March, 1941

University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

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VOLUME 89

MARCH, 1941

No. 5

PROLEGOMENA TO A SCIENCE OF CRIMINAL LAW

JEROME HALL †

INTRODUCTION

Idle speculation, that most noble of all the intellectual virtues, must justify itself in a practical world. It never succeeds in completely eluding executioner *Qui Bono*; and the history of civilization could be told in the contrivances resorted to in an endless effort to escape his axe. Whatever may be true of other fields of law, in the criminal law thoroughgoing analysis is necessarily philosophical, i. e., speculative. Centuries before most other branches of our law saw birth, criminal law was an established control; it remains the archetype of all law. The challenging character of its problems makes it no accident that theologians and philosophers have discussed it through the ages. From Plato to Aquinas to Kant and Bentham, and on into the present, the essential problems of the criminal law have strongly influenced the perennial currents of western philosophy. And we need merely to recall the works of Hale, Blackstone, Livingston, and Bishop to realize that important progress in criminal law in its purely professional aspect, is inseparable from philosophic insight and scholarship. That the suggested requirements for sound research have not been lost on serious scholars in this field is abundantly attested by their interest in and exploitation of various methods of analysis and techniques of investigation, as well as by their persistent integration of the criminal law with non-legal disciplines—many years before these matters became vital issues in law and legal education generally.

† Ph. B., 1922, J. D., 1923, University of Chicago; Jur. Sc. D., 1935, Columbia University; S. J. D., 1935, Harvard University; Professor of Law, Indiana University Law School; author, *THEFT, LAW AND SOCIETY* (1935); editor, *READINGS IN JURISPRUDENCE* (1938); author of various articles.

Criminal law represents the major social effort to eliminate serious conflict, and to do so not arbitrarily, but in accordance with methods and directed toward ends that we are pleased to call "rational". Against the fervid tide of instinctual drives, of emotions that stir to the very innards, and the brunt of ungovernable circumstances that buffet this awkward creature, this would-be Prometheus, almost comic in his frailty, against these and all the other forces that cry out man's impotence and the limitations of his brute ancestry, rise irrepressible intelligence and indomitable will to achieve the vision of the good life. To those who build their view of law on passion, one need simply point to the sciences, to art and philosophy, as the irrefutable evidence of creative imagination, of thought, of wise experiment. So, too, of mature legal systems, and, considering the nature of the problems, so especially of the criminal law. These systems exist, and their import as regards the rational side of human nature is evident. The implications of such endeavor and of its relevant verbal expression provide ample justification for the present investigation; the many shortcomings in existing knowledge suggest the imperative need.

I. A FORMAL SCIENCE OF CRIMINAL LAW

In a flash of insight, one of the greatest modern legal scholars said, "*Rechtswissenschaft ist Wortwissenschaft.*" That epigram aptly describes the function of formal analysis of the criminal law.¹ For words are the vehicles of our thought and the tools of the profession. Their misuse is as important as their correct use. In the criminal law, we have seen judges simply follow the terms, the sheer externals of prior decisions, in disregard of the world of fact in which they operate, seemingly impelled by a kind of word-magic that facilitates acceptance of the fixed form as assurance of a persisting and identical reality. Save marginal skepticism, it is only the jolt of wide disparity that engenders criticism of legal language. But normally the language of the criminal law discharges its functions as adequately as may be expected, though hardly ever as well as it might. In any event, the language institution provides an ultimate and inescapable problem, a never-ending challenge to improvement of the criminal law.

The Professional Literature

We can analyze the terms and generalizations employed in the criminal law, and the systematization of these propositions. Such an enterprise may be purely formal in the sense of being confined to words and their logical interrelation. It may, on the other hand, study the

1. Cf. FOURTH REPORT OF H. M'S. COMMISSIONERS ON CRIMINAL LAW (1839) xv, xviii.

reference of these symbols to the indicated segments of reality, to determine the meaning of the terms and the various changes in such denotation. It may, finally, take an operational or functional view, and relate both terms and their factual referents to the attainment of various desired objectives. We shall, as indicated, begin with the simplest, yet perhaps most sophisticated approach of all since it represents awareness and analysis of language as a basic tool. We operate here within the distinctive structure of the language only. In this context, we assume that the criminal law consists of all the rules of municipal law whose sanctions contain words signifying "penalty", such as punishment, fine, imprisonment, execution, or the like.²

When we examine the professional literature of the criminal law from the dooms of the Anglo-Saxon kings to the contemporary treatises, we find that it consists of propositions of a distinctive type. These prescriptions are composed of words which by usage and technical interpretation come to be the recognized terms and rules of the criminal law. The great classics of the criminal law provide the best source of such materials for its analysis.

Bracton is our earliest important writer on the criminal law as elsewhere. "He was the crown and flower of English medieval jurisprudence." His treatise reveals the influence of Roman law. The terms that Bracton employed to designate crimes are, for the most part, still extant: robbers, burglars, thieves, forgers, treason, conspirators, sedition, homicide, breaking the peace, mayhem, assault, arson, larceny, abortion, false imprisonment. Some of his terms have departed from our books, e. g., outlaws, cattle-lifters, clippers-of-coin, hiding treasure-trove, circumcision. His "falsifiers" has been subdivided; his "harbourers" have become accessories after the fact or receivers of stolen goods; "murder" is no longer the secret killing it was in his day. These terms seem almost to have existences of their own, some dropping off, others persisting with every promise of immortality so far, at least, as their external vestments are concerned—but all changing some, as the flux of social life fills them with the dynamic content of vibrant reality.

If we scrutinize Bracton and the other medieval English treatises, we find hardly any classification of crimes. The lines of analysis were procedural; such distinctions as treason, felony, misdemeanor are made with a direct eye to procedure.³ Consequences are set forth, to be sure,

2. It will be noted that the formal approach focuses on the terms employed in the sanction. This is suggested by "penal law", whereas "criminal law" has more immediate reference to the behavior element. The two terms are, however, used synonymously. Cherry distinguishes them, considering all criminal law to be penal law, but not vice versa, since the latter, he asserts, includes penal actions of a civil nature. CHERRY, *GROWTH OF CRIMINAL LAW IN ANCIENT COMMUNITIES* (1890) 1-3.

3. Bracton's *Concerning the Crown* is the second treatise of Book II, which is entitled *OF ACTIONS*.

which makes it possible for later writers to tabulate characteristics of various offenses. But the early writers were not interested in classification of substantive offenses as such—a fact as significant of the relation of treatise to concomitant legal problems as it is evidence of the then-backward state of criminal legal science, as presently conceived.

More noteworthy than lack of classification is lack of general formulas which include more than single rules of law, of generalizations constituting doctrine or theory. Bracton is, of course, far in advance of the Anglo-Saxon dooms. They were severely isolated propositions, whereas Bracton juxtaposed the various rules defining the law of the individual crimes. That, from the point of view of a science of criminal law, is his great achievement; he developed the categories that constituted the various crimes. Moreover, we do find occasional significant generalizations;⁴ but these statements are in the context of his discussion of a specific offense (homicide); no attempt is made to apply them generally.⁵

Hale's *Pleas of the Crown* provided the next great peak in the professional literature of the criminal law.⁶ His first contribution to the criminal law was a small book entitled *Pleas of the Crown, or A Methodical Summary of the Principal Matters relating to that Matter* (1685). He there divided offenses into those immediately against God (heresy, witchcraft) and those immediately against man, capital and non-capital, the former consisting of treason (high and petit) and felonies against (1) the life of man, (2) the goods (larceny, robbery, piracy), (3) the habitation (burglary, arson) and (4) "protection of Justice." The book is little more than the outline of a contemplated treatise, but it exhibits considerable thought on the systematization of the materials. It is precisely this arrangement which Hawkins fol-

4. As when he states "a crime has not been contracted, unless the will of hurting has intervened, and the will and the purpose distinguish the misdeed, and a theft is never at all committed without the intention of thieving. And according to what may be said of an infant or a madman, when the innocence of design protects the one, and the imbecility of the act excuses the other." 2 BRACTON, LEGIBUS ET CONSUETUDINIBUS ANGLIAE (Twiss ed.) 399-401.

5. Compare his significant analysis of four offenses where, he states, they "are to be considered from seven points of view, the cause, the person, the place, the time, the quality, the quantity, and the event." *Id.* at 157. These, however, are not used as categories for general application, but as brief, specific differentiae of the four crimes he discusses.

6. Of the intervening works since Bracton, few were more than justices' handbooks. Perhaps the most significant contribution is Lombard's table of analysis, in which he classifies crimes into public and private, then subdivides the former into offenses against the King and those against the Commonwealth, and the latter, into crimes against the body, against goods, and against both together. EIRENARCHA (1607 ed.) 222-3. But his discussion is hardly more than a digest of the cases. Staunford has been too summarily dismissed as little more than annotated Bracton. 5 REEVES, HISTORY OF ENGLISH LAW (1880) 164-5. The fact that Coke's THIRD INSTITUTE dominated the field for 200 years is eloquent of the still primitive state of the authoritative literature for centuries after Bracton. "A more disorderly mind than Coke's and one less gifted with the power of analyzing common words it would be impossible to find." 2 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) 206.

lowed in his treatise, published 1716, some twenty years prior to the posthumous publication of Hale's *Pleas of the Crown*. Hawkins had a keen eye to the limitations of the earlier works; they were, he said, "far from being compleat Systems." He sought to apply a "clear Method" and to reduce "all the Law relating to this Subject, under one general Scheme."⁷ His plan was modeled so closely after Hale's that much of it seems sheer plagiarism and mechanical spelling out of Hale's brief model. He devoted the first two pages to mental incapacity and compulsion; and throughout was closely confined to particular statutes and specific rules.

