The Problem of Crime

Third Edition

A Peace and Social Justice Perspective

Richard Quinney
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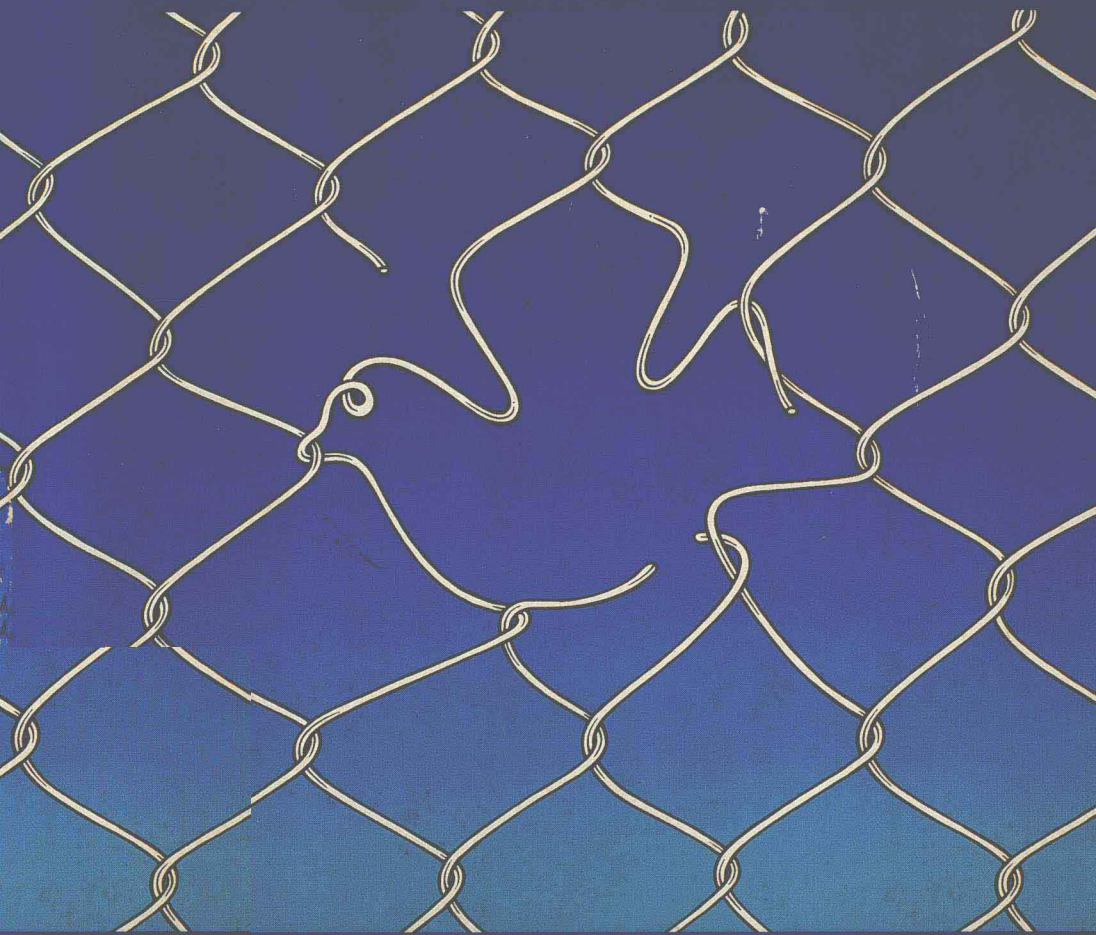

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Preface

We begin with a fundamental realization: No amount of thinking and no amount of public policy have brought us any closer to understanding and solving the problem of crime. The more we have reacted to crime, the farther we have removed ourselves from any understanding and any reduction of the problem. In recent years, we have reformulated the law, punished the offender, and quantified our knowledge. Yet the United States remains one of the most crime-ridden nations. In spite of all its wealth, economic development, and scientific advances, this country has one of the worst crime records in the world.

With such realization, we return once again—as if starting anew—to the subject of crime, a subject that remains one of our most critical indicators of the state of our personal and collective being. What is to be said is necessarily outside of the conventional wisdom of our understanding of the problem and of our society's attempt to solve it.

