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# PIONEERS IN CRIMINOLOGY

## The Historical Development of Criminology

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EDITOR.

### INTRODUCTION

This paper is a summary statement of the contributions made by the pioneers in criminology. Sociologists in general and criminologists in particular have been negligent in their treatment of the historical development of ideas and theories.<sup>1</sup> The Pioneer Series has performed a much needed service for criminology by reminding us of that history. Criminologists can benefit from a re-evaluation of the major contributions made to criminology and the issues which result therefrom. The Pioneer Series emphasized something that is too often ignored in textbooks; namely, the variety of disciplines which have contributed to the development of criminology: Law, medicine, sociology, psychology, psychiatry, chemistry, physics, architecture, history, theology, and social work. Many of the issues in criminology are a result of differences in training and orientation in various disciplines.

If we understand the pioneers, then we can better understand the current issues in criminology. Tracing the major strands of thought running throughout the Pioneer Series in terms of theoretical issues, we find at the same time indications of the ways in which these issues have influenced the modern criminologist. Twentieth century criminology is a product of the theories of the eighteenth and nineteenth centuries. A historical evaluation of criminology is of no value unless we relate it to the things which criminologists are doing today. It is the major thesis of this paper that criminologists today are interested in certain problems because they are involved in the theoretical issues developed by the pioneers. What these issues are

<sup>1</sup> HOWARD BECKER AND ALVIN BOSKOFF, *MODERN SOCIOLOGICAL THEORY*, New York; Dryden Press, 1957, p. 35 ff.

and the ways in which they influenced modern criminology are the objectives of this paper.

Criminology involves three different types of problems:

(1) The problem of detecting the law breaker, which is the work of the detective, the police officer, the medical specialist, the chemist; in other words, the field of criminalistics. The Pioneer Series article on Hans Gross discusses the pioneering work of this man in the field of criminalistics.

(2) The problem of the custody and treatment of the offender once he is detected and legally judged to be guilty, which is the work of the penologist. Social workers, psychiatrists, sociologists, psychologists, juvenile court judges, probation and parole officers, and others are engaged in correction work in connection with the prevention and control of delinquency and crime. Pioneer Series articles on Haviland, Maconochie, Doe, Aschaffenburg, Ray, and Maudsley deal with one or more aspects of correctional work.

(3) The problem of explaining crime and criminal behavior, which is the problem of scientifically accounting for the presence of crime and criminals in a society. The legal aspect of crime is of interest to the lawyer and to the sociologist who is studying the sociology of criminal law. The explanation of criminal behavior is of interest to the sociologist, the psychologist, the psychiatrist, the anthropologist, and the biologist. Pioneer Series articles on Bentham, Beccaria, Garofolo, Lombroso, Ferri, Goring, Tarde, Durkheim, and Bonger deal with crime and criminals from several different points of view. The problems associated with the detection, treatment, and explanation of crime and criminals are mutually interrelated, and there is a great deal of overlapping of fields.

Any attempt to classify the men dealt with in the Pioneer Series would be arbitrary since each pioneer wrote about a number of issues from a number of viewpoints. A classification of the following type is suggested:

<i>Classical School</i>	<i>Positive School</i>
Bentham	Garofolo
Beccaria	Lombroso
	Ferri
	Goring
<i>Legal Aspects of Crime</i>	<i>Psychiatric Aspects of Crime</i>
Doe	Aschaffenburg
Montero	Ray
	Maudsley
<i>Sociological Aspects of Crime</i>	<i>Prison Architecture</i>
Tarde	Haviland
Durkheim	
Bonger	
<i>Prison Reform</i>	<i>Criminalistics</i>
Maconochie	Gross

Another type of classification, based on whether the pioneer in question was primarily interested in crime or in the individual offender can be made in this way:

<i>Crime</i>	<i>Individual Offender</i>	
Bentham	Lombroso	Doe
Beccaria	Garofolo	Maudsley
Montero	Ferri	Maconochie
Durkheim	Goring	Tarde
Bonger	Aschaffenburg	Gross
	Ray	Haviland

In any historical survey of criminology we must deal with a dilemma. This dilemma is found in the Classical School, founded by Bentham and Beccaria, and the Positive School, founded by Lombroso, Garofolo, and Ferri.<sup>2</sup> The Classical School developed in the eighteenth century in an attempt to reform the legal system and to protect the accused against harsh and arbitrary action on the part of the State. The Positive School developed in the nineteenth century as an attempt to apply scientific methods to the study of the criminal.

The Classical School defined crime in legal terms; the Positive School rejected the legal definition of crime. The Classical School focused attention on crime as a legal entity; the Positive School focused attention on the act as a psychological entity. The Classical School emphasized free will; the Positive School emphasized determin-

<sup>2</sup> See the Pioneer Series articles on LOMBROSO, GAROFOLO, FERRI, BENTHAM, AND BECCARIA.

ism. The Classical School theorized that punishment had a deterrent effect; the Positive School said that punishment should be replaced by a scientific treatment of criminals calculated to protect society.

The Positive School has dominated American criminological thinking.<sup>3</sup> This school finds supporters in biology, psychiatry, psychology, social work, sociology, and anthropology, each of whom applies the concepts of his science to the study of the criminal. As a result of this orientation, criminology has been dominated by an interest in the individual offender: his personality, body build, intelligence, family background, the neighborhood from which he comes, or the groups to which he belongs. The basic assumption since Lombroso's time is that an explanation of human behavior is an explanation of crime. The criminologist looks for the etiology of crime in behavior systems rather than in legal systems.

#### DEFINITION OF CRIME

The Classical School defined crime within the strict limits of criminal law. Bentham placed emphasis on the crime, not on the criminal. Bentham was much more concerned with the consequences of the act than with the motivation for the act.<sup>4</sup> Beccaria was opposed to the barbaric and arbitrary practices associated with the court system in England during his time. He believed in the social contract theory of government, that is, that sovereignty resided in the people and the law applied equally to all members of society.<sup>5</sup> The Classical School believed in the doctrine of *nullum crimen sine lege*, no crime without a law.

The Positive School attacked the legal definition of crime, and in its place substituted a concept of natural crime. The positivist rejected the juridical concept of crime in favor of the sociologic notion of crime.<sup>6</sup> Garofolo notes that the concept of a "criminal" presupposes the concept of "crime." He observed that "although the naturalists speak

<sup>3</sup> JEROME HALL, *CRIMINOLOGY, TWENTIETH CENTURY SOCIOLOGY*, ed. by GEORGES GURVITCH AND WILBERT E. MOORE, New York: Philosophical Press, 1945, p. 346.

<sup>4</sup> GILBERT GEIS, *Pioneers in Criminology, VII: Jeremy Bentham*, *JOUR. OF CRIM. L., CRIMINOL., AND POL. SCI.*, July-August, 1955, pp. 159-171.

<sup>5</sup> ELIO MONACHESE, *Pioneers in Criminology, IX: Cesare Beccaria*, *JOUR. OF CRIM. L., CRIMINOL., AND POL. SCI.*, November-December, 1955, pp. 439-449.

<sup>6</sup> FRANCIS A. ALLEN, *Pioneers in Criminology, IV: Raffaele Garofolo*, *JOUR. OF CRIM. L., CRIMINOL., AND POL. SCI.*, November-December, 1954, pp. 373-390.

of the criminal, they have omitted to tell us what they understand by the word crime."<sup>7</sup> The positivist's rejection of the legal definition was based on the idea that for scientific purposes the concept of crime cannot be accepted as a legal category, since the factors which produce the legal definition are contingent and capricious. Garofolo then defined natural crime as an act that offends the moral sentiments of pity and probity in the community. Allen and Hall have pointed out the fact that the positivistic notion of crime is susceptible to corruption in the hands of corrupt political officials. The fact that Ferri became a member of the Fascist movement in Italy is of concern to those who regard civil liberties as a fundamental aspect of criminal law.<sup>8</sup> Whereas for Beccaria individual rights are supreme; there are no safeguards against abuse of state power in the work of Garofolo and Ferri.<sup>9</sup>

As a result of the rejection of legal categories by the Positive School there is no agreement in criminology today as to "what is crime?" Sutherland, Reckless, Sellin, Clinard, and others have either rejected the legal definition of crime or have stated that criminological research should not be limited by such legal definitions.<sup>10</sup> The most common definition of crime by the sociological school is the definition of crime as "anti-social" behavior. Sellin states that criminologists should study violations of conduct norms rather than legal norms. The eminent British criminologist, Professor Hermann Mannheim, is in agreement with Sellin's position. Mannheim asks the question, "Is criminology concerned exclusively with criminal behavior in the legal sense or rather with the much wider conception of anti-social behavior?"<sup>11</sup> He answers the question by noting that criminology tends to become the science of undesirable social behavior.<sup>12</sup> "It is the object of Criminology to study criminal behavior and the physical, psychological, and socio-economic factors behind it; how and why people commit crimes. . . ."<sup>13</sup> Mannheim

focuses attention on criminal behavior while at the same time removing the study of law from the field of criminology. "While it is no doubt one of the functions of the Sociology of the Criminal Law to examine the conditions under which criminal laws develop, such an examination cannot be regarded as coming under the scope of Criminology."<sup>14</sup>

