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## Who Is the Criminal?

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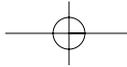
**W**hat is crime? As a lawyer-sociologist, the writer finds perturbing the current confusion on this important issue. Important because it delimits the subject matter of criminological investigation. A criminologist who strives to aid in formulating the beginnings of a science finds himself in an increasingly equivocal position. He studies the criminals convicted by the courts and is then confounded by the growing clamor that he is not studying the real criminal at all, but an insignificant proportion of non-representative and stupid unfortunates who happened to have become enmeshed in technical legal difficulties. It has become a fashion to maintain that the convicted population is no proper category for the empirical research of the criminologist. Ergo, the many studies of convicts which have been conducted by the orthodox, now presumably outmoded criminologists, have no real meaning for either descriptive or scientific purposes. Off with the old criminologies, on with the new orientations, the new horizons!

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.<sup>1</sup>

Recent protestants against the orthodox conceptions of crime and criminal are diverse in their views: they unite only in their denial of the allegedly legalistic and arbitrary doctrine that those convicted under the criminal law are the criminals of our society and in promoting the confusion as to the proper province of criminology. It is enough here to examine briefly a few of the current schisms with a view to the difficulties at which they arrive.

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**Source:** *American Sociological Review*, 12(10)(1947): 96-102.



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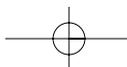
### I

A number of criminologists today maintain that mere violation of the criminal law is an artificial criterion of criminality, that categories set up by the 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.”<sup>2</sup> The validity of this contention must depend, of course, upon what the nature of the subject matter is. These scholars suggest that, as a part of the general study of human behavior, criminology should concern itself broadly with all anti-social conduct, behavior injurious to society. We take it that anti-social conduct is essentially any sort of behavior which violates some social interest. What are these social interests? Which are weighty enough to merit the concern of the sociologist, to bear the odium of crime? What shall constitute a violation of them? – particularly where, as is so commonly true in our complicated and unintegrated society, these interests are themselves in conflict? Roscoe Pound’s suggestive classification of the social interests served by law is valuable in a juristic framework, but it solves no problems for the sociologist who seeks to depart from legal standards in search of all manner of anti-social behavior.

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 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 or artifice.<sup>3</sup>

### II

In a differing approach certain other criminologists suggest that “conduct norms” rather than either crime or anti-social conduct should be studied.<sup>4</sup> There is an unquestionable need to pursue the investigation of general conduct norms and their violation. It is desirable to segregate the various classes of such norms, to determine relationships between them, to understand similarities and differences between them as to the norms themselves, their sources, methods of imposition of control, and their consequences. The subject matter of this field of social control is in a regrettably primitive state. It will be important to discover the individuals



who belong within the several categories of norm violators established and to determine then what motivations operate to promote conformity or breach. So far as it may be determinable, we shall wish to know in what way these motivations may serve to insure conformity to different sets of conduct norms, how they may overlap and reinforce the norms or conflict and weaken the effectiveness of the norms.

We concur in the importance of the study of conduct norms and their violation and, more particularly, if we are to develop a science of human behavior, in the need for careful researches to determine the psychological and environmental variables which are associated etiologically with non-conformity to these norms. However, the importance of the more general subject matter of social control or "ethology" does not mean that the more specific study of the law-violator is non-significant. Indeed, the direction of progress in the field of social control seems to lie largely in the observation and analysis of more specific types of nonconformity to particular, specialized standards. We shall learn more by attempting to determine why some individuals take human life deliberately and with premeditation, why some take property by force and others by trick, than we shall in seeking at the start a universal formula to account for any and all behavior in breach of social interests. This broader knowledge of conduct norms may conceivably develop through induction, in its inevitably very generic terms, from the empirical data derived in the study of particular sorts of violations. Too, our more specific information about the factors which lie behind violations of precisely defined norms will be more useful in the technology of social control. Where legal standards require change to keep step with the changing requirements of a dynamic society, the sociologist may advocate – even as the legal profession does – the necessary statutory modifications, rather than assume that for sociological purposes the conduct he disapproves is already criminal, without legislative, political, or judicial intervention.