Hale's treatise in many ways is still the greatest accomplishment of any single scholar in the field.⁸ For the first time in the professional literature of the criminal law (published just four years prior to the founding of the University of Pennsylvania) we find, placed at the very beginning of the treatise, a detailed discussion of a "general part," including punishments, incapacities (infancy, idiocy, insanity), accident, ignorance of law and of fact, compulsion and necessity. This analysis covers fifty-eight folio pages, and immediately thereafter, Hale reveals his full awareness of the significance of his analysis: "having premised these general observations relating to all crimes, that are capital, and their punishments, I shall now descend to consider of capital crimes particularly, and therein first of high treason."⁹ His discussion of the particular crimes includes the arguments of various scholars, presented in a closely reasoned analysis; he has a constant faculty for discovering "the one in the many", e. g., when, in his opening chapter on homicide, he analyzes first "those considerations, that are applicable as well to murder as to manslaughter." From our present viewpoint, however, his discussion seems marred by over-concern with numerous statutes, specific cases, and procedure. And his general part was confined almost entirely to matters of culpability; his discussion of principals and accessories in felonies comes near the end of the first volume; as concerns treason, it is in the middle of his discussion of that offense. Solicitation is treated even more in immediate

7. HAWKINS, *PLEAS OF THE CROWN* (8th ed. 1824) preface xii.

8. Hale is without question one of the greatest scholars in the history of the law. He was one of the earliest writers to think in terms of a *science* of law. See his *ANALYSIS OF THE LAW* (3d ed. 1739); excerpts are reprinted in the writer's *READINGS IN JURISPRUDENCE* (1938) 592-9. "He often said, that the true grounds and reasons of law were so well delivered in the Digests, that a man could never understand law as a science so well as by seeking it there." BURNETT, *THE LIVES OF SIR MATTHEW HALE, WILMOT AND QUEEN MARY* (1774) 12. He read widely in science and philosophy "and had the new books, written on those subjects, sent him from all parts . . . he used to recreate himself with philosophy, or the mathematicks; . . . and he used to say, 'No man could be absolutely a master in any profession, without having some skill in other sciences.' . . . It may seem extravagant, and almost incredible, that one man, in no great compass of years, should have acquired such a variety of knowledge, and that in sciences that require much leisure and application." *Id.* at 13-15.

9. I HALE, *PLEAS OF THE CROWN* (1736) 58.

relation to particular offenses. Despite these limitations, it is possible for the first time, with Matthew Hale, to speak of a system of the common law of crimes.

The next great advance towards a formal science of criminal law was the publication of Blackstone's *Commentaries*. Somewhere between the extremes of Bentham's youthful, almost ruthless disparagement and Sir William Jones' superlative estimate,¹⁰ we must form our own judgment as regards his work. Blackstone was assuredly a learned¹¹ and a talented scholar though hardly a very original one. Following Hale, he begins with a discussion of general principles, precisely those which Hale had discussed. Attempt is still treated in relation to a few specific crimes (to rob and to steal) and not generally. Nor is there yet any understanding of the relation of solicitation to the various crimes. As general categories, these were still to be developed.

Blackstone's chief contribution in this regard is his discussion of principals and accessories, to which he devotes an entire chapter. There are other advances: his analysis of "crime" quite deliberately at the very outset of his treatise, whereas Hale had defined the term in a brief parenthetical clause. Most important was his classification of crimes which marked a definite improvement upon prior English taxonomy. It is rather easy to demonstrate that in these advances Blackstone was simply following the natural law writers, Grotius,¹² Pufendorf and Domat, as well as Beccaria and Montesquieu. Blackstone's definition of "crime" is purely formal, but in his discussions of *mala in se* and in his earlier definition of "law", he was clearly under the influence of natural law writers. His definition of punishment¹³ follows Pufendorf's analysis.¹⁴ His discussion of the "right to punish" is likewise in the direct line of the 17th and 18th century natural law writing. Blackstone's classification of crimes is similar to that of Montesquieu¹⁵ and Pufendorf,¹⁶ and almost identical with Domat's.¹⁷ Like Domat, Pufendorf, and most of the other natural law writers, Blackstone first dealt with

10. "His *Commentaries* are the most correct and beautiful outline that ever was exhibited of any human science." Quoted in STORY, MISCELLANEOUS WRITINGS (1835) 230.

11. In his DISCOURSE ON THE STUDY OF THE LAW (1758) he writes of law as "a science" (25, 26) and of "scientific method" (30). It is worth recalling, also, that Blackstone was a poet before he became a lawyer.

12. Grotius has a general significance rather than on the criminal law in particular, except as to punishment, which he did discuss in some detail. He emphasized law treatise writing "in a comprehensive and systematic manner." DE JURE BELLI AC PACIS (London 1925) Prolegomena I.

13. 4 BL. COMM. *7 *et seq.*

14. "Punishment . . . is an evil of suffering inflicted for an evil of doing, or, it is some uneasy evil inflicted by authority, in a compulsive way, upon view of antecedent transgression." 8 PUFENDORF, LAW OF NATURE AND NATIONS (4th ed. 1729) 763.

15. 1 MONTESQUIEU, THE SPIRIT OF LAWS (Nugent trans. 5th ed. 1793) 201-4.

16. 8 PUFENDORF, *op. cit. supra* note 14, at 782.

17. See 5 DOMAT, LE DROIT PUBLIC SUITE DES LOIS CIVILES DANS LEUR ORDRE NATUREL (1697) 192-3.

"crimes against God," as was done by Hawkins but by none of the other major English writers, all of whom began with treason. A rather curious direct bit of evidence of Blackstone's aping the French writers is his "Crimes against the Public Police", an expression which had, of course, quite a different meaning in French from that employed in England. The advance in systematization was great. Even Bentham had some praise for Blackstone's classification¹⁸ and, indeed, whatever opinion one holds concerning Blackstone's originality, there is no question but that, building on Hale and the French writers, he left the criminal law of England not only much better organized than he had found it, but also in a state which, for the most part, is still accepted.¹⁹

Of the more important later treatises, we may be quite brief. East (1803) begins immediately with the particular offenses (those "against religion" first); he limited his analysis entirely to them. As regards general theory and systematization, he represented a definite retrogression. Russell (1819) followed Blackstone (i. e., Hale) as to his general topics. The subject matter of his work gives it the appearance of the first contemporary lawyers' treatise, e. g., his relegating crimes against religion to three pages in the latter part of the book. Gabbett (Dublin, 1835) also followed Blackstone closely, as did a number of early American works on the criminal law of various states.

In this country we have produced two major treatises on the criminal law. Wharton (1st ed. 1846), modelled after Chitty, Archbold, and Burn, was chiefly concerned with pleading, practice and evidence. It was a practitioner's manual and a digest of cases. Bishop (1st ed. 1856) is the most important work since Blackstone; it has not yet been superseded.²⁰ It consisted of two large volumes, the first of which was entirely devoted to general problems, though much of it dealt with statutory interpretation. The second volume discussed the specific offenses. In the preface to his third edition (1865) he stated that he had planned the first volume as a text for schools, the second was for practitioners; but in this edition he blended the two volumes into one

18. A FRAGMENT ON GOVERNMENT OR A COMMENT ON THE COMMENTARIES (1823) xli.

19. "Since the publication of Blackstone's *Commentaries* hardly any work has been published in England upon the Criminal Law which aims at being more than a book of practice, and books of practice on Criminal Law are simply compilations of extracts from text-writers, and reports arranged with greater or less skill—usually with almost none. . . ." 2 STEPHEN, *op. cit. supra* note 6, at 218-19.

20. Considerable insight into the development of understanding of formal legal science in this country in the first third of the 19th century can be had from STORY, *Hoffman's Course of Legal Study* (first published in the No. AMERICAN REV. 1817) reprinted in his MISCELLANEOUS WRITINGS (1835) especially at 226, 233-4. Hoffman is revealed as one of the outstanding pioneers in legal education in this country, and perhaps the leading early exponent of a science of law. See HOFFMAN, *LEGAL OUTLINES* (1829), and his *COURSE OF LEGAL STUDY* (2d ed. 1836).

integrated work. Wharton's 8th edition (1880) was a radically new revision; it represented his initial effort to achieve a systematic treatise.²¹ Bishop's work since 1856 had taken effect—rather cogent evidence in this test of the market, that scholarly analysis is recognized as possessing the greater practical utility.

The Major Problems for Formal Analysis

The problems of a formal science of criminal law have only been indicated above. We need to state what these problems are, especially in light of contemporary needs. In doing so, we must here deal directly with the chief relevant problems in the criminal law. As indicated above, interest centers on terms, rules, and fundamental principles. As to the first, each crime is a legal concept composed of several simpler elements; thus common law burglary includes: breaking, entering, dwelling-house, night-time, and intent to commit a felony. We may designate burglary, murder, larceny, rape, etc., as autonomous or independent legal concepts and the various elements that compose them as subordinate or dependent legal concepts.²² Each concept, autonomous or dependent, whatever be its every-day usage, is defined in more or less apt legal terms; the meanings thus established operate in rules of criminal law. The rules of criminal law consist of distinctive propositions (prescriptions)²³ each of whose subjects is an independent legal concept, expressed as a general description of behavior-circumstances; whose predicates consist of statements of treatment-consequences which signify "penalty"; and whose copula is "must" or "shall" (as imperative), or a synonym.²⁴ Formal analysis of the rules includes discovering their component legal concepts, dividing these into their dependent elements, and defining the latter.

A body of penal law which consists simply of an accumulation of rules of law, constituting various particular crimes and penalties, lacks system. The initial step towards systematization consists in discovering that a few rules are relevant to more than one offense. These gravitate towards the "general part" of the criminal law, the others (defining specific crimes), become the "special part". The

21. See his Preface to the 8th edition for an illuminating statement of his progressively increasing insight into the problems of a formal science of criminal law.

22. In simple legal systems (*cf.* the earliest Anglo-Saxon dooms) the penal laws are announced in terms of such elements.

23. We are familiar with Austin's description of such rules as "commands", and the like by most of his successors in the later analytical school. It seems to the writer that Kelsen's insight in terming them "hypothetical judgments" is truer in this context. "Command" and "hypothetical judgment" are not antithetical. If one has in mind the psychological or factual import of rules of law, "command" is proper. On the other hand, if one is dealing with the problems of a formal science, then it is more precise to designate such prescriptions as "hypothetical judgments".

24. "All such particular laws or rules consist of annexations of legal consequences to defined circumstances or combinations of facts." SEVENTH REPORT OF H. M'S. COMMISSIONERS ON CRIMINAL LAW (1843) 6; also see *id.* at 11.

general part consists of prescriptions which modify all the rules of the special part. Thus the prescriptions dealing with infancy, insanity, compulsion, mistake, etc., limit all the rules establishing the particular crimes. We saw this great step taken with full awareness of its significance by Sir M. Hale. Next, it is discovered that certain terms are common to two or more offenses. These links serve as unifying agents, bringing together, e. g., murder, manslaughter and battery; robbery and assault; and, on a larger canvas, crimes against the person, against property, and so on. Finally there is undertaken the search for fundamental principles which have reference to the totality of rules included in both general and special parts. This last endeavor is the most important and creative of all; it is the essential prerequisite of any body of knowledge which may with some propriety be termed "a formal science" of criminal law. Some discussion of the two most basic of such principles is needed.