Opposition to the definition of crime as anti-social behavior or undesirable behavior have come from Jerome Hall, Francis A. Allen, Paul Tappan, George B. Vold, Robert G. Caldwell, and the writer.<sup>15</sup> Hall writes, "Criminology is synonymous with Sociology of Criminal Law. . . . The above theory suggests the general boundaries of criminology. It must be concerned, first, with the meaning of the rules of criminal law . . . and this requires investigation of their origins, the legislative history, . . . and accompanying social problems."<sup>16</sup> Hall traced the development of the law of theft from the Carrier's Case to the present in order to show how the criminal law has developed in response to social and economic changes brought about by the Industrial Revolution. The interrelations of law and economy in the solution of social problems are highlighted in his book, *Theft, Law and Society*.<sup>17</sup> Francis A. Allen states, "It may be doubted that so complete an elimination of the legal content of the concept has well served the development of criminological theory."<sup>18</sup>

The view that crime is undesirable social behavior is especially apparent in the field of juvenile delinquency. The broad legal definition of delinquency makes it possible to equate "delinquency" with "problem behavior." Paul Tappan refers to this situation as "legal nihilism." He notes that a juridical approach to delinquency is uncommon, and in its place we find a casework approach that is nonlegal or anti-legal in orientation.<sup>19</sup> Roscoe Pound observed that the discretionary power of the Star Chamber was a trifle compared to that

<sup>7</sup> *Ibid.*, p. 375.

<sup>8</sup> THORSTEN SELLIN, *Pioneers in Criminology*, XV: *Enrico Ferri*, *JOUR. OF CRIM. L., CRIMINOL., AND POL. SCI.*, January-February, 1958, p. 489. See also HALL, *op. cit.*, p. 346 ff.; ALLEN, *op. cit.*, pp. 373-390.

<sup>9</sup> ALLEN, *op. cit.*, p. 389.

<sup>10</sup> CLARENCE RAY JEFFERY, *The Structure of American Criminological Thinking*, *JOUR. OF CRIM. L., CRIMINOL., AND POL. SCI.*, January-February, 1956, p. 658 ff.

<sup>11</sup> HERMANN MANNHEIM, *GROUP PROBLEMS IN CRIME AND PUNISHMENT*, London: Routledge and Kegan Paul, 1955, p. 261.

<sup>12</sup> *Ibid.*, p. 262.

<sup>13</sup> *Ibid.*, p. 261.

<sup>14</sup> *Ibid.*, p. 260.

<sup>15</sup> JEFFERY, *op. cit.*; ROBERT G. CALDWELL, *CRIMINOLOGY*, New York: Ronald Press, 1956, p. 112 ff., p. 67 ff.; HALL, *op. cit.*; ALLEN, *op. cit.*; GEORGE B. VOLD, *Some Basic Problems in Criminological Research* *FED. PROB.*, March, 1953, p. 37.

<sup>16</sup> JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW*, Indianapolis: Bobbs-Merrill Co., 1947, p. 559.

<sup>17</sup> JEROME HALL, *THEFT, LAW AND SOCIETY*, 2nd ed., Indianapolis: Bobbs-Merrill Co., 1952.

<sup>18</sup> ALLEN, *op. cit.*, p. 377.

<sup>19</sup> PAUL W. TAPPAN, *CONTEMPORARY SURVEY OF JUVENILE DELINQUENCY*, New York: United Nations, 1952, pp. 3-9.

of the juvenile court.<sup>20</sup> A juvenile court hearing is not regarded as a criminal trial; therefore, the usual constitutional guarantees as to life and liberty do not apply. The juvenile is often deprived of legal rights which are available to the adult.<sup>21</sup>

Because there is no standard from which delinquent behavior can be measured, a subjective evaluation of the behavior by a judge or caseworker must be relied upon. What constitutes "vulgar language," "idleness," "immorality," or "habitually" is a major problem in the administration of any juvenile court code.<sup>22</sup> The jurisdiction of the juvenile court is often based on the fact that the child has an emotional problem rather than on any act of delinquency.<sup>23</sup> There is some question as to whether the juvenile court should function as a welfare agency. "It is even more pathetic that the very social instrument that was once hailed as a great reform measure now stands as a barrier to progress in meeting their basic needs."<sup>24</sup>

The confusion of crime and criminals is commonplace in criminology. The criminologist seeks the answer to crime in the behavior of the offender rather than in the criminal law. Ferri stated that "crime must be studied in the offender."<sup>25</sup> The question "why and how people commit crimes" is an important one; however, a theory of behavior is not a theory of crime. Behavior is criminal only when judged by some standard of conduct. The term "crime" refers to the act of judging or labeling the behavior, rather than to the behavior itself. Why people behave as they do and why the behavior is regarded as criminal are two separate problems requiring different types of explanation. If we wish to include all anti-social behavior within the scope of criminology, we must either state that all deviant behavior is criminal or that criminology is concerned with non-criminal as well as criminal behavior. What we are concerned with in either case is the sociology of deviant behavior, not the sociology of crime. Only in the criminal law do we find the distinction between criminal and non-criminal behavior. People are executed or sent to prison for violating a law; they are not executed or sent to prison for "anti-social" behavior in general. Sellin points out that man be-

longs to many different social groups, each with its own system of conduct norms. However, when he states that the criminologist ought to study all norms violations he ignores the fundamental and important differences between state norms, familial norms, religious norms, educational norms, economic norms, or voluntary association norms. By placing all conduct norms in a single category he is overlooking certain important characteristics of the norms.

The removal of crime from the realm of legal fact has blurred the distinction between criminal and non-criminal behavior. In textbooks it is common to observe that 99 percent of the population commit acts for which they could be charged with a crime.<sup>26</sup> Less than 4 percent of the crimes known to the police result in a prison sentence.<sup>27</sup> These observations place the criminologist in a cul-de-sac. If he is to ignore the legal status of crime, he then must study all deviant behavior. This is an acceptable procedure if one is interested in explaining behavior; it is not too helpful if we wish to understand why individual A is in prison and individual B is not. From these statistical observations of non-criminal populations we must conclude that they differ from criminal populations, not in terms of sociological and psychological variables related to the life experiences of the individual offender, but in terms of the process of legal adjudication. The criminal has been caught and convicted in a court of law. The problem shifts from "why and how individuals commit anti-social acts" to "why and how criminal law is administered."

The problem of the "non-adjudicated" criminal concerned Sutherland a great deal, and his research in connection with white-collar crime was an attempt to bring within the scope of criminology the criminal who was not in prison. He defined white-collar crime as "socially injurious acts" whether conviction occurred or not, a concept that has been criticized by Tappan and Caldwell.<sup>28</sup> Sutherland made a valuable contribution to the sociology of law by pointing out the differential treatment of white-collar criminals by our judicial system. However, he did not focus attention on the interaction of economic and legal institutions in the same way that Jerome Hall did, for example, in his study of theft. Sutherland shifted his atten-

<sup>20</sup> HERBERT A. BLOCH AND FRANK T. FLYNN, *DELINQUENCY*, New York: Random House, 1956, p. 320.

<sup>21</sup> *Ibid.*, p. 305 ff.

<sup>22</sup> *Ibid.*, p. 313

<sup>23</sup> *Ibid.*, p. 322

<sup>24</sup> *Ibid.*, p. 337

<sup>25</sup> SELLIN, *op. cit.*, p. 482

<sup>26</sup> WALTER C. RECKLESS, *THE CRIME PROBLEM*, New York: Appleton-Century-Croft, Inc., 1955, p. 12.

<sup>27</sup> *Ibid.*, p. 18.

<sup>28</sup> CALDWELL, *op. cit.*, p. 67 ff.

tion to the question "why do certain individuals commit white-collar crimes?" He entered into a discussion of a shoe salesman who became a white-collar criminal through differential association.<sup>29</sup> The problem of what social changes in the nineteenth century produced government regulation of business is ignored in Sutherland's work. The legal dimension of white-collar crime is slighted in favor of a study of the offender. In Sutherland's work we have a beautiful example of the shift in emphasis from the crime to the criminal. White-collar crime did not exist before certain legal changes occurred. Why these changes occurred can be determined only by a study of law and society, not by a study of the criminal. The progress and development of criminal law has been due to social and economic historical forces. No evaluation of the personality of the individual criminal is going to substitute for a sociological analysis of law.

