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Theft, Law and Society – 1968

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Theft, Law and Society—1968

by Jerome Hall

THE PRESIDENT'S Commission on Law Enforcement and Administration of Justice has reported that "burglary, automobile theft, and larceny of \$50 and over make up 87 percent of Index crimes",¹ i.e., of the crimes listed in the *Uniform Crime Reports* published by the F.B.I. This excludes robbery and, more important as regards theft, millions of petty thefts as well as the numerous frauds and embezzlements, all of which are not included in the *Uniform Crime Reports*. Statistical generalization about crime in hazardous, but for the sole purpose of blocking out the contours of the picture, it seems safe to say that of all the genuinely criminal acts committed in this country, 90 per cent are crimes against property. One thinks directly of the billions of dollars these crimes involve annually and then, in a more reflective mood, of the moral implications of this phenomenon. For, as an English scholar recently said, "In our society property has become an extension of personality and violation of it constitutes a violation of the self."²

There are many other reasons to study theft and the law concerning it. Crimes of violence are more dramatic and enlist widespread interest and reaction; and they frequently involve emotion or mental disease. Theft is restricted to voluntary conduct that is often deliberate and sometimes very

The law of theft has long been the most complicated branch of the criminal law, writes Mr. Hall, and this is so in the face of the fact that crimes against property can be estimated safely as accounting for 90 per cent of all genuine crime in this country. The Model Penal Code has done much to simplify the law of theft and to eliminate outmoded distinctions, the author concedes, but he maintains that distinctions still must be recognized among the various types of theft, the persons involved in theft and the appropriate penalties for various crimes against property. Improvement, he concludes, demands further and better research.

carefully planned; yet, except in rare cases, public opinion is relatively indifferent. A far higher percentage of crimes of violence is "cleared" by the arrest of suspects than in the case of theft. The instinct to live has long been a constant, simple factor, and the ways of killing human beings are relatively few. But economies differ greatly, and they have long histories marked by many changes reflected in numerous inventions and the production of a great variety of goods. The methods of misappropriation are correspondingly complex. In no other field of the criminal law does private adjudication and co-operation—by employers, insurance companies and protective associations—operate as widely and importantly as in that of theft. Gaps between the law of theft and relevant values sometimes become very wide, and then one encounters those strange statutory interpretations about which the canons of construction are wholly silent. All of

this and much else combine to provide fascinating opportunities for studies that can be very helpful in the improvement of the administration of criminal justice.

The Model Penal Code and Subsequent Enactments

The law of theft has long been the most technical branch of the criminal law. But now we have the theft provisions of the American Law Institute's Model Penal Code, the recent enactment of theft statutes based on the code in New York, Illinois, Wisconsin,

EDITOR'S NOTE: This article is drawn from an address presented at the meeting of the Maryland State's Attorneys Association in Baltimore, December 15, 1967.

1. THE CHALLENGE OF CRIME IN A FREE SOCIETY 19 (1967.) The commission concluded that, "The number of offenses—crimes of violence, crimes against property and most others as well—has been increasing "Most forms of crime—especially crimes against property—are increasing faster than population growth." *Id.* at 30.

2. TERENCE MORRIS, in CHANGING CONCEPTS OF CRIME AND ITS TREATMENT 23-24 (Klare ed. 1966).

Minnesota, Indiana and other states, and the 1967 proposed Michigan bill. What is the significance of these proposed and enacted changes?

When I wrote *Theft, Law and Society* in 1935 it was plain that in trying to answer "so apparently simple a question as, what can be 'stolen', [one] would be introduced into a labyrinthian network of legal propositions woven into innumerable statutes and cases", and "that the rules. . . have become so highly involved, numerous and technical that they are extremely difficult to apply competently. . .".³ That was no discovery—Stephen had implied as much in 1863. And if, to the technicality of the common law on the subject of larceny is added that of the distinctions among the various types of larceny and of the other forms of theft, the need to eliminate the excessive complexity of this branch of the law is obvious.

This law had also accumulated various historical accidents such as Coke's exclusion of instruments representing choses in action from the subject matter of larceny. There were other parts of the law, e.g., the distinction of larceny by trick from false pretenses and the exclusion of *ferae naturae* and of noncorporeal property, which, though justifiable when adopted, later became indefensible. And there were procedural difficulties, especially in the cases where one property crime was charged and another proved and convictions were set aside on the ground of variance.

