IS "WHITE COLLAR CRIME" CRIME?

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THE ARGUMENT has been made that business and professional men commit crimes which should be brought within the scope of the theories of criminal behavior.[1] In order to secure evidence as to the prevalence of such white collar crimes an analysis was made of the decisions by courts and commissions against the seventy largest industrial and mercantile corporations in the United States under four types of laws, namely, antitrust, false advertising, National Labor Relations, and infringement of patents, copyrights, and trademarks. This resulted in the finding that 547 such adverse decisions had been made, with an average of 7.8 decisions per corporation and with each corporation having at least 1.[2] Although all of these were decisions that the behavior was unlawful, only 49 or 9 per cent of the total were made by criminal courts and were *ipso facto* decisions that the behavior was criminal. Since not all unlawful behavior is criminal behavior, these decisions can be used as a measure of criminal behavior only if the other 498 decisions can be shown to be decisions that the behavior of the corporations was criminal.

This is a problem in the legal definition of crime and involves two types of questions: May the word "crime" be applied to the behavior regarding which these decisions were made? If so, why is it not generally applied and why have not the criminologists regarded white collar crime as cognate with other crime? The first question involves semantics, the second interpretation or explanation.

A combination of two abstract criteria is generally regarded by legal scholars as necessary to define crime, namely: legal description of an act as socially injurious, and legal provision of a penalty for the act.[3]

When the criterion of legally defined social injury is applied to these 547 decisions the conclusion is reached that all of the classes of behaviors regarding which the decisions were made are legally defined as socially injurious. This can be readily determined by the words in the statutes—"crime" or "misdemeanor" in some, and "unfair," "discrimination," or "infringement" in all the others. The persons injured may be divided into two groups: first, a relatively small number of persons engaged in the same occupation as the offenders or in related occupations, and, second, the general public either as consumers or as constituents of the general social institutions which are affected by the violations of the laws. The antitrust laws are designed to protect competitors and also to protect the institution of free competition as the regulator of the economic system and thereby to protect consumers against arbitrary prices, and to protect the institution of democracy against the dangers of great concentration of wealth in the hands of monopolies. Laws against false advertising are designed to protect competitors against unfair competition and also to protect consumers against fraud. The National Labor Relations Law is designed to protect employees against coercion by employers and also to protect the general public against interferences with commerce due to strikes and lockouts. The laws against infringements are designed to

[1] Edwin H. Sutherland, "White Collar Criminality," *American Sociological Review*. 5:1-12, February, 1940; Edwin H. Sutherland, "Crime and Business," *Annals of the American Academy of Political and Social Science*. 217:112-18, September, 1941.

[2] Paper on "Illegal Behavior of Seventy Corporations," to be published later.

[3] The most satisfactory analysis of the criteria of crime from the legal point of view may be found in the following papers by Jerome Hall: "Prolegomena to a Science of Criminal Law," *University of Pennsylvania Law Review*. 89:549-80, March, 1941; "Interrelations of Criminal Law and Torts," *Columbia Law Review*. 43:735-79, 967-1001, September-November, 1943; "Criminal Attempts—A Study of the Foundations of Criminal Liability," *Yale Law Review*. 49:789-840, March, 1940.

protect the owners of patents, copyrights, and trademarks against deprivation of their property and against unfair competition, and also to protect the institution of patents and copyrights which was established in order to "promote the progress of science and the useful arts." Violations of these laws are legally defined as injuries to the parties specified.

Each of these laws has a logical basis in the common law and is an adaptation of the common law to modern social organization. False advertising is related to common law fraud, and infringement to larceny. The National Labor Relations Law, as an attempt to prevent coercion, is related to the common law prohibition of restrictions on freedom in the form of assault, false imprisonment, and extortion. For at least two centuries prior to the enactment of the modern antitrust laws the common law was moving against restraint of trade, monopoly, and unfair competition.

Each of the four laws provides a penal sanction and thus meets the second criterion in the definition of crime, and each of the adverse decisions under these four laws, except certain decisions under the infringement laws to be discussed later, is a decision that a crime was committed. This conclusion will be made more specific by analysis of the penal sanctions provided in the four laws.