The acceptance by many criminologists of the Positive School's position in respect to the definition of crime and the emphasis placed on the study of the individual offender is not surprising if one considers the history of American sociology. The original problem which occupied the attention of sociologists during the period from 1910 to 1939 was the problem of socialization and personality development. The work of W. I. Thomas, G. H. Mead, John Dewey, and C. H. Cooley was in the area of socialization. These men were interested in the question of how a person comes to be a member of a group. It mattered little whether the social norms involved were legal or non-legal in nature. It was not until the late 1930's that there occurred in American sociology a revival of interest in European sociologists such as Weber, Durkheim, Tonnies, Sombart, and others.<sup>30</sup> The problem of social structure and social institutions now assumed a more important place in sociological discussions. The sociology of law is a European import, based on the work of such European writers as Weber, Durkheim, Maine, Jhering, Ehrlich, Gurvitch, Sorokin, and Timasheff.<sup>31</sup> It is of interest to speculate as to why sociologists in the United States did not develop an interest in the study of law until quite recently.

One additional observation concerning the definition of crime is in order. If we define crime as the

violation of a law, we must then state what we mean by law. This would require us to investigate such topics as the sociology of law and sociological jurisprudence. If we equate law and custom, as some writers do, then the legal definition of crime and the social definition of crime are synonymous. It is beyond the scope of this paper to pursue further the various meanings of the term "law" except to note that the definition of crime, be it legal or sociological, must be based on a study of law and society rather than on a study of the individual offender.

#### IS CRIMINOLOGY A SCIENCE?

According to George B. Vold, "the essential point in positivism is the application of a deterministic and scientific method to the study of crime."<sup>32</sup> This writer would disagree with Vold's observation to this extent: the main characteristic of positivism is its attempt to answer the riddle of criminality by means of scientific studies of the individual offender. The use of scientific method is one of the major characteristics of positivism; however, scientific studies can be made of crime and criminal law as well as of the criminal. Because of his orientation the criminologist has not concerned himself with these other theoretical issues.

The reason the criminologist is not interested in studying law and society is his reform orientation. There is no way in which knowledge of law and society can be used to reform the criminal. The criminologist assumes that he must reform the criminal if the science of criminology is to be a success. When this writer recently advocated that greater attention be paid to the study of criminal law he was told by several probation officers, "But this does not help us to deal with the individual offender." Criminology has developed to a great extent as a branch of the penal reform movement in the United States. The major problems in criminology have been derived from the needs of parole boards and prison administrators for tools with which to reform or manage criminals. The interest shown in parole prediction tables and prison research is illustrative of this reform orientation. The development of criminology is limited by this interest in penal reform and prison problems.

Auguste Comte is the father of positivism in sociology. He envisioned a society in which all

<sup>29</sup> EDWIN H. SUTHERLAND, *WHITE COLLAR CRIME*, New York: Dryden Press, 1949, p. 235 ff.

<sup>30</sup> BECKER AND BOSKOFF, *op. cit.*, p. 79 ff.

<sup>31</sup> BECKER AND BOSKOFF, *op. cit.*, p. 424 ff.; TWENTIETH CENTURY SOCIOLOGY, *op. cit.*, p. 297-341.

<sup>32</sup> GEORGE B. VOLD, *THEORETICAL CRIMINOLOGY*, New York: Oxford University Press, 1958, p. 39.

social problems are solved by scientists using positivistic methods of research. When society reaches the positive stage of development morals and politics will become positivistic sciences. Positivism subordinates questions about what ought to be or what must be to questions of what in fact is. "Positivistic thinkers. . . have wished to see intelligence applied to the alleviation of all pressing human ills." Auguste Comte "was first and foremost a social reformer, and he was interested in science because he thought of it as an instrument for the reorganization of human life."<sup>33</sup> America has developed a philosophy, which, like Comte's takes its point of departure from the disparity between the state of the natural sciences and the state of social affairs, and which proposes to eliminate this disparity by extending the scientific outlook to all domains of human behavior.<sup>34</sup>

The positivistic view of Comte was offset by the development of a German school of sociology. The German school made a distinction between the *Sein* and the *Sollen*, the *is* and the *ought*. Max Weber regarded sociology as value-free. Sociology is concerned with what is; it does not attempt to determine ethical and moral issues. Weber recognized that values are facts which can be scientifically analyzed. He also recognized the fact that sociology does not furnish answers to questions concerning how people ought to behave. Weber made a distinction between natural and social science, a distinction which the positive school has denied.<sup>35</sup> Most American sociologists follow the value-free approach. Robert Bierstedt writes, "Sociology is a categorical, not a normative discipline, that is, it confines itself to statements about what is, not what ought to be."<sup>36</sup> Kingsley Davis writes, "The normative approach (in the sense of analyzing norms and institutions, not in the sense of laying down moral imperatives) is used. . . ."<sup>37</sup> Talcott Parsons states, "Existence and values are

intimately related and interdependent, and yet. . . conceptually distinct."<sup>38</sup>

The positivistic position established by Comte is found today in such works as George Lundberg's "*Can Science Save Us?*" In his writings Lundberg argues that, by emulating the physical sciences and by using statistical and quantitative techniques of analysis, sociology can be used as a tool for obtaining social objectives. Lundberg, following John Dewey and the pragmatists, regards science as an instrument of human adjustment and human progress. The final objective of science is the prediction and control of events which is possible when one uses mathematical models. Lundberg agrees with Weber that sociology must be free of values and value-judgments. He feels that science can furnish us with the means to reach the goals or ends which are existent in society. The major tenets of positivism are quantitativism, behaviorism, and pragmatism.<sup>39</sup>

According to Weber the purpose of sociology is to understand social events; according to Comte and Lundberg the purpose of sociology is to aid in the scientific solution of social problems. Criminologists in general have followed the Positive School. Criminologists are very anxious that criminology be recognized as a science. They believe that the crime problem can be solved if criminology is scientific. That is why the criminologist has been willing to reject the legal definition of crime in favor of "universal categories of behavior" which he feels is necessary for scientific analysis. The Michael-Adler report concluded that criminology is not a science due to the unscientific nature of sociology and psychology.<sup>40</sup>

Whether or not we regard criminology as a science depends upon the use to which we want to put our knowledge. Scientific studies can be made of crime, criminal law, criminals, prisons, and other such topics. In this sense a science of criminology is possible. If we believe, however, that science can determine the policy to be pursued in the treatment of criminals then we are no longer within the realm of science. Punishment and

<sup>33</sup> A HISTORY OF PHILOSOPHICAL SYSTEMS, ed. by VERGILIUS FERM, New York: Philosophical Library, 1950, p. 330-331.

<sup>34</sup> *Ibid.*, p. 337.

<sup>35</sup> JOHN CUBER, *SOCIOLOGY*, 3rd ed., New York: Appleton-Century-Croft, Inc., 1955, p. 42 ff.; RALPH ROSS AND ERNEST VAN DEN HAAG, *THE FABRIC OF SOCIETY*, New York: Harcourt, Brace and Co., 1957 p. 273 ff.

<sup>36</sup> ROBERT BIERSTEDT, *THE SOCIAL ORDER*, New York: McGraw-Hill Book Co., 1957, p. 11.

<sup>37</sup> KINGSLEY DAVIS, *HUMAN SOCIETY*, New York: Macmillan Co., 1949, p. 80.

<sup>38</sup> KENNETH S. CARLSTON, *LAW AND STRUCTURES OF SOCIAL ACTION*, London: Stevens and Sons, 1956, p. 20.

<sup>39</sup> BECKER AND BOSKOFF, *op. cit.*, p. 86; ROSCOE AND GISELA HINKLE, *THE DEVELOPMENT OF MODERN SOCIOLOGY*, New York: Doubleday and Co., 1954, p. 54 ff.; GEORGE SIMPSON, *MAN IN SOCIETY*, New York: Doubleday and Co., 1955, p. 48 ff.

<sup>40</sup> *THE SUTHERLAND PAPERS*, edited by ALBERT COHEN, ALFRED LINDESMITH, AND KARL SCHUESSLER, Bloomington: Indiana University Press, 1956, p. 229 ff.

reform are not a means to an end; they represent goals or values. Science cannot determine the ultimate values of society. Even an extreme positivist such as Lundberg feels obliged to make a distinction between science and policy. The advocates of the "New Penology" ignore this issue. Studies of criminals and prisons will never tell us how we ought to treat the criminal any more than studies of the atom will tell us how we ought to use the atomic bomb. In the next several sections of the paper free will, determinism, and punishment will be discussed in terms of this distinction between the *is* and the *ought*.