In all of the above respects the Model Penal Code and the new statutes have made important gains. The thick underbrush has been cut away, the law has been simplified, outmoded distinctions have been abandoned and the above procedural problem apparently has been solved. I say "apparently" because the language in some of the new statutes and recent court decisions raises doubts. Long before the recent theft laws, the joinder of property crimes was allowed, and in California, which led the way, the prosecution can simply charge theft. But it is still necessary to prove a particular common law crime and there is, accordingly, little likelihood that law students and lawyers will soon be able to escape the

discipline of that difficult subject. Under the new statutes, when "theft" can be charged, the prosecution may be compelled to file answers to a bill of particulars. The net gain in procedure is therefore problematic.

That the old problem of variance requires very careful handling is shown in the recent Indiana decision in *Coates*, 229 N.E. 2d 640 (Sup. Ct. 1967). In that case, the information charged theft by receiving, while the evidence showed that the defendant stole the property. The Indiana Criminal Code §10-3029, which is part of the Offenses Against Property Act provides: "The general purpose of this act . . . is to unify several traditionally distinct offenses against person and property in order to eliminate pointless procedural obstacles to the conviction of thieves and swindlers. Specifically, it is the purpose of this act to consolidate all of the theft group of crimes except robbery. . .".⁴ Despite that provision, the Indiana Supreme Court said, "The question is whether under the Theft Code there is one crime of theft . . . or whether there are various forms of theft. . ." The court noted that California and New York had made "specific provisions to determine these procedural matters". Because there is no such provision in the new Indiana statute, the conviction was reversed.

The Model Penal Code and the recent statutes also have recommended or made new substantive laws, and these raise more difficult questions. Few, I think, doubt that the inclusion of noncorporeal property is an important advance. That the case of one who intentionally made illegal use of another's machinery is indistinguishable on the merits from the larceny of tangible goods seems clear. It remains to be seen whether the exclusion of the infringement of trademarked products was sound.

On the other hand, serious doubts may well be entertained about the provision in the code and several of the new statutes concerning taking or exercising unlawful "control" over the moveable property of another.⁵ "Control" is not a common law term in a technical sense, nor is it defined in some of the new statutes. Illinois, Indiana and the proposed Michigan bill de-

fine "obtains or exerts control" in certain common law terms, but they add that "control" "includes but is not limited to" those terms. "Control" is discussed in the comments in the A.L.I.'s first and second tentative drafts (1953 and 1954). The problem was complicated by the draftsmen's desire to create a single offense "embracing . . . larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like".⁶ "Control" apparently was taken as the common concept running through all of those crimes "and the like".

Since it is certainly possible that "control" will be challenged on well-known grounds of due process concerning the definiteness of criminal statutes, the term merits careful attention. The code comments⁷ make it clear that the draftsmen reject "asportation" as essential to theft on the psychological ground that the removal of a chattel is not significant as regards the culpability of offenders and because they thought that the same punishment should be imposed for attempted theft and consummated theft, as they provided in the official draft.⁸ I do not know of any state which has such a rule, and its general adoption in the future seems very unlikely. But the draftsmen, having rejected "asportation", struggled, unsuccessfully I think, to distinguish theft from noncriminal acts and also to include criminal attempts or some criminal attempts within theft. "[T]he ultimate issue", they say, is "whether the behavior of the actor constituted a negation or usurpation of the owner's dominion".⁹ They put the case of one who *animo furandi* enters another's automobile, releases the brake and turns on the ignition as falling within theft, i.e., they omit only the asportation. But granted that the series of actions in the example constitutes a "negation" of the owner's dominion,

3. HALL, THEFT, LAW AND SOCIETY 37, 55 (1935).

4. BURNS IND. STAT. § 10-3029.

5. MODEL PENAL CODE § 223.2 (Proposed Official Draft, 1962).

6. Id. § 223.1(1) (emphasis supplied).

7. MODEL PENAL CODE, Comment (Tent. Drafts Nos. 1, 1953 at 65, and 2, 1954, at 61-62).

8. MODEL PENAL CODE § 5.05(1) (Proposed Official Draft, 1962).

9. MODEL PENAL CODE, Comment (Tent. Draft No. 1, 1953, at 65, and 1954, at 61-62).



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conduct short of those particular acts can be similarly appraised.

"Control" is often used in the law of property to determine possession, and in that context no manipulation or contact is needed. Yet, it seems odd to say that one who, in the absence of the owner, stood *animo furandi* near an automobile whose door was not locked was in "control" of the automobile and guilty of theft. On the other hand, one who *animo furandi* took hold of the handle of the door of an automobile, opened it and sat inside the car would certainly be acting in "negation" of the owner's dominion. Turning on the ignition seems unnecessary; indeed, taking hold of the handle would seem to suffice. Thus, at many points doubts would arise as to where noncriminal action ends or where "control" begins, and there would be no established way to resolve them objectively.

