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## LEGALISTIC DEFINITION OF CRIME AND AN ALTERNATIVE VIEW

*In the first part of the paper, the author addresses one of the most famous definitions of crime given almost half a century ago by American criminologist Tapan, and criticizes it for being restrictive and overtly formalistic. Tapan equals crime with criminal offence, understood as a legal category. In the seventies, Schwedingers defined crime as a breach of basic human rights and had laid a foundation stone for many alternative definitions of the crime. One of the most influential ones at present is the “constitutive definition” given by Stewart Henry and Dragan Milovanovic*

*According to this definition, there are two types of crime, depending on whether the injured person loses certain qualities important for its present status (reduction crimes) or is prevented from achieving desired position in the society (repression crimes). This definition of the crime enables to broaden the scope of criminology to all actions which injure somebody else, where 'injury' is understood in the broadest sense.*

Keywords: *Crime. – Injury. – Reduction. – Repression. – Degradation. – Discrimination.*

### INTRODUCTION

In a classic article, “Who is the Criminal?” written in 1947, Paul Tappan developed a definition of crime that has been called the legalistic definition of crime. His “juristic” view is:

“Crime is an intentional act in violation of the criminal law (statutory and case law), committed without defense or excuse, and penalized by the state as a felony or misdemeanor” (Tappan in Lanier and Henry, 2001: 31).

Over the years, a number of criticisms of his approach have been written. The most important criticism was that his definition of crime was too narrow. It only incorporated harms defined as so by the State. Furthermore, it reduced the development of theories of crime to only looking at those “legally” guilty. Thus “factually guilty” did not become phenomena that the criminologist could deal with in constructing theories of crime. An alternative was needed. The first major alternative was provided by Schwendinger and Schwendinger in 1970 (reproduced in Lanier and Henry, 2001), in their article “Defenders of Order? Or Guardians of Human Rights?” Several others have also appeared since this important article (see Lanier and Henry, 2001). In 1996, we (Henry and Milovanovic, 1996) developed a “constitutive definition” of harm. We recognized the limitations of Tappan’s original work, and the importance of Schwendinger and Schwendinger’s alternative. We wanted to develop a more sociological definition of harm that would incorporate all forms of harm. Thus, since 1996 we have co-authored several chapters and essays on an alternative definition of harm. This short paper will summarize some of the key elements of our theory.

We want to first go over the elements of the “legalistic definition of crime” in the context of the U.S. experience. We then briefly summarize the alternative by Schwendinger and Schwendinger (1970[2001]). Finally, we move to explaining the constitutive definition of harm.

## LEGALISTIC DEFINITION

The legalistic definition of crime has been the pillar of conventional thought in criminology. It argues that “only those are criminals who have been adjudicated as such by the courts” (Tappan, 2001: 31). This is known as “legal guilt.”<sup>1</sup> Of course, a person may have actually done the crime but may be found not guilty by the courts. This is known as “factual guilt.” The criminologist who wants to study the criminal, who wants to develop a theory of criminal behavior is bound by the legal system’s definition of crime. One is restricted to its definition of who the criminal is.

Let us look at the legalistic definition of crime in more detail. We will separate each component. Thus:

(1) “Crime is an intentional act...”: In the US system of law, there is a distinction between *mens rea* and *actus reas*. To be convicted of crime the State must prove both. It has the burden of proving guilt

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1 In the US experience, one must be found “guilty beyond a reasonable doubt,” and it is the jury which will do this.

beyond a reasonable doubt. *Mens rea* deals with the state of mind. *Actus reas* stands for an act. In our system of law, one must have “intended” to commit a crime, and one must have committed some act to be found guilty of a crime. Normally, both must exist. Thus a person may intend to commit a crime (guilty thoughts) but may not do the act. This is not a crime. On the other hand, one may have done harm to another, but did not have “intent.” This either diminishes responsibility for the act, or evaporates it, as in cases of insanity, duress, accident. In some cases, however, such as “possession of burglary tools,” the act itself, by itself is a crime. And in some cases, where a person plans to do an act, and takes one step in furtherance of the crime, although short of completion, she or he can be prosecuted for a crime. Conspiracy cases are examples.