#### THE CRIMINAL

Lombroso is generally credited with shifting the criminologist's attention from the crime to the criminal. Since his time the major issue has been "how and why do people commit crimes?" Attention has been focused on the individual offender. The history of criminology is the history of theories of personality development. Whenever a new theory of personality appears, it is immediately applied to the criminal. Textbooks in criminology tell us a great deal about the physical, mental, emotional, and social characteristics of the criminal.

The biological school was developed by Lombroso, Garofolo, Ferri, and Goring. Lombroso started with the concept of the born criminal, but he in his later writings recognized other factors as being important. Ferri emphasized the importance of anthropological and social as well as physical factors. Ferri classified criminals as born, insane, habitual, occasional, and passionate. Goring discovered through his measurements of English convicts that the criminal was physically and mentally inferior to the non-criminal. It is of interest to note that Tarde, not Goring, is responsible for the refutation of Lombroso. Edwin Driver in his article points out that the American criminologist has credited Goring with the refutation of Lombroso while ignoring the biological orientation of his work.<sup>41</sup> The interest in heredity and constitutional types is still seen in the writings of Hooton, Sheldon, and the Gluecks.

The mental testers attempted to locate the cause of criminal behavior in mental defectiveness.

<sup>41</sup> EDWIN D. DRIVER, *Pioneers in Criminology*, XIV: *Charles Goring*, JOUR. OF CRIM. L., CRIMINOL., AND POL. SCI., January-February, 1957, pp. 515-525. MARGARET S. WILSON, *Pioneers in Criminology*, I: *Gabriel Tarde*, JOUR. OF CRIM. L., CRIMINOL., AND POL. SCI., May-June, 1954, pp. 3-10.

Henry Goddard is representative of this stage of criminological thinking.

Tarde located the cause of criminal behavior in imitation, and it is a short step from Tarde to Sutherland. Guerry and Quetelet emphasized the importance of criminal statistics in relation to ecological processes, age, sex, climate, and other variables. Park, Burgess, Shaw, and McKay developed the ecological school in the United States, work which was basic to the formulation of Sutherland's theory. Bonger emphasized poverty and economic conditions as a factor in criminality, and many studies have been made in an attempt to relate crime rates to economic conditions.

The Freudian theory of personality development has been used by psychiatrists as a basis for explaining criminal behavior. The psychiatric approach is both individualistic and social psychological depending upon the school of psychiatry to which one belongs. Both the sociological and psychiatric schools emphasize the importance of the family in relation to crime. The sociologist emphasizes the environmental and associational aspects of family living; the psychiatrist emphasizes the emotional aspect of family living. The two major explanations of behavior today are the sociological, symbolized by Sutherland, and the psychiatric, symbolized by Freud.<sup>42</sup>

The shift from the biological orientation of Lombroso to the social and psychological orientation of the modern criminologist has misled some as to the true influence of the Positive School on modern criminology. If the term "positivist" is applied to Sutherland, for example, someone will object because Sutherland's theory of behavior is not the same as Lombroso's. The importance of the Positive School is that it focused attention on motivation and on the individual criminal. It sought an explanation of crime in the criminal, not in the criminal law. This is true of every theory of criminal behavior which is discussed in the textbooks today, even though the explanation is in terms of social and group factors rather than in terms of biological factors. The shift in criminological thinking has been from a biological to a sociological and psychological explanation of behavior, not in terms of a shift in interest from the criminal to crime. The emphasis is still upon the individual offender, not crime.

When the definition of crime was discussed above, it was noted that the reason the crimi-

<sup>42</sup> CALDWELL, *op. cit.*, p. 181 ff.



nologist feels the need to reject legal definitions of crime is because he is seeking a universal category of behavior that can be explained in terms of a theory of behavior. If one is attempting to explain motivation and behavior, one cannot rely upon legal categories for the obvious reason that the same behavior pattern will be both legal and illegal at different times and in different places.<sup>43</sup> Regardless of whether we accept Lombroso's theory of behavior, or Sheldon's theory, or Sutherland's theory, or Glueck's theory, we are still dealing with the criminal, not crime. Sutherland's theory of differential association is a theory of behavior, based on a study of criminals. The only reason the issue of a definition of crime is raised in modern criminology is because the criminologist has to have some device by which to place behavior in that category before it is studied as such. However, the criminologist is in a real dilemma in this respect, since as soon as he has derived his universal category of behavior he has lost the very thing he started out to study, namely crime.

Two major difficulties confront us today in respect to the problem of understanding the criminal. (1) A theory of criminal behavior is not a theory of crime. It does not explain why the behavior is criminal or non-criminal. (2) There is no theory of criminal behavior available which explains all criminal behavior. The psychiatric theory is inadequate because not all criminals are emotionally disturbed, and few emotionally disturbed individuals are criminals. The sociological explanation is inadequate because not all criminals have a history of prior associations with other criminals, and not all individuals who associate with criminals become criminals. A theory which integrates the legal, sociological, and psychological aspects of crime and criminal behavior is needed.<sup>44</sup>

In his study of the individual criminal the criminologist has confused two distinct and separate sociological processes: institutionalization and socialization.

The individual learns group-defined ways of acting and feeling, and he learns many of them so fundamentally that they become a part of his

<sup>43</sup> JEFFERY, *op. cit.*, p. 671 ff.

<sup>44</sup> The writer has outlined some of the problems in such an approach to criminological theory in an article entitled *An Integrated Theory of Crime and Criminal Behavior* published in the March-April, 1959 issue of the *Journal of Criminal Law, Criminology and Police Science*.

personality. The process of building group values into the individual is called socialization.<sup>45</sup>

Socialization is the sociologist's inclusive term for the various processes through which the original nature becomes fashioned into the social being. . . . A major part of a socialization process consists, of course, of learning.<sup>46</sup>

By institutionalization we mean the development of orderly, stable, socially integrating forms and structures cut of unstable, loosely patterned, or merely technical types of action.<sup>47</sup>

Sociologists have coined the term institutionalization to describe the process of formalizing interaction in groups. There is a tendency for participation in most groups to become habituated and formalized into increasingly rigid roles. Each person's behavior becomes laid out for him in specific ways, and elaborate rules and regulations exist prescribing the proper procedure.<sup>48</sup>

The process of learning behavior expected of a person in the group is socialization. Sutherland's theory of differential association is a theory of socialization. Non-sociological theories of behavior place little or no emphasis on socialization processes. On the other hand, the way in which law develops in response to social problems and social change is institutionalization. Jerome Hall's study of "Theft, Law and Society" or the writer's study of crime and social change in England are examples of studies of institutionalization.<sup>49</sup> Crime is a product of institutionalization; behavior is a product of socialization. The confusion of crime and behavior is the confusion of institutionalization and socialization.

#### FREE WILL VERSUS DETERMINISM

Whereas the Classical School accepted the doctrine of free will, the Positive School based the study of criminal behavior on scientific determinism. Every act had a cause. The Pavlovian theory of conditioned response patterns strengthened the deterministic approach to behavior. John B. Watson made determinism popular in the United

<sup>45</sup> LEONARD BROOM AND PHILIP SELZNICK, *SOCIOLOGY*, Evanston: Row, Peterson, and Co., 1955, p. 81.

<sup>46</sup> CUBER, *op. cit.*, p. 180.

<sup>47</sup> BROOM AND SELZNICK, *op. cit.*, p. 238.

<sup>48</sup> CUBER, *op. cit.*, p. 319.

<sup>49</sup> JEROME HALL, *THEFT, LAW AND SOCIETY*, *op. cit.*; CLARENCE RAY JEFFERY, *Crime, Law and Social Structure*, *JOUR. OF CRIM. L., CRIMINOL., AND POL. SCI.*, November-December, 1956, p. 423 ff.; CLARENCE RAY JEFFERY, *The Development of Crime in Early English Society*, *JOUR. OF CRIM. L., CRIMINOL. AND POL. SCI.*, March-April, 1957, p. 647 ff.

States at about the same time that Freud introduced the theory of psychic determinism.

The major argument today concerning determinism occurs in the criminal law. The law assumes the responsibility of the individual for his voluntary conduct. The Neo-Classical School recognized that infants, lunatics, and others were not legally responsible for their actions. The legal position has been under attack by psychiatrists for many years.<sup>50</sup> The Pioneer Series articles on Isaac Ray, Charles Doe, and Henry Maudsley dealt with this issue of legal versus psychological responsibility. The legal test of insanity, the right and wrong test as stated in the McNaghten case, has been criticized by psychiatrists. Ray and Doe were influential in setting aside the McNaghten rule in the state of New Hampshire. The New Hampshire rule was applied in the case of *United States vs. Durham*. In the Durham case the court said, "The accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."

