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Clarence R. Jeffery

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The writer's contact, as a student, with the late Dr. Edwin H. Sutherland, and with Dr. Joseph Schneider of Indiana University, resulted in a research project designed to study the relationship between crime and social structure, in an effort to transcend the study of the individual offender. In the last seminar offered prior to his death in 1950 Sutherland put forth this idea; however, this aspect of his work has been largely ignored by his former students. The writer made a study of law and English society in an effort to relate crime to social organization and social change. He is currently making a similar study of white-collar crime. He is a member of the Department of Sociology and Anthropology in the Southern Illinois University.

This article is an abstract of the first part of an unpublished Ph.D. dissertation, "An Institutional Approach to a Theory of Crime," Department of Sociology, Indiana University, 1954. The writer is greatly indebted to Joseph Schneider and the late Edwin H. Sutherland, under whose joint direction this project was undertaken, and whose ideas have contributed to the development of the paper.—EDITOR.

Several years ago a candidate for the doctor's degree in the field of criminology was asked by a member of the examining committee, "Would there be any crime tomorrow if the criminal laws were repealed today?" Three criminologists of recognized stature were present at this examination, and they could not agree as to what constituted a crime. One argument was that even if all the criminal laws were repealed crime would still exist because the same acts would still be committed. The following paper is a result of an interest created by this amazing situation in criminology, which, upon analysis, is revealed to be the product of an intellectual tradition extending back several centuries.

An examination of the literature in this field reveals a lack of agreement among criminologists as to what is crime, and even as to what is the proper subject matter of criminology. Any attempt to construct a theory of crime without an adequate foundation is doomed to failure. The field cannot be delimited until an analysis of the term "crime" is made and a basic definition established. It is the purpose of this paper to trace the development of criminological thinking in order to ascertain (1) what criminologists are attempting to do, and (2) what they have to do in order to develop a theory of crime.

I. DEFINITION OF CRIME

THE LEGALISTIC SCHOOL

Thorsten Sellin defines crime as:

> . . . a violation of the criminal law, i.e. a breach of the conduct code specifically sanctioned by the state. . . . The term crime is often carelessly and erroneously used to designate any kind of behavior as injurious to society, even though not defined by the criminal law.[1]

[1] THORSTEN SELLIN; *"Crime,"* DICTIONARY OF SOCIOLOGY, ed. P. Fairchild, New York: Philosophical Library, 1944, p. 73.

Antisocial conduct may be regarded as a universal phenomenon, a function of group life; but the extent thereof, the particular form it takes and the nature of the reaction it provides are variables which are intimately dependent on the cultural status and the social organization of the group. In some social groups today theft, infanticide, cannibalism, killing a policeman, cheating at cards or selling stock backed by imaginary assets are considered good and praiseworthy conduct.[2]

The concept of antisocial conduct has not been defined or developed to the degree of precision which would make comparative scientific research possible. The criminologist studies such conduct only in one of its manifestations, crime, assuming that crime is an adequate sample of it. Crime is a legal concept, although some writers have used the term indiscriminately to denote antisocial, immoral, or sinful behavior.[3]

This statement presents a valid argument for differentiating anti-social and anti-legal conduct. Paul W. Tappan defends the legal definition of crime:

What is crime? As a lawyer-sociologist, the writer finds perturbing the current confusion on this important issue. Important because it delimits the subject matter of criminological investigation.[4]

This position reflects in part at least the familiar suspicion and misunderstanding held by the layman sociologist toward the law. To a large extent it reveals the feeling among social scientists that not all anti-social conduct is proscribed by law (which is probably true), that not all conduct violative of the criminal code is truly anti-social, or is not so to any significant extent (which is also undoubtedly true). Among some students the opposition to the traditional definition of crime as law violation arises from their desire to discover and study wrongs which are absolute and eternal rather than mere violations of a statutory and case law system which vary in time and place; this is essentially the old metaphysical search for the law of nature. They consider the dynamic and relativistic nature of law to be a barrier to the growth of a scientific system of hypotheses possessing universal validity.[5]

However desirable may be the concept of socially injurious conduct for purposes of general normation or abstract description, it does not define what is injurious. It sets up no standard. It does not discriminate cases, but merely invites the subjective value judgments of the investigator. Until it is structurally embodied with distinct criteria or norms—as is now the case in the legal system—the notion of anti-social conduct is useless for purposes of research, even for the rawest empiricism. The emancipated criminologist reasons himself into a cul de sac: having decided that it is footless to study convicted offenders on the ground that this is an artificial category—though its membership is quite precisely ascertainable, he must now conclude that, in his lack of standards to determine anti-sociality, though this may be what he considers a real scientific category, its membership and its characteristics are unascertainable. Failing to define anti-social behavior in any fashion suitable to research, the criminologist may be deluded further into assuming that there is an absoluteness and permanence in this undefined category, lacking in the law. It is unwise for the social scientist ever to forget that all standards of social normation are relative, impermanent, variable. And that they do not, certainly the law does not, arise out of mere fortuity and artifice.[6]

[2] THORSTEN SELLIN; *"Crime,"* ENCYCLOPEDIA OF THE SOCIAL SCIENCES, IV, 563.