The Sherman antitrust law states explicitly that a violation of the law is a misdemeanor. Three methods of enforcement of this law are provided, each of them involving procedures regarding misdemeanors. First, it may be enforced by the usual criminal prosecution, resulting in the imposition of fine or imprisonment. Second, the attorney general of the United States and the several district attorneys are given the "duty" of "repressing and preventing" violations of the law by petitions for injunctions, and violations of the injunctions are punishable as contempt of court. This method of enforcing a criminal law was an invention and, as will be described later, is the key to the interpretation of the differential implementation of the criminal law as applied to white collar criminals. Third, parties who are injured by violations of the law are authorized to sue for damages, with a mandatory provision that the damages awarded be three times the damages suffered. These damages in excess of reparation are penalties for violation of the law. They are payable to the injured party in order to induce him to take the initiative in the enforcement of the criminal law and in this respect are similar to the earlier methods of private prosecutions under the criminal law. All three of these methods of enforcement are based on decisions that a criminal law was violated and therefore that a crime was committed; the decisions of a civil court or a court of equity as to these violations are as good evidence of criminal behavior as is the decision of a criminal court.

The Sherman antitrust law has been amended by the Federal Trade Commission Law, the Clayton Law, and several other laws. Some of these amendments define violations as crimes and provide the conventional penalties, but most of the amendments do not make the criminality explicit. A large proportion of the cases which are dealt with under these amendments could be dealt with, instead, under the original Sherman Law, which is explicitly a criminal law. In practice, the amendments are under the jurisdiction of the Federal Trade Commission, which has authority to make official decisions as to violations. The Commission has two principal sanctions under its control, namely: the stipulation and the cease and desist order. The Commission may, after the violation of the law has been proved, accept a stipulation from the corporation that it will not violate the law in the future. Such stipulations are customarily restricted to the minor or technical violations. If a stipulation is violated or if no stipulation is accepted, the Commission may issue a cease and desist order; this is equivalent to a court's injunction except that violation is not punishable as contempt. If the Commission's desist order is violated, the Commission may apply to the court for an injunction, the violation of which is punishable as contempt. By an amendment to the Federal Trade

Commission Law in the Wheeler-Lea Act of 1938 an order of the Commission becomes "final" if not officially questioned within a specified time and thereafter its violation is punishable by a civil fine. Thus, although certain interim procedures may be used in the enforcement of the amendments to the antitrust law, fines or imprisonment for contempt are available if the interim procedures fail. In this respect the interim procedures are similar to probation in ordinary criminal cases. An unlawful act is not defined as criminal by the fact that it is punished, but by the fact that it is punishable. Larceny is as truly a crime when the thief is placed on probation as when he is committed to prison. The argument may be made that punishment for contempt of court is not punishment for violation of the original law and that, therefore, the original law does not contain a penal sanction. This reasoning is specious since the original law provides the injunction with its penalty as a part of the procedure for enforcement. Consequently all of the decisions made under the amendments to the antitrust law are decisions that the corporations committed crimes.[4]

The laws regarding false advertising, as included in the decisions under consideration, are of two types. First, false advertising in the form of false labels is defined in the Pure Food and Drug Law as a misdemeanor and is punishable by a fine. Second, false advertising generally is defined in the Federal Trade Commission Act as unfair competition. Cases of the second type are under the jurisdiction of the Federal Trade Commission, which uses the same procedures as in antitrust cases. Penal sanctions are available in antitrust cases, as previously described, and are similarly available in these cases of false advertising. Thus, all of the decisions in false advertising cases are decisions that the corporations committed crimes.

The National Labor Relations Law of 1935 defines a violation as "unfair labor practice." The National Labor Relations Board is authorized to make official decisions as to violations of the law and, in case of violation, to issue desist orders and also to make certain remedial orders, such as reimbursement of employees who had been dismissed or demoted because of activities in collective bargaining. If an order is violated, the Board may apply to the court for enforcement and a violation of the order of the court is punishable as contempt. Thus, all of the decisions under this law, which is enforceable by penal sanctions, are decisions that crimes were committed.