Psychiatrists in general are in favor of the Durham rule. Nearly ninety per cent of the psychiatrists interviewed concerning the test of criminal responsibility indicated that they favored the Durham test.<sup>51</sup> The Royal Commission on Capital Punishment recommended abrogating the McNaghten test and leaving it to the jury "to determine whether at the time of the act the accused was suffering from disease of the mind to such a degree that he ought not to be held responsible."<sup>52</sup> The acceptance of the psychiatric position by lawyers and courts is a current trend. The late George Dession stated in 1938 that "the infiltration of psychiatry into the administration of criminal law will one day be recognized as overshadowing all other contemporary phenomena in its influence on the evolution of criminal justice."<sup>53</sup> Fredric Wertham, a psychiatrist, regards this as a dangerous trend in the administration of justice.<sup>54</sup>

In the issue of criminal responsibility we again witness clearly the influence of the Positive School. The criminal rather than the crime is the issue at hand. Scientific determinism replaces volitional conduct. The inner motivation of the act replaces

the overt harm or consequence of the act. The innermost aspect of the psyche is explored in an effort to answer the question "how and why do people commit crimes?" The evaluation of behavior is placed in the hands of experts. Fredric Wertham feels that the McNaghten rule should be retained, and he refers to the psychiatric position as "psychoauthoritarianism."<sup>55</sup> Robert G. Caldwell refers to the general movement away from judicial procedures as "the tyranny of the expert."<sup>56</sup>

The argument that scientific determinism ought to replace free will is always framed in terms of psychic determinism. When the psychiatrist offers testimony he is doing so in terms of certain concepts he has concerning determinism. An issue which seems to have been systematically ignored is that there are also sociological determinants of behavior. Why do we allow a defendant the defense that certain psychic factors determined his behavior, if we do not allow the same defense to the man who has lived in a criminalistic subculture and whose behavior is therefore determined by his environment? Why not have sociologists testifying as to the environmental determinants of the behavior of a Negro male living in Harlem? Certainly this individual did not will to be born a Negro or to live in Harlem. The writer is not suggesting this as a policy, but is asking the question "why has the discussion of determinism been concerned solely with psychic determinism?"

The law is a measure of social, not individual, responsibility. The law assumes that individuals are responsible for their actions, for otherwise a state of social anarchy would exist. The deterministic argument assumes that responsibility and free will are synonymous, and that determinism precludes responsibility.<sup>57</sup> It can be argued that unless a person is conditioned to expect certain consequences for his action he is not aware of the prohibitions and thus is not responsible. Determinism leads to responsibility. It is on the basis of these anticipated consequences of behavior that society holds the individual responsible. The socialization process is based on role-taking processes which allow one to anticipate the consequences of his behavior and thus one orients his behavior toward the significant other. The late Robert Lindner expressed it in these terms, "Be-

<sup>50</sup> JEROME HALL, *Psychiatry and Criminal Responsibility*, YALE L. JOUR., May, 1956, p. 761 ff.; HALL, *PRINCIPLES*, *op. cit.*, p. 477 ff.

<sup>51</sup> UNIVERSITY OF CHICAGO LAW REVIEW, Winter 1955, p. 327.

<sup>52</sup> *Ibid.*, p. 356.

<sup>53</sup> *Ibid.*, p. 363.

<sup>54</sup> *Ibid.*, p. 581.

<sup>55</sup> *Ibid.*, p. 336.

<sup>56</sup> CALDWELL, *op. cit.*, p. 342.

<sup>57</sup> ROSS AND VAN DEN HAAG, *op. cit.*, p. 295 ff.

cause every act involves other persons, and most if not all actions at the time of their inception include some foreknowledge of their potential effects, a network of responsibility exists among all members of the species."<sup>58</sup> Kenneth S. Carlston writes, "Responsibility on the part of the members for the effective performance of their roles in accordance with accepted norms is another distinguishing feature of the organization (of society)."<sup>59</sup> Not only is the concept of responsibility necessary for the function of society but for the understanding of the social psychology of personality development. Coutu has suggested the term "social accountability" in place of responsibility, and perhaps such a term would be preferred by those who think of responsibility in terms of free will.<sup>60</sup> This is similar to the position taken by Enrico Ferri, namely that a person is legally or socially responsible for his actions by the fact that he is a member of society, not because he is capable of willing an illegal act. Ferri applied the concept of responsibility to the insane, to juveniles, and to others now regarded as being incapable of responsibility.<sup>61</sup> Arnold Green has written:

The first proposition—that the criminal is not responsible for his crimes—is inconsequential, at least from the point of view of maintaining society. Whether or not a man is responsible for what he does, he must be held personally accountable for what he does. Only on the basis of mutual accountability can mutual prediction of behavior take place, without which all social relationships would be impossible. We know, for example, that an individual will act thus and so in a given situation because deviation from expected behavior would be to his discredit or disadvantage. He would be punished, either by losing his reputation, ridicule, or in extreme cases, expulsion. Only by accepting responsibility (accountability) for his actions can an individual invoke upon his fellows their common system of moral norms. Only through a mutual assurance that future behavior can be predicted on the basis of past and present actions can social relationships be preserved. But the person who denies the concept of responsibility (free-will)

<sup>58</sup> ROBERT LINDNER, *MUST YOU CONFORM?* New York: Rinehart and Co., 1956, p. 204.

<sup>59</sup> KENNETH S. CARLSTON, *LAW AND STRUCTURES OF SOCIAL ACTION*, London: Stevens and Sons, 1956, p. 31.

<sup>60</sup> WALTER COUTU, *EMERGENT HUMAN NATURE*, New York: Alfred A. Knopf, 1949, p. 412.

<sup>61</sup> SELLIN, *op. cit.*, p. 491.

often attempts to relieve the criminal of responsibility (accountability).<sup>62</sup>

The desire on the part of the psychiatrist to abolish certain basic concepts such as responsibility, guilt, and punishment has brought the following reply from Fredric Wertham:

The ultra-radical proposal has been made to turn most or all offenders over to psychiatry, and to abolish the very concepts of responsibility, crime, punishment, and personal guilt. This is not only impracticable, but harmful, for it deflects our attention from the present-day abuses of psychiatric criminology and from the fight against them. Such an abolition of judicial categories would in practice infringe on the safety of society and on the rights of the individual.<sup>63</sup>

Instead of just delving into the minutiae "of doubtful dreams" he should develop a social orientation corresponding to the growing awareness of social responsibility in a changing world. Instead of the currently too-prevalent practice of giving for social ills individualistic and therefore evasive explanations, the psychiatrist should not shirk his duty to determine the point where individual guilt resolves itself into social responsibility.<sup>64</sup>

The association of the terms "conditioned response" and "involuntary action" is due to the fact that Pavlovian or classical conditioning is used as the example. B. F. Skinner and other psychologists interested in learning theory have introduced into psychological literature the term "operant" or "instrumental" conditioning, based on self-initiated or voluntary behavior on the part of the subject. If modern psychologists, using the latest research techniques, can use such terms as "self-initiated" or "voluntary actions", certainly the lawyer is justified in talking about voluntary actions or intent.<sup>65</sup>

Law is both descriptive, the law as it is, and evaluative, the laying down of moral imperatives. The study of law can be descriptive, and thus a member of the social sciences, or it can be evaluative, and thus within the field of ethics and morals. The law regulating adultery exists as a fact, as a code of behavior; it also represents a moral impera-

<sup>62</sup> ARNOLD GREEN, *SOCIOLOGY*, 2nd ed., New York: McGraw-Hill Book Co., 1956, p. 36.

<sup>63</sup> FREDRIC WERTHAM, *SHOW OF VIOLENCE*, New York: Doubleday and Co., 1949, p. 18.

<sup>64</sup> *Ibid.*, p. 18.

<sup>65</sup> ERNEST H. HILGARD, *INTRODUCTION TO PSYCHOLOGY*, 2nd ed., New York: Harcourt, Brace and Co., 1957, p. 29 ff.

tive, namely, people ought not commit adultery. Confusion arises when law is treated exclusively either as a fact or as a moral imperative. Very often moral imperatives are confused with conventional behavior. Social norms, legal and otherwise, tell us how people ought to behave, not how they do behave. Statistical norms are confused with norms that establish standards of behavior. The *ought* can never be derived from the *is*. The distinction between the descriptive and prescriptive aspects of law goes to the very heart of jurisprudence.<sup>66</sup> The descriptive is often confused with the prescriptive.<sup>67</sup> The relationship between science and policy is demonstrated today in the physical sciences. Physicists were able to produce an atomic bomb, but the moral implications of the bomb have driven many scientists into other areas of research. The physicist does not determine how the bomb ought to be used. The program to produce satellites also illustrates the difference between the scientific knowledge necessary to launch a satellite and the governmental policy which the United States has pursued in an effort to do so. These examples not only point out the gap between science and policy, but they also point out the fact that scientists do not determine policy. They work within the policy framework determined by the power structure of society.