### III

Another increasingly widespread and seductive movement to revolutionize the concepts of crime and criminal has developed around the currently fashionable dogma of "white collar crime." This is actually a particular school among those who contend that the criminologist should study anti-social behavior rather than law violation. The dominant contention of the group appears to be that the convict classes are merely our "petty" criminals, the few whose depredations against society have been on a small scale, who have blundered into difficulties with the police and courts through their ignorance and stupidity. The important criminals, those who do irreparable damage with impunity, deftly evade the machinery of justice, either by remaining "technically" within the law or by exercising their intelligence, financial prowess, or political connections in its violation. We seek a definition of the white collar criminal and find an amazing diversity, even among those flowing from the same pen, and observe that characteristically they are loose, doctrinaire, and invective. When Professor Sutherland launched the term, it was applied to those individuals of upper socioeconomic class who violate the criminal law, usually by breach of trust, in the ordinary course of

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their business activities.<sup>5</sup> This original usage accords with legal ideas of crime and points moreover to the significant and difficult problems of enforcement in the areas of business crimes, particularly where those violations are made criminal by recent statutory enactment. From this fruitful beginning the term has spread into vacuity, wide and handsome. We learn that the white collar criminal, may be the suave and deceptive merchant prince or “robber baron,” that the existence of such crime may be determined readily “in casual conversation with a representative of an occupation by asking him, ‘What crooked practices are found in your occupation?’”<sup>6</sup>

Confusion grows as we learn from another proponent of this concept that, “There are various phases of white-collar criminality that touch the lives of the common man almost daily. The large majority of them are operating within the letter and spirit of the law. . . .” and that “In short, greed, not need, lies at the basis of white-collar crime.”<sup>7</sup> Apparently the criminal may be law obedient but greedy; the specific quality of his crimes is far from clear.

Another avenue is taken in Professor Sutherland’s more recent definition of crime as a “legal description of an act as socially injurious and legal provision of penalty for the act.”<sup>8</sup> Here he has deemed the connotation of his term too narrow if confined to violations of the criminal code; he includes by a slight modification conduct violative of any law, civil or criminal, when it is “socially injurious.”

In light of these definitions, the normative issue is pointed. Who should be considered the white collar criminal? Is it the merchant who, out of greed, business acumen, or competitive motivations, breaches a trust with his consumer by “puffing his wares” beyond their merits, by pricing them beyond their value, or by ordinary advertising? Is it he who breaks trust with his employees in order to keep wages down, refusing to permit labor organization or to bargain collectively, and who is found guilty by a labor relations board of an unfair labor practice? May it be the white collar worker who breaches trust with his employers by inefficient performance at work, by sympathetic strike or secondary boycott? Or is it the merchandiser who violates ethics by under-cutting the prices of his fellow merchants? In general these acts do not violate the criminal law. All in some manner breach a trust for motives which a criminologist may (or may not) disapprove for one reason or another. All are within the framework of the norms of ordinary business practice. One seeks in vain for criteria to determine this white collar criminality. It is the conduct of one who wears a white collar and who indulges in occupational behavior to which some particular criminologist takes exception. It may easily be a term of propaganda. For purposes of empirical research or objective description, what is it?

Whether criminology aspires one day to become a science or a repository of reasonably accurate descriptive information, it cannot tolerate a nomenclature of such loose and variable usage. A special hazard exists in the employment of the term, “white collar criminal,” in that it invites individual systems of private values to run riot in an area (economic ethics) where gross variation exists among criminologists as well as others. The rebel may enjoy a veritable orgy of delight in damning as criminal most anyone he pleases; one imagines that some experts would thus consign to the criminal classes any successful capitalistic business man; the reactionary or conservative, complacently viewing the occupational

practices of the business world might find all in perfect order in this best of all possible worlds. The result may be fine indoctrination or catharsis achieved through blustering broadsides against the “existing system.” It is not criminology. It is not social science. The terms “unfair,” “infringement,” “discrimination,” “injury to society,” and so on, employed by the white collar criminologists cannot, taken alone, differentiate criminal and non-criminal. Until refined to mean certain specific actions, they are merely epithets.