The methods for the repression of infringements vary. Infringements of a copyright or a patented design are defined as misdemeanors, punishable by fines. No case of this type has been discovered against the seventy corporations. Other infringements are not explicitly defined in the statutes on patents, copyrights, and trademarks as crimes and agents of the state are not authorized by these statutes to initiate actions against violators of the law. Nevertheless, infringements may be punished in either of two ways: First, agents of the State may initiate action against infringers under the Federal Trade Commission Law as unfair competition and they do so, especially against infringers of copyrights and trademarks; these infringements are then punishable in the same sense as violations of the amendments to the antitrust laws. Second, the patent, copyright, and trade mark statutes provide that the damages awarded to injured owners of those rights may be greater than (in one statute as much as threefold) the damages actually suffered. These additional damages are not mandatory, as in the Sherman antitrust law, but on the other hand they are not explicitly limited to wanton and malicious infringements. Three decisions against the seventy corporations under the patent law and one under the copyright law included awards of such additional damages and on that account were classified in the tabulation of decisions as evidence of criminal behavior of the corporations. The other decisions, 74 in number, in regard to infringements were classi-

[4] Some of the antitrust decisions were made against meat packers under the Packers and Stockyards Act. The penal sanctions in this act are essentially the same as in the Federal Trade Commission Act.

fied as not conclusive evidence of criminal behavior and were discarded. However, in 20 of these 74 cases the decisions of the court contain evidence which would be sufficient to make a *prima facie* case in a criminal prosecution; evidence outside these decisions which may be found in the general descriptions of practices regarding patents, copyrights, and trademarks, justifies a belief that a very large proportion of the 74 cases did, in fact, involve wilful infringement of property rights and might well have resulted in the imposition of a penalty if the injured party and the court had approached the behavior from the point of view of crime.

In the preceding discussion the penalties which are definitive of crime have been limited to fine, imprisonment, and punitive damages. In addition, the stipulation, the desist order, and the injunction, without reference to punishment for contempt, have the attributes of punishment. This is evident both in that they result in some suffering on the part of the corporation against which they are issued and also in that they are designed by legislators and administrators to produce suffering. The suffering is in the form of public shame, as illustrated in more extreme form in the colonial penalty of sewing the letter "T" on the clothing of the thief. The design is shown in the sequence of sanctions used by the Federal Trade Commission. The stipulation involves the least publicity and the least discomfort, and it is used for minor and technical violations. The desist order is used if the stipulation is violated and also if the violation of the law is appraised by the Commission as wilful and major. This involves more public shame; this shame is somewhat mitigated by the statements made by corporations, in exculpation, that such orders are merely the acts of bureaucrats. Still more shameful to the corporation is an injunction issued by a court. The shame resulting from this order is sometimes mitigated and the corporation's face saved by taking a consent decree.[5] The corporation may insist that the consent decree is not an admission that it violated the law. For instance, the meat packers took a consent decree in an antitrust case in 1921, with the explanation that they had not knowingly violated any law and were consenting to the decree without attempting to defend themselves because they wished to co-operate with the government in every possible way. This patriotic motivation appeared questionable, however, after the packers fought during almost all of the next ten years for a modification of the decree. Although the sequence of stipulation, desist order, and injunction indicates that the variations in public shame are designed, these orders have other functions, as well, especially a remedial function and the clarification of the law in a particular complex situation.

The conclusion in this semantic portion of the discussion is that 473 of the 547 decisions are decisions that crimes were committed.

This conclusion may be questioned on the ground that the rules of proof and evidence used in reaching these decisions are not the same as those used in decisions regarding other crimes, especially that some of the agencies which rendered the decisions did not require proof of criminal intent and did not presume the accused to be innocent. These rules of criminal intent and presumption of innocence, however, are not required in all prosecutions under the regular penal code and the number of exceptions is increasing. In many states a person may be committed to prison without protection of one or both of these rules on charges of statutory rape, bigamy, adultery, passing bad checks, selling mortgaged property, defrauding a hotel keeper, and other offenses.[6] Consequently the criteria which have been used in defining white collar crimes are not categorically different from the criteria used in defining other crimes, for these rules are abrogated both in regard to white collar crimes and other crimes, including some felonies. The proportion of decisions rendered against corporations without the protection

[5] The consent decree may be taken for other reasons especially because it cannot be used as evidence in other suits.