The older writers had treated the requirement of an "act" in connection with the treason statutes which ran in terms of "compassing or imagining"; the principle was established that "men were not to be tried for their thoughts". The early date of its enunciation, when there was hardly any organized criminal law, is additional proof that this was not employed as a scientific generalization, but as a guaranty against abuse. Later on, e. g., in Russell, we find the typical, confused sort of assertion put forth as general doctrine that "so long as an act rests in *bare intention* it is not punishable. . . ." ²⁵ Russell's statement that every crime must include an overt act, and the like by other, earlier writers, though apart from analysis of treason, must still be interpreted in that general context. In addition to the above emphasis on overt behavior, Blackstone, following various continental writers, had defined a crime as "an act committed, or omitted". ²⁶ This also brought "act" into prominence.

Bishop made "act" a central doctrine of the criminal law. ²⁷ In his first edition, he did not bring the problem of "omission" into his discussion of the "act" doctrine; he simply asserted, "The difference between omitting and doing is not so much in principle as in degree." ²⁸ In his second edition he added a section in which he stated, "A neglect is not properly an act, yet in a sense it is. It is a departure from the order of things established by law." ²⁹ Thus he insisted on the requirement of an "act" as a general principle. This and the *mens rea*

25. 1 RUSSELL, CRIMES (1st ed. 1819) 61.

26. 4 BL. COMM. *5.

27. BISHOP, CRIMINAL LAW (1st ed. 1856) § 229, at 200; § 312, at 278.

28. *Id.* § 235, at 206.

29. BISHOP, CRIMINAL LAW (2d ed. 1858) § 313a, at 355.

principle constituted the two most basic doctrines of his treatise on criminal law. They are still generally accepted as such in this country.

The writer believes that this analysis of the criminal law which puts forth the "act" and the *mens rea* doctrines as the two foundation principles, is defective for various reasons. Both have an ideological origin. As noted, insistence on "act" rose in the law of treason and served as a check on over-zealous prosecutors; the *mens rea* doctrine was a religious contribution that served to limit penalization to morally culpable behavior. But despite this, it is possible that these doctrines have, as is widely believed, become valid basic generalizations. We need to consider the matter quite regardless of origin.

Their deficiencies as general doctrine are apparent if we reflect on the course of the usual analysis in which they are employed. We begin with a case of ordinary overt bodily movement, and have no difficulty as regards its designation as "act". Then we proceed to solicitation, and influenced here, perhaps, by behavioristic psychology, we extend "act" to include the talking. Mere possession (e. g., of counterfeit money) gives rise to skepticism; then certain cases of involuntary manslaughter and various statutory offenses make it clearly impossible to retain "external bodily movement" as an adequate designation of the legal conditions. We are likely then to resort to fiction, or to debate whether "omission" is "action", etc. The doctrine has broken down, and at crucial points. The breakdown is fatal so far as scientific generalization is concerned; we cannot be content with the sort of pedestrianism that inevitably accompanies the method of broad generalization, qualified, modified, and excepted to so often as to reduce the original "principle" to little more than a point of orientation. The like is true of the *mens rea* principle, once we encounter involuntary manslaughter, other crimes of negligence, and various statutory offenses. In wrestling with this problem, as with that concerning "act", we construct a maze of rote and dogma; it becomes obvious that though we may be transmitting a tradition, assuredly it is a tough one, and anything but scientific. This invalidity of the two presently accepted major generalizations in our criminal law discipline is an index, also, of faulty analysis of various basic problems, such as that of the petty offenses. To this we shall shortly revert.

If the generalizations concerning "act" and *mens rea*, are not basic principles, what are these principles and what is their relationship to the above two presently accepted doctrines?³⁰ If, as indicated,

30. Any attempt to answer these questions must be tentative; there is, moreover, a degree of unavoidable arbitrariness in any brief disposition. We can stipulate various proposals, note their relevancy to different objectives, and modify them as empirical discovery provides greater insight. On the other hand, such an endeavor is by no means merely conventional. It should at least fix a target for further discussion and criticism of basic problems of the criminal law.

the difficulties are the incomplete reference of the "act" and *mens rea* principles to the relevant field of criminal phenomena plus pretended adequate reference, two corrective procedures are theoretically available: we can narrow their field of reference (criminal behavior); or we can subsume these principles under broader generalizations that do include the required field of reference. Various cases of involuntary manslaughter reveal the necessary direction as regards the "act" doctrine. Since it is agreed that these cases must remain within the field of criminal phenomena, we are, accordingly, as regards this doctrine, compelled to seek a broader generalization. Bentham was among the first to appreciate the need for taking account of omissions, and he proposed that the doctrine be stated in terms of "mode of conduct", which would include both act and omission.³¹ This certainly is more suggestive than Bishop's assertion that there is no difference in principle between the two; nor did it rely on the dogmas sometimes employed in dealing with this problem. But it is apparent that such terms as "conduct" or "behavior" may include but do not synthesize the ideas of "act" and "omission". Indeed, it is impossible to effect a synthesis of these, since the essence of "act" (as well as the motives that prompted its assertion as basic principle) is the precise contradiction of "omission to act".

It is evident, also, that we do not seek here to generalize about conduct or behavior apart from law, but that, on the contrary, we are concerned solely with behavior forbidden or prescribed by law. It will be argued below that we are not driven to the extremity of asserting that (legally) criminal behavior is completely lacking in any common empirical quality, that it is simply whatever may be included in the behavior-circumstance element of a penal law. Anticipating the conclusions of that analysis, it is suggested that one fundamental principle of the criminal law is that *there must be a legally defined social harm*; and that the other major principle is that *there must be a legally prescribed penalty*. As noted, the positive criminal law is common to both of the above conceptions, a condition which has in a special context been stated as *nulla poena sine lege, nullum crimen sine lege*. This is a necessary, not an arbitrary or formal element in our present analysis, since, as will appear, positive law constitutes part of the reality we seek to explore; the total reality constituting the object of analysis, is "legally defined social harm".³²

In early law, "harm" was a simple notion of which the denotation was an injury sustained from contact with an individual, his servant,

31. BENTHAM, A FRAGMENT ON GOVERNMENT (1823) xliv, n.

32. Henceforth to be termed "harm". Limitation of space makes impossible analysis of "legally prescribed penalty". It is evident that any thorough analysis would need to consider the entire problem of sanctions.

animal or even his inanimate property. Presumably some sense of justice existed then; we may assume that this was satisfied by such all-inclusive, and to us indiscriminate, liability. The relevant distinctive ideas in advanced law are such notions as intention, negligence, accident. In an evolution that must have extended over many centuries, these ideas become integrated with correspondingly modified notions of liability and wrong. When we examine the identity of the "harm" proscribed in advanced legal systems, it is much more complex than formerly. We can divide "harm" into various simpler elements, and the limitations of speech, if not of thought, require that we do so. But initially we need to grasp the notion of legally defined social harm in its complex reality. One major element, the so-called "material" or objective element, is *injury* to an interest; the other, the so-called subjective or moral element, is *culpability*. Of these two constituent elements of "harm" we shall omit analysis of the injury since this has elsewhere been discussed in some detail.³³

As regards the second element of "harm", we must note, first, that there is never simply a determination of culpability, but always of some degree of culpability. These gradations are sometimes specifically expressed in the law, as in manslaughter and murder in the first and second degrees, the lesser degree of blame constituting the essential difference. But beyond such distinctions there are broader questions of culpability, involving intention, negligence and even absolute liability, imposed by statute. These two notions (injury and culpability) are like the two sides of a coin, or the two lenses of a telescope. Both are essential elements; it makes no difference whether one looks through the "injury" lens to focus with the "culpability" lens or vice versa. So much of injury as is recognized as involving culpability constitutes the "harm" we seek to apprehend. Evidently "injury" presupposes an accepted scheme of values or interests.

Culpability has to do with the relation of the actor (wrongdoer) to the injury.³⁴ This relationship has traditionally been conceived in terms of his "understanding" and "volition".³⁵ Idiocy, infancy and

33. Hall, *Criminal Attempt—A Study of Foundations of Criminal Liability* (1940) 49 YALE L. J. 789, 814 *et seq.*

34. Culpability is sometimes spoken of as imputability; but imputation may better be restricted to judgments of fact-finding, i. e., that certain evil consequences are as a matter of fact to be laid at the door of a human actor because he caused them in a purely physical sense. Culpability is then an expression of legal liability which includes a finding of imputation. Cf. 2 BRACTON (Twiss ed.) 263, 473. PUFENDORF (4th English ed.) Bk. I, Cap. V, § 3, 45; I CARRARA, PROGRAMME DU COURS DE DROIT CRIMINEL (1876) 21; 2 ROSSI, TRAITÉ DE DROIT PÉNAL (1829) 105.

35. See 1 HALE P. C. c. 2. We have noted that most of the subjects included in the general part by Hale and Blackstone dealt with culpability. See *supra*.

In a number of parts of this discussion terms are used and views put forth which in another context might be seriously challenged. The writer does not criticize them here because the present need called for an initial endeavor such as this. To those of

insanity exclude culpability through lack of capacity to understand. Apart from such special and personal lack of capacity, there may be normal failure to understand, as when acting under a reasonable mistake of fact. Likewise compulsion and necessity exclude culpability because of absence of the actor's volition. Culpability, it must be remembered, is defined in positive criminal law. Consequently, as regards such matters as justification and excuse, there may have been a physical injury but no culpability.³⁶ In addition, the merely physical injury, though deliberately inflicted, is not considered tantamount to the materially equivalent legal harm, probably not even by the injured transgressor himself.