Vague, omnibus concepts defining crime are a blight upon either a legal system or a system of sociology that strives to be objective. They allow judge, administrator, or – conceivably – sociologist, in an undirected, freely operating discretion, to attribute the status “criminal” to any individual or class which he conceives nefarious. This can accomplish no desirable objective, either politically or sociologically.<sup>9</sup>

Worse than futile, it is courting disaster, political, economic, and social, to promulgate a system of justice in which the individual may be held criminal without having committed a crime, defined with some precision by statute and case law. To describe crime the sociologist, like the lawyer-legislator, must do more than condemn conduct deviation in the abstract. He must avoid definitions predicated simply upon state of mind or social injury and determine what particular types of deviation, in what directions, and to what degree, shall be considered criminal. This is exactly what the criminal code today attempts to do, though imperfectly of course. More slowly and conservatively than many of us would wish: that is in the nature of legal institutions, as it is in other social institutions as well. But law has defined with greater clarity and precision the conduct which is criminal than our anti-legalistic criminologists promise to do; it has moreover promoted a stability, a security and dependability of justice through its exactness, its so-called technicalities, and its moderation in inspecting proposals for change.

#### IV

Having considered the conceptions of an innovating sociology in ascribing the terms “crime” and “criminal,” let us state here the juristic view: Only those are criminals who have been adjudicated as such by the courts. Crime is an intentional act in violation of the criminal law (statutory and case law), committed without defense or excuse, and penalized by the state as a felony or misdemeanor. In studying the offender there can be no presumption that arrested, arraigned, indicted, or prosecuted persons are criminals unless they also be held guilty beyond a reasonable doubt of a particular offense.<sup>10</sup> Even less than the unconvicted suspect can those individuals be considered criminal who have violated no law. Only those are criminals who have been selected by a clear substantive and a careful adjective law, such as obtains in our courts. The unconvicted offenders of whom the criminologist may wish to take cognizance are an important but unselected group; it has no specific membership presently ascertainable. Sociologists may strive, as does the legal profession, to perfect measures for more complete and accurate ascertainment of offenders, but it is futile simply to rail against a machinery of justice which is, and to a large extent must inevitably remain, something less than entirely accurate or efficient.

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Criminal behavior as here defined fits very nicely into the sociologists' formulations of social control. Here we find *norms* of conduct, comparable to the mores, but considerably more distinct, precise, and detailed, as they are fashioned through statutory and case law. The *agencies* of this control, like the norms themselves, are more formal than is true in other types of control: the law depends for its instrumentation chiefly upon police, prosecutors, judges, juries, and the support of a favorable public opinion. The law has for its *sanctions* the specifically enumerated punitive measures set up by the state for breach, penalties which are additional to any of the sanctions which society exerts informally against the violator of norms which may overlap with laws. *Crime* is itself simply the breach of the legal norm, a violation within this particular category of social control; the criminal is, of course, the individual who has committed such acts of breach.

Much ink has been spilled on the extent of deterrent efficacy of the criminal law in social control. This is a matter which is not subject to demonstration in any exact and measurable fashion, any more than one can conclusively demonstrate the efficiency of a moral norm.<sup>11</sup> Certainly the degree of success in asserting a control, legal or moral, will vary with the particular norm itself, its instrumentation, the subject individuals, the time, the place, and the sanctions. The efficiency of legal control is sometimes confused by the fact that, in the common overlapping of crimes (particularly those *mala in se*) with moral standards, the norms and sanctions of each may operate in mutual support to produce conformity. Moreover, mere breach of norm is no evidence of the general failure of a social control system, but indication rather of the need for control. Thus the occurrence of theft and homicide does not mean that the law is ineffective, for one cannot tell how frequently such acts might occur in the absence of law and penal sanction. Where such acts are avoided, one may not appraise the relative efficacy of law and mores in prevention. When they occur, one cannot apportion blame, either in the individual case or in general, to failures of the legal and moral systems. The individual in society does undoubtedly conduct himself in reference to legal requirements. Living "beyond the law" has a quality independent of being non-conventional, immoral, sinful. Mr. Justice Holmes has shown that the "bad man of the law" – those who become our criminals – are motivated in part by disrespect for the law or, at the least, are inadequately restrained by its taboos.