If we make a distinction between what is and what ought to be, and if we assign to science questions of what is and to policy makers questions of what ought to be, then this conflict between law and psychiatry takes on new meaning. Psychiatry is, or wants to be, a science. Law has a policy-making function. The psychiatrist has attacked the McNaghten rule principally on the grounds that it is not scientific. The McNaghten rule is not a scientific statement; it states a matter of policy. When the psychiatrist argues that the McNaghten rule is no longer acceptable, he is arguing as a policy-maker, not a scientist. The

<sup>66</sup> MORRIS R. COHEN, *REASON AND LAW*, Glencoe: Free Press, 1950, p. 159 ff.

<sup>67</sup> WILLIAM SEAGLE, *QUEST FOR LAW*, New York: Alfred A. Knopf, 1941, pp. 7-17. The school of philosophical jurisprudence emphasizes the ethical aspect of law. The analytical school emphasizes the descriptive aspect of law. Sociological and historical jurisprudence attempts to relate law to the social sciences. JEROME HALL has stated that it is a mistake to separate law as fact and law as value. He advocates integrative jurisprudence which combines the descriptive and evaluative aspects of law. See *INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES*, New York: Oxford University Press, 1947, p. 313 ff.

sociologist has decided he could not act as both scientist and policy-maker, and perhaps the psychiatrist will find it necessary to make a similar distinction between science and policy. It is no refutation of a legal doctrine to observe that it is not scientific. Law evaluates behavior and establishes norms of conduct. The criminal is one who has been judged by the group to have violated a conduct code and is deserving of punishment and condemnation. Mental illness is not defined as the violation of a conduct code. There is no scientific approval or disapproval of mental illness, any more than one approves or disapproves of an infected appendix. A man may have syphilis and commit a crime at the same time. We do not ask a lawyer to treat the syphilis, and the doctor is not supposed to make a moral issue of syphilis. The fact that doctors treated syphilis as a moral and not as a scientific issue for years illustrates the point. At the same time we do not ask the doctor what punishment ought to be assigned to the man who has contracted syphilis through an illegal act. In the case of crime, however, we assume that the presence of mental disease places in the hands of psychiatrists the moral evaluation of the behavior. There is a right and wrong in law; there is no right and wrong in science, only what is. This observation does not preclude the possibility that policy decisions may be based on scientific evidence. Gregory Zilboorg, a psychiatrist, makes such a distinction between science and policy.

If we as scientific contemporaries are to pass judgment on every contemporary social crisis in terms of our civic reactions clothed in the cloak of our scientific training, much of that which is positive, creative, and permanent in our science is bound to be tarnished, as so much of the human spirit was tarnished, whenever scientific knowledge was made to serve the immediate ends of social crises. This mistake is a dangerous error which little helps our civic performances and hurts a great deal our scientific performance and capacity.

As scientists we cannot exist unless we stand *au dessus de la melle*. If we find ourselves unable to stand above the battle, we must give up our scientific position. There is no choice. For there is no socialist physics, or capitalistic algebra, or Soviet astronomy, or Fascist biology; and there is no American psychoanalysis or British psy-

chiatry. Science remains universal and cosmopolitan as it always has been, or it is not science.<sup>68</sup>

Zilboorg goes on to state that criminals are neurotic individuals, and "Such individuals should be treated, of course, instead of punished."<sup>69</sup> Zilboorg fails to realize that when he states we ought to substitute treatment for punishment he is contradicting what he said a few pages earlier about the separation of science and policy and the maintenance of scientific neutrality on social and political issues. He also states that as a psychiatrist he is identified "with the person to be served and not with the disindividualized aggregate called society or history."<sup>70</sup> Here he is stating that he is a positivist, that is, he is interested in the criminal and not in social meaning of crime, guilt, and punishment.

#### THE PURPOSE OF PUNISHMENT

The Classical School advocated a definite penalty for each crime. The punishment must fit the crime, e.g., for armed robbery a man would receive five years in prison. The Classical School punished the man for the crime, for what he had done.

The Positive School rejected the doctrine of *nulla poena sine lege*—no punishment without a law. The Positive School emphasized individualized treatment and the protection of society against the criminal. The punishment must fit the criminal. A man was sentenced, not according to the seriousness of the offense, but according to the factor or factors which motivated him to commit a crime. It is foolish, reasoned the positivist, to sentence all men guilty of armed robbery to the same length of time, since the motivational pattern for each man would be different. One man might commit armed robbery because he does not have the vocational training necessary for him to get a job; another man might commit armed robbery because it served him as a psychological substitute for love which he did not receive from his parents. In the one case the criminal would receive vocational training; in the other case he would receive psychotherapy. Since it is not possible to know at the time of the trial how long a time will be necessary to rehabilitate the criminal, an indefinite sentence

<sup>68</sup> GREGORY ZILBOORG, *On Social Responsibility, SEARCHLIGHTS ON DELINQUENCY*, ed. by K. R. EISSLER, New York: International Universities Press, 1949, p. 334.

<sup>69</sup> *Ibid.*, p. 335.

<sup>70</sup> *Ibid.*, p. 337.

is needed, which could theoretically be from one year to life.<sup>71</sup> Each criminal would receive individualized treatment according to his own psychological and sociological needs. The criminal, not the crime, governed the sentence or punishment given. The time a man spent in prison would be determined, not by the crime he had committed, but by the time needed to adjust and rehabilitate him. Whether or not a man was adjusted and ready to return to society would be determined by scientific penology.

Garofolo was skeptical about the possibility of reforming the criminal. He advocated the death penalty, overseas colonies, and life imprisonment for those lacking all moral sense. For the young offender he recommended the indeterminate sentence, and for less serious violations he advocated reparations rather than punishment.<sup>72</sup> Garofolo also recognized the value of the deterrence theory, though he also realized its limitations. He also observed that any system of enforced treatment is punitive in nature.<sup>73</sup>

Ferri continued the Positive School's emphasis on social welfare and social defense. The purpose of criminal justice was to afford maximum protection or defense of society against the criminal. The defense of society was placed above the rights of individuals. Ferri recommended penal colonies, indeterminate sentences, hospitals, scientifically trained judges, and the abolition of juries. Although he recognized the value of individualized treatment, he also recognized its limitations. Individualized treatment was limited to the five classes of criminals which he developed.<sup>74</sup>

The modern trend in penology has been in the direction of positivism, with such innovations as the indeterminate sentence, parole, probation, suspended sentences, and good time laws.<sup>75</sup> "The reforms made in the criminal law in all civilized nations in the last half century have resulted in the adoption of many of the proposals of the positivists."<sup>76</sup> For Bentham a harm or pain must result from the crime before it is punished. The positivist turned attention to motivation, and punishment was related to human motivation

<sup>71</sup> WALTER C. RECKLESS states for example, *The ideal indeterminate sentence law fixes all sentences from one year to life*. WALTER C. RECKLESS, *THE CRIME PROBLEM*, 2nd ed., New York: Appleton-Century-Croft, Inc., 1955, p. 622.

<sup>72</sup> ALLEN, *op. cit.*, p. 382 ff.

<sup>73</sup> *Ibid.*, p. 386.

<sup>74</sup> SELLIN, *op. cit.*, p. 491.

<sup>75</sup> HALL, *PRINCIPLES, op. cit.*, p. 50 ff.

<sup>76</sup> SELLIN, *op. cit.*, p. 492.

rather than to the overt act or consequence of the act. "Motivation rather than the objective nature of crime, is a basis for sanctions."<sup>77</sup> This attitude, again, is illustrative of the positivist's interest in the criminal rather than crime. The social defense position has resulted in such legislation as sexual psychopathic laws and habitual offender laws.