In the US experience, government police agencies have set up “sting operations” to control crime. Here, the police try and trap people in completing the crime. They might offer drugs for sale, disguised prostitutes, or offer stolen merchandise for sale and wait to see who will complete the criminal act.

(2) “or omission”: Normally, if a citizen does not do anything to report a crime, even if he or she is observing it in progress, he or she cannot be charged with a crime. We do not have what are called “good Samaritan laws.” One does not have an obligation to help another being assaulted by a criminal. There are exceptions. If one has a specific license to care – a doctor, a nursing home operator, a parent – and one does nothing when a dangerous situation arises or ones skills are required, then one can be charged with a crime when the person under their care is hurt. But generally, in the US system of law, one does not have to get involved in order to help a person being victimized. This is unlike many laws in European countries.

(3) “in violation of criminal law...”: In the US system of law, before police try and make an arrest there must be some specific law written in the criminal codes by the State and Federal Government. Absent that, it is not a crime. One cannot reason that a particular act is similar to a crime listed in these codes. An act must be defined with all the elements that make it up. Thus, each criminal act is defined in terms of the elements needed to be proven. If for example a person kills another, if “intent” cannot be proven but the result is still death, perhaps one can try and show “negligence” (negligent homicide, or manslaughter). Here one is showing diminished responsibility.

(4) “(statutory or case law)”: In the US system of law, “statutory law” means laws that have been passed by legislatures and placed in the state criminal code or federal criminal code. “Case law” stands for how judges interpret law. Once the law is interpreted it becomes the basis for

legal rulings in future cases. This is known as “stare decisis” (law based on precedents).

(5) “committed without defense or excuse”: In the US legal system certain “defenses” or “excuses” are allowed. Such as the insanity defense and duress. “Ignorance of the law” is generally not an excuse. These defenses or excuses are arguments that say that the person did not have full intent, or in some cases, no intent at all to do the crime, even though the act was completed. In short, there was no “mens rea.” One excuse, “entrapment,” argues that the police were so excessive in their design to get some person to do the crime, that the court recognizes that the “design”, the “intent” to do it cannot be attributed to the person who does it. In other words, it was the police who were over zealous. Interestingly, the US Supreme Court has said that having a previous criminal record can be considered by the jurors when considering whether the person was “entrapped.”<sup>2</sup>

(6) “and penalized by the state as a felony or misdemeanor”: In the US legal system an act can only be considered “criminal” after it has been defined as such by the legislators and has been placed in the criminal code as a prohibited act. A “felony” is anything punishable by a year or more and time spent will be in prison. A “misdemeanor” is anything punishable by less than a year and the time spent will be in a “jail.”<sup>3</sup>

Jails are generally for those awaiting trial or awaiting to being sent to a prison. They are also places where one spends up to one year for some crime.

In short, the legalistic definition of crime provides the formal elements of a crime. Let me offer some brief critical commentary. First, it is a political process which defines the act as a crime. It is a political process that defines appropriate defenses or excuses. For example, in the extreme, consider trying to use “living in a ghetto” as an “excuse” to commit a crime.<sup>4</sup> Clearly, powerful elites will assure this would not take place. For if they were to take place, consider the questions that would

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2 A defendant can also argue the “necessity defense,” which over 2/3ds of the States allow. Here, if the judge allows the defense, the defendant must show that even though he or she did do the crime, they did it to stop some greater immanent harm.

3 Currently there are over 2.1 million inmates in US prisons and jails. Another 5 million are under some form of supervision (i.e., probation, parole).