It will now be recognized that "act", as external bodily movement, is subordinate to "volition"; and that *mens rea* is subordinate to "understanding". This relation of "act" and *mens rea* to the two elements of "culpability", locates these doctrines in the general scheme of penal liability. It reveals the import of their special functions by this relationship; it becomes possible within the broader scheme thus envisaged to avoid the labored treatment of the narrower doctrines traditionally stressed since Bishop. It becomes evident that omission to act may involve an individual's volition as plainly as his external bodily movement; more incisive analysis and clearer expression become possible by correct focus on what is legally significant.³⁷

logical-positivist bent such terms as social harm, culpability, understanding, volition, and so on may be "nonsense". Some of the tests of sensible observation may be satisfied as regards the denotation of the term "volition", i. e., the specific behavior patterns relied upon (bodily movements, surrounding circumstances, consequences) to some extent can be observed. But as to "understanding", reliance is mainly on inner experience and on introspection, both as method of discovery and as proof. As to the problem in general and the terms employed above, in particular, they have certain advantages. It would be interesting to examine an analysis of the above problems in current "scientific" terms, to learn just how far we could dispense with these traditional concepts.

36. In our analysis of any crime (legally defined social harm) we necessarily discuss separately the consequences or injury effected, and the culpability of the doer. Thus we stress on the one hand, the breaking, entering and the other "objective" elements of burglary, and the like for other crimes; and in a separate context, we treat of such matters as infancy or insanity, compulsion or necessity. This has led one scholar to argue with some degree of persuasion that the criminal law has three basic conceptions: harm, delinquent, and penalty. In a series of thoughtful articles, the author, Givanovitch, argues that there are these three basic categories, insisting that the notion of "delinquent" (under which he subsumes culpability) is an independent idea and that "injury" is likewise, being the factual damage. He relies upon such cases as diplomatic exemption from liability, and the liability of a competent accomplice for the wrong of one *non compos mentis*. In such a case, he argues, if there were no harm, there could be no liability on the part of the competent person. His argument is within the framework of the positive law, and consequently is fallacious for reasons stated in the text above. His analysis is nonetheless quite suggestive on the problem of the basic categories of the criminal law. See Givanovitch, *De l'Élément subjectif dans la Notion du Délit* (1909) 22 REV. PEN. SUISSE 257; *De la Notion du Délit* (1910) 23 REV. PEN. SUISSE 43; *Sur les Notions fondamentales du Droit criminel* (1916) 40 REV. PEN. ET DE DROIT PÉNAL 431; *Le Système Tripartite* (1926) 3 REV. INTN'L DE DR. PEN. 67.

37. Thus manslaughter is not correctly explained by placing omission to act on a par with action. Such equivalence would be proper as regards deliberate omission to act, e. g., the railroad employee who intentionally omits to give the necessary signals; but it is not relevant as regards negligence. On the contrary, the nature of the latter

We have dealt with a few major problems concerning the distinctive terms and prescriptions of the criminal law, and the possible systematization of these by reference to certain basic principles which have been described. Finally, we may briefly note certain immediate, practical possibilities of persistent cultivation of formal analysis of the criminal law.

First, it must be pointed out that although the importance of the ideal of a formal science of criminal law and of the suggested methods of analysis can hardly be exaggerated, actual construction of such a science, if the term be rigorously defined, is impossible of attainment. A formal science of criminal law would be a totally systematized body of penal prescriptions, i. e., all deducible from a few premises.³⁸ Such systematization has been achieved only where letters or numbers are used in total disregard of fact. It is conceivable that some future Lewis Carroll may achieve such systematization of a body of penal law. But it is highly questionable, even theoretically, in light of the particular historical origins and empirical significances of the terms (and the limitations of our vocabulary) whether we can ever have a formal science of criminal law that would possess any practical utility. The requirements of formal science would blot out essential characteristics of any actual penal law.

If a formal science of criminal law cannot be invented, what can we reasonably expect to achieve in pursuit of that ideal? The formulation of unambiguous terms to denote as accurately as possible the various segments of reality they symbolize can be progressively advanced in this manner. The discovery of common ideas through formal analysis will certainly facilitate greater insight into the problems of classification and codification.³⁹ Thus improvement in classification is clearly the major desideratum of formal analysis of the criminal law. In this regard, it is possible here simply to note that recent emphasis on the purpose of classification has tended to imply that the classifier is free to do whatever he wills. On the contrary, the purposes themselves are rather largely fixed; more than that, the various realities

problem (e. g., involuntary manslaughter) is thus confused. What is revealed as the real problem in such offenses is: why criminal liability though there is complete lack of volition, and hence, seemingly, no culpability?

38. Compare Stephen's attempt to deduce the entire law of crimes from the Ten Commandments. 3 STEPHEN, *op. cit. supra* note 6, at 366-7.

39. It is apparent that there would be a close relationship between a criminal code and analysis directed towards construction of a formal science of criminal law. A science of criminal law would, however, contain propositions which referred to the totality of criminal law, i. e., to both general and special parts. It could not be based on generalization from the general part alone. This may be more readily seen if we remember that the total body of criminal law could be stated by adding to each particular rule all of the qualifications stated in the general part. Since a science of criminal law would consist of generalizations about the entire criminal law, the relevant formal analysis would contribute to sound construction of the general part.

necessarily dealt with have their distinctive characteristics. It is the job of the researcher to discover them in detail and in relation to the particular objectives more or less given him to pursue. Classification in the criminal law is no non-Euclidian fantasy; the classifier is challenged by all the rigorous actuality that social life, rational control, and adjudication present to the creative imagination. His dependence upon social research and discovery, and upon organized social knowledge will be indicated in the following analysis of a sociology of criminal law.

II. A SOCIOLOGY OF CRIMINAL LAW

Two major obstacles have prevented the construction of a sociology of criminal law. The one, a modern development, results from the rise of the legislature as the chief, deliberate, law-making agency, together with the concomitant recognition of the lack of typicality of the product, and belief in the impossibility of generalizing thereon, suggested by phenomena ranging from passage of laws at the instigation of small pressure groups to what seems sheer whimsicality. To this we shall return.

Convention and Mala Prohibita

The other major obstacle has a much older origin; it first appears as an ancient and revered theory; it runs to the very roots of our thinking on this problem. It affects all of the petty offenses immediately, and, per consequence, a sociology of criminal law directly. For these offenses are in correct legal form. They contain recognized words of penalty. They are enforced by the state. Yet they have been placed beyond the possible field of criminal phenomena by a tradition extending back at least to Aristotle—they were wrong merely by convention, not by Nature.⁴⁰ The uncertainties, the inhibitions on thought, as a consequence, can hardly be exaggerated. For we have been frustrated at the very core of necessary insight, namely, in the creation of a unified field of phenomena, distinct from all others.⁴¹

The distinction drawn between crimes *mala in se* and those *mala prohibita* is the somewhat dubious application of the above philosophic position. The former have been declared "intrinsically wrong", the

40. Compare the Greek distinction between universal law and particular law. This was supported by the observation that the laws of various states were alike in some ways but differed in others. We are concerned here with the application of this theory in the criminal law, and particularly with the confusion to which it has given rise as a result of its use by the courts as a persuasive mask to conceal and gain ready acceptance for a really complex ratiocination.

41. Representative of the continental position is Carrara, who states that *contraventions* are essentially unlike crimes; that they are violations of law which protect not right, but expediency, and whose sole foundation is utility. I CARRARA, *op. cit. supra* note 34, at 83, n. 1. Cf. ALLEN, LEGAL DUTIES (1931) 237.

latter "wrong" merely because legally prohibited,⁴² i. e., not morally wrong at all.⁴³ We need first to consider the bias that petty misdemeanors are merely "conventional"; for this has been the overriding generalization which has rigorously limited the range of our curiosity and analysis.

It is argued, e. g., that traffic laws are mere convention, borne out by the fact that the English drive on the left side, we on the right. This instance is superficially persuasive, but on reflection, it must be recognized that travel in opposite directions simultaneously is the peculiar attribute of the traffic problem; and that therefore the essence of this traffic law is the maintenance of order in the flow. This can be achieved in various ways (some streets are one-way drives), but what is not a matter of mere convention is the separation of one-direction traffic from opposite-direction traffic. Similar regulations, as to stopping at intersections, speed limits, display of lights at night, etc., can only by dogmatic and unwarranted usage be designated as "conventions". Such laws may not exist in the Sahara, but in the cities, there is need for them; there is as much "reason" in relation to urban conditions, values and objectives as for any law, however traditional. The failure to remove garbage, to sweep sidewalks, to clear them of ice, to place safety appliances in factories, are all morally wrong, though obviously in lesser degree than the harms long known as felonies. So long as "the public good" reasonably requires any regulation, that regulation is not conventional. If another regulation can fill the same need, this does not mean that either is arbitrary. The far greater likelihood is that the two overlap in stipulating the same general conditions or in proscribing the same essential misconduct.

Again, it is argued with reference to the petty offenses, that certain violations are clearly not unethical (e. g., speeding on an open road), but such argument as to exceptional cases is applicable to felonies as well. The euthanasia movement in respected medical circles is one obvious instance, at least of the debatableness of the issues, and what of Jean Valjean and of cases of theft of necessities to provide for others? The illustrations can be extended generally and indefinitely.

42. One of the best discussions of *leges mere poenales* is Janssen, *Les Lois pénales* (1923) 50 NOUVELLE REV. THÉOLOGIQUE, 113, 232, 292. Janssen holds that such laws are not binding on conscience (this, of course, is quite apart from unjust laws); but that submission to the penalty is binding on conscience. For references to theological arguments opposing his views and asserting that there are no *leges mere poenales* see *id.* at 116, 235, 238.

Also, Dabin, accepting Janssen's position, argues for a distinction between universal laws and laws that provide means only, i. e., of utility. LA PHILOSOPHIE DE L'ORDRE JURIDIQUE POSITIF (1929) 653 *et seq.*

43. The distinction thus made between *in se* and *prohibita* has been rejected by several writers, e. g., Lévi, *Extent and Functions of the Doctrine of Mens Rea* (1922) 17 ILL. L. REV. 587-8, and Note (1930) 30 COL. L. REV. 74, but without considering the general significance of their conclusions.