Ferri delivered a lecture entitled "New Horizons in Criminal Law", which was later published as *Criminal Sociology*. Barnes and Teeters published *New Horizons in Criminology* in which they propose such reform measures as the elimination of prisons, the elimination of punishment, the elimination of the jury system, the elimination of the concept of free will, individualized treatment, and the elimination of other aspects of the legal system. Scientists and mental hospitals would replace judges, juries, and prisons.<sup>78</sup>

The abandonment of the principle of legality often leaves the accused without the traditional safeguards found in the law. Jerome Hall has been an outspoken critic of this movement.<sup>79</sup> Francis A. Allen asks the question, "What social interests are to be protected by the criminal law?" We must deal with the problem of the expansion of state power into more and more aspects of social life.<sup>80</sup> The late George Dession emphasized the protection of individual rights as an important function of criminal law. Dession deplored the development of such legal proceedings as denaturalization of naturalized citizens, deportation of aliens, loyalty hearings, anti-trust proceedings, and sexual psychopathic laws which allow a man to be committed for an indefinite period even though he has committed no offense. These actions are always taken under the disguise of social welfare. "Should not the safeguards of criminal proceedings be applied in the above situations?"<sup>81</sup> The Pioneer Series article on *Montero* is relevant in this respect because *Montero* placed emphasis on the protection of individual rights and the limitation of the power of the state.<sup>82</sup>

The positivist has ignored the fact that the

<sup>77</sup> *Ibid.*, p. 481.

<sup>78</sup> HARRY ELMER BARNES AND NEGLEY K. TEETERS, *NEW HORIZONS IN CRIMINOLOGY*, New York: Prentice-Hall, Inc., 1950, p. 289 ff.; p. 644 ff.; p. 947 ff.

<sup>79</sup> HALL, *PRINCIPLES*, *op. cit.*, p. 19 ff.

<sup>80</sup> ALLEN, *op. cit.*, p. 378.

<sup>81</sup> RICHARD C. DONNELLY, *George Dession*, *JOUR. OF CRIM. L., CRIMINOL., AND POL. SCI.*, March-April, 1956, p. 773.

<sup>82</sup> MANUEL LOPEZ-REY, *Pioneers in Criminology*, X: *Pedro Dorado Montero*, *JOUR. OF CRIM. L., CRIMINOL., AND POL. SCI.*, January-February, 1956, p. 605 ff.

criminal law is a double-edged sword. It protects society against the individual, and it protects the individual against the arbitrary actions of the state. The law prescribes the area in which the state can act.

Criminology textbooks pay a great deal of attention to the inhumanity of man to man: the inhumanity of punishment, the brutal methods of torture and punishment, the ineffectiveness of capital punishment, the complicated legal procedure followed by courts of law, the dishonesty of judges and police officials, the injustices of trials and jury decisions, the brutality of police methods, and the unsavory conditions in all prisons. What is sometimes ignored is the fact that the Classical School developed as a reaction to harsh penal methods where people were executed for minor offenses. The principle of legality was a political doctrine designed to protect the accused against such abuses. Bentham and Beccaria led a wave of legal reform in England.<sup>83</sup> The Positive School places us in a major contradiction in this respect. In order to carry out the social defense philosophy he must sacrifice the individual offender. "The Positive School is committed to the thesis that any measure necessary to protect Society (the accused, and, of course, the convicted person are automatically excluded therefrom) is justifiable."<sup>84</sup>

In the case of the adult offender, as in the case of the juvenile, the issue is sometimes whether the accused has a personality problem which needs treatment, rather than whether or not the defendant has committed an objective harm. The sexual psychopathic laws represent a movement in this direction. "The sexual psychopathic laws have given birth to a bastard class—neither criminal or insane—whose members are designated "offenders" because of their offensive behavior. These unhappy nonconformists may be punished or treated just as badly as the criminal and the insane, but obtain far less in the way of due process of law."<sup>85</sup> Hermann Mannheim, E. H. Sutherland, and Paul Tappan have criticized the sexual psychopathic laws in this country.<sup>86</sup> Harsh penal methods are now appearing under the guise of "reform" and "science".

It is often stated that the purpose of criminal law ought to be treatment and reform. The ob-

<sup>83</sup> GEIS, *op. cit.*, pp. 159-171; MONACHESI, *op. cit.*, p. 439-449.

<sup>84</sup> HALL, *PRINCIPLES*, *op. cit.*, pp. 550-551.

<sup>85</sup> UNIVERSITY OF CHICAGO LAW REVIEW, p. 355.

<sup>86</sup> MANNHEIM, *op. cit.*, p. 205 ff.

ervation has been made that there is always a punitive aspect to treatment.<sup>87</sup> Whether or not punishment and treatment can be separated is a relevant question. Sheldon Glueck once commented, "A sick person has a right not to be treated; it is only when he becomes contagious that he may be quarantined."<sup>88</sup>

The reform argument assumes that reform is possible, and that we have the knowledge necessary to reform the criminal. This argument assumes we know the cause of crime and therefore the cure. It overworks the analogy between crime and disease.<sup>89</sup> It overlooks the fact that crime is a product of society. In his book, "Must You Conform?", the late Robert Lindner argues that when we classify homosexuality as a disease and not a crime we are not really helping the homosexual but are in fact creating new oppressive measures to use against him. It is control disguised as reform and treatment. The same thing can be said for regarding behavior of other types as a disease rather than a crime. If crime is the product of society, do we reform the individual or must we reform the society?

The rehabilitative treatment of the offender is the objective most frequently discussed and applauded today. Criminological positivism, with its focus upon the individual offender, was introduced by Lombroso and his followers. An individualized and, more particularly, a therapeutic orientation has developed rather steadily in subsequent years under the impetus of the modern clinical movement. . . . The focus upon mental pathology has resulted in a conception of criminals as "sick people".<sup>90</sup>

The positivist emphasizes parole and the indeterminate sentence, yet a determinate sentence has more value than does the indeterminate sentence as a factor in success or failure of parole.<sup>91</sup> Sweating out a parole and observing the political maneuvers of parole boards is very demoralizing to an inmate. Many inmates feel that a release on parole automatically lessens one's chances of reforming after release from prison. "Society is not yet fulfilling its responsibility to the implications

of parole."<sup>92</sup> Today the Youth and Adult Authorities are held in high esteem by penologists. The American Law Institute was instrumental in the establishment of these agencies. The Model Correction Act removed from the courts the power of probation and placed the offender in the hands of the Authority for an indeterminate period for which there is neither a minimum or a maximum.<sup>93</sup> "It seems to many that this feature of the model Act is extreme and even dangerous, in view of the possibility of miscarriages of justice, as well as mistakes in judgment."<sup>94</sup> The arguments against the indeterminate sentence are many and varied.<sup>95</sup> Alexander Maconochie, the British reformer, emphasized the importance of the indeterminate sentence, but as John Barry noted in his article, "Maconochie would have been surprised at the arbitrary powers entrusted to tribunals such as the Adult and Youth Authorities and Parole Boards."<sup>96</sup> The emphasis has shifted from a rigid sentencing procedure which did not take into account individual factors, to an indeterminate sentence which does not take into account the rights of individuals. Perhaps we can find a compromise between such two extremes. At least it is difficult to justify the indeterminate sentence and parole as "reform measures".

The modern criminologist places little value on the deterrent theory of punishment, though both Lombroso and Garofolo realized the deterrent effect of criminal law. They placed more emphasis on overseas colonies and capital punishment than on reform.<sup>97</sup> As Morris R. Cohen points out, we cannot say that law does not deter because some individuals commit crimes.<sup>98</sup> The notion that law does not deter is fatalistic and this conflicts with the positivist's concept of determinism.<sup>99</sup>

The optimum result in treatment cannot be attained by mere reaffirmations of faith in "individualization" and "therapy", or by the elabora-

<sup>92</sup> DONALD F. WILSON, *MY SIX CONVICTS*, New York: Pocket Books, Inc., 1951, p. 281.

<sup>93</sup> BLOCH AND FLYNN, *op. cit.*, p. 490.

<sup>94</sup> ENCYCLOPEDIA OF CRIMINOLOGY, ed. by VERNON C. BRANHAM AND SAMUEL B. KUTASH, New York: Philosophical Library, 1949, p. 465.

<sup>95</sup> CALDWELL, *op. cit.*, p. 644 ff; EDWIN H. SUTHERLAND AND DONALD R. CRESSEY, *PRINCIPLES OF CRIMINOLOGY*, 5th ed., New York: J. P. Lippincott, 1955, p. 560 ff.

<sup>96</sup> JOHN V. BARRY, *Pioneers in Criminology*, XII: *Alexander Maconochie*, *JOUR. OF CRIM. L., CRIMINOL., AND POL. SCI.*, July-August, 1956, p. 150.

<sup>97</sup> ALLEN, *op. cit.*, p. 373 ff.

<sup>98</sup> COHEN, *op. cit.*, p. 49.

<sup>99</sup> *Ibid.*, p. 49.

<sup>87</sup> UNIVERSITY OF CHICAGO LAW REVIEW, p. 350 ff.

<sup>88</sup> HENRY NUNBERG, *Problems in the Structure of the Juvenile Court*, *JOUR. OF CRIM. L., CRIMINOL., AND POL. SCI.*, January-February, 1958, p. 507.