[3] *Ibid.*, pp. 563–564.

[4] PAUL W. TAPPAN, *Who Is the Criminal?*, AMERICAN SOCIOLOGICAL REVIEW, February, 1947, p. 96.

[5] *Ibid.*, p. 96.

[6] *Ibid.*, p. 97.

Donald R. Taft states that:

Criminal law calls for punishment by the state. . . . Criminology is, strictly speaking, concerned only with acts which are made punishable under the criminal law. . . Hence acts which made up the subject matter of criminology are somewhat arbitrarily determined.[7]

If the subject matter of criminology is somewhat arbitrarily determined because of the relativistic nature of the law, then it must be concluded that the subject matter of sociology in general is somewhat arbitrarily determined.

Edwin H. Sutherland has stated:

The essential characteristic of crime is that it is behavior which is prohibited by the State as an injury to the State and against which the State may react, at least as a last result, by punishment. The two abstract criteria generally regarded by legal scholars as necessary elements in a definition of crime are *legal* descriptions of an act as socially harmful and *legal* provision of a penalty for the act.[8] (writer's italics)

THE SOCIOLOGICAL POSITION

Harry Elmer Barnes and Negley K. Teeters regard crime as offenses harmful to the group.

A crime is any act which the group regards as sufficiengly menacing to warrant a decisive group reaction to condemn and to restrain the offender of such an act. This is as true in our day as in primitive times.[9]

Walter C. Reckless observes that crime "sociologically speaking, is fundamentally a violation of conduct norms which contain sanctions, no matter whether found in the criminal law of a modern state or merely in the working rules of special social groups."[10] According to this definition, a violation of a Roman Catholic conduct code, such as not attending Mass, or a violation of a family regulation, such as not coming home to dinner on time, is a crime. They are violations of conduct codes which contain sanctions. Punishment is involved in either case. Reckless rejects a legal definition of a crime for the following reason:

Present legal categories, even if used properly, are not adequate behavior descriptions and give very little insight into the kind of behavior acted upon officially as crime. For example, the behavior reported as theft and cleared by arrest in the case of one person may be radically different from an offense reported as theft and cleared by arrest in the case of another person.[11]

Lindesmith and Dunham also reject criminal law as a basis for a science of criminology.

. . . the criminal has been defined as one who violates the criminal law, but because laws change and multiply in the course of time, and vary from one locality to another, and are

[7] DONALD R. TAFT, *Criminology*, New York: Macmillan Company, 1950, p. 297.

[8] EDWIN H. SUTHERLAND, *White Collar Crime*, New York: Dryden Press, 1949, p. 31.

[9] HARRY ELMER BARNES AND NEGLEY K. TEETERS, *New Horizons in Criminology*, revised ed., New York: Prentice Hall, Inc., 1945, p. 2.

[10] WALTER C. RECKLESS, *Criminal Behavior*, New York: McGraw-Hill Book Co., 1940, p. 10.

[11] WALTER C. RECKLESS, *The Crime Problem*, New York: Appleton-Century-Crofts, 1950, p. 20.

sometimes arbitrary, the legal definition has not provided a satisfactory category for purposes of scientific analysis.[12]

In "Culture Conflict and Crime" Sellin reverses his earlier position. "We shall attempt to show that the categories set up by the criminal law do not meet the demands of scientists because they are of a 'fortuitous nature' and do not 'arise intrinsically from the nature of the subject matter'."[13]

The criminal norms, i.e. the conduct norms embodied in the criminal law change as the values of the dominant groups are modified or as the vicissitudes of social growth cause a reconstitution of these groups themselves and shifts in the focus of power. Thus crimes of yesteryear may be legal conduct today, while crimes in one contemporary state may be legal conduct in another.[14]

As a matter of fact, the variability in the definition of crime—and consequently in the meaning attached to the noun "criminal"—is too familiar to the social scientist to require any demonstration. It should however, raise in his mind the question of how such variability can permit the formulation of the universal categories required in all scientific research.... They are indeed a rich source for the scientist, but the application of scientific criteria to the selection and classification of these data independent of their legal form is essential to render them valuable to science.[15]

What *is* claimed is that if a science of human conduct is to develop, the investigator in this field of research must rid himself of the shackles which have been forged by the criminal law.... Confinement to the study of crime and criminals and the acceptance of the categories of specific forms of "crime" and "criminal" as laid down in law renders criminological research theoretically invalid from the point of view of science.[16]

Sellin observes that a person belongs to a number of normative groups—family, play, political, and religious.

Conduct norms are, therefore, found wherever social groups are found, i.e. universally. They are not the creation of any one normative group; they are not confined within political boundaries; they are not necessarily embodied in law.

These facts lead to the inescapable conclusion that the study of conduct norms would afford a sounder basis for the development of scientific categories than a study of crime as defined in the criminal law. Such study would involve the isolation and classification of norms into universal categories, transcending political and other boundaries, a necessity imposed by the logic of science.[17]

Applying these criteria to the study of criminals, it becomes obvious that etiological conduct research is not greatly interested in the legal label attached to the crime, but to the meaning of the crime to the violator. Significant is the presence or absence in that violator of the criminal law norm as applying to the life situation involved, the manner in which this norm was incorporated in personality, the place it has in the violator's configuration of

[12] ALFRED R. LINDESMITH AND H. WARREN DUNHAM, *Some Principles of Criminal Typology*, SOCIAL FORCES, March, 1941, p. 307.