[6] Livingston Hall, "Statutory Law of Crimes, 1887-1936," *Harvard Law Review*. 50:616-53, February, 1937.

of these rules is probably greater than the proportion rendered against other criminals, but a difference in proportions does not make the violations of law by corporations categorically different from the violations of laws by other criminals. Moreover, the difference in proportion, as the procedures actually operate is, not great. On the one side, many of the defendants in usual criminal cases, being in relative poverty, do not get good defense and consequently secure little benefit from these rules; on the other hand, the Commissions come close to observing these rules of proof and evidence although they are not required to do so. This is illustrated by the procedure of the Federal Trade Commission in regard to advertisements. Each year it examines several hundred thousand advertisements and appraises about 50,000 of them as probably false. From the 50,000 it selects about 1,500 as patently false. For instance, an advertisement of gum-wood furniture as "mahogany" would seldom be an accidental error and would generally result from a state of mind which deviated from honesty by more than the natural tendency of human beings to feel proud of their handiwork.

The preceding discussion has shown that these seventy corporations committed crimes according to 473 adverse decisions, and also has shown that the criminality of their behavior was not made obvious by the conventional procedures of the criminal law but was blurred and concealed by special procedures. This differential implementation of the law as applied to the crimes of corporations eliminates or at least minimizes the stigma of crime. This differential implementation of the law began with the Sherman antitrust law of 1890. As previously described, this law is explicitly a criminal law and a violation of the law is a misdemeanor no matter what procedure is used. The customary policy would have been to rely entirely on criminal prosecution as the method of enforcement. But a clever invention was made in the provision of an injunction to enforce a criminal law; this was not only an invention but was a direct reversal of previous case law. Also, private parties were encouraged by treble damages to enforce a criminal law by suits in civil courts. In either case, the defendant did not appear in the criminal court and the fact that he had committed a crime did not appear in the face of the proceedings.

The Sherman antitrust law, in this respect, became the model in practically all the subsequent procedures authorized to deal with the crimes of corporations. When the Federal Trade Commission bill and the Clayton bill were introduced in Congress, they contained the conventional criminal procedures; these were eliminated in committee discussions, and other procedures which did not carry the external symbols of criminal process were substituted. The violations of these laws are crimes, as has been shown above, but they are treated as though they were not crimes, with the effect and probably the intention of eliminating the stigma of crime.

This policy of eliminating the stigma of crime is illustrated in the following statement by Wendell Berge, at the time assistant to the head of the antitrust division of the Department of Justice, in a plea for abandonment of the criminal prosecution under the Sherman antitrust law and the authorization of civil procedures with civil fines as a substitute.

> While civil penalties may be as severe in their financial effects as criminal penalties, yet they do not involve the stigma that attends indictment and conviction. Most of the defendants in antitrust cases are not criminals in the usual sense. There is no inherent reason why antitrust enforcement requires branding them as such.[7]

If a civil fine were substituted for a criminal fine, a violation of the antitrust law would be as truly a crime as it is now. The thing which would be eliminated would be the stigma of crime. Consequently, the stigma of crime has become a penalty in itself, which may be imposed in connection with other penalties or withheld, just as it is possible to combine imprisonment with a fine or have a fine without imprisonment. A civil fine is a financial penalty without the additional penalty of stigma, while a criminal

[7] Wendell Berge, "Remedies Available to the Government under the Sherman Act," *Law and Contemporary Problems*. 7:111. January, 1940.

fine is a financial penalty with the additional penalty of stigma.

When the stigma of crime is imposed as a penalty it places the defendant in the category of criminals and he becomes a criminal according to the popular stereotype of "the criminal." In primitive society "the criminal" was substantially the same as "the stranger,"[8] while in modern society "the criminal" is a person of less esteemed cultural attainments. Seventy-five per cent of the persons committed to state prisons are probably not, aside from their unesteemed cultural attainments, "criminals in the usual sense of the word." It may be excellent policy to eliminate the stigma of crime in a large proportion of cases, but the question at hand is why the law has a different implementation for white collar criminals than for others.

Three factors assist in explaining this differential implementation of the law, namely, the status of the business man, the trend away from punishment, and the relatively unorganized resentment of the public against white collar criminals. Each of these will be described.