Next, we are met with this sort of argument: "yesterday it was illegal to possess alcoholic liquor; today it is legal to possess such liquor but illegal to possess gold. Therefore such regulations cannot deal with harms which are 'intrinsically wrong', they must be mere conventions, 'wrong' (note the shift in the basis for this judgment) merely because prohibited by positive law." Sometimes this argument is advanced to support the *mala in se* doctrine, i. e., to exclude the petty offenses as *leges mere poenales*. It is then assumed that acts now called *mala in se* were always *mala in se*, and that they were and are so "universally". But, limiting ourselves to modern times, we know that even "murder" was not in Bracton's day what it is with us. We know that as recently as 1761 in *Rex v. Wheatly*,⁴⁴ the King's Bench held that one who deliberately delivered less merchandise than he represented was not even to be censured; the judges refused to condemn a man simply "for making a fool of another". We know that until the beginning of the last century, what is now embezzlement was a mere breach of trust. It is possible to supplement the list considerably without resort to the usual references to "savage" parricide, and the like. On the other hand, it is possible, indeed quite defensible, on the basis of like elements in the laws of various societies, to premise certain common instincts, moral judgments, sense of justice, conscience, and so on. The point of the present argument is not denial of such community of all human kind, but rather to note that the same needs, the same mental faculties, by and large the same processes of forming moral attitudes, all of these give rise to different laws when the conditions are different. This is "normal", "rational". The incidence of this argument on petty regulations in modern metropolitan areas will be apparent.

Finally, let us more closely scrutinize the accepted test, which runs as follows: is the forbidden behavior wrong in itself, intrinsically immoral, i. e., would it be immoral entirely apart from and irrespective of its prohibition by positive law; or is it wrong merely because forbidden by positive law? This test, it is submitted, requires what, as a matter of fact, is quite impossible to be done. For it assumes that we can eradicate from our value-judgments the centuries-old influence of the positive criminal law. Such suggested separation of law and moral attitudes also ignores the facts (a) that positive criminal law is at least as old as ethics; (b) that our ethical principles are in great measure the product of positive law; and (c) that positive law itself provides the major principles for criticism of much of the legal order, for in a great many cases, no extra-legal ethical principle exists. The dogma of an

44. 1 Black. W. 273, 96 Eng. Rep. R. 151 (K. B. 1761).

all-inclusive ethics is as fallacious as it that of an all-inclusive system of law—only in a technical, logical sense can “no gaps” be sustained.

The arbitrary and fallacious procedure of the accepted theory is stressed as a necessary corrective. For if the above criticism of the traditional theory is valid, it should help remove the bias that disregards the small harms and the new harms because they cannot be immediately inferred from ethical norms, which, harking from an older age, stress the major wrongs. Neither the existence of such ethical norms nor the importance of valuation of positive laws is challenged in the least. What is to be emphasized here is that in forming any actual ethical judgment, it is impossible in fact to ignore the influence and significance of the positive law. We must accordingly regard the existing test simply as a questionable device of analysis.

The unfortunate effect of the *mala in se-mala prohibita* doctrine in the criminal law when interpreted as an application of the natural law-convention distinction, has been the setting up of a rigid dichotomy between traditional harms and the mass of petty misdemeanors which were accordingly declared completely unmoral. A truer interpretation in light of the analysis above, is provided by the notion of “continuum”, which suggests a range in morality from the major moral principles to the least of ethical norms. The notion moral “continuum” provides a common, connecting link that unifies all positive criminal laws which serve a desirable end. (The differences throughout run in terms of degree, not of kind.) None of such laws is morally “indifferent”. On the other hand, it is, of course, quite possible that a law may be immoral just as it may run directly counter to the moral attitudes entertained by the vast majority.

We need now to examine the focal point of maximum difficulty, namely, the holding as regards various petty offenses, sometimes termed “public welfare offenses”, that no intent, knowledge, or negligence is required. The actor, indeed it may be the “acted on”, is simply “at peril”; on the occurrence of “the facts”, the offense has been committed. Mr. Francis Sayre, in a thoughtful article,⁴⁵ came to the conclusion that such offenses are not “really” crimes, that they are in the nature, rather, of public torts, where the public need far outweighs any consideration concerning individual penalty; that these laws, though in penal form, constitute a type of “regulation” that differs essentially from criminal law. This disposition certainly suggests one possible method of unifying the field of criminal phenomena, simply by excluding these troublesome petty offenses. The rest of the penal laws would provide the “real” crimes. Even if one accepted that position, *mala in*

45. Sayre, *Public Welfare Offenses* (1933) 33 COL. L. REV. 55.

se, mala prohibita would still be objectionable as confused vocabulary since they suggest a distinction within the category "criminal" whereas, on the "public welfare regulation" analogy, the distinction should be between criminal and non-criminal. And the above analysis of petty offenses demonstrates the impossibility, at least, of any such sweeping disposition.

The major problem for analysis has to do with insistence on culpability as an essential element of criminal behavior. On this premise we must recognize that the boundaries of the problem we are exploring become extended far beyond petty offenses. Reasonable mistake of law is perhaps the outstanding instance, but there is also certain reasonable mistake of fact, e. g., concerning the age of girls in rape, the employment of children, where, also, precocious physical development may reasonably deceive; and there has recently been an accumulation of statutes eliminating "intent to defraud" from a number of seriously punished offenses. Beyond these, and most troublesome in some regards, are numerous cases of involuntary manslaughter, such as death of a child due to failure of the parent to summon medical aid because he was too stupid to understand the need (though not mentally diseased), or because he belonged to a sect which forbade use of medicine. Here we do not hesitate to impose very serious penalties in accordance with a test that completely ignores the defendant's capacities (it does not even assume that he could have done better) and imposes the standards of the community by way of the "reasonable man". The problems raised as regards culpability are exceedingly difficult ones; it is possible here to analyze them solely as they affect the minor misdemeanors.

When we examine the public welfare laws and other typical, minor offense statutes, we find that they are silent as to intent. But in many of the cases where it is announced that "the facts" only need be established, not the criminal intent (e. g., the race tout in possession of lottery tickets, of whose character he was "innocent", or the questionable restaurateur in possession of liquor), it is apparent that proof of "the facts" constituted proof of intent. What we have here turns out to be no less than is required in felonies, i. e., intent must be inferred from the facts. In other cases, despite the "at peril" dogma, the courts have required proof of certain knowledge, e. g., that a bottle (of liquor) was known to be present and was not simply "planted"; and presumably no court would convict a somnambulist of any offense. Where the courts sometimes stop short concerns normal insistence on proof of special circumstances bringing the facts to the defendant's knowledge. They have in some cases found violations despite admitted lack of such knowledge.

When we examine the early English cases extending the *mala prohibita* doctrine—the butcher who sold diseased meat and the tobacconist who sold adulterated tobacco, both quite innocently and using due care—we find the ground put forth that proof of intent is too difficult in such cases, that insistence on such proof would nullify the legislative policy. But it is apparent that the problems of proof, case by case, offer no greater difficulties than in most felonies, and much less than in some, e. g., receiving stolen property.

We get much closer to the probable bases of judicial decision in such cases when we note several other factors. First, the penalties are small, usually fines. Secondly, these cases (e. g., the public welfare and traffic offenses) are of enormous frequency; the cost of regular judicial proceedings in all of them would be huge.⁴⁶ There is, next, little loss of reputation involved, a sad commentary, perhaps, on the moral sensibilities of the community as regards minor wrongs, but not entirely blameworthy.⁴⁷ Finally there is the desire to further attainment of the legislative policy, which, it is thought, would be endangered if proof of intent were required. When courts pretend to ignore these criteria, they argue on the patently fallacious ground of *first* determining that the offense is or is not *mala in se* and *then* finding that intent must or must not be proved. But obviously the morality of the proscribed behavior can be judged only after it is decided that the behavior was or was not intentional. The courts must have been greatly influenced in this regard to set aside the tradition of strict construction, to inflict what Bishop stigmatized as "outrage"; to reverse, in effect, the valued presumption of innocence and thus to punish the one innocent person rather than to allow a hundred guilty ones to escape. If the courts announced their reasons directly (i. e., the cases are so numerous as to swamp existing traditional processes of adjudication; even though proof beyond reasonable doubt is not established, a preponderance usually is; the penalty will be exceedingly small in such cases; there is no loss of prestige) instead of uttering the mystic *malum prohibitum* formula, they would avoid their present cruel treatment of innocent persons. Over and beyond the purely negative reasons for conviction in such cases, the dominant one is implementation of the legislative policy. The point to be stressed is that the premise underlying such legislation is that intent and negligence *do in fact play essential parts in such offenses*. If this were not the premise, such legislation would

46. Many of them are diverted to licensing boards; traffic cases are being increasingly handled by clerks.

47. Even Sir F. Pollock asserted that petty misdemeanors were "without any general and lasting imputation upon his moral character". SECOND REPORT OF H. M.'S COMMISSIONERS ON CRIMINAL LAW (1836) 77. But this concedes the immorality of the conduct nonetheless.

constitute either a special tax on engaging in certain industries (which is unlikely in this context) or it would be utter stupidity. For if the matter were not within human control, if it were a matter solely of chance, there would be no sense whatever in such legislation or such penalization (why not punish insane persons for such offenses?). The assumption *must* be that better results, satisfactory results, can be had; that there was negligence or intent despite inability to *establish* either beyond any reasonable doubt; and that, considering the reasons for surrendering the traditional safeguards noted above, it is wise to punish an occasional innocent person rather than allow great numbers of guilty ones to escape. It amounts to a judgment that the cost of justice would be so great in comparison with what is regarded as involving occasional petty injustice, that the latter procedure is preferred.

The key to understanding the petty offenses (and others where *mens rea* has been excluded) is, therefore, that they are designed to catch the wilful and the negligent; they are not intended to penalize sheer accident. Their purpose is thus identical with that of the major offenses, i. e., to catch real offenders. But they are so phrased as *also* to include the morally innocent, and these occasionally are caught, aided by administrative incompetence or persecution. These laws therefore have a dual nature. If read literally, severely separated from their purpose and their administration, they are non-penal (and immoral!), *mala prohibita* is applicable. But read against their purpose and their normal administration, they are penal.

