright, 1920, p. 398.

³⁷ DURKHEIM, EMILE, *THE DIVISION OF LABOR IN SOCIETY*, Glencoe: The Free Press, 1947.

³⁸ WEBER, MAX, *LAW IN ECONOMY AND SOCIETY*, edited by MAX RHEINSTEIN, Cambridge: Harvard University Press, 1954, pp. 336-337.

³⁹ *Ibid.*, p. 27.

Today legal coercion by violence is the monopoly of the state. . . . We shall speak of "State law", i.e., of law guaranteed by the state, only when, and to the extent that, the guarantee for it, that is, specific coercion, is exercised through the specific, i.e., normally directed and *physical*, means of coercion of the political community.⁴⁰

Jerome Hall has analyzed criminal law in relation to the changes that have occurred in society. He views law as a means of solving social problems. In "Theft, Law and Society," Hall traces the development of the law of theft from the Carrier's Case through the eighteenth century when the law of theft included such crimes as embezzlement, larceny by trick, and obtaining property by false pretences. "Every legal problem arises within the framework of a particular set of social institutions".⁴¹ These changes in the criminal law were brought about by the Industrial Revolution and the need which it created for a system of law which would protect a modern commercial economy. Hall regards the subject matter of criminology to be "law and society" rather than the individual offender.⁴²

Primitive Law

The position taken by Maine and Weber, namely, that a political authority is necessary in order to have law, has recently been challenged by anthropologists. E. S. Hartland declared that "custom is king," meaning that all custom is law.⁴³ William Seagle represents another tradition when he states that law and custom are not one, and primitive peoples do not have law because they do not have courts and a state system. He denies that there is any such thing as primitive law.⁴⁴ Malinowski accepts the idea that primitives have law. He rejects the idea that law depends upon a central authority, courts, and a state system. He states that "in looking for law and legal forces, we shall try merely to discover and analyze all the rules conceived and acted upon as binding obligations . . .".⁴⁵ Law, according to Malinowski, is a binding obligation, and that which makes it binding is not the State or a court, but a system of reciprocity in social relationships.⁴⁶ MacIver and Page observe that Malinowski's notion of a "domain of legal rules" is in reality various levels of customary control.⁴⁷ Hoebel recognizes the difficulty encountered in Malinowski's view of law when he writes: "If an act produced disorder of any sort, he (Malinowski) looked upon it as a criminal act."⁴⁸

Hoebel and Llewellyn attempt to distinguish law and custom while, at the same time, they deny that a state system is necessary in order to have law.

⁴⁰ *Ibid.*, p. 14.

⁴¹ HALL, *THEFT, LAW AND SOCIETY*, *op. cit.*, p. 3.

⁴² JEFFERY, *op. cit.*

⁴³ HOEBEL, E. ADAMSON, *THE LAW OF PRIMITIVE MAN*, Cambridge; Harvard University Press, 1954, p. 20.

⁴⁴ *Ibid.*, pp. 21-22.

⁴⁵ MALINOWSKI, BRONISLAW, *CRIME AND CUSTOM IN SAVAGE SOCIETY*, London: Kegan, Paul, Trench, Trubner and Co., 1926, p. 15.

⁴⁶ *Ibid.*, pp. 63-66.

⁴⁷ MACIVER AND PAGE, *op. cit.*, p. 176.

⁴⁸ HOEBEL, *op. cit.*, p. 182.

The point at which this view of modern culture clarifies the primitive picture appears in the concept that not all devices which canalize conduct need be thought of as "law". The point at which it obscures is in suggesting that only when officials of the political state come into reckoning does it pay to think of any canalizing device as being law-stuff.⁴⁹

The Cheyenne Way is a study of Cheyenne law, or primitive law. The material presented here indicates that Cheyenne law was tribal law. Some writers have viewed the military society as a quasi-judicial organization; however, when Buffalo Chief killed another Cheyenne he was exiled from the tribe, though he was acting under the authority of the military society.⁵⁰ The practice of the blood-feud existed or had existed in Cheyenne history. An aborted fetus was found; however, the feud was precluded since it occurred within the family unit.⁵¹ In another place the authors state: "Homicide had ceased to be legally a matter for blood revenge."⁵² Hoebel and Llewellyn, therefore, used the term "law" to apply to conduct codes sanctioned and enforced by social units other than the State.