First, the methods used in the enforcement of any law are an adaption to the characteristics of the prospective violators of the law, as appraised by the legislators and the judicial and administrative personnel. The appraisals regarding business men, who are the prospective violators of the four laws under consideration, include a combination of fear and admiration. Those who are responsible for the system of criminal justice are afraid to antagonize business men; among other consequences, such antagonism may result in a reduction in contributions to the campaign funds needed to win the next election. Probably much more important is the cultural homogeneity of legislators, judges, and administrators with business men. Legislators admire and respect business men and cannot conceive of them as criminals, that is, business men do not conform to the popular stereotype of "the criminal." The legislators are confident that these business men will conform as a result of very mild pressures.

This interpretation meets with considerable opposition from persons who insist that this is an egalitarian society in which all men are equal in the eyes of the law. It is not possible to give a complete demonstration of the validity of this interpretation but four types of evidence are presented in the following paragraphs as partial demonstration.

The Department of Justice is authorized to use both criminal prosecutions and petitions in equity to enforce the Sherman antitrust law. The Department has selected the method of criminal prosecution in a larger proportion of cases against trade unions than of cases against corporations, although the law was enacted primarily because of fear of the corporations. From 1890 to 1929 the Department of Justice initiated 438 actions under this law with decisions favorable to the United States. Of the actions against business firms and associations of business firms, 27 per cent were criminal prosecutions, while of the actions against trade unions 71 per cent were criminal prosecutions.[9] This shows that the Department of Justice has been comparatively reluctant to use a method against business firms which carries with it the stigma of crime.

The method of criminal prosecution in enforcement of the Sherman antitrust law has varied from one presidential administration to another. It has seldom been used in the administrations of the presidents who are popularly appraised as friendly toward business, namely, McKinley, Harding, Coolidge, and Hoover.

Business men suffered their greatest loss of prestige in the depression which began in 1929. It was precisely in this period of low status of business men that the most strenuous efforts were made to enforce the old laws and enact new laws for the regulation of business men. The appropriations for this purpose were multiplied several times and persons were selected for their vigor in ad-

[8] On the role of the stranger in punitive justice, see Ellsworth Faris, "The Origin of Punishment," *International Journal of Ethics*. 25:54-67, October, 1914; George H. Mead, "The Psychology of Punitive Justice," *American Journal of Sociology*. 23: 577-602, March, 1918.

[9] Percentages compiled from cases listed in the report of the Department of Justice "Federal Antitrust Laws, 1938."

ministration of the laws. Of the 547 decisions against the seventy corporations during their life careers, which have averaged about forty years, 63 per cent were rendered in the period 1935-43, that is, during the period of the low status of business men.

The Federal Trade Commission Law states that a violation of the antitrust laws by a corporation shall be deemed to be, also, a violation by the officers and directors of the corporation. However, business men are practically never convicted as persons and several cases have been reported, like the six per cent case against the automobile manufacturers, in which the corporation was convicted and the persons who direct the corporation were all acquitted.[10]

A second factor in the explanation of the differential implementation of the law as applied to white collar criminals is the trend away from reliance on penal methods. This trend advanced more rapidly in the area of white collar crimes than of other crimes because this area, due to the recency of the statutes, is least bound by precedents and also because of the status of business men. This trend is seen in the almost complete abandonment of the most extreme penalties of death and physical torture; in the supplanting of conventional penal methods by non-penal methods such as probation and the case work methods which accompany probation; and in the supplementing of penal methods by non-penal methods, as in the development of case work and educational policies in prisons. These decreases in penal methods are explained by a series of social changes: the increased power of the lower socio-economic class upon which previously most of the penalties were inflicted; the inclusion within the scope of the penal laws of a large part of the upper socio-economic class as illustrated by traffic regulations; the increased social interaction among the classes, which has resulted in increased understanding and sympathy; the failure of penal methods to make substantial reductions in crime rates; and the weakening hold on the legal profession and others of the individualistic and hedonistic psychology which had placed great emphasis on pain in the control of behavior. To some extent overlapping those just mentioned is the fact that punishment, which was previously the chief reliance for control in the home, the school, and the church, has tended to disappear from those institutions, leaving the State without cultural support for its own penal methods.[11]

White collar crime is similar to juvenile delinquency in respect to the differential implementation of the law. In both cases, the procedures of the criminal law are modified so that the stigma of crime will not attach to the offenders. The stigma of crime has been less completely eliminated from juvenile delinquents than from white collar criminals because the procedures for the former are a less complete departure from conventional criminal procedures, because most juvenile delinquents come from a class with low social status, and because the juveniles have not organized to protect their good names. Because the juveniles have not been successfully freed from the stigma of crime they have been generally held to be within the scope of the theories of criminology and in fact provide a large part of the data for criminology; because the external symbols have been more successfully eliminated from white collar crimes, white collar crimes have generally not been included within these theories.