"Asportation" is an extremely precise test to differentiate the attempt from the consummated crime; and although the difference between attempt and mere preparation is not a precise

one, common law formulas and case law provide much help in determining that question.¹⁰ If both common law "asportation" and "attempt" are abandoned, and at the same time, in almost every state, attempts must be distinguished from the consummated crimes as well as from noncriminal conduct, how can those distinctions be made and applied by use of "control"? The above difficulties concerning "control" raise serious doubts about the entire plan of the new statutes, since that term is central in most of them.

As regards those parts of the code which are neither evident improvements nor subject to serious doubts, some portions are of questionable merit. Two examples may be given: first, the inclusion within theft of such cases as *Mitchneck*, 130 Pa. Super. 433, 198 A. 463 (1938). The defendant in that case, by agreement with his employees, withheld from their wages certain sums that were to be paid by him to the commissary where they purchased supplies, but he did not make the promised payment. A Pennsylvania court set aside a conviction of embezzlement on the ground that he had not converted the money of another. It is clear that the draftsmen of the new provisions wished to bring such cases within the orbit of theft, but even if the courts reach the intended result, one may doubt whether that change is an improvement over the old law. The second example concerns the adoption of what was previously a small minority view, namely, that making a promise to pay, but intending not to pay, is criminal fraud (theft). The doubt here relates to the possibility of abuse. Able judges have expressed opposite views on this question, and although in principle most students of criminal law probably approve this extension of common law fraud, further study of the problem is needed to remove the lingering apprehension that careless or optimistic businessmen may be prosecuted.

There is one very important aspect of the Model Penal Code and of some of the new statutes that must be brought into focus if the sweeping nature of the substantive changes they have introduced is to be understood, namely, the provisions regarding pun-

ishment, especially the application of the same penalties to all the forms of theft, with additional discretionary provisions increasing the punishment for repeaters, professional offenders and others. The basis of these provisions is the Model Penal Code's classification of offenses into felonies, misdemeanors and violations, and the subclassification of felonies into three degrees and misdemeanors into two. There is doubtless much to be said for this plan, which was largely the work of a distinguished criminologist, the late Professor Paul Tappan; but it has been severely criticized on the ground that the initial maximum punishment is mandatory in all cases and that the plan is too rigid, encouraging administrative inflexibility rather than individualization.¹¹ The British Criminal Law Revision Committee has taken quite a different direction from that of the American Law Institute.¹² And the New York penal code, which provides five degrees of felony and three degrees of misdemeanor, also differs from the Model Penal Code in subjecting extortion to a higher penalty than any other form of theft.¹³ Everyone agrees that the maze of penalties that still prevails in most states should be done away with, but this important problem seems to require further study to discover the best alternative plan.

It is clear that the criminal receiver is the heart of the theft problem. Not only large-scale professional theft but also countless thefts by juveniles and occasional offenders depend on the availability of a regular market—and to provide that service is the crucial function of the criminal receiver. It also is clear why it is very difficult to convict criminal receivers and, further, that the habitual offender laws are not adequate, that, indeed, in many cases they are not even relevant. Have the code and the recent enactments made adequate use of this knowledge?

The code treats receiving stolen property, if the defendant is in the business of buying or selling stolen

10. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 578-584 (2d ed. 1960).

11. Rubin, *Sentencing and Correctional Treatment Under the Law Institute's Model Penal Code*, 46 A.E.A.J. 994 (1960).

12. See *infra* at note 14.

13. NEW YORK PENAL LAW § 155.40 (McKinney).

property, in the same manner as it treats theft of property valued at over \$500, *i.e.*, as a third-degree felony (223.1(2a)) for which the maximum punishment is five-years' imprisonment. It also provides for a discretionary sentence of five additional years (6.07(3)) if the defendant has been previously convicted of two felonies or of one felony and two misdemeanors, or if he has been shown to have been a professional criminal whose income cannot be accounted for through legitimate means. But large-scale dealers in stolen property have rarely been convicted two or three times; moreover, since their business was taken into account in 223.1(2a), it is doubtful that it can again be considered as the basis for an extended sentence. Section 165.45 of the New York penal code makes both theft of over \$250 and theft by a pawnbroker or one in the business of buying, selling or otherwise dealing in property class E felonies (four years). Section 165.50 deals with theft of over \$1,500 (class D, seven years), but does not mention dealers. Thus, the only distinctive treatment of dealers is to place the small operators in the minimal class of felony. Section 3252 of Michigan's proposed bill classifies receiving by a dealer of property which does not exceed \$1,000 as a class A misdemeanor (one year), and Section 3251 classifies receiving of property worth over \$1,000 by a dealer as a class C felony (five years). Each of these sections makes receiving a less serious crime than other theft of property of like value! Excepting Wisconsin's, the other recent statutes do not distinguish dealers from other receivers or receiving from larceny. In sum, except for the above halting and sometimes dubious "advances" and the improvement of the law concerning proof of *mens rea* in the case of dealers, the traditional approach of treating receivers and thieves alike and making the gravity of the receiver's offense depend on the value of the property still prevails. The central role of the receiver in the field of theft is ignored when no distinction is made between receiver and thief, and basing the gravity of the offense of receiving on the value of the property received ignores the fact that a junk dealer

who buys stolen goods from the neighborhood boys commits harm far greater than that designated by the small value of the stolen property in the individual transactions.