<sup>89</sup> COHEN, *op. cit.*, p. 55; HALL, *PRINCIPLES, op. cit.*, p. 132.

<sup>90</sup> PAUL W. TAPPAN, *CONTEMPORARY CORRECTION*, New York: McGraw-Hill Book Co., 1951, pp. 110-111.

<sup>91</sup> RECKLESS, *op. cit.*, pp. 637-639.

tion of case histories. It cannot be achieved, either, by a cavalier rejection of the incapacitative and deterrent objectives of correction in favor of an exclusively rehabilitative goal.<sup>100</sup>

In the case of punishment, as in the case of responsibility, there is a confusion of what is and what ought to be. The question of punishment is a moral issue. The sociologist and psychiatrist do not hesitate in suggesting what ought to be done with the offender. At its conception American sociology was dominated by a philosophy of social reform; however, this aspect of sociological thinking has been modified since that time. In criminology the reform issue still looms large, and the criminologist is more often than not more of a reformer than a scientist. Science can tell us that executing some criminals will not deter others; it cannot tell us that we ought not to execute them. One of the major difficulties encountered in criminology when we deal with ethical issues is that the sociological positivist and the legal positivist divorce fact and ethics.<sup>101</sup> This does not mean that the positivist does not make ethical judgments; it means that he makes ethical judgments without acknowledging that he is making them. Criminology is a science; law is a policy making procedure.

Perhaps the most glaring defect in the sociological analysis of punishment is that it views punishment always in the context of what it means to the individual offender, never in terms of what it means to society. Because the positivist is concerned with the individual offender, it should be expected that he would neglect the sociological meaning of punishment. The social purpose of punishment is to create social solidarity. Emile Durkheim viewed punishment as a reflection of group solidarity. Any act which violated the social code had to be punished in order to restore order and to reaffirm the violated code. In this way group solidarity was maintained.<sup>102</sup>

Since sanctions are not revealed by analysis of the act that they govern, it is apparent that I am not punished simply because I did this or that. It is not the intrinsic nature of my action that produces the sanction which follows, but the fact that the act violates the rule which forbids it. In

fact, one and the same act, identically performed with the same material consequences, is blamed or not blamed according to whether or not there is a rule forbidding it. The existence of the rule and the relation to it of the act determine the sanction. Thus homicide, committed in time of peace, is freed from blame in time of war. An act, intrinsically the same, which is blamed today among Europeans, was not blamed in ancient Greece, since there it violated no pre-established rule.

We have now reached a deeper conception of sanctions. A sanction is the consequence of an act that does not result from the content of the act, but from the violation by that act of a pre-established rule. It is because there is a pre-established rule, and the breach is a rebellion against this rule, that a sanction is entailed.<sup>103</sup>

The purpose of punishment is social disapproval of the act through collective action on the part of the group. Durkheim's analysis of punishment has the advantage of placing attention on the normative structure relating to acts and not on the act itself. The Positive School was opposed to the position taken by Durkheim, that is, it focused attention on the act and not on the meaning of a violation to the social group.

Morris R. Cohen regards reprobation or disapproval as an important aspect of punishment.<sup>104</sup> Fredric Wertham notes that a neglected but important aspect of punishment is the condemnation of the crime.<sup>105</sup> Bronislaw Malinowski states, "Every element of primitive law, every claim, is determined by the need to maintain the identity of the group"<sup>106</sup> Arnold Green writes:

The second proposition—that punishment fails to reform the criminal—is also inconsequential in the present context. The real social function of punishment is not so much to change the behavior of the extreme rebel as it is to give the majority of more or less norm-accepting persons a continued reason for remaining norm-accepting. As many sociologists, including Emile Durkheim and George H. Mead have pointed out, punishment affirms social values. Punishment serves to set off wrong from right. That in many instances it fails to rehabilitate the individual offender does not destroy

<sup>100</sup> TAPPAN, CONTEMPORARY CORRECTION, *op. cit.*, p. 12.

<sup>101</sup> HALL, PRINCIPLES, *op. cit.*, p. 546.

<sup>102</sup> WALTER A. LUNDEN, *Pioneers in Criminology*, XVI: *Emile Durkheim*, JOUR. OF CRIM. L., CRIMINOL., AND POL. SCI., May-June, 1958, p. 5 ff.

<sup>103</sup> LEWIS A. COSNER AND BERNARD ROSENBERG, *SOCIAL THEORY*: New York: Macmillan Co., 1957, p. 108.

<sup>104</sup> COHEN, *op. cit.*, p. 50.

<sup>105</sup> WERTHAM, *SHOW OF VIOLENCE*, *op. cit.*, p. 19.

<sup>106</sup> CARLSTON, *op. cit.*, p. 6.



its essential function. Without punishment, organized society is inconceivable.<sup>107</sup>

Radcliffe Brown has analyzed social sanctions in terms of their social function, and he concludes:

In a consideration of the function of social sanctions it is not the effects of the sanction upon the person to whom they are applied that are most important but rather the general effects within the community applying the sanctions. For the application of any sanction is a direct affirmation of social sentiments by the community and therefore constitutes an important, perhaps essential, mechanism for maintaining these sentiments. Organized negative sanctions in particular . . . are expressions of conditions of social dysphoria brought about by some deed. The function of the sanction is to restore to the social euphoria by giving definite collective expression to the sentiments which have been affected by the deed, as in the primary sanctions and to some extent in the secondary sanctions, or by removing a conflict within the community itself. The sanctions are thus of primary significance to sociology in that they are reactions on the part of the community to events affecting its integration.<sup>108</sup>

The use of punishment by society is not as important in terms of whether or not it reforms the individual as in terms of what it does for society. Punishment creates social solidarity and re-enforces the social norms.

#### CONCLUSIONS

In the *Pioneers in Criminology* we witness the development of the major issues underlying modern criminological thinking. Whereas the Classical School focused attention on the *crime*, the Positive School shifted the emphasis to the *criminal*. The major characteristic of criminological thinking since Lombroso's time is the preoccupation of criminologists with the problem "why do individuals commit crimes?"

The Positive School gained its name from the positivist philosophy of the nineteenth century which applied scientific method to social problems. This school maintained the position that criminology must become scientific, by which they meant that the explanation of criminal behavior and the treatment of criminals must be accom-

plished by scientific means. Science is designed to explain why people behave the way they do; it does not tell us how people ought to behave. The reason we have crime, however, is not because individuals behave the way they do, but because others think they ought not to behave in that way and have it within their power to judge their behavior. Crime involves an ethical issue.

The biological explanation of behavior has been seriously challenged by sociologists and psychologists since Lombroso's time. This tenet of positivism has been refuted. However, the criminologist has accepted a theory of behavior as a theory of crime. Crime and criminal behavior are confused. Even though in modern criminology the Lombrosian explanation of behavior is rejected, the positivist's interest in the criminal is maintained.

Because the positivist wanted to study the criminal rather than crime, he was obliged to reject the legal definition of crime. "Anti-social behavior" is often used in place of a legal definition. There is no agreement among criminologists as to the meaning of the term "crime", though this is presumably the starting point for any research. Some use a social definition of behavior; some use a legal definition of behavior. Some regard the sociology of law as outside the scope of criminology; some regard it as basic to criminological theory.

The scientific approach substituted determinism for volition. The individual criminal is again the center of attention, since the question is one of individual responsibility. Although Ferri used the concept of legal responsibility in place of moral responsibility, the individualistic approach is gaining headway in law as evidenced in the recent Durham decision.

The Positive School regarded the protection of society as the governing factor in punishment. Punishment was designed to fit the criminal, not the crime. Such reform measures as parole, probation, and indeterminate sentences furthered the individualistic approach to criminology. The objection to the social defense school comes from those who do not want social welfare placed above individual welfare. Individualized treatment must of necessity place great discretionary power in the hands of the experts.

The Positive School advanced the field of criminology by placing the study of the criminal within a scientific framework. Today, as a result, we know a great deal more about the criminal than we have

<sup>107</sup> GREEN, *op. cit.*, p. 37.

<sup>108</sup> EDGAR F. BORGETTA AND HENRY J. MEYER, *SOCIOLOGICAL THEORY*, New York: Alfred A. Knopf, 1956, p. 443 ff.

known heretofore. The criticisms made of the positivist are to be viewed as attempts to raise questions other than those raised by this school, and not as a blanket condemnation of a healthy interest shown in the criminal. The criminologist's attempt to separate criminology and criminal law, and his related attempt to derive criminality from the behavior of the criminal offer a major obstacle to a theory of crime. More attention needs to be paid to the meaning of crime in terms of criminal law, social structure, and social change. A re-evaluation of the theoretical structure of criminology is called for at this period in the development of criminological thinking.