4 Consider also the difference between criminal and civil proceedings. In civil proceedings the defendant (usually some large corporation) is asked “why is it not the case that you should be stopped in what you are doing?” And the defendant can file a “consent decree” which means “I will stop doing what you claim I am doing, but I do not agree that I am doing it.” Imagine, for the moment, under principles of formal equality, that we allowed the lower class defendant the same legal privilege?

follow about the nature of the political economic order – job availabilities, discrimination, life chances, poor medical, school, and legal services for the poor, etc. In the extreme, consider if a dictatorship arose in a society and we as criminologists simply accepted the legalistic definition of crime from which to construct our theories of criminal behavior? Second, consider that most legislators are lawyers by formal training. The whole process of defining crime is legalistic. Sociological examinations are limited.

Even where evidence is presented that is overwhelming such as in the US Supreme Court decision death penalty case, *McCleskey v. Kemp* (1987), the court returns to legalistic arguments. Here the high Court was provided huge amounts of the very best statistical evidence (the Baldus study) that showed that black defendants were much more likely to be sentenced to death compared to white defendants even though the crime was the same. The US Supreme Court simply said, that even though the statistics show this pattern, in this particular case, the case of McCleskey's appeal, he had to show specifically that he was discriminated against. The courts, in short, follow legalistic arguments, not sociological.

## CONSTITUTIVE DEFINITION

In 1996, Stuart Henry and I (1996) set out to provide an alternative definition of harm. We were unhappy with the limitations of the legalistic definition of crime. We needed new visions on how harm can be defined.

The Schwendinger and Schwendinger (2001) definition of harm was an improvement. It stated: "Any person, social system, or social relationship that denied or abrogated basic rights are criminal." Basic rights are distinguished by the right to racial, sexual, and economic equality." They are "basic" because "there is so much at stake in their fulfillment." Further, "individuals who deny these rights to others are criminal," and "likewise, social relationships and social systems which regularly cause the abrogation of these rights are also criminal" (Schwendinger and Schwendinger in Lanier and Henry, 2001, p. 88).<sup>5</sup> This definition, originally meant as an anti-Vietnam war statement when it was written,

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5 As they further say, "all human being are to be provided the opportunity for the free development of their potentialities...All person must be guaranteed the fundamental prerequisites for well-being, including food, shelter, clothing, medical services, challenging work, and recreational experiences, as well as security from predatory individuals or repressive and imperialistic social elites" In short, "these material requirements, basic services, and enjoyable relationships are not to be regarded as rewards or privileges. They are rights!" (Schwendinger and Schwendinger in Lanier and Henry, 2001: 85).

quickly became the litmus test as to a willingness to engage in an alternative view. It greatly expanded the discussion. It called into question the legitimacy of the legalistic definition of crime. Criminologists who merely accepted it without questioning it, and who then devised theories based on it, without anything more, could then be accused of being lackeys of the State.

Let's now turn to our contribution in this debate.<sup>6</sup> At the outset, we need to define "harm" in a more comprehensive manner. Harm (crime) can be defined as "the expression of some agency's energy to make a difference to others and it is the exclusion of those others who in the instant are rendered powerless to maintain or express their humanity." In other words, harm revolves around imposing power on the other without being subject to any meaningful counter. By "agency we mean those who invest energy ["excessive investors"] in denying others through harms of reduction or repression." Agents (and agency) could be defined as a human being (or human beings), social identities (women, men), various groups (ethnic, racial, etc.), political parties, social and cultural institutions, agents of social control (i.e., police), the legal apparatus (the legal system and its laws), the state (and its various organs, etc.).<sup>7</sup>

Two forms of harm can be identified: harms of reduction and harms of repression. (1) *Harms of reduction* "occur when an offended party experiences a loss of some quality relative to their present standing." They occur "when a person is reduced to one or more... dimensions, each of which itself is socially constituted and therefore subject to change over time, as well as culturally." In other words, harms of reduction occurs when a person is reduced in some way (i.e., from being a fully functioning human being to being something less than that, due to some crippling harm received; from an active agent to a passive agent; from the ability to say "no," to its inability; from being able to speak against the State, to being denied the ability to criticize, etc.).<sup>8</sup>

(2) *Harms of repression* "occurs when an offended party experiences a limit or restriction preventing them from achieving a desired

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6 Excerpts from Henry and Milovanovic, *Constitutive Criminology* (1996); Milovanovic and Henry, "Constitutive Definitions of Crime," in Henry and Lanier, *What is Crime?* (2001).