From introspection and from objective analysis of criminal histories one can not but accept as axiomatic the thesis that the norms of criminal law and its sanctions do exert some measure of effective control over human behavior; that this control is increased by moral, conventional, and traditional norms; and that the effectiveness of control norms is variable. It seems a fair inference from urban investigations that in our contemporary mass society, the legal system is becoming increasingly important in constraining behavior as primary group norms and sanctions deteriorate. Criminal law, crime, and the criminal become more significant subjects of sociological inquiry, therefore, as we strive to describe, understand, and control the uniformities and variability in culture.

We consider that the "white collar criminal," the violator of conduct norms, and the anti-social personality are not criminal in any sense meaningful to the social scientist unless he has violated a criminal statute. We cannot know him as

such unless he has been properly convicted. He may be a boor, a sinner, a moral leper, or the devil incarnate, but he does not become a criminal through sociological name-calling unless politically constituted authority says he is. It is footless for the sociologist to confuse issues of definition, normation, etiology, sanction, agency and social effects by saying one thing and meaning another.

## V

To conclude, we reiterate and defend the contention that crime, as legally defined, is a sociologically significant province of study. The view that it is not appears to be based upon either of two premises: 1. that offenders convicted under the criminal law are not representative of all criminals and 2. that criminal law violation (and, therefore, the criminal himself) is not significant to the sociologist because it is composed of a set of legal, non-sociological categories irrelevant to the understanding of group behavior and/or social control. Through these contentions to invalidate the traditional and legal frame of reference adopted by the criminologist, several considerations, briefly enumerated below, must be met.

1. Convicted criminals as a sample of law violators:
  - a. Adjudicated offenders represent the closest possible approximation to those who have in fact violated the law, carefully selected by the sieving of the due process of law; no other province of social control attempts to ascertain the breach of norms with such rigor and precision.
  - b. It is as futile to contend that this group should not be studied on the grounds that it is incomplete or non-representative as it would be to maintain that psychology should terminate its description, analysis, diagnosis, and treatment of deviants who cannot be completely representative as selected. Convicted persons are nearly all criminals. They offer large and varied samples of all types; their origins, traits, dynamics of development, and treatment influences can be studied profitably for purposes of description, understanding, and control. To be sure, they are not necessarily representative of all offenders; if characteristics observed among them are imputed to law violators generally, it must be with the qualification implied by the selective processes of discovery and adjudication.
  - c. Convicted criminals are important as a sociological category, furthermore, in that they have been exposed and respond to the influences of court contact, official punitive treatment, and public stigma as convicts.
2. The relevance of violation of the criminal law:
  - a. The criminal law establishes substantive norms of behavior, standards more clear cut, specific, and detailed than the norms in any other category of social controls.
  - b. The behavior prohibited has been considered significantly in derogation of group welfare by deliberative and representative assembly, formally

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constituted for the purpose of establishing such norms; nowhere else in the field of social control is there directed a comparable rational effort to elaborate standards conforming to the predominant needs, desires, and interests of the community.

- c. There are legislative and juridical lags which reduce the social value of the legal norms; as an important characteristic of law, such lag does not reduce the relevance of law as a province of sociological inquiry. From a detached sociological view, the significant thing is not the absolute goodness or badness of the norms but the fact that these norms do control behavior. The sociologist is interested in the results of such control, the correlates of violation, and in the lags themselves.
- d. Upon breach of these legal (and social) norms, the refractory are treated officially in punitive and/or rehabilitative ways, not for being generally anti-social, immoral, unconventional, or bad, but for violation of the specific legal norms of control.
- e. Law becomes the peculiarly important and ultimate pressure toward conformity to minimum standards of conduct deemed essential to group welfare as other systems of norms and mechanics of control deteriorate.
- f. Criminals, therefore, are a sociologically distinct group of violators of specific legal norms, subjected to official state treatment. They and the non-criminals respond, though differentially of course, to the standards, threats, and correctional devices established in this system of social control.
- g. The norms, their violation, the mechanics of dealing with breach constitute major provinces of legal sociology. They are basic to the theoretical framework of sociological criminology.<sup>12</sup>