The vagueness of "control" and the abandonment of common law distinctions among various types of theft and related crimes in favor of the general notion of "theft" raise the old issue of codification versus a more circumspect improvement of the criminal law. One is apt to think of the principle of legality as a protection of accused persons. But, as noted above, broad terms and classifications may aid convicted offenders; and convictions also are made more difficult by employing the term "theft" in unfamiliar ways, by the wide use of "intent to deprive permanently" (which may increase the difficulty of convicting embezzlers who, under the present rules, need not have had that intention), by blurring the distinction between attempt and the consummated crime, and so on.

Legal Analysis and Sociological Research

Many who cherish the principle of legality will be apprehensive of the abandonment of the common law standard of precision in favor of broad statutory definitions of new terms. But they may nonetheless think the time has arrived for the adoption of new legislation in this complicated field. The consequent dilemma can be resolved by following sound methods of study as regards both legal analysis and relevant sociological research.

The lawyer's primary tasks will be (a) eliminating archaic survivals and cleaning up current statutes, (b) bringing cognate provisions in the retained law into such juxtaposition as will facilitate the perception of existing classifications and an appraisal of the various sanctions, and (c) designing a statute, if one is needed, to cope with procedural difficulties. These initial steps also would have the not insignificant advantage of informing the members of the Bar of exactly what was going on and of preparing them for the next step—the appraisal of proposed wide-ranging reforms so that informed judgments could be made as to which proposals were sound, which unsound,

and which would require factual and other study before they could be evaluated with warranted assurance. In this connection, it is interesting and instructive to see some of the directions taken by the British Criminal Law Revision Committee, who, of course, were familiar with the Model Penal Code and recent American statutes. In addition to fixing the maximum penalty for receiving and extortion (14 years) higher than that for larceny, embezzlement and fraud (10 years), and having a single set of penalties rather than two sets, the committee rejected the use of "theft" as a unifying concept; indeed, they did not place even obtaining property by false pretenses in that category, but limited "theft" to larceny and embezzlement. They decided that, "To create a new offense of theft to include conduct which ordinary people would find difficult to regard as theft would be a mistake."¹⁴ The committee also thought there would be consequent procedural difficulties in charging theft by false pretenses, and their report reveals a disinclination to abandon common law precision.

As for sociological research, many have urged the desirability of large-scale efforts to provide much needed knowledge. Before making those efforts, however, it should be recognized that "research" can mean almost anything and that it can be wasteful and even dangerous unless critical attention is paid to certain elementary facts. During 1932 and the quarter of a century that followed, several books based on sociological research were published, each written by one or two scholars who performed their own research,¹⁵ and I think anyone who reads these books will agree that they made very important contributions; indeed, some have become classics. Then, the large foundations entered the field and we now have million-dollar research projects, equipped with all imaginable paraphernalia. Their results are far more detailed than the earlier books, and they may be superior in other respects. But one may entertain serious

14. CMND. No. 2977, at 20, ¶ 38 (1966). For other criticism of the "jumping together" tendency, see Kuh, *A Prosecutor Considers the Model Penal Code*, 63 COLUM. L. REV. 613, 620 (1953).

15. BERLE & MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

doubts about the large-scale projects and wonder whether we cannot use our resources more effectively.

First, it seems clear that the significance of sociolegal research depends more on art than on science and that, unlike research in the physical and biological sciences, where many time-consuming operations can be safely delegated to inexperienced assistants, almost every step in sociolegal research depends on the judgment, imagination and knowledge of the researcher. I do not mean to draw a hard line between art and science since both are exemplified in scientific work of a high order. But one of the unhappy facts about some of the large-scale research projects is that they culminate in descriptions of piles of raw data or of data organized along trivial lines, while the modest research of a single investigator may culminate in very significant discoveries. When millions of dollars have gone into a research project, raising proportionate expectations, and when what emerges by way of novelty is a tiny mouse and the laboring of what was already known or easily could be discovered in conversation with a half dozen experts, it is necessary to question reliance on large-scale research to solve our problems. An obvious alternative is to build small research groups around very talented persons who may be expected to produce significant results and also to train the other members of the team, some of whom may have the potential to become great sociolegal researchers.