A third factor in the differential implementation of the law is the difference in the relation between the law and the mores in the area of white collar crime. The laws under consideration are recent and do not have a firm foundation in public ethics or business ethics; in fact certain rules of business ethics, such as the contempt for the "price chiseler," are generally in conflict with the law. These crimes are not obvious, as is assault and battery, and can be ap-

[10] The question may be asked, "If business men are so influential, why did they not retain the protection of the rules of the criminal procedure?" The answer is that they lost this protection, despite their status, on the principle "You can't eat your cake and have it, too."

[11] The trend away from penal methods suggests that the penal sanction may not be a completely adequate criterion in the definition of crime.

preciated readily only by persons who are expert in the occupations in which they occur. A corporation often violates a law for a decade or longer before the administrative agency becomes aware of the violation, and in the meantime the violation may have become accepted practice in the industry. The effects of a white collar crime upon the public are diffused over a long period of time and perhaps over millions of people, with no person suffering much at a particular time. The public agencies of communication do not express and organize the moral sentiments of the community as to white collar crimes in part because the crimes are complicated and not easily presented as news, but probably in greater part because these agencies of communication are owned or controlled by the business men who violate the laws and because these agencies are themselves frequently charged with violations of the same laws. Public opinion in regard to picking pockets would not be well organized if most of the information regarding this crime came to the public directly from the pick-pockets themselves.

This third factor, if properly limited, is a valid part of the explanation of the differential implementation of the law. It tends to be exaggerated and become the complete explanation in the form of a denial that white collar crimes involve any moral culpability whatever. On that account it is desirable to state a few reasons why this factor is not the complete explanation.

The assertion is sometimes made that white collar crimes are merely technical violations and involve no moral culpability, i.e., violation of the mores, whatever. In fact, these white collar crimes, like other crimes, are distributed along a continuum in which the *mala in se* are at one extreme and the *mala prohibita* at the other.[12] None of the white collar crimes is purely arbitrary, as is the regulation that one must drive on the right side of the street, which might equally well be that he must drive on the left side. The Sherman antitrust law, for instance, is regarded by many persons as an unwise law and it may well be that some other policy would be preferable. It is questioned principally by persons who believe in a more collectivistic economic system, namely, the communists and the leaders of big business, while its support comes largely from an emotional ideology in favor of free enterprise which is held by farmers, wage-earners, small business men, and professional men. Therefore, as appraised by the majority of the population it is necessary for the preservation of American institutions and its violation is a violation of strongly entrenched moral sentiments.

The sentimental reaction toward a particular white collar crime is certainly different from that toward some other crimes. This difference is often exaggerated, especially as the reaction occurs in urban society. The characteristic reaction of the average citizen in the modern city toward burglary is apathy unless he or his immediate friends are victims or unless the case is very spectacular. The average citizen, reading in his morning paper that the home of an unknown person has been burglarized by another unknown person, has no appreciable increase in blood pressure. Fear and resentment develop in modern society primarily as the result of the accumulation of crimes as depicted in crime rates or in general descriptions, and this develops both as to white collar crimes and other crimes.

Finally, although many laws have been enacted for the regulation of occupations other than business, such as agriculture or plumbing, the procedures used in the enforcement of those other laws are more nearly the same as the conventional criminal procedures, and law-violators in these other occupations are not so completely protected against the stigma of crime as are business men. The relation between the law and the mores tends to be circular. The mores are crystallized in the law and each act of enforcement of the laws tends to re-enforce the mores. The laws regarding white collar crime, which conceal the criminality of the behavior, have been less effective than other laws in re-enforcement of the mores.

[12] An excellent discussion of this continuum is presented by Jerome Hall, "Prolegomena to a Science of Criminal Law," *University of Pennsylvania Law Review*. 89:563-69, March, 1941.