Gerhard Mueller, following the anthropological tradition of Malinowski, Hoebel, and Llewellyn, criticizes Max Weber for stating that primitives have no criminal law. Mueller points out that primitives have a system of punishment. "... the infliction of a penalty, from whatsoever consideration and under whatsoever aspects, as a consequence of norm violation, is exactly what we define as criminal in its nature."⁵³ Law and custom are thus distinguished on the basis of force and punishment.

Hoebel defines law in terms of force. "A social norm is legal if its neglect or infraction by an individual is regularly met . . . by the application of physical force by an individual or group possessing the socially recognized privilege of so acting."⁵⁴ However, the group entitled to use force is not the same in the case of primitive groups and in the case of modern society. Hoebel recognizes this fact when he discusses the trend of the law. He quotes MacIver to the effect that social change among social units has been from simple to complex, from homogeneous to heterogeneous. Hoebel arranges cultural development along an evolutionary line from hunting to pastoral to agricultural to industrial.⁵⁵ As we progress from the simple hunting economy to the industrial economy we progress from tribal law to state law. "As for law, simple societies need little of it."⁵⁶ Social control in primitive groups is in the hands of the kindred. Social relations are intimate, direct, and face-to-face. Informal types of social control are used. There is no need for supra-familial authority; there is no need for state control.⁵⁷ Even among highly organized hunters, such as the Comanches

⁴⁹ HOEBEL, E. ADAMSON, AND LLEWELLYN, K. N., *THE CHEYENNE WAY*, Norman: The University of Oklahoma Press, 1941, p. 23.

⁵⁰ *Ibid.*, pp. 101-103.

⁵¹ *Ibid.*, p. 119.

⁵² *Ibid.*, p. 132.

⁵³ MUELLER, GERHARD, *Tort, Crime and the Primitive*, *JOUR. OF CRIM. L., CRIMINOL. AND POL. SCI.*, September-October, 1955, p. 311.

⁵⁴ HOEBEL, *op. cit.*, p. 28.

⁵⁵ *Ibid.*, p. 292.

⁵⁶ *Ibid.*, p. 293.

⁵⁷ *Ibid.*, pp. 293-294.

and Cheyenne, we find the clan and tribe, with tribal law. "Nevertheless, kinship continues to loom large in the law. Kinsmen stand together. Homicide and adultery continue to be the chief sources of difficulty, and they remain almost exclusively private offenses."⁵⁸ "The development of criminal law remains weak."⁵⁹ Among Higher Hunters 33 percent allowed compensation for most wrongs in the place of the feud. There was always the right of the feud in the event the payment was not made.⁶⁰ Among Horticulturalists 45 percent allow or make mandatory the acceptance of compensation in lieu of the feud.⁶¹ An offense against the individual is an offense against his clan.⁶² Gradually, due to industrialization, urbanization, and population growth, the kinship tie is dissolved, and in its place we have the institutionalized chieftainships and the King's Peace.⁶³ "An offense against the individual has become a crime against the government."⁶⁴ "The struggle of the law through the ages of development on the primitive level has revolved around the problem of subordinating the kin-centered psychology to that of the community."⁶⁵ Hoebel views this shift in law as one from kinship to State, rather than from status to contract.⁶⁶ It must be remembered, however, that Maine also called attention to this shift from kinship to State.

Murdock observes that 99 percent of man's history has been without a government. Among primitives social control is informal, centered in the family. Technological advances and population growth made these informal controls ineffective, and as a result State control emerged. Among the Cheyenne the military society was used, but only for several weeks during the hunt. Most of the time the Cheyenne were without formal controls.⁶⁷ Murdock views the problem of social control as a problem of formal versus informal control.