Second, researchers find what they are able to recognize as relevant, and they interpret their findings in the light of their preferences, their "ideology" in the current mode. One who is firmly persuaded that poverty is the cause of crime, that punishment is obsolete, that all criminal acts are inexorably determined, that the criminal law represents the interest of a ruling class, that deterrence and justice are myths and so on—such a researcher finds the data that reflect and sustain his philosophical bias. The point is not that sound research and evaluation are impossible because everyone has a philosophy, but that the researcher's philosophical preferences should be stated at the outset, not left for speculative

reading between the lines of his report.

Third, in many, if not all, research groups, there should be included an opposition group, the "devil's advocates" if you please, whose function would be to criticize the policies, methods and findings of the majority and to carry on limited studies based on opposed policies and methods with a view to discovering if other findings are defensible. There are other ways to guard against bias in sociolegal research. For example, a committee of consultants, selected because they are known to represent opposing views, might serve as a council to whom preliminary reports would be made at various stages of the research. These measures may complicate the tasks of research, but who can doubt that they would stimulate thinking and the improvement of plans of investigation? They also would expose the lack of knowledge regarding many questions, and this would highlight the importance of experience and sound judgment in solving problems and dispel the illusion that there is some sort of magic in social research that can solve all problems.

Fourth, after the above safeguards have been provided, a basic preliminary question must be confronted, namely, what is feasible? For example, the question of deterrence is an elusive one, since it is impossible to discover how many persons did *not* commit a certain crime because of the presence or the absence of a particular law or sanction. Equal difficulties beset the determination of trends—whether crime has increased or decreased. Sufficient data to resolve a problem cannot always be discovered, or the cost of doing so may be prohibitive. Without implying that venturesome studies should not be attempted, it seems plain that if sociolegal research is to enlist continued public support, it should be largely concentrated on problems regarding which it is probable that definite, significant results can be reached.

It is also much clearer than it was thirty-five years ago that in sociolegal research, the motto must be: "Divide if you hope to conquer." It cannot be overemphasized, and therefore bears repeating, that there are occasional and

professional thieves and there are persons who may commit theft only once; there are different kinds of theft, ranging from petty neighborhood theft to shoplifting to the skilled pickpocket and on to the large-scale theft of jewelry or furs; there are various types of automobile theft, including the joyride; receivers range from the lady who once in a lifetime is tempted into buying a stolen ring to the professional receiver who does a million-dollar-a-year business; embezzlement ranges from ten-dollar conversions by department store clerks to very large defalcations by brokers and bankers. Similar distinctions are to be drawn regarding "fraud" and the offenders tagged by that general term. One of the doubts about the leveling provisions of the new antitheft enactments is that the use of omnibus concepts such as "theft" and "control" may, despite the best of intentions, obscure important social differences.

Fifth, the progress of comparative criminal law has revealed the importance of taking careful account of foreign experience. Knowledge of the ways foreign codes handle burglary, receiving stolen goods, professional or habitual offenders, the effect of intoxication on criminal liability and other problems is very helpful; even a small state could make excellent use of one or two experts in foreign penal law.

Sixth, the publication of any research pointed toward major legal reforms should give ample space to minority opinions. In this regard, a comparison of the narrowly restricted reports of the A.L.I. on the Model Penal Code with the twelve or more bulky volumes compiled by the Germans engaged in a similar project is illuminating and not at all comforting as regards the American publications. Not only do opinions differ very sharply regarding many problems of criminal law, but also reform of the criminal law should be a continuing effort; for no sooner is one project completed, no matter how admirable it may seem to be, than its defects and deficiencies are recognized and the need for further study becomes apparent. It is a great waste of talent, time and money when, on each occasion of renewed study, we start from scratch, without benefit of

the discussions of able persons who engaged in similar past studies. Indeed, it is strange that in the country which, more than any other, recognizes the importance of the dissenting judicial opinion, the largest legal research institute did not allow any space in its reports on a penal code for the expression of the dissenting views of participants in that work.

Poverty, Theft and Punishment

The administration of the criminal law, especially as regards theft, depends ultimately on the climate of public opinion and sometimes even more on the opinion of articulate intellectuals concerning such questions as causation, responsibility and punishment. When it is frequently said, even in the highest political quarters and especially with reference to widespread looting, that poverty is the cause of theft or an important causal factor, the implication is that the law can play only a superficial role and that until poverty is eliminated we must expect no decrease in the volume of theft.