Several beliefs underlie our arguments in this book: (1) Thought of the Western rational mode is conditional, limiting knowledge primarily to what is already known; (2) Each life is a spiritual journey into the unknown and the unknowable, beyond the ego-centered self; (3) Human existence is characterized by suffering; crime is suffering; and the sources of suffering are within each of us; (4) Through love and compassion, beyond the ego-centered self, we can end suffering and live in peace, personally and collectively; (5) Crime can be ended only with the ending of suffering, only

when there is peace and social justice, and (6) Understanding, service, justice—all these—flow naturally from love and compassion, from mindful attention to the reality of all that is, here and now. A *criminology of peacemaking*—a nonviolent criminology of compassion and service—seeks to end suffering and thereby eliminate crime.

These observations and assumptions serve as the basis for our revision of *The Problem of Crime*. We build on the critical and Marxist foundations of the previous edition. In this revision we extend the perspective to incorporate the ultimate goals of peace and social justice. There can be no solution to the problem of crime without peace and social justice. They are the beginning of a world free of crime.

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Richard Quinney
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Crime and Social Order

The problem of crime begins as a problem of society. The initial problem is not that of crime, but the failure of a society to provide an authentic existence. To focus on the problem of crime outside its social context is to avoid the deeper meaning of crime in contemporary society. Likewise, to neglect the larger social order and its internal contradictions is to ignore the possibilities of creating a world liberated from the oppression and the crime that result from these contradictions. Our critical understanding of crime must be related to the larger context that makes crime possible. Our understanding is ultimately for the transformation of society.

THE CONCEPT OF CRIME

Important words go beyond the assigned boundaries of their dictionary meanings. A critical interpretation of the historical development of words in any language would bear witness to this. *Crime* is one such important word, a word that signifies different meanings to many different people and is always straining at the boundaries of its conventional meaning.

To a great extent the meaning of crime depends upon the social location from which one is approaching the problem of crime. Thus, crime begins to have meaning for us in the course of formulating an idea of crime related to our experience, an idea that is meaningful for our lives. The

concept necessarily depends upon the interests and perceptions of those who are constructing the concepts. There are, for instance, the concepts of crime held by the legal authorities of the state, including the police, lawyers, and judges. Criminologists, those who study crime, often construct their own ideas of crime. And, of course, various attitudes are held by the general public toward crime. All of the meanings of the word are ultimately rooted in different perceptions of reality.

In other words, diverse concepts of crime, rooted in diverse social histories, are employed simultaneously for different purposes. Therefore, in order to gain an understanding of crime, we must first consider its multiple meanings. The objective is to develop an understanding of crime that will be of maximum use in our critical investigations.

The various conceptions of crime differ from one another primarily in the extent to which they refer to the criminal law, that is, to the degree they conform to the state's definition of crime. On the other hand, the nonstate definitions of crime go beyond its legal meaning. For example, a completely subjective definition of crime and the criminal was noted by an early sociologist in the suggestion that the criminal is "a person who regards himself as a criminal and is so regarded by society" (Burgess, 1950, p. 35). On other occasions sociologists have argued that because criminal laws change in the course of time, vary from one locality to another, and are often arbitrary, the legal categories of crime do not provide satisfactory units for scientific analysis (Lindesmith & Dunham, 1941). Using a different approach, Thorsten Sellin (1938), in broadening the scope of criminology, suggested that criminology includes the study of the violation of all "conduct norms." But it is important to note that Sellin did not extend the concept of crime beyond violation of the criminal law, stating that "it is wiser to retain that term crime for the offenses made punishable by the criminal law and to use the term abnormal conduct for the violations of norms whether legal or not" (p. 32).

Edwin H. Sutherland (1949) proposed a definition of crime that has been adopted by most sociologists.

> The essential characteristic of crime is that it is behavior which is prohibited by the State as an injury to the State and against which the State may react, at least as a last resort, by punishment. The two abstract criteria generally regarded by legal scholars as necessary elements in a definition of crime are legal descriptions of an act as socially harmful and legal provision of a penalty for the act. (p. 31)

Following this conception, an act is a crime only when it is in violation of a criminal law.