[13] THORSTEN SELLIN, *Culture Conflict and Crime*, New York: Social Science Research Council, 1938, p. 21.

[14] *Ibid.*, p. 22.

[15] *Ibid.*, p. 23.

[16] *Ibid.*, p. 24.

[17] *Ibid.*, p. 30.

personality elements and scale of values, and its strength. Ultimately, science must be able to state that if a person with certain personality elements in a certain configuration happens to be placed in a certain typical life situation, he will probably react in a certain manner, whether the law punishes this response as a crime or tolerates it as unimportant.[18]

Sutherland made the following reply to Sellin:

Sellin . . . proceeds to re-define crime as a violation of any conduct norm whatever. He argues that a solid basis for a science of criminology cannot be found unless the arbitrary definitions of the legislatures are replaced by definitions drawn up by scientists and for scientific purposes. Even if this is done, it is not possible to escape the evaluations of behavior which are made by groups. . . . In this respect crime is like all other social phenomena, and the possibility of a science of criminal behavior is similar to the possibility of a science of any other behavior. Social science has no stable unit, for all social sciences are dealing with phenomena which involve group evaluations. Consequently the methodological problems are by no means solved when crime is redefined as a violation of any conduct norm.[19]

Tappan has met Sellin's argument in a similar manner:

Since conduct norms and conceptions of antisociality are socially determined and culturally variable, just as delinquency is, it is difficult to see how their use will solve the problem of definition of norms. . . . The legal standards are the most specific, continuous ones, approximating the criteria of anti-sociality at least as closely as any of the looser, cruder determinations based upon convention or tradition.[20]

Donald R. Cressey is also involved in the argument that in order to arrive at universal categories of behavior the legal definition must be abandoned.[21]

The *behavior* to be explained in this manner was at first defined as embezzlement, and a legal definition of that crime was used. Upon contact with cases, however, it was almost immediately discovered that the term is not used in a consistent manner in the jurisdiction where the research was conducted and that many persons whose behavior was adequately described by the legal definition actually had been sentenced to a penitentiary on some other charge. Consequently, the legal definition was abandoned and in its place two criteria for inclusion of any particular case in the study were established: (1) The person must have accepted a position of trust in good faith. . . . (2) The person must have violated the trust. These criteria permit inclusion of almost all persons convicted for embezzlement and in addition a proportion of those convicted for larceny by bailee, forgery, and confidence game.[22]

Cressey creates a new category, "violation of trust," which he then explains in terms of "non-shareable problems." Cressey quotes Jerome Hall's study "Theft, Law and Society" as "an excellent analysis of theft from this point of view."[23] When

[18] *Ibid.*, p. 44–45.

[19] EDWIN H. SUTHERLAND, *Principles of Criminology*, 4th ed.; New York: J. P. Lippincott, 1947, pp. 23–24.

[20] PAUL W. TAPPAN, *Juvenile Delinquency*, New York: McGraw-Hill Book Co., 1949, p. 71.

[21] DONALD R. CRESSEY, *Criminological Research and the Definition of Crimes*, AMER. JOUR. OF SOCIOL., May, 1951, pp. 548–549.

[22] DONALD R. CRESSEY, *The Criminal Violation of Financial Trust*, AMER. SOCIOL. REV., December, 1950, p. 740.

[23] EDWIN H. SUTHERLAND, *Principles of Criminology*, revised by DONALD R. CRESSEY, 5th ed.; New York: J. P. Lippincott Co., 1955, p. 18.

Hall studied theft he was interested in the development of criminal law as a social process. He studied theft as an aspect of "law and society." He did not study the offender, the thief. Cressey studied the offender; embezzlers, larceners, forgers, and confidence men. Hall's objection to American criminology is based on the fact that criminologists study criminals, not crime.[24] Certainly this criticism applies to Cressey's study of trust violators. Cressey, like Sellin, Reckless, and Lindesmith, is interested in a "universal category of behavior" which is not found in the legal definition of crime. They are all interested in studying the individual offender.

The methodological issue existing in criminology is not unique to it. The formal definition of marriage and divorce is in legal terms, which vary from jurisdiction to jurisdiction. The family expert does not define divorce in terms of "violations of all conduct norms," nor does he seek "universal categories of behavior." He does not redefine divorce in non-legal terms. No universal categories of marriage and divorce exist. It is recognized that the "causes" of divorce are not those given in divorce proceedings. However the family expert makes a distinction between (1) divorce as a social process, an effort at social control on the part of the Christianized State, and (2) divorce as the product of social interaction of two people. In the literature a distinction is made between (1) the family as a social institution, and (2) marriage, courtship, and parenthood. Course work is divided into Marriage and Parenthood, "the social psychology of dating, courtship, and family relations," and The Family, "the family in historic and contemporary society."[25] There is an extensive bibliography on the family as an institution; however, when this writer attempted to discuss "crime as a social process" he had to spend three years doing basic research in order to gain a minimum of knowledge. The criminologist pays homage to Hall's "Theft, Law and Society," but he does not pay attention to Hall's criticism of American criminology, nor does he attempt to carry on research on "law and society." To the writer's knowledge there is not a single course offered in the United States on "crime as a social process." The study of crime within an institutional framework has never been attempted.