There is no reason to continue to believe that the present mode of dealing with these offenses is the best solution obtainable, or that we must be content with this sacrifice of established principles. The raising of a presumption of knowledge might be an improvement. Perhaps an entirely new machinery of adjudication should be established in such cases, which would determine culpability. In any event, the above analysis of *mala prohibita* indicates directions that need to be pursued towards construction of a unified field of phenomena, the subject matter of a sociology of criminal law.⁴⁸

48. The writer has no thought of suggesting that the above analysis is completely satisfying. He is convinced that a fresh approach to *mala prohibita* is essential to valid theorizing on a sociology of criminal law, and trusts the above represents a sound beginning in that direction. Another avenue he should have liked to explore concerns the hypothesis of non-penal functions of criminal law. Such offenses as vagrancy, begging, drunkenness, prostitution, drug addiction, and gambling suggest functions that ought not be penal. Again, there is the problem raised by the fact that for certain misconduct only (apparently) penal sanctions are available. The notion "regulation" rather than "penalization" is too ambiguous and dull-pointed to provide a very helpful attack. It must be emphasized that we cannot accept words of "penalty" in their present indiscriminate use, as denoting actual punishment; the logic of the relevant scientific method requires exclusion of so-called "crimes" from the field of actual crimes. We cannot avoid, indeed, we must seek to *impose* the necessary theoretical bases upon the data, lopping off what does not fall within the orbit of the sustaining theory.

The Dilemma of Legal Formalism versus Sociological Positivism

The scholar who seeks the theoretical foundations for a sociology of criminal law is, in our day, confronted by a second major obstacle, set by the two opposing theories which dominate the field. They represent positions that are diverse in nature, implication, and significance generally; somewhat fortuitously both are labelled "Positivism". The one should be termed Legal Formalism, the other, Sociological Positivism.⁴⁹

The issues have been formulated in the Italian literature on criminology, known professionally as the Positive School. The father of this school was a physician, a creditable calling, to be sure, but hardly one expected to yield fruitful social science or appreciation of the significance of law. Lombroso was no systematizer; he attempted no definition of "crime".⁵⁰ But he was all the more certain that he knew a "criminal" when he saw one. It was as easy as small-pox! So far as law and social science are concerned, Lombroso brought all the naïvete of the man on the street to his analysis of what "crime" was, and all the advantages which such a forthright view not infrequently provides in scientific experiment.⁵¹ It was his fortune to be in front of the 19th century positivistic trend in sociology.

But the first theoretician of the school was Baron Garofalo, a judge and a scholar with a definitely speculative bent. He asserted that to determine "the boundaries of criminality, the sociologist cannot turn to the man of law. . . . We must arrive at the notion of the *natural crime*", which meant "those acts which no civilized society can refuse to recognize as criminal and repress by means of punishment."⁵² The criterion was factual, "the average moral sense of the whole community".⁵³ Specifically, the natural crime was "injury . . . to the elementary altruistic sentiments of *pity* and *probity*".⁵⁴ He later pro-

49. These are sometimes called analytical positivism and sociological positivism. They have certain common elements; the former was termed positivism to contrast natural law, the latter, to contrast science and rigorous scientific methods with metaphysics. But there is a fundamental clash between these two types of positivism which make it more important, for present purposes, that the problems of difference, rather than similarity, be discussed.

50. The meanings given the term "crime" parallel the entire history of human thought. One might classify them as theological, ethical, classical, utilitarian, positivist, formal, pragmatist, eclectic, and the various neo-modifications of these. See SALDANA, *L'EVOLUTION DU CRIME* (1930). Our objective is a sociology of criminal law; hence our interest must be directed by what is significant for this goal.

51. He found the equivalents of criminal behavior in animals and even in certain plants. Quite seriously he wrote, "Recently there has been introduced in Chicago the electric bludgeon, and also a small torpedo, which, being slipped into the intended victim's pocket, explodes and blows him to pieces." LOMBROSO, *CRIME, ITS CAUSES AND REMEDIES* (Horton, trans. 1918) 58.

52. GAROFALO, *CRIMINOLOGY* (trans. Millar, 1914) 4-5.

53. *Id.* at 10.

54. *Id.* at 33. It is noteworthy that there is a close underlying parallelism between natural law writers and sociological positivists. Both rejected legal rules as essential criteria; both rested primarily on non-legal bases. Whereas the natural law writers

vided that the act "must in addition be *harmful to society*".⁵⁵ He conceded that this definition of crime required the conclusion that such legal offenses as acts of sex perversion, resistance to police officers, acts which menace the state such as political riots and sedition, public disorder, carrying arms, gambling, and many others were not "really" criminal offenses.⁵⁶ He concluded that "the legal notion of crime must be laid aside as valueless for our purposes".⁵⁷

If Lombroso provided the original major impetus and Garofalo the theoretical framework, it was certainly Ferri who supplied the energy, zeal, and oratory (he was one of Italy's greatest trial lawyers) which established the Positive School as a new force in criminology. It is hardly exaggeration to assert that he has been the dominating influence on American criminology in recent years; much of the publication and reform movement here can be traced directly to him—sometimes to his very words. In Ferri's volatile imagination the familiar Classical-Positivist thesis crystallized, under definitely positivistic auspices. He spoke of the "doctrines of criminal law developed to the highest degree of metaphysical pedantry,"⁵⁸ and wrote that the classical school of criminal law "had and preserves a theoretical method, the '*a priori*' study of crime as an abstract juridical being."⁵⁹ "To the classical criminologist, the person of the criminal is an entirely secondary element, as the patient formerly was to the physician. . . . He was concerned with the crime and not with the criminal."⁶⁰ The new school of Positive Criminology "proposes the complete study of crime, not as a juridical abstraction, but as a human act, as a natural and social fact."⁶¹ He criticized Tarde's declaration that "crime is always 'a wilful violation of law,'" asserting that "this is remaining in the old circle where crime is what the legislator punishes."⁶² "The fact remains that the proper subject of criminal anthropology is the *anti-social*

insisted on conformity to ethical principle as the only true standard, the positivists have insisted on a social, factual criterion as the only true standard. There was not, to be sure, in natural law writing, the bitter disparagement of positive law; but on the other hand, the natural law writers laid the foundations for criticism of positive law, i. e., its separation from morals. It will be recalled that Garofalo's first statement of the "natural crime" was deeply colored by the vocabulary of natural law.

55. *Id.* at 51.

56. *Id.* at 42.

57. *Id.* at 60.

58. FERRI, *CRIMINAL SOCIOLOGY*, (trans. Kelly and Lisle, 1917) 2.

59. *Id.* at 3. "Criminal law, also, has until now consisted in the study of crimes considered as abstract entities. Until now the criminologist has studied robbery, homicide, and forgery, in and for themselves, as 'juridical entities,'—as abstractions." *Id.* at 12.

60. *Id.* at 13. In a footnote he adds, without apparent realization of its import, "before studying crime as a juridical fact, it should be studied as a natural and social phenomenon." *Ibid.*

61. *Id.* at 18.

62. "In the eyes of the criminal anthropologist, he who slays for gain, and he who urges his victim to suicide in order to come into inheritance are both equally criminal." *Id.* at 78.

individual in his tendencies and in his activity."⁶³ He regarded Garofalo's definition of crime as "original and happy", but incomplete.⁶⁴ After some deliberation, he accepted Colajanni's definition of the "natural crime" as scientific: "punishable acts (*delicts*) are those which determined by individual and anti-social motives, disturb the conditions of existence and shock the average morality of a given people at a given moment."⁶⁵ Despite occasional indications that he had some awareness of the theoretical import of positive penal law, Ferri championed the non-legal "natural crime".⁶⁶ In the first third of this century the Positive School became the dominant criminology,⁶⁷ although it certainly was not taken up in England as here, and the dissents of Tarde and Saleilles as well as the prevalence of Durkheim's sociology with its strong legal orientation moderated the movement considerably in France, and that despite Comte.⁶⁸

We know of course that the vast pretensions of originality have been largely exposed.⁶⁹ Equally, the disparagement of the Classical School as formalistic was almost completely unfounded.⁷⁰ It was none other than Beccaria who in 1764 wrote:

63. *Id.* at 79.

64. *Id.* at 80.

65. *Id.* at 81. He repeated this frequently. Cf. LA JUSTICE PÉNALE, RÉSUMÉ DU COURS DE SOCIOLOGIE CRIMINELLE (1898) 11.

66. For a series of sociological (non-legal) definitions of "crime" see Crocq, *Compte Rendu* (1901) CONGRESS INTERNATIONAL D'ANTHROPOLOGIE CRIMINELLE 408, 412. Cf. Hamon, *De la Définition du Crime* (1893) 8 ARCH. ANTH. CRIM. 242, and MAXWELL, LE CONCEPT SOCIAL DU CRIME (1914).

67. We need not here develop the other major tenets of the Positivist School. Ferri writes of "the illusion of the free human will"; and of that "dangerous malady, which we call crime." THE POSITIVE SCHOOL OF CRIMINOLOGY (1913) 21, 45. For criticism of this, see SALEILLES, LES NOUVELLES ÉCOLES DE DROIT PÉNAL (1901) 22-23. In 1926 Ferri came to admit the punitive nature of penal sanctions as necessary, a matter which some of his American disciples should look into. See the quotation by SALDANA, LA NOUVELLE PHILOSOPHIE PÉNALE (1927) 6.

68. It is clear also that positivism in social science goes back at least a century before Comte. See HAÉVY, RISE OF PHILOSOPHICAL RADICALISM (1928).

69. See Lindesmith and Levin, *The Lombrosian Myth in Criminology* (1937) 42 AM. J. OF SOC. 653; *English Ecology and Criminology of the Past Century* (1937) 27 J. CR. LAW AND CRIM. 801. "I have no more doubt of every crime having its cure in moral and physical influence, than I have of the efficacy of the Peruvian bark in curing the intermitting fever." RUSH, *An Enquiry into the Effects of Public Punishments upon Criminals, and upon Society* (1787) in ESSAYS (1798) 155.

See, too, ROSSI, 3 TRAITÉ DE DROIT PÉNAL (1829) 310; ROSCOE, OBSERVATIONS ON PENAL JURISPRUDENCE AND THE REFORMATION OF CRIMINALS (1819); TURNBULL, A VISIT TO THE PHILADELPHIA PRISON (1797) 2, 61-62, 81-83; AHRENS, COURS DE DROIT NATUREL (1868) 230-1; THONISSEN, LE DROIT PÉNAL DE LA RÉPUBLIQUE ATHÉNIENNE (1875) 453; QUINCY, CHARGE TO THE GRAND JURY (1822) 4, 10.

"The legislator therefore must study the nature of man. . . ." ANON, ON THE PRINCIPLES OF CRIMINAL LAW (1846) 2-3.

"A prison thus regulated becomes a hospital for the treatment of moral diseases." DRAFT PROPOSAL ON THE PRINCIPLES OF PUNISHMENT (1847). Cf. Radzinowicz and Turner, quotation from Hencke (1823), *The Language of Criminal Science* (1940) 7 CMB. L. J. 233.