The importance of the criminal law to a definition of crime was forcefully presented in 1933 by Jerome Michael and Mortimer J. Adler in their

examination of the field of criminology. According to their argument, there would be no crime without criminal law.

> If crime is merely an instance of conduct which is proscribed by the criminal code it follows that the criminal law is the formal cause of crime. That does not mean that law produces the behavior which it prohibits, although, as we shall see, the enforcement or administration of the criminal law may be one of the factors which influence human behavior; it means only that the criminal law gives behavior its quality of criminality. (p. 5)

Michael and Adler concluded that "the most precise and least ambiguous definition of crime is that which defines it as behavior which is prohibited by the criminal code" and that "this is the only possible definition of crime." Later, C. Ray Jeffery (1956) was to similarly argue: "Where does crime exist, if not in the legal codes?" (p. 671).

The legalistic definition of crime was taken to its extreme by Paul W. Tappan (1947), who suggested that "only those are criminals who have been adjudicated as such by the courts (p. 100). But Tappan's conception of crime is not as legalistic as it might appear at first glance. In this conception, Tappan recognized the important and essential point that a person is a criminal by the fact that a definition has been imposed on him or her by others, in particular, by the authorities of the state who are charged with the administration of the law. The labeling of persons and behaviors as criminal—the imposition of a legal category—is nothing other than a social enterprise. While not necessarily implying that the person must reach the stage of being adjudicated in the courts before he or she is regarded as criminal, a writer some time ago defined the criminal in terms of the legal action of others:

> A criminal is one who acts in such a way that organized society, in the form of the community of which he is a part, is compelled to declare that the act and the actual or potential consequences of that act are a menace or injury to it, and is forced to take steps to suppress further activities of his along similar lines. (Levitt, 1922, p. 90)

In a similar fashion, Richard R. Korn and Lloyd W. McCorkle (1959) have offered a definition of crime that indicates that an act is not a crime until the offender is caught, tried, and punished, crime thus being "an act or omission ascribed to a person when he is punished by the authorities in continuous political control over the territory in which he is" (p. 46; see also Turk, 1964). To a number of criminologists, then, crime is a *legal status* that is assigned to behaviors and persons by authorized agents of the state.

More recently the question has been raised as to whether the legalistic concept of crime limits the criminologist to the established order and its

Table 1.1: The Concepts of Crime

I. *Legal Concept:* Crime as a legal category assigned to conduct by authorized agents of the state.
Level of Meaning (corresponds to stage of legal process):
1. Crime = Violation of criminal law formulations (formulation stage)
2. Crime = Arrest (arrest stage)
3. Crime = Prosecution (prosecution stage)
4. Crime = Conviction (conviction stage)

II. *Social/Popular Concept:* Crime as conduct that does not necessarily involve either the violation of a criminal law or the application of the legal category to the conduct.

Level of Meaning:
Crime = Violation of *human rights*

official version of reality. The argument has been presented by Herman and Julia Schwendinger (1970) and others following their lead, that a legalistic concept prevents criminology from examining—or even questioning—the existing institutions and arrangements of the society as themselves criminal. There is, indeed, the danger that a sole reliance on the state's definition of crime can lead to an uncritical acceptance of the existing order. As unwitting ancillary agents of power, many criminologists often provide the kind of information that governing elites can find useful in manipulating and controlling those who threaten the established system (Hartjen, 1972). This discussion leads ultimately to the development of a critical and nonviolent criminology.

We recognize, then, that several concepts of crime coexist. Each concept serves the interests of those who treasure it. As shown in the table above, these concepts can be separated into two basic groups and five levels of meaning. The first four levels correspond to the legal concept of crime. Crime, according to these four levels of meaning, refers to the legal category that is assigned to conduct by authorized agents in a politically organized society. Each of these first four levels of meaning depends upon a certain stage of the legal process in which the category of crime is applied—formulation of criminal law, arrest, prosecution, and conviction. The fifth concept of crime is the one employed by the public (and sometimes by criminologists) to refer to conduct that does not necessarily involve either the violation

of a criminal law or the application of the legal category to the conduct. Undoubtedly several meanings of crime are contained within this last popular conception of crime, all involving a violation of basic human rights. The notion of crime as social injury, social harm, or a violation of human rights is, in effect, basic to those who strive to improve the human condition, for it provides the intellectual and practical tools for the reconstruction of society.