II. Positivist Criminology

The Classical School

The Classical School of Criminology originated in a gross revolt against the harsh and arbitrary decisions of judges during the eighteenth century. At this time the judges were acting according to the circumstances surrounding the case, rather than according to the offense committed. Jeremy Bentham advocated a reform of the penal system based upon the application of a hedonistic psychology of pain and pleasure. The offender was assumed to possess free will and to be governed in his choices by pleasure and pain. Cesare Becarria attempted to make punishment less arbitrary and severe. He argued that all people who violated a specific law should receive identical punishments regardless of the circumstances surrounding the case, such as age, sex, wealth, and state of mind. Children and lunatics were exempted

[24] See below.

[25] From the Southern Illinois University Bulletin.

from punishment on the grounds that they did not possess a well-developed free will. This system is voluntaristic and legalistic.[26]

The doctrine of the Classical School is *nullum crimen sine lege*, that is, without a legally defined harm there is no crime. Crime is defined in legal terms, in terms of a system of positive law. The total reality constituting the object of analysis is "a legally defined social harm." The question thus raised by the Classical School is: "Is the forbidden behavior wrong in itself, intrinsically immoral, i.e., would be immoral entirely apart from and irrespective of the prohibition of the positive law; or is it wrong merely because it is forbidden by law?" "For the classicist's emphasis on crime as an objective harm, an injury to society, was laid within the framework of the positive criminal law."[27]

The Positive School

The Positive School came to be known as the Italian School of criminology in the late nineteenth century. The leaders of this school were Lombroso, Garafalo, and Ferri. This school originated during an era of liberalism and benign governments when law was above suspicion.[28] Whereas the Classical School maintained an interest in crime, the Positive School turned the interest from crime to criminals. They were eager to deny one of the basic tenets of the Classical School, namely, that men acted on the basis of a free will. However, in their haste to be "scientific" they failed to define crime in any manner which would allow criminal actions and non-criminal actions to be differentiated.

Lombroso, the leader of this school, never defined crime, but insisted he knew a criminal when he saw one.[29] Garafalo talked about natural crimes. "Natural crime he defined as crimes against the law of nature—i.e. the rules of right conduct revealed to man through his reason. . . ."[30] Garafalo stated his position as:

> . . . the sociologist cannot turn to the man of law. . . . We must arrive at a notion of *natural crime* . . . "those acts no civilized nation can refuse to recognize as criminal and repress by means of punishment."

Garafalo's criterion of criminality was "the moral sense of the community." Specifically, a natural crime was an "injury . . . and harmful to society." He concluded that "the legal notion of crime must be laid aside as valueless for our purposes." Ferri referred to "doctrines of criminal law developed to the highest degree of metaphysical pedantry," and he wrote that the classical school of criminology "had and preserves a theoretical method, the 'a priori' study of crime as an abstract juridicial being." The classical school, he said, was concerned "with the crime and not the criminal." "The new school of Positive Criminology proposes a complete study

[26] Sutherland, *Principles*, *op. cit.*, pp. 50–51. Mabel A. Elliott, *Crime in Modern Society*, New York: Harper and Brothers, 1952, pp. 437–441.

[27] Jerome Hall, *Prolegomena to the Science of Criminal Law*, U. of Penn. Law Rev., March, 1941, p. 574.

[28] Jerome Hall, *Criminology*, Twentieth Century Sociology, ed. by Georges Gurvitch and Wilbert E. Moore, New York: Philosophical Library, 1945, pp. 345–346.

[29] Hall, *Prolegomena*, *op. cit.*, p. 570.

[30] Thorsten Sellin, *Crime*, Enclyclopedia of the Social Sciences, IV, 586.

of crime, not as a juridicial abstraction, but as a human act, as a natural and social fact." For the positivist "the fact remains that the proper study of criminal anthropology is the anti-social individual in his tendencies and in his activities."[31] Ferri came to be known as the champion of the notion of natural crime and anti-social individuals.

The Positivist, in order to overcome the problem of the relativism of the criminal law, resorted to the concept of a natural crime, an act which was repulsive to all people at all times and in all places.[32] This search for an absolute standard is, according to Tappan, a search for a metaphysical concept of a natural law. The Roman jurists made a distinction between *jus naturae*, a rule of right conduct which was absolute for all men, and *jus civilis*, positive law or man-made law. Using this distinction, the criminologist came to view crime as being of two orders: crime *mala in se*, or offenses against a natural moral code, and crime *mala prohibita*, or offenses against man-made law. Jerome Hall points out that this classification of crime as *mala in se* is the major obstacle to a sociology of criminal law.[33]

By focusing attention on the criminal, and especially on the problem of the motivation of criminal behavior, the Positivist ignores the problem "what is crime?" He seeks the cause of crime in the individual delinquent. He assumes that there are absolute standards by which behavior is judged anti-social. Florita made the following observation concerning the Positivist:

> Criminal anthropology studies delinquency starting from the axiom that the causes of crime are to be found in the individual delinquent, which is to say, starting from Lombroso's theory. . . . It is to be expected that—after seventy years of life—criminal anthropology will supply us through its numerous books, with a more detailed definition of crime, that it will enable us in short to distinguish a criminal from a non-criminal action without the aid of penal laws. The reader can search for this definition in the books written on criminal anthropology but he will not be able to find it. . . . All this is astounding and unbelievable. . . . The claim of the Lombrosian school and of criminal anthropology to search for the cause of violation of a social rule (penal law) in nature, namely, in the individual constitution of man (the active subject of the crime) appears to be absolutely absurd and . . . unscientific.[34]

Morris R. Cohen, in a critical analysis of Positivism in law, made the following statement:

> The positivists who wish to develop a science of criminology, and who believe that a science can deal only with facts of existence, find it difficult to admit that what is a crime is determined by legislation. They are thus forced to maintain that certain acts are criminal by nature, whether committed by man, beasts or even plants. Unfortunately, however, they do not tell us what traits distinguish a criminal from any other act.[35]

The most thoroughgoing attempt to define natural crime is that of Garafalo who identifies it with those harmful actions which shock the moral sense of pity and probity of all civilized people. This moral sense, he holds, is not only unaffected by legislation which makes acts

[31] HALL, *Prolegomena, op. cit.*, p. 570–572.

[32] GABRIEL TARDE, *Penal Philosophy*, Boston: Little, Brown and Co.; 1912, p. 70.

[33] JEROME HALL, *Prolegomena to the Science of Criminal Law, op. cit.*, pp. 563–565.

[34] GIORGIO FLORITA, *Enquiry into the Causes of Crime*, THE JOUR. OF CRIM. L., CRIMINOL., AND POL. SCI., May–June, 1953, p. 3.

[35] MORRIS R. COHEN, *Reason and Law* Glencoe: The Free Press, 1950, p. 23.

criminal that were not so before, but it is independent also of the circumstances and exigencies of any given epoch. But how can positivists who identify science with determinism hold that social changes can occur without having any effect on what is deemed criminal? Garafalo admits the obvious and well authenticated fact that laws as to what constitutes crime do vary, but he thinks that the sentiments of pity and probity are the same among all civilized peoples. But who are the civilized people? The naive answer is: those whose views are like our own, from which it follows that our ancestors were not, and that other people . . . are not civilized. . . . As a matter of historic fact, not only do different "civilized" peoples vary in their moral sense or sentiment as to what pity and probity require, but within any community there is a large variation in this respect.[36]

In the past the most heinous crimes (judging by the severity of the punishment) have been sacrilege or ceremonial defilement, witchcraft and heresy. But what any community regards as most dangerous is not eternally fixed in the nature of things, but varies from time to time and from locality to locality in ways which we cannot always explain. Moreover, it is not always the feeling of danger that makes us regard certain acts as punishable. The causes of social irritation and active resentment are wider. Children in New York have stoned men for wearing straw hats after September 15th, and Mexican peasants have burnt new orange groves planted by foreigners for no other reason than the dislike of any novelty in their vicinity.[37]

The Positivist accepted the nineteenth century philosophy of evolution as it applied to cultural development. As Cohen points out, their argument "is supported by the fashionable assumption that there is a cosmic law according to which all people must, regardless of diverse circumstances in their environment, evolve along the same uniform line of which we today represent the highest point."[38]

To summarize, the Classical School (a) insists upon a clear cut legal definition of that act which is to be punished as criminal, and (b) fosters the idea of free will, that is, men commit crimes because of free choices of right and wrong. The Positive School (a) rejects the notion of free will and substitutes in its place determinism of conduct outside the will, and (b) refuses to define crime in legal terms, and substitutes the concept of a social crime or a natural crime, a crime against the laws of nature. The confusion found in current criminological thinking can be traced to this conflict. The Classical School was rejected because of the free will interpretation given human behavior, and along with this the Positivist rejected the legal definition of crime. The Positivist studied the criminal, not crime. He applied determinism to the study of human behavior, but when it came to defining crime he did so in terms of such vague metaphysical terms as natural crimes, crimes against sentiments of pity and probity. The Positivists refuse to recognize that what is criminal is determined by legislation. They refuse to apply the scientific principles of determinism to the study of law.[39] The Classical School possessed a fruitful approach to the study of crime, the

[36] *Ibid.*, pp. 23–24.

[37] *Ibid.*, p. 26.

[38] *Ibid.*, p. 24.

[39] The free will versus determinism controversy is the keystone to the current controversy in penology, especially as it involves the question of insanity and criminal responsibility. How can a man be punished if his behavior is determined? This has led to the courtroom controversy between the lawyer and the psychiatrist. See GABRIEL TARDE, *Penal Philosophy*, Boston: 1912; LOUIS COHEN, *Murder, Madness, and the Law*, New York: 1942; MORRIS R. COHEN, *Reason and Law*; Glencoe: 1950.

Positivist School to the study of criminal behavior. A synthesis of several approaches to the field of criminology is needed.