This is an engaging but far from novel thesis. Many criminologists have studied the relation of economics to crime, particularly theft. The theory that capitalism is the basic cause is little heard nowadays, perhaps because the Soviet Union's criminal law, after fifty years of communism, has become more punitive than ever, indicating that crime is a major problem there. In 1961 and 1962, "making or passing counterfeit money or securities (Article 87), violation of rules on currency transactions (Article 88), stealing state or social property on an especially large scale (Article 93-1)" and other crimes were subjected to the death penalty.¹⁶ In addition, despite the savagery of capital punishment for property crimes and in the face of their recent espousal of legality and the prohibition of retroactivity in their new penal code, the Russians have applied the death penalty retroactively in cases of theft. There have been many studies of the relationships between poverty and crime and between economic depressions and crime, but the results are conflicting and uncertain; some of

them indicate that more crimes against property are committed during periods of prosperity than during depressions.

As regards all of this research, the publication of the late E. H. Sutherland's *White Collar Crime* (1949) raised a basic challenge. Sutherland maintained that none of the criminological studies on causation was valid because the property crimes of middle- and upper-class persons, especially businessmen, had not been taken into account. Unfortunately, his book was marred in ways that aroused serious criticism. The meaning of the term "white collar crime" was not consistent throughout his work, so it was impossible to use the concept in research. He accumulated what he called "convictions" of many corporations without distinguishing administrative actions from decisions of criminal courts, and in many instances he did not even require a conviction. His claim that as a result of legislative bias in their favor, upper-class offenders are tried by administrative tribunals or civil courts rather than by criminal courts¹⁷ was far from proved; in fact, the courts seem to be especially lenient with department store clerks who commit petty thefts.¹⁸ He also showed a lack of appreciation of the distinctive character of "corporate crime" and of the functions of administrative boards, and he treated strict liability offenses as though they were indistinguishable from genuine crimes in which *mens rea* is essential.

But if we set aside these dubious and unsupported aspects of Sutherland's book, it must be recognized that his emphasis on the commission of property crimes by upper- and middle-class persons¹⁹ was an important corrective of the opinion that poverty is the cause of theft, even if it seems odd that it was necessary for criminologists to be informed that large-scale frauds and embezzlements are very frequent and that they are not committed by poor, uneducated persons. Such a causal thesis, which is an application of a scientific concept of cause—in this case the covariation of variables, e.g., the law that gases expand in proportion to increase in temperature—is extremely difficult, perhaps impossible, to establish with regard to social problems. It

is impossible to isolate one social factor from all the others; and it is therefore impossible, by varying the facts concerning particular factors, to discover the causal efficacy of any one of them.

Consequently, the argument for causation shifted to a set of multiple factors, e.g., the combination of poverty, unemployment, limited education and broken homes. But this approach also encountered difficulties. All persons designated by those criteria do not commit crimes. Indeed, a large majority of them are not known to have committed any crime; and, on the other hand, many thefts and other crimes are committed by middle- and upper-class persons who, so far as is known, do not have any of the selected characteristics. The multiple-causation theory has been extended to include many additional factors whose combined operation is said to be responsible for crime; but that amounts to saying that the American way of life is the cause of crime in America. If that is the upshot of research on multiple causation, actual improvement—not just talk about it—is extremely difficult to produce if, indeed, it is not utopian.

Again, the argument shifted, this time away from poverty and unemployment (that would make the crime rate of many so-called under-developed countries the highest in the world, which it is not) to the great disparity in wealth between the poor and the rich. This carries some persuasiveness, no doubt, but the difficulty with this formulation is that human nature being what it is, there is not only a gap between rich and poor, but also between the poor and the skilled workers, between lower-middle, middle and upper-middle classes, between the millionaire and the multimillionaire and, finally, between each of us and those

16. BERMAN, *SOVIET CRIMINAL LAW AND PROCEDURE* 61 - 62 (1966); and see Hazard, *Soviet Socialism and Embezzlement*, 26 WASH. L. REV. 301 (1951).

17. *THE SUTHERLAND PAPERS* 168-169 (Cohen, Lindesmith & Schuessler eds., 1956).

18. See Robin, *The Corporate and Judicial Disposition of Employee Thieves*, 1967 WIS. L. REV. 685.

19. *WHITE COLLAR CRIME—A BIBLIOGRAPHY* (compiled by D.C. Tompkins, 1967).

ubiquitous neighbors of ours, "the Joneses".

Opposed to all of these versions of mechanical causation is a view of "cause" that is dominant in criminal law, namely, that we deal with persons who cause changes to occur by consciously doing certain things, e.g., by pressing a bell or taking someone's chattel. The cause, in short, is a human being characterized by his concern with *reasons* for acting in certain ways.