In any modern society the regulation of human behavior, even in the smallest community, is accomplished through an inseparable compound of law and the mores, of institutionalized coercion and public opinion, of formal sanctions and informal social control.⁶⁸

The major difficulty with the anthropologists's use of the term "law" is that it is used to refer to both family-centered control and State-centered control. It is rather puzzling to this writer that Hoebel starts his discussion of law by denouncing the people who define law in terms of a central authority, and then he concludes his survey of the development of law by noting, as did Maine and Weber, that a shift in control has occurred from the family to the State. This use of the term "law" has

⁵⁸ *Ibid.*, p. 310.

⁵⁹ *Ibid.*, p. 311.

⁶⁰ *Ibid.*, p. 310.

⁶¹ *Ibid.*, p. 318.

⁶² *Ibid.*, p. 318.

⁶³ *Ibid.*, p. 322-329.

⁶⁴ *Ibid.*, p. 324.

⁶⁵ *Ibid.*, p. 322.

⁶⁶ *Ibid.*, p. 329.

⁶⁷ MURDOCK, GEORGE P., *Feasibility and Implementation of Comparative Community Research*, AMER. SOCIOLOGICAL REV., December, 1950, pp. 715-716.

⁶⁸ *Ibid.*, p. 717.

been the object of criticism by other authors. Cantor points out the difficulty involved in the use of the term "law" in two different ways when he writes: "What has happened is that in modern times the judicial and legal institutions of Western European Society have been detached from other instruments of government and society." "Until a society has reached the point where there is a differentiation between legal and other social agencies, criminal law does not really exist as a body of distinct rules, procedures, and definitions of crime."⁶⁹ If, as Cantor phrased it, crime is "the function of a complex Christian, urban, industrial civilization,"⁷⁰ then the term "crime" does not describe primitive data, for the terms "Christian," "urban," and "industrial" do not describe primitive social systems.

Many sociologists reject the notion that primitives possess a state system. MacIver denies that the modern state is to be found among primitives.⁷¹ Kingsley Davis points out that in primitive societies non-political structures, such as the clan, are used to maintain social order.⁷² Martindale and Monachesi write: "In a sacred society legitimate power is in the hands of kinship groups. Blood feuds are clan affairs. In secular societies legitimacy is in the hands of specialized institutions, with a legitimate basis."⁷³ Cairns compares Malinowski's definition of law with Cardozo's, and he concludes that Malinowski's definition does not apply to modern society, whereas Cardozo's does not apply to primitive societies.⁷⁴ This confusion of law and custom has been discussed by Morris R. Cohen and Roscoe Pound, and they both conclude that law and custom can be and must be differentiated.⁷⁵ William Seagle summarizes this controversy when he states that "the temptation is strong to seek in primitive society those manifestations which in the modern world have come to be the subject matter of legal obligation, to select the customs relating to marriage, inheritance, and property and pronounce them to be primitive law."⁷⁶

We must be careful in our system of logic if we attempt to use primitive data and data from modern society in the same system of explanation. The terms "law" and "crime" do not mean the same thing in these two cases, and it is misleading to use them to refer to two distinct types of social organization. If we view law as the product of social organization, then we must distinguish primitive organization from that which characterizes modern society.

State Law

To further differentiate primitive law and state law a discussion of the characteristics of state law is in order. The growth and development of the English law from tribal law to state law supports Maine's thesis that there has been a transition from

⁶⁹ CANTOR, NATHANIEL, *Law and Order in Primitive Society*, ENCYCLOPEDIA OF CRIMINOLOGY, p. 340.

⁷⁰ *Ibid.*, p. 340.

⁷¹ MACIVER, ROBERT, *THE MODERN STATE*, London: Oxford University Press, 1926, pp. 40-42.

⁷² DAVIS, *op. cit.*, p. 481-492.