70. One of the gross, positivistic distortions of the classicists is the endlessly repeated assertion that the latter were concerned with concepts, and not with men; and they referred to emphasis on law as evidence. No better example of fallacious argument employed as deliberate propaganda can be found. It is true the classicists emphasized positive law. Therefore, cried Ferri, they are not interested in men but in

"The good or bad logic of the judge . . . will depend on his good or bad digestion; on the violence of his passions; on the rank, and condition of the accused, or on his connections with the judge; and on all those little circumstances, which change the appearance of objects in the fluctuating mind of man. Hence we see the fate of a delinquent changed many times in passing through the different courts of judicature, and his life and liberty, victims to the false ideas, or ill humor of the judge; who mistakes the vague result of his own confused reasoning, for the just interpretation of the laws."⁷¹

Beccaria conceived of crime as "destructive of public safety and happiness";⁷² as "injury done to society";⁷³ he frequently reveals a keen appreciation of the social aspects of criminal behavior. His insistence on law cannot be understood apart from the cruel individualization of the *ancien régime*.⁷⁴ He was a relentless foe of severity of punishment, legal or not, in which regard he certainly may be compared favorably with the devotees of the Positivist School.⁷⁵ Only gross inability to understand or deliberate unwillingness to do so can account for the positivistic interpretation of Beccaria's insistence on reasonable proportion of penalty to degree of crime, as formalistic. On the contrary, his recommendations concerning crime prevention, reliance on the sciences, education, and mildness of treatment reveal his wise and firm grasp of the facts.⁷⁶

Ferri's criticism of Carrara, Beccaria's successor, has, from a particularistic viewpoint, some greater validity because by that time, the late 19th century, a *system* of criminal law had been developed. But Ferri's revulsion from Carrara's view of crime as "a juridical being"⁷⁷ is on the same critical level as current misapprehension of formal legal science. Moreover Carrara was much concerned with the social effects of criminal behavior and with precise measurement of the degree of injury, which he based upon the importance of the value, the reparabil-

abstractions. The very opposite is, of course, true; the classicists insisted on law precisely because they were humanitarians. But they knew enough about men and government to understand the need for legal guarantees to implement human values. See Hall, *Nulla Poena Sine Lege* (1937) 47 YALE L. J. 165.

71. BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS (3d ed.) 15.

72. *Id.* at 21.

73. *Id.* at 26, 29.

74. "Every member of society should know when he is criminal, and when innocent. The uncertainty of crimes hath sacrificed more victims to secret tyranny, than have ever suffered by public and solemn cruelty." *Id.* at 41.

75. *Id.* at 101-2.

76. As for the charge of concept worship, see *id.* at 51.

77. Cf. "One may remark that the harm (*délit*) does not define an *action*, but an *infraction*. The notion of the harm is not, then derived from the *material fact* nor from the *prohibition of the law*, considered singly, but from the *conflict* between the one and the other." 1 CARRARA, *op. cit. supra* note 34 at 34. "Hence the idea of the harm is only the idea of a relationship: the relationship of contradiction between human behavior and the law. There alone is found the *juridical being* (*l'être juridique*) to which one gives the name, harm (*délit*). . . ." *Id.* at 35.

ity of the damage, and the diffusability of the evil,⁷⁸ all reminiscent of Bentham's detailed analysis. As for Bentham, himself (and the like is true of Livingston), his repudiation of formalism, his persistent concern with interests, psychological data, and objective detailed devices for measuring the extent of social harm as fact, together with his painstaking analyses of individualization of treatment, these reveal only too clearly the ideological bias of the Positivists in their appraisal of the Classical School. What confronts us in this regard is drive for reform implemented by a mythical representation of the classical criminology. Our interest here is not in the dialectics of such debate nor in the psychology of penal reform. But this correction of the significance of the Classical School is essential to the construction of a sociology of criminal law, as will appear. For the Classicists' emphasis on crime as an objective harm, an injury to society, was laid within the framework of the positive criminal law.

Despite the Italian Positivists' fallacious criticism of the Classical School, the issues thus raised—the divergent views of Legal Formalism and Sociological Positivism—pose the central problems for a sociology of criminal law. The rise in importance of an exclusively legal notion of "crime" may be dated from the Analytical Jurisprudence of Austin, though it is not without significance that Blackstone, when he defined "law" generally, joined formal and natural law ideas, but gave a completely juridical definition of "crime".⁷⁹ Austin's view of "absolute" duties is dubious, but there is no question of his insight into the formal nature of positive law and of his consequent consistency as regards "crime".⁸⁰ The prevailing lawyers' definition of "crime" is, accordingly, simply one phase of the rise of the "imperative" (formal or pure) theory of law; our objective must be the resolution of the opposition set up by these two types of so-called positivism as revealed in the criminal law. So far as concerns the theoretical construction of the foundations of a sociology of criminal law, the major difficulty is presented by the well-nigh dominant and restricted choice between a rigorously formal view of crime and a rigorously non-legal empirical view of crime. Neither is adequate; neither provides a conception of "crime" which is fruitful for construction of a sociology of criminal law. Neither is able to supply distinctive phenomena which might theoretically lead to a sociology of criminal law. The lawyer's view of crime is purely formal, which is to say that it lacks any empirical quality whatever. No social discipline can possibly be developed on such a

78. *Id.* at 100. Cf. 1 DAGGE, CONSIDERATION ON CRIMINAL LAW (1774) 207-8; JOUSSE, TRAITÉ DE LA JUSTICE CRIMINELLE DE FRANCE (1771) 1.

79. 4 BL. COMM. *5.

80. 1 AUSTIN, LECTURES ON JURISPRUDENCE (4th ed. 1873) 68; cf. SALMOND, JURISPRUDENCE (7th ed. 1924) 235.

foundation. Moreover, the formal interpretation focuses on the sanction, specifically on "penalty"; what is wanted is the possibility of empirical generalization on the behavior-circumstance elements of penal laws. The defects in sociological positivism have been indicated, and will shortly be discussed further. The major thesis to be maintained is that we can resolve the conflict described above and that that is the only avenue to a sociology of criminal law.

A Suggested Solution

Criminologists have recognized the impossibility of constructing a social discipline upon a purely formal conception of "crime". Those who ventured to examine the contents of penal laws found the utmost heterogeneity, even whimsicality, as in obsolete laws; they fell back upon the grounding of crime exclusively in social, i. e., non-legal phenomena. Garofalo's particular criteria are now rejected; but such terms as mores, sentiments, moral attitudes (and such writers as Durkheim, Sumner and Westernmarck) have taken central positions in contemporary social theory, perhaps especially in criminology. Whereas natural law writers selected ethical principle as the essential test of criminality, and the Classicists spoke of "injury to society" as an objective harm, contemporary sociologists insist upon factual reference, moral attitudes are not ethical principles.⁸¹ The relationship between moral attitudes and objective harm is less readily discernible; the two, no doubt, overlap.⁸² Such careful observers as Holmes, Livingston and Stephen have stressed the need for conformance of law to mores,⁸³ and it would seem that even greater considerations than those they had in mind (such as verifiability) recommend reference to mores as the

81. An existing moral attitude is an emotionally held belief; the mores in their totality constitute the social sentiments, the convictions of the greatest part of any community. By reference to the body of sentiments, some area of fairly competent prediction of behavior under certain conditions is possible. By reference to collective sentiments it is possible frequently to predict what value-judgments most people will, as a matter of fact, utter concerning certain events. But the actual passing of moral judgments as well as inquiry concerning the existence and origin of moral attitudes are quite different from an inquiry into the goodness or rightness of any proposal or event. We may desire certain ends, we may have certain attitudes concerning the desirability of a course of conduct; these are social facts. On the contrary, we may ask whether certain conduct ought to be pursued, or whether a certain decision is right or good.

82. So far as man is rational they must be said to be equivalent. But man is also irrational and his moral attitudes reflect this also. Here, then, the two criteria would diverge. Injury to society, "objective harm" presupposes a scheme of values, intellectually defensible.

83. It will be noted that the position above postulates the priority of moral attitudes when these conflict with ethical principles. This, it is believed, is what Holmes, Livingston and others had in mind when they insisted that law must reflect the moral ideas of the people. Cf. HOLMES, *THE COMMON LAW* (1881) 41. It must be recognized, nonetheless, that there is frequent tension between morals and moral attitudes, and that in many notable instances, judges have on this ground mitigated the rigor of penal laws. In *administration* generally, there is such mitigation suggested by ethical principles at variance both with moral attitudes represented in law and even with (cases of passion) public opinion, opposed to law.

more reliable basis of a social discipline. What needs to be remembered, however, is that intelligent self-interest as well as some degree of impartial appraisal cannot actually be separated from mores; we need to free that term from the current insinuation that emotional attitudes only are involved.

Despite its valuable enlargement of the field of interest, sociological positivism rests upon an error so basic that it bars the way to great progress. For sociological positivism is *fatally defective in ignoring* (or rather in pretending to ignore)⁸⁴ *the positive criminal law*. Correction of this error represents the core of the theory to be maintained. Briefly stated, it is based upon the following:

1. Rules of criminal law and society are coexistent.⁸⁵ Any sound theorizing must rest within the framework of this, as given. The notion that natural law came first, that first there was ethical principle or conscience (its counterpart is that moral attitudes are separable and prior) and that positive law came later is implemented by the accepted literary version of the origin and history of criminal law. Here we have long been confronted with a simplistic rendition that has achieved the status of myth. The stages were, we are told: complete disorder, i. e., complete absence of law; then, the family feud motivated by vengeance, still absence of law; next regulation of the feud by compositions, the beginning of law; and finally, law. This account is supported by conjecture resting on a dubious, empirical foundation.

Revision of this literary version of legal evolution carries direct significance for criminal law, for the alternative hypothesis centers on the co-existence of *society and law*. We know nothing of man other than in society. A "society" presupposes the existence of conditions of survival. If we speculate concerning early human societies, we must therefore postulate a general interest,⁸⁶ an interdependence of individuals, which judging from the fact of survival and the exigencies thereof, can well be envisaged as control adequate for that purpose.⁸⁷ If we further assume the rationality of early peoples in their own terms (as contemporary anthropology requires us to do) we must believe that

84. A suggestive bit of evidence of the deficiency of its analysis is provided by the fact that criminologists do not base their researches exclusively upon mores or social values; they do not actually ignore the criminal law; on the contrary, they *accept* segments of behavior defined in the criminal law as socially criminal behavior. The fact that this is done more or less unconsciously, indicates that at least major penal laws are not chance, but are "natural" phenomena.