## Notes

1. The manner in which the legal definition of the criminal is avoided by prominent sociological scholars through amazingly loose, circumlocutory description may be instanced by this sort of definition: "Because a collective system has social validity in the eyes of each and all of those who share in it, because it is endowed with a special dignity which merely individual systems lack altogether, individual behavior which endangers a collective system and threatens to harm any of its elements appears quite different from an aggression against an individual (unless, of course, such an aggression hurts collective values as well as individual values). It is not only a harmful act, but an objectively evil act [sic!], a violation of social validity, an offense against the superior dignity of this collective system. . . . The best term to express the specific significance of such behavior is crime. We are aware that in using the word in this sense, we are giving it a much wider significance than it has in criminology. But we believe that it is desirable for criminology to put its investigations on a broader basis; for strictly speaking, it still lacks a proper theoretic basis. . . . Legal qualifications are not founded on the results of previous research and not made for the purpose of future research; therefore they have no claim to be valid as scientific generalizations – nor even as heuristic hypotheses." Florian Znaniecki, "Social Research in Criminology," 12 *Sociology and Social Research* 207, (1928).

2. See, for example, Thorsten Sellin, *Culture Conflict and Crime*, pp. 20–21, (1938).
3. An instance of this broadening of the concept of the criminal is the penchant among certain anthropologists to equate crime with taboo. See, especially, Bronislaw Malinowski, *Crime and Custom in Savage Society*, (1936), and “A New Instrument for the Study of Law – Especially Primitive,” 51 *Yale L. J.* 1237, (1944). Compare William Seagle, “Primitive Law and Professor Malinowski,” 39 *American Anthropologist* 275, (1937), and *The Quest for Law*, (1941). Karl Llewellyn and E. Adamson Hoebel, *The Cheyenne Way*, (1941) and E. Adamson Hoebel, “Law and Anthropology,” 32 *Virginia L. R.* 835, (1946).
4. Sellin, *op. cit.*, pp. 25 ff.
5. E. H. Sutherland, “Crime and Business,” 217 *The Annals of the American Academy of Political and Social Science* 112, (1941).
6. Sutherland, “White-Collar Criminality,” 5 *American Sociological Review* 1, (1940).
7. Harry Elmer Barnes and Negley K., Teeters, *New Horizons in Criminology*, pp. 42–43, (1943).
8. Sutherland, “Is ‘White-Collar Crime’ Crime?” 10 *American Sociological Review* 132, (1945).
9. In the province of juvenile delinquency we may observe already the evil that flows from this sort of loose definition in applied sociology. In many jurisdictions, under broad statutory definition of delinquency, it has become common practice to adjudicate as delinquent any child deemed to be anti-social or a behavior problem. Instead of requiring sound systematic proof of specific reprehensible conduct, the courts can attach to children the odious label of delinquent through the evaluations and recommendations of over-worked, under-trained case investigators who convey to the judge their hearsay testimony of neighborhood gossip and personal predilection. Thus these vaunted “socialized tribunals” sometimes become themselves a source of delinquent and criminal careers as they adjudge individuals who are innocent of proven wrong to a depraved offender’s status through an administrative determination of something they know vaguely as anti-social conduct. See Introduction by Roscoe Pound of Pauline V. Young, *Social Treatment in Probation and Delinquency*, (1937). See also Paul W. Tappan, *Delinquent Girls in Court*, (1947) and “Treatment Without Trial,” 24 *Social Forces*, 306, (1946).
10. The unconvicted suspect cannot be known as a violator of the law: to assume him so would be in derogation of our most basic political and ethical philosophies. In empirical research it would be quite inaccurate, obviously, to study all suspects or defendants as criminals.
11. For a detailed consideration of the efficacy of legal norms, see Jerome Michael and Herbert Wechsler, “A Rationale of the Law of Homicide,” 37 *Columbia Law Review* 701, 1261, (1937).
12. For other expositions of this view, see articles by Jerome Hall: “Prolegomena to a Science of Criminal Law,” 89 *University of Pennsylvania Law Review* 570, (1941); “Criminology and a Modern Penal Code,” 27 *Journal of Criminal Law and Criminology* 4, (May–June, 1936); “Criminology,” *Twentieth Century Sociology*, pp. 342–65, (1945).