⁷³ MARTINDALE, DON, AND MONACHESI, ELIO, *ELEMENTS OF SOCIOLOGY*, New York: Harper and Bros., 1951, p. 458.

⁷⁴ CALVERTON, V. F., ed., *THE MAKING OF MAN*, New York: Modern Library, 1930, pp. 337-338.

⁷⁵ JEFFERY, *op. cit.*,

⁷⁶ SEAGLE, WILLIAM, *THE HISTORY OF LAW*, New York: Tudor Publishing Co., 1946, p. 34.

kinship authority to territorial authority. It likewise supports Weber's thesis that a change from traditionalistic to rationalistic authority occurred when the State emerged as the unit of social order.

If law and crime are functions of the State, then logically we should expect to find certain characteristics of one reflected in the other. Weber stated that a separate political community existed when we find "(1) a 'territory'; the availability of physical force for its domination; and (2) communal action which is not restricted . . . but regulates, more generally, the interrelations of the inhabitant of the territory."⁷⁷ The authority of the State rests upon and is limited by (1) its territorial limits, and (2) its right to use force. Criminal law reflects these characteristics of the State in that (1) criminal jurisdiction is always territorial, and (2) the final sanction of the criminal law is force, in the form of a fine, imprisonment, or the death penalty. The use of force by the State is dramatically seen in the form of the electric chair or the hangman's noose. Other social groups do not maintain electric chairs, though they do punish offenders. If we define crime as the violation of a conduct code which brings punishment to the offender, then we would include in our definition of crime violations of codes without regard for the social unit or the type of authority involved. This is exactly the position taken by many criminologists today.⁷⁸

Criminal law developed as a system of social control when the family no longer possessed the power or the means to enforce social order. The characteristics of the law, are, therefore, a reflection of the social relationships that produced the law. The legal relationship can be designated a contractual *Gesellschaft* relationship. In the familistic *Gemeinschaft* community custom dominates, and there is no separate legal system; in a contractual *Gesellschaft* society law becomes a major means of social control.⁷⁹ Law is more characteristic of urban than rural societies. The legal relationship is impersonal, rationalistic, involuntary, secular, contractual, and secondary.⁸⁰ Emotions, such as love and hate, are not supposed to be shown. Loomis and Beegle use the example of General Patton slapping a soldier.⁸¹ Generals do not slap soldiers; they court martial them according to a code of laws. Slapping a soldier would properly belong to charismatic authority, and Patton might have thought of himself as a personal leader. A judge is not supposed to show emotions while he administers the law. It is recognized that emotional feelings do occur in these situations, but when they do occur they intrude upon the basic structure of the secondary group.

EUROPEAN AND AMERICAN THEORIES OF CRIME COMPARED

It should be noted that the legal theories of crime discussed above are of European origin, with the exception of Hall's work. These men were interested in a type of sociology different from that which interests American sociologists. Max Rheinstein observes that American sociology developed as a science of specialties, taking over

⁷⁷ WEBER, *op. cit.*, p. 339.

⁷⁸ JEFFERY, *op. cit.*

⁷⁹ MERRILL, FRANCIS P., AND ELDREDGE, H. W., *CULTURE AND SOCIETY*, New York: Prentice-Hall, Inc., 1952, pp. 36-38.

⁸⁰ MACIVER AND PAGE, *op. cit.*, p. 231 ff.

⁸¹ LOOMIS AND BEEGLE, *op. cit.*, p. 805.