85. Cf. ORTOLAN, *COURS DE LEGISLATION PÉNALE* (1841); SCELLE, *DROIT DES GENS* (1932) 6 *et seq.*

86. We may here note the import of Durkheim's analysis in terms of "mechanical" organism, a simple undifferentiated solidarity, the area of public, general interests, the core of criminal law.

87. "Even in the lowest societies we are not to suppose that serious aggressions are matters of entire indifference to the bystanders." HOBHOUSE, 1 *MORALS IN EVOLUTION* (1906) 99.

their control was sufficiently well designed and established to achieve their desired goals. Hence, even though we adhere to a regime of families and feuds, we must postulate a minimum orderliness directed by known norms, their institutionalization and public sanction, in short, the existence and functioning of criminal law.

2. Rules of criminal law have a dual nature; they can be viewed formally as distinctive concepts whose significances can be intellectually apprehended, communicated, and probed critically. This is the lawyer's attitude towards, and employment of, the rules. But rules of criminal law may also be vehicles of distinctive phenomena. These rules, in this aspect, are social facts integrated in the moral attitudes; as such they have origins, histories, and observable effects on human conduct.

It is this latter nature of legal rules that is relevant to a sociology of criminal law. The following differentiations are thus essential. "Formal criminal law" means (1) that a proposition possesses the distinctive formal attributes of a rule of penal law (that a general description of behavior-circumstances is joined to consequences stated in terms of "penalty" by the verb "must" or "shall"), and (2) that the prescription in question has come into being by the exercise of a legally authorized law-making organ. Every formal criminal law is also a "potential criminal law", i. e., subject to limits (e. g., completely nonsense laws), every formal law may win some degree of actual acceptance. The term "formal criminal law" thus designates obsolete laws, unknown laws and, generally, laws about whose position in the mores we have no information whatever. Finally, "actual criminal laws" are those formal, penal laws concerning which we know that they are integrated in the mores, they have some appreciable degree of public acceptance. The distinctive phenomena of a sociology of criminal laws are *those penal laws which are part of (integrated in) the mores*. The behavior-circumstances of such (actual) penal laws constitute *the legally defined social harms* discussed above.

3. Implied in the above is that actual criminal laws cannot, in fact, be separated from moral attitudes, although such arbitrary separation may be useful in analysis of various problems. This has been developed in connection with the *mala prohibita* problem discussed above.

4. The integration of rules of criminal law in the mores may be wide or narrow; they may be intensely espoused, held with little more than indifference, or opposed. These variations intersect such categories as economic, social status, power, racial, political groups, and so on.⁸⁸

88. The use of such terms as mores, folkways, public opinion, etc., fosters the illusion that there exists a single "entity" which pervades the entire population. In fact,

CONCLUSION.

In the traditional felonies, it will be granted, the behavior that is legally (formally) criminal is also socially criminal, i. e., integrated in the mores. But on the other hand we confront the fact that the mores are more or less indifferent to,⁸⁹ sometimes definitely opposed to, certain penal laws. There may be sheer imposition by power groups, even complete irrationality, if the dictator is insane. On this latter basis many criminologists conclude that the positive law must be ignored entirely. They leap from the frying pan of mere form into the fire of completely non-legal phenomena.

The analysis above sought to bring petty offenses within a unified field of phenomena, relevant to a sociology of criminal law. To advance the analysis farther, it was emphasized that the reason we accept the traditional felonies as "true" crimes is that we are convinced that these laws are widely and intensely integrated in the mores. Thus, admittedly, criminologists cannot accept formal penal laws as social phenomena in absence of evidence of support in the mores. By like token they should not reject the possibility that formal penal laws may, in fact, also be social phenomena. We have been obsessed with the heterogeneity, whimsicality, irrationality of legislation; and recently so vigorously reminded that laws can be imposed by small power groups, that we have lost sight of the pervasive limiting conditions, and more, of the role of theory which quite properly imposes its own conditions, as well as that of relevant factual investigations.⁹⁰ Even the "omnipotent" despot is limited by "social conditions", though Maine

there is vast diversity in moral attitudes. But this does not bar reasonably precise determination of the existence of certain moral attitudes, or their extent, or their intensity. In some instances we observe the population almost evenly divided; in many other instances, it seems that only particular groups are interested in the enforcement of certain laws. In every instance, the question is: what extent of the population approves of this law actively, what extent simply acquiesces, what extent is indifferent, what extent opposes? If we can divide the hitherto sweeping hypotheses and inquiries into narrow, pointed issues, we may hope for like determinations. We may hope for significant data and for sensible conclusions concerning actual law and merely formal law.

89. See Coleman, *Everyone a Criminal* (1933) 11 LAW STUD. 11; concerning a court's claim of right to disregard obsolete laws, see Note, *Enforcement of Obsolete Laws* (1908) 67 CENT. L. J. 141.

90. That a legislature represents many special interests and enacts laws to promote them, that it is subjected to an intermittent impact of numerous pressure groups, that it legislates too speedily, without investigation, improvidently, all this has long been apparent. No assurance as to social acceptance can be inferred from the mere passage of legislation. Beyond that is the political problem which concerns such notions as "majority", the distribution and exercise of power, the actual creation and imposition of control. In an age when monopoly of lethal machinery by a numerically insignificant minority gives absolute control, we need no elaboration of the thesis that control is neither an index of rationality, nor one of general consensus. We confront the basic problem of law-making in a "real" sense; it is apparent that its relationship to legal sociology is intimate. Cf. ". . . parliament is regularly in its sittings and active in its labours; and if the protection of society requires the enactment of additional penal laws, parliament will soon supply them." 3 STEPHEN, *op. cit. supra* note 6, at 360.

no doubt exaggerated this control. In any event, the guiding, inescapable fact is that positive penal laws form an essential part of the reality which it is the legal sociologist's job to investigate. He can generalize against this condition of integrated mores-and-law. He must reject what is not significant in that vital configuration. Hence penal laws not integrated in the mores must be excluded; by like token, mores not crystallized in penal laws must also be excluded.⁹¹

The general nature of a sociology of criminal law has been described elsewhere.⁹² In constructing that discipline, it is necessary not only to recognize the dynamism of the criminal law,⁹³ but also to detect the uniformities in its growth, and the forces and conditions that characterize its change. But we must not confuse the nature and conclusions of our analysis, that, in their mere verbalization, necessarily assume relatively sharp and definite form, with the vibrant, integrated, changing character of the reality that confronts us. The theory advocated above rejects the extreme positivism which sought to construct a sociology on analogy of mechanics; which dictated the limitation of theory to explanation in terms of physics, based exclusively on what was observ-

91. If certain behavior, considered "anti-social", is not made criminal, the following hypotheses are relevant:

1. That in that society, the behavior is not considered anti-social, e. g., savages who kill their aged parents under duty to do so.

2. That if it is considered anti-social, it may be so infrequent in occurrence as not to engage sufficiently sustained interest to result in legislation, e. g., kidnapping of adults in France. See KUN, *LES PRINCIPALES IMPERFECTIONS DU CODE PÉNAL* (Paris, 1933) 38-41.

3. That, though considered anti-social, it is not considered as sufficiently damaging to engage legal concern.

4. That, though considered anti-social and serious, it may be better left to the parties because the nature of their relationship and of the conduct precludes effective legal compulsion.

5. That though grievously harmful, the conduct is vague, and the causation so uncertain, that it runs counter to the overriding principle which confines law to overt behavior that is readily perceived.

6. The problem may be novel, i. e., insufficient time may have elapsed to result in relevant law-making.

Both as regards existing laws and emerging, future laws, there is an area of potentiality where prediction necessarily borders on prophecy.

92. See Hall, *Criminology and a Modern Penal Code* (1936) 27 J. OF CR. L. AND CRIM. 1. See generally, TIMASHEFF, *SOCIOLOGY OF LAW* (1939).

93. It is surely a mistaken view to regard the rules of criminal law as fixed. We must be ever aware that analysis necessarily imposes even upon our thinking, and certainly upon our expression, the appearance of rigidity, permanence, stability, uniformity. The actual situation is always changing, moving, altering. The form of legal rules is fixed, but the spontaneous life of the group, as well as the slower but nonetheless ever-shifting body of consciously held principles, are in constant tension with the rules. As to these we find "normally" not only a core of clear meaning that does provide some degree of uniform direction, but also, and equally important, a wide area of sheer potentiality, of shift and modification, within limits to be sure, but nonetheless inevitable, as the impact of spontaneous social life and changing ethical principles make themselves felt in an endless series of conflicts and problem-situations.

See generally, GURVITCH, *ÉLÉMENTS DE SOCIOLOGIE JURIDIQUE* (1940).

able and verifiable by laboratory methods.⁹⁴ Where can the legal sociologist find any place for rules of law within a dogma such as this? He must follow and develop the sounder sociology which recognizes that rules of law may be social facts.

It becomes apparent that progress towards a formal science of criminal law facilitates construction of a sociology of criminal law.⁹⁵ The better form once discovered spreads its beneficent truth-value through the legal system by its compendency with other forms. So, too, the persistent checking of rules against reality provides not only the possibility of revision of the formal rules; it stipulates the necessity for such revision. The formal science lays bare the essential empirical contents of the rules, thus supplying the *sine qua non* of a sociology of criminal law. This dual give-and-take goes on in a common sense way in administration, under stress of immediate necessity to avoid untruths and evils apparent to all. A sociology of criminal law would richly supplement such reliance upon individual insight and experience by providing an organized body of knowledge, the slow product of reliable methods of investigation and enlightening theory.

94. An empirical discipline is concerned with facts, i. e., phenomena that can be sensed. But it by no means follows that explanation must be restricted to behaviorism. It is one thing to start with observable facts; it is quite another matter to restrict theory to paraphrased mechanics.

95. A formal science of criminal law would consist of prescriptions, i. e., the rules of criminal law, systematized, whereas a sociology of criminal law would consist of general descriptions. The distinction is ignored by those who define "law" as predictions of official behavior. See CAPITANT, *L'ILLICITE* (1928).