The thesis that poverty is the cause of crime often coincides with the dogma that, in law, rehabilitation is the *only* rational end to be pursued. That thesis, however, runs counter to certain hard facts. There is the fact that embezzlement in the Post Office is regularly prosecuted and that embezzlement is lower there than in almost any other business.²⁰ There is the fact that the conviction of prominent income-tax violators definitely deters that sort of offense. There are well-known facts regarding the sharp increase of crime in Boston, Liverpool and Copenhagen when the police went on strike or were kept from performing their duties.²¹ The rehabilitationist thesis runs counter to the fact that there are professional offenders, perpetrators of large-scale jewelry, fur and security thefts, as well as embezzlers who are brokers or other "pillars of society" and are normal, much smarter than most men and frequently better educated. For such offenders, rehabilitation by the personnel of most prisons is so remote a possibility as to be irrelevant. And if it is superstitious to treat these people as they deserve to be treated, and illusory to treat them in ways believed to deter potential offenders, then nothing remains but to abandon all legal controls.

The rejection of dogmatic rehabilitationism does not in the least imply that there should not be an important place for correctional treatment in our system of criminal justice. Everyone nowadays hopes that we will soon acquire the knowledge needed to rehabilitate offenders.²² The present position is that any defensible system of criminal law must also take account of deterrence, and, most important if emphasis is to

be placed on any single goal, the law and its administration must be just, resting on the moral validity of the criminal law and the treatment of offenders as human beings. In short, "punishment should enhance the individual's sense of personal value".²³

Nor does anything said above imply that prosecutors and judges should shut their eyes to the facts of poverty, unemployment and broken homes. We do not need to wait for criminologists to prove that these are causes in any rigorous sense of that term to accept the thesis that a combination of these factors may tempt more people than would otherwise be tempted to commit crimes against property. Nor does it mean that because a man is of middle- or upper-class status, courts should be insensitive to his situation, its pressures and temptations. But the difference between being tempted to act and being caused to move is of infinite significance as regards personal responsibility. It implies that there is no *necessary* or inevitable connection between poverty and crime and that, e.g., improved family life and education in moral values can make an important contribution; hence poverty and unemployment call for mitigation, not the exculpation that the law extends to infants and psychotic persons. The relativity of "poverty" is recognized along with the fallacy of the propaganda that when there is no more poverty (whatever that might mean) crimes against property will disappear. Accordingly, it is the prosecutor's duty to use the criminal law in ways that inculcate respect for human beings and those elements of personality that are called "property".

But it has been objected by an American sociologist that, "If it is true that so many of us have at one time or another committed some criminal offense, then a retributive and negative attitude towards those who have been caught is not only illogical, it is hypocritical as well."²⁴ I think this is fallacious for several reasons. As regards many acts that seem to be formally criminal, such as the occasional use of the company's postage stamps on personal mail, there is a sort of understanding that although such conduct is

not approved, it is not criminal; if one cannot say there is consent to such petty appropriation, it is, in practice, an instance of the *de minimis* doctrine. It is also fallacious to imply, if that was the intention, that if everyone sometime in his life *has* committed a theft, everybody is a thief. But most seriously, the above statement reflects a failure to recognize that one of the principal functions of the criminal law is to strengthen everybody's moral fiber and to inhibit common desires that, if acted on, would injure other persons' interests. Even habitual offenders and major felons sometimes acknowledge their culpability, and every thoughtful person has often punished himself in acute awareness of the gaps between his conscience and his actions. From a somewhat different point of view, it has been pointed out that some acts are so violent or repulsive that they will not often be committed even if there are no legal controls, but that as regards stealing, the support of the criminal law is necessary.²⁵ "When we travel by train," said the late Sir Alexander Maxwell, Chairman of the British Prison Commission, "we most of us intend to pay our fares, but the presence of the ticket collector at the barrier just clinches the matter!"²⁶ Since everyone needs the authority and the moral instruction of the legal institution, the rehabilitationist dogma is, at bottom, an attack on the conditions that are necessary for the maintenance of civilized life. But, as stated, although one rejects the philosophy of

20. HALL, *THEFT, LAW AND SOCIETY* 328-330 (2d ed. 1952).

21. Andenaes, *The General Preventive Effects of Punishment*, 114 U. OF PA. L. REV. 961-962 (1966). "In face of extremist claims about the futility of punishment it is well to remember such facts as: of 81,012 people committed to prison between 1930 and 1939 in the U.K. 65,147 (80.4 per cent) had not returned there by 1941." Flew, *Crime or Disease?* 5 BARR. J. Soc'y 50 (1954).

22. "We know as yet very little about what kinds of treatment are most suitable for what kinds of criminals and even less about how, or whether, the rate of success varies according to the duration and intensity." Andenaes, *id.* at 971. "Clear evidence that reformatory measures do in fact reform would be very welcome." WOOTON, *SOCIAL SCIENCE AND SOCIAL PATHOLOGY* 335 (1959).