III. The Development of American Criminology

The Positive School of criminology has dominated American criminology since its inception. Sutherland observed that "all of the schools which developed subsequent to this (the Classical School) accepted the hypothesis of natural causation and for that reason they are sometimes called positivistic."[40] According to Jerome Hall, "the most serious criticism of 20th Century Criminology is that it has hardly become aware of the existence of this major problem; far from trying to rise above the inhibiting restrictions of the Schools, it has gone whole-hog positivistic."[41] "20th Century Criminology, especially in the United States, is so largely a mere application of the European Positivist School, that Ferri, its chief theoretician, needs no summarization.[42]

American criminology developed in response to Positivism, that is, it developed a systematic study of the criminal. According to Sutherland the various approaches to the study of the criminal are the Classical, Cartographic, Socialist, Typological (Lombrosian, Mental Testers, and Psychiatric), and the Sociological.[43] With the exception of the Classical School these schools applied the nineteenth century concept of determinism to the study of human behavior. The major argument in respect to causation is whether the determinism exists in the individual, or in the individual interacting with other individuals. Individualistic determinism was expressed by William Healy when he noted that the "dynamic center of the whole problem of delinquency and crime will ever be the individual offender."[44] The causes of crime were listed variously as body type, feeblemindedness, and psychopathy. Social determinism placed emphasis upon the individual as a member of the group, rather than upon the individual in isolation. Ernest W. Burgess brought the social psychological point of view to the study of criminals when in 1923 he stated that the criminal was a person. He defined a person as an individual with status in a group.[45] The Mead-Cooley-Dewey school of social psychology came to be a major approach to the analysis of criminal behavior. This school, combined with the ecological studies of Park, Burgess, and Shaw, led to Sutherland's theory of differential association. Sociologists have explained criminal behavior in terms of poverty, broken homes, residential zones, ecological processes, social disorganization and differential association However American sociological criminology is still positivistic, that is, it studies the criminal. Burgess recognized this fact when he observed that: "In conclusion, the point may be raised that this article deals with the sociology of personality rather than of delinquency."[46]

The textbooks on criminology tell us a great deal about the individual criminal,

[40] Sutherland, *Principles, op. cit.*, p. 51.
[41] Jerome Hall, *Criminology, op. cit.*, p. 346.
[42] *Ibid.*, p. 345.
[43] Sutherland, *Principles, op. cit.*, p. 50.
[44] William Healy, *The Individual Delinquent*, Boston: 1915, p. 22.
[45] Ernest W. Burgess, *The Study of the Delinquent as a Person*, The Amer. Jour. of Sociol., May, 1923, pp. 657-680.
[46] Burgess, *op. cit.*, p. 680.

his age, sex, intelligence, physical makeup, marital status, economic status, race, and nationality. Sutherland devotes one chapter to crime, twelve chapters to the criminal, and sixteen to penology. Elliott devotes parts of three chapters to crime, eleven chapters to the criminal, and fifteen to penology. Barnes and Teeters devote segments of five chapters to crime, eight chapters to the criminal, and twenty-eight to penology. Cavan devotes one chapter to crime, eleven to the criminal, and twelve to penology. Reckless devotes less than a chapter to crime, thirteen to the criminal, and seven to penology.[47]

This interest in criminals and penology has obscured for the criminologist the relation of these problems to crime. George B. Vold observes:

> An obviously important first problem is that of terminology, that is, the meaning to be given words in common use in the field. Take, for example, the two most common terms in the field, "crime" and "criminal behavior." An enormous amount of confusion follows from the common assumption of superficial usage that, for practical purposes, crime is crime; and that it is some aspect or quality of the behavior that makes it criminal.
>
> Criminal behavior is human behavior, and the study of human behavior is a perfectly legitimate subject matter for scientific inquiry. It may not be assumed, however, that an adequate scientific explanation of some particular human behavior is likewise an adequate explanation of why some particular behavior is criminal.
>
> . . . Instead of the familiar, intensive study of the attributes and characteristics of the individuals who have been adjudged criminal, this view holds that attention needs to be focused on the intensive study of why some political jurisdictions designate certain widespread and relatively common forms of human behavior as *crimes*, while other jurisdictions do not so designate the same behavior or, in extreme cases, consider such behavior as entirely legitimate and respectable.[48]

Edwin H. Sutherland and Positivism

Some of Sutherland's followers have denied that he can aptly be called a Positivist. The Positivists rejected a legal definition of crime, whereas Sutherland insisted upon a legal definition of crime. In what sense then is Sutherland a Positivist? He has stated that "the problem in criminology is to explain the criminality of behavior, not the behavior as such."[49] Does his theory of differential association do what, according to Sutherland, a theory of crime should do, namely, explain the criminality of behavior? This theory is an explanation of behavior, and not an explanation of how the behavior came to be labeled criminal. As Sutherland observed, the theory "was stated from the point of view of the person who engages in criminal behavior."[50] "The process of learning criminal behavior . . . involves all the mechanisms that are involved in any other learning."[51] If the same mechanisms are involved in criminal

[47] These figures are rough approximations for the reason that none of these textbooks makes a clear distinction between crime and criminals. For this reason chapters which discuss crime usually devote a portion of the discussion to criminals.