areas not already preempted by the other social sciences, e.g., criminology, race relations, urbanization, family, and so forth.⁸² It might also be noted that American sociology has shown more interest in topics of a social problems nature than in topics of a more theoretical nature. In Europe sociology was viewed as a synthesizing science, and it made greater use of political, economic, religious, and legal materials.⁸³ The European sociologist is interested in an institutional method, a study of the history and interrelationships of various institutions, e.g., Weber's study of Protestantism and capitalism. European sociology is historical in orientation, whereas American sociology is ahistorical.⁸⁴ The current interest in social theory and social systems, as seen in the writings of Parsons, Becker, MacIver, Sorokin, and Znaniecki, can be traced to this German influence. With the exception of Becker, these men are European-trained scholars. This approach found in German sociology came from the Institutional School. The Institutional School of economics challenged the British Classical School on at least three points: (1) The Institutionalists attacked the narrow and individualistic scope of British thinking, substituting a study of the interrelationships of institutions in a social whole. (2) The Institutionalists criticize the static nature of Classical postulates, and in its place they substituted history and laws of social development. (3) The Institutionalists rejected the abstract method of the Classical School, and in its place they substituted a realistic study of institutional structures as they developed historically.⁸⁵

A comparison of the theories of Hall, Maine, Durkheim, and Weber with those of Sutherland, Reckless, Sellin, Healy, Sheldon, and the Gluecks, soon reveals certain fundamental differences. The former group is interested in law and society; the latter group is interested in the criminal personality. Sutherland's answer to "why do people behave criminally?" is not the same as Sheldon's, but the question remains the same in the two cases. This positivistic orientation is the most characteristic aspect of the American criminology. As a result of this orientation certain problems occur, the chief of which is the lack of a definition of crime.⁸⁶ An example of this confusion is seen in the question "Is white-collar crime crime?"⁸⁷ The political community is functionally interrelated with other institutional structures. From the fifteenth century to the present the State has been extending its control over other institutions. White-collar crime was the result of this extension of legal controls into the economic sphere. In order to understand white-collar crime we must understand the social changes which produced government regulation of business. Sutherland's treatment of the topic in terms of the theory of differential association ignores the institutional dimensions of the problem, and for that reason Tappan, Burgess, and others can criticize the validity of the concept. A definition of crime can never be established by studying the personality makeup of offenders. A study of white-collar crime patterned after Hall's study of theft, or Weber's study of law and economy,

⁸² WEBER, *op. cit.*, p. xxvii.

⁸³ *Ibid.*, p. xxvii.

⁸⁴ See above discussion.

⁸⁵ WHITTAKER, EDMUND, *A HISTORY OF ECONOMIC IDEAS*, New York: Longmans, Green and Co., 1940, 732 ff.

⁸⁶ JEFFERY, *op. cit.*

⁸⁷ SUTHERLAND, EDWIN H., *WHITE COLLAR CRIME*, New York: Dryden Press, 1949, p. 29 ff.

would reveal the nature of this relationship between State and economy. As Weber pointed out, property and contractual rights can be protected by the kinship group.⁸⁸ It is characteristic of our modern society that they are legal relationships. White-collar crime is a result of this institutional arrangement, and a study of the social system is the only way to answer the question "Is white-collar crime crime?"

SUMMARY

(1) A theory of crime depends upon an institutional study of law and society. The cause of crime is to be found in the legal and social institutions, not in the individual offender.

(2) The method used is that of institutional history. It emphasizes the functional interdependence of the various parts of the social system. It rejects the individualistic and ahistorical orientation of the British school of functionalism.

(3) The concept of cause is replaced by one of function, or interdependence.

(4) The approach is normative, that is, it focuses attention on the social norms and institutional structures which make up the normative order by which behavior is judged to be social or antisocial, legal or illegal.

(5) Legal norms are related to the social changes that occur in these institutional structures. Historically, the State has replaced the family as the unit of social control. Law now emerges as the formal system of maintaining social order and control. Crime emerges as a result of this institutional arrangement and social change.

TAPPAN, PAUL W., *Who Is the Criminal*, AMER. SOCIOLOGICAL REV., February, 1947, pp. 96-103. See also a comment by ERNEST W. BURGESS on an article by FRANK HARTUNG, *White-Collar Offenses in the Wholesale Meat Industry in Detroit*, THE AMER. JOURNAL OF SOCIOLOGY, July, 1950, p. 34.

⁸⁸ WEBER, *op. cit.*, p. 39.