23. Miller *supra* note 2, at 101.

24. Wolfgang, *id.* at 41.

25. "The average normal housewife does not need to be deterred from poisoning her husband, but possibly does need a deterrent from shoplifting." Wilkins, quoted by Andenaes, *supra* note 21, at 958.

26. Quoted, *supra* note 2, at 170.

determinism and the dogma that rehabilitation is the only rational purpose to be sought, it is also true, and easy to see as regards theft, that there is no place for vindictiveness and that all available opportunities for rehabilitation that are consistent with justice and deterrence should be used.

Social Prophylaxis

Thus we come to the final and in some ways the most important and difficult question considered in this discussion, namely, the possibility of dealing with theft in ways that advance what might be called "social prophylaxis". In eighteenth-century England, hundreds of convicted thieves were transported first to the American colonies and after 1776 to Australia. Statutes on vagrancy, military service and other methods of diverting restless youths from criminal careers were also utilized. Today, the deportation of citizens would be harsh, indeed, unthinkable. The New York Court of Appeals in *Fenster v. Leary*, 229 N.E. 2d 426 (1967), held the state's vagrancy law unconstitutional, as punishment of a status; and recent decisions reversing convictions of alcohol addicts for disorderly conduct have added to the abandonment of the traditional use of the criminal law as an instrument of social prophylaxis. The current concern for the rights of persons accused of crime or charged with juvenile delinquency also is believed by many to have increased society's need for protection. At the same time, efforts to encourage enrollment in job training centers and other calls for voluntary cooperation seem doomed to ineffectiveness if only because of the small number of persons who respond.

It is probably not a mere coincidence that the expansion of the concepts of "mental disease" and "addiction" and the consequent use of "civil commitment" and other noncriminal procedures have been increasingly, if not deliberately, employed to offset the restrictions on use of the criminal law

and to meet the enlarged social need. But this raises the threat of a therapeutic state directed by a bureaucracy composed of experts who claim to be able to recognize potentially dangerous persons (although they did not violate any law) and seem eager to apply compulsory treatment in "hospitals" that may have far less concern for their patients than obtains for convicts in enlightened prisons. When psychiatrists of high repute insist that most of the population is mentally diseased, the spectre of the therapeutic state stands at every man's elbow. The literature on sociopathology, the abuse of the civil commitment of allegedly mentally "diseased" persons, and the so-called sexual psychopath laws are eloquent witnesses of what is involved.

Is there any way out of this impasse—a mounting crime problem on the one hand and, on the other, the expansion of the concepts of "disease" and "dangerousness" to gain acceptance of preventive coercion? Although the use of educational and ameliorative measures is outside the scope of the present discussion, it is evident that there are limits on what can or should be done. Within the realm of the lawyer's special competence, what he may opt for, so far as coercive measures are concerned, are plans and procedures that are consistent with the values of a democratic legal order. I have referred to the traditional functions of the criminal law to educate and protect. But we are now constrained to seek a wider use of legal controls—one that will cope with the insistent problem of social prophylaxis. Is there any large-scale method that can be employed that is not only constitutional but also consistent with American sensibilities? This is an extremely difficult problem and it is with considerable diffidence that I make the following suggestion.

One of the several possible attacks on this problem concerns the millions of petty thefts committed annually by unemployed, unskilled persons; and the relevant question is whether,

among them, a class of offenders can be definitely marked out and selected for compulsory training in vocational centers where they are taught a trade and later helped to find employment. The maximum period of detention might be three years, which is at present provided in some states on second conviction for petty larceny.

The nature of this offense, especially when accompanied by poverty and unemployment, the fact that public emotions are not aroused, and other distinctive facts make it feasible to eliminate punitive methods except as to detention. Retributionists, deeply concerned as they are that punishment be just, may think three years' confinement for the commission of a petty misdemeanor is harsh. A very humane administration of the program might resolve that difficulty. On the other hand, for the complete rehabilitationist, the above proposal will seem far too restricted, even if it does not in the least imply that felons should not be given vocational training. But, as seen, rehabilitation alone (even if knowledge of how to do that becomes available), is not adequate as regards some crimes and types of offenders; and in any case, even if the rehabilitationists were right, and deterrence and justice were relics of the past, they would still encounter public opinion as a barrier to their sweeping program. Finally, those who think punishment has an important function in criminal law, find support in the statement by Attorney General Aulic of Norway that young offenders who are released after questioning "regard the intervention of the police as a temporary inconvenience, of negligible importance". As his compatriot, Professor Andenaes, adds, "the humanizing of penal practice must be kept within certain limits if it is not to lead to an undermining of respect for law and authority".²⁷

27. Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L. C. & P. S. 195 (1952).