[48] George B. Vold, *Some Basic Problems in Criminological Research*, Fed. Prob., March, 1953, p. 37.

[49] Sutherland, *Principles*, *op. cit.*, p. 4.

[50] *Ibid.*, p. 8.

[51] *Ibid.*, p. 7.

as in non-criminal behavior, then these mechanisms do not explain the criminality of that behavior. This theory explains how people come to be bricklayers, Catholics, Communists, and school teachers through a process of differential association. Criminal behavior can be learned; the learning process does not make the behavior criminal.

This confusion of crime and criminal behavior is found in Sutherland's monograph on "White Collar Crime." He sought a theory of criminal behavior which did not explain such behavior in terms of poverty or psychopathic personalities. When Sutherland defines crime he does so in terms of a legal system; when he explains crime in terms of differential association it is criminal behavior, not crime, he is explaining. In "White Collar Crime" it is the criminal, the offender, who is analyzed.

> The definition of crime, from the point of view of the present analysis, is important only as a means of determining whether the behavior should be included within the scope of a theory of criminal behavior. . . . the criminologist who is interested in a theory of criminal behavior needs to know only that a certain class of acts is legally defined as crimes . . .[52]

Sutherland established a legal definition of crime for taxonomic purposes in order to study criminal behavior which in itself is a valuable procedure, but is not a study of crime. He accepted the Positivists emphasis on the criminal while rejecting their definition of crime. Differential association is a refutation of the Lombrosian and neo-Lombrosian explanations of criminal behavior.

Sutherland states that "the legal definitions should not confine the work of the criminologist, and he should be completely free to push across the barriers of legal definitions whenever he sees behavior outside the legal field which resembles the behavior within."[53] This is identical with the argument put forth by Sellin and Reckless when they rejected a legal definition of crime. In another place Sutherland states: ". . . if the laws against stealing were repealed stealing would not, in a legal sense, be a crime, but it would still be stealing and the public would react to it by lynch law and public disgrace. The name of the behavior would be changed but the behavior would remain essentially the same."[54] If stealing is not a crime in a legal sense then in what sense is it crime? Where does crime exist after the criminal laws have been repealed? If the criminologist is free to cross legal barriers what difference does it make whether crime is defined in legal terms or otherwise? We started out by asking "Would there be any crime tomorrow if the criminal laws were repealed today?" So far there is no evidence that the criminologist has answered this question. This explains why the criminologist who accepts a legal definition of crime, Sutherland for example, and the criminologist who accepts a social definition of crime, Sellin or Reckless for example, can work within the same framework and deal with the same problem. Sutherland, Sellin, and Reckless disagree as to a definition of crime, but they agree that in order to arrive at universal categories of behavior legal barriers can and must be crossed. Such a classification of behavior is not a study of the criminality of behavior since criminality exists not in the behavior but in the social system that controls and regulates the behavior. Sutherland defined crime in

[52] SUTHERLAND, *White Collar Crime, op. cit.*, p. 30.
[53] SUTHERLAND, *Principles, op. cit.*, p. 24.
[54] *Ibid.*, p. 18.

legal terms, but because he participated in the general intellectual orientation of American sociologists he was never able to forget he was studying the individual offender.[55] American criminologists are willing to cut across legal barriers in order to arrive at categories of behavior because, as Positivists, they are interested in the behavior, not the criminality of that behavior. The real issue in criminology is not the social versus the legal definition of crime, but the study of crime versus the study of the criminal.

To summarize, American criminology has developed within the following framework:

(1) The Positivist defined crime in terms of natural law, a law of right conduct common to all men, which law during the nineteenth century came to be the doctrine of cultural evolution.

(2) The Positivist is interested in the criminal. He applies the concept of determinism to the study of criminals. The theories of criminal behavior that have emerged are the same ones used to explain non-criminal behavior. On the basis of these studies of the criminal no trait has been discovered that differentiates the criminal from the non-criminal.

(3) The issue "what is crime?" can never be settled by studying the criminal, since the act is not the label, and the criminal is the product of whatever definition of crime we establish.

IV. A Proposed Outline for the Study of Criminology

Sutherland has observed that "the sociology of law, which is an attempt at scientific analysis of the conditions under which criminal laws develop . . . is seldom included in general books on criminology."[56] There has been no effort to study the conditions under which the *act* is labeled criminal. A slaying in society A may be similar to a slaying in society B in terms of the causal sequence leading to the slaying; it may be "caused by" physical type, feeblemindedness, or differential association. However, in society A the act may be murder; in society B it may be an honorific act. Before 1920 in China it was an honorific act to slay the enemies of one's father. A man in the army is capable of committing crimes which, as a civilian, he could not possibly commit regardless of his personality makeup or reaction pattern, such as absence without leave, desertion, disobeying a superior officer, or falling asleep at the post.