7 More abstractly, they also include COREL sets, historical configurations of relatively autonomous coupled iterative loops that "vary in their effects in time, place, and manner." COREL sets, derived from chaos theory, stand for how various institutions in society find themselves interconnected, having differential and nonlinear effects on each other, in particular moments in history.

8 For more subtle forms of racism in the US which can be seen as harms or reduction, see Dragan Milovanovic and Katheryn Russell's (2001) study of "petit apartheid."

position or standing.” “[T]hey diminish a person’s or group’s position, or deny them the opportunity to attain a position they desire, a position that does not deny another from attaining her or his or their own position.” Consider, for example, Schwendinger and Schwendinger (2001) and Abraham Maslow’s humanistic psychology and the idea of the drive for the fulfillment of potentialities (self actualization). If these are repressed because of persons, social systems, or social relationships, they can be seen as harms of repression. Consider, for example, racism, sexism, ageism, etc. In addition, if a capitalist system denies a high percentage of its citizens a decent wage and living condition, if it systematically maintains a high percentage of minorities in poverty, if it places impediments on certain groups in their ability to self actualize, it can be seen as engaging in harms of repression.

Consider, for example, Johnson and Leighton’s (1995) careful examination of statistics indicating the system-wide repression of poor black men in the US. Their statistics, for example, demonstrate the disproportionate early death rates of young black men. Their study indicates a form of “black genocide” taking place in the US, even though it is not officially called that. If a practice of genocide can be shown, whether attributable to individuals, the State, or social systems, it can be seen as a harm of repression.

A harm rather than a mere change revolves around five factors: (1) “whether the entity suffering the change perceives it as a loss”, (2) “whether the person or entity is fully free to object to the exercise of power responsible for imposing the reduction,” (3) “whether they are free to resist it,” (4) “whether their resistance is able to prevent the reduction occurring,” and (5) whether “change...[is] coproduced through a process of conscious active participation by all of those affected by it.”

Thus our conceptualization of crime:

“Harms, or ‘crimes,’ are expressions of the exercise by one or more agencies of power [excessive investors] over others, who in the instant of that expression, whether momentary or sustained over time, are rendered powerless to make a difference. Crime is thus a denial of the other’s humanity. In the instance of its expression, the victim, therefore, is rendered a non person, a less complete human being, incapable of making a difference.”

In short, our definition revolves around the capacity to make a difference. When power is inflicted on another and the other cannot make a difference, she or he is subject to harms or crimes. In this position, the person becomes a non person, a less complete human being, a person who cannot make a difference. “Crimes are nothing less than moments in the expression of power, such that those who are subjected to them are

denied their own contribution to the encounter and often to future encounters, they are denied their worth. Crime is the power to deny others their ability to make a difference.”

The “criminal” (agent) is thus an “excessive investor” in power to dominate. He or she is an excessive investor in harms of reduction or harms of repression. In other words, an “excessive investor” in power over others is the essential element defining the “criminal” (agent, or agency). Implicit in our definition, of course, is a vision of a humane society where power is not distributed in ways where human beings remain subjugated.

## CONCLUSION

To embrace the legalistic definition of crime is to be imprisoned in state, politically dictated, and legalistically dictated logic. A more sociological investigation would consider a broader understanding as to what in fact is “harm.” The Schwendinger and Schwendinger (2001) analysis began this more comprehensive analysis. Our constitutive definition is offered as furthering this discussion so that we as criminologists do not limit ourselves to arbitrary categories in crime construction.

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