The question "what is crime?" is prior logically and historically to the study of

[55] This emphasis on the individual rather than on social structure is the dominant theme of American sociology. The Hinkles have labeled it "voluntaristic nominalism." "American sociology has traditionally viewed society as the sum of individuals who are, in turn, the source of all that is produced in and characteristic of the society." Roscoe C. and Gisela J. Hinkle, *The Development of Modern Sociology*, New York: Doubleday and Co., 1954, p. 16. Morris R. Cohen makes the same observation. "The great confusion and futility of social theory in the past can be traced in a large part to the attempt to build up a social philosophy on a nominalistic logic. Nominalistic logic must inevitably lead to atomic individualism. . ." Morris R. Cohen, *American Thought*, Glencoe: The Free Press, 1954, p. 307. American criminology is a reflection of American social thought in general.

[56] Sutherland, *Principles*, *op. cit.*, p. 1.

the criminal. It is prior historically for a norm has to exist before it can be violated; it is prior logically for before an individual can be studied as a criminal he must first be classified as one. The Positivist has rejected legal categories as a basis for a science of criminology, and as a result he is left with no valid criteria for the inclusion or exclusion of cases from his studies. The controversy raging around Sutherland's concept of white collar crime is a good example of this confusion. The problem is further confused by the fact that Sutherland, who did more than any other criminologist to clarify the definition of crime, states that legal categories can be transcended in order to arrive at universal categories of behavior. Where does crime exist, if not in the legal codes? Is crime a characteristic of criminals, or of social systems? This writer would argue that if you want to know something about crime you need to study social systems, not criminals.

The American criminologist has attempted to differentiate criminals from non-criminals on the basis of personality traits. The major objection raised to all theories of criminal behavior is that they do not successfully differentiate the two groups. Non-criminals possess the same traits as criminals. Can the criminal be distinguished from the non-criminal without the aid of legal codes?

The argument that crime has to be defined in other than legal terms is based on the assumption that the law does not afford universal categories of behavior. This assumption (1) confuses the act with the label, (2) ignores the fact that all standards of conduct are relative and impermanent, and (3) ignores the fact that laws are in themselves conduct codes.

The sociological study of law is handicapped, as is the study of crime, because of the confusion of "law" and "custom." The sociologist is prone to regard any custom as law. This confusion of law and custom originated in the "free law" movement in Germany, led by the Austrian jurist Ehrlich.[57] Morris R. Cohen notes in this connection that "Law as custom and law through deliberate legislation are thus both realities, and we cannot by an arbitrary definition disprove the existence of one or of the other."[58] This confusion of law and custom is found in both Timasheff's and Gurvitch's treatment of the sociology of law.[59] In commenting on this confusion Roscoe Pound writes:

> This broader usage is common with sociologists. But certainly for jurists, and I suspect also for sociologists, it is expedient to avoid adding to the burdens of a term of too many meanings, and to use "law" for social control through the systematic application of the force of politically organized society.[60]

MacIver and Page differentiate law and custom on the basis of the social institution involved and the sanctions applied.[61] Law is a product or social structure. How-

[57] MORRIS R. COHEN, *Reason and Law*, Glencoe: The Free Press, 1950, pp. 65–67. See also HARRY E. BARNES AND HOWARD BECKER, *Contemporary Social Theory*, New York: Appleton-Century Co. 1940, pp. 675–677.

[58] COHEN, *op. cit.*, p. 67.

[59] ROSCOE POUND, *Sociology of Law*, TWENTIETH CENTURY SOCIOLOGY, edited by GEORGES GURVITCH AND WILBERT E. MOORE, pp. 315–317.

[60] *Ibid.*, p. 300.

[61] R. M. MACIVER AND CHARLES H. PAGE, *Society, An Introductory Analysis*, New York: Rinehart and Co., 1949, pp. 175–181.

ever, the State is not the total community. "... the state is one form of social organization..."[62] This confusion which exists is due to the failure on the part of criminologists to differentiate (1) custom and law, (2) state and society, and (3) crime and wrong-doing. In the case of crime the institutional structure involved is the State. It is the State that is offended, does the prosecuting, and does the punishing.

A study of the sociology of criminal law should give us information concerning (1) the conditions under which behavior comes to be defined as criminal, and (2) how legal norms intersect and are integrated with the norms of other institutional structures. It is a well known fact that laws vary as social conditions change. Such changes produce conflicts between legal codes and other codes, which means that laws are not always supported by public opinion. If it is recognized that legal codes are a special category of conduct codes in general, then the opposition between a legal definition and a social definition, which never did exist, is resolved. All legal codes are conduct codes; not all conduct codes are legal codes. A legal definition of crime is a sociological definition, if it is based on a sociological study of law rather than on a study of the criminal. The sociology of criminal law would provide us with a framework for the study of crime, and at the same time it would enable us to differentiate between the criminal and the non-criminal. The legal criterion is the only standard that differentiates the two groups. Further studies of the personality makeup of the offender, of the type engaged in for the past fifty years, are never going to furnish a differential. An explanation of criminal behavior is going to depend upon an explanation of behavior. Such an explanation necessarily involves many non-sociological factors. It is to be questioned at this time whether the sociologist has to be so concerned with human motivation. It seems to the writer that the sociologist would do better to be more concerned with group reactions to certain types of behavior. The study of social structure is sociological; the study of human motivation is only quasi-sociological. A study of social systems in relation to the topic "law and society" would eventually lead to a theory of crime.

[62] *Ibid.*, p. 13.