LEGAL ORDER AND THE STATE

The legal order of a society is recognized as the official regulator of the various realms of social life. Although several different kinds of normative systems operate to control behavior, the law of the state establishes the formal restraints for all members of the society. And associated with law are the formal means of assuring compliance with the official regulations.

The legal system in a society is thus regarded as the prime example of formal social control. Accordingly, the law consists of (1) explicit rules of conduct, (2) planned use of sanctions to support the rules, and (3) designated officials to interpret and enforce the rules (Davis, 1962). Roscoe Pound (1943), the legal scholar, observed that as societies have increased in complexity, the law as a formal means of control has developed to regulate social life. Regulation of the members of society has tended to shift from the informal controls of the family and religion to the formal control of the state. Pound noted that "in the modern world law has become the paramount agent of social control. Our main reliance is upon force of a politically organized state" (p. 20).

In addition to the concept of law as a type of formal social control, virtually all legal scholars and social scientists have defined it in terms of the body of rules created and enforced by a sovereign state. The state is seen as a political community that governs a territory and all the inhabitants within it through the use of authorized power and through the threat or application of punitive sanctions. Yet, certain scholars have departed from this prevailing view of law. Max Weber (1954), for example, conceived of legality as a legitimated pattern of normative rules, whether the rules are of the state or fall outside the province of the state. According to Weber, all legal orders are "externally guaranteed by the probability that coercion, to bring about conformity or avenge violation, will be applied by a *staff* of people holding themselves specially ready for that purpose" (p. 5). However, Weber was clear in distinguishing between the law of the state and the law of other bodies:

> We shall speak of "state" law, i.e., of law guaranteed by the state, only when, and to the extent that, the guaranty for it, that is, legal coercion, is exercised through the specific, i.e., normally direct and physical means of coercion of the political community. . . . Wherever the means of coercion which constitute the guaranty of a "right" belong to some authority other than the political, for instance, a hierocracy, we shall speak of "extra-state law". (pp. 14, 16)

Subsequent writers, taking Weber as a point of departure, have argued that "the traditional view of law as an integral part of the state has tended to obscure the fact that law exists in nonstate contexts as well" (Evan, 1962, p. 183). They point out that the growth of large-scale organizations is the representative characteristic of modern life and that in industry, government, education, medicine, and so on, the bureaucratic principle—the principle of rational coordination—prevails. Moreover, there is a modern trend toward a convergence of governmental and nongovernmental forms of organization and modes of action, a blurring of the public and private sectors of economy and society. Government today includes many activities not directly related to the functions of the state, and many private organizations tend to be quasi-public in operation. This phenomenon has prompted Philip Selznick (1961, 1963) to write the following in regard to the concept of legality:

> A kind of legality seems to develop within these large enterprises. In both public and private bureaucracies, authority and rule-making tend to take on the impersonality, the objectivity, and the rationality of a legal system. (1963, p. 88)

Although in basic agreement with Weber's concept of legality, Selznick (1968) takes exception to the notion that a legal order exists only when there is a coercive apparatus for purposes of norm enforcement. In modern organizations, legality may be achieved through *authority* rather than coercion. The legal order, according to this conception, is primarily an authoritative order, and to understand the distinctively legal the observer must look to that special kind of obligation in which persons act in accordance with authoritatively determined norms.

A major reason for expanding the concept of legality to include rules outside those of the political state is that such an expansion may provide for the comparative study of public and private normative orders in modern society. Likewise, the traditional concept of legality is called into question when there is a desire for the comparative study of primitive and early historical normative orders in relation to the legal systems of modern societies. To the anthropologist, interested in the study of primitive law, the problem is that of differentiating between custom and law in primitive

society. Bronislav Malinowski (1926), in his study of a primitive society on the Trobriand Archipelago, proposed and utilized the following "anthropological definition of law":

> The rules of law stand out from the rest in that they are felt and regarded as the obligations of one person and the rightful claims of another. They are sanctioned not by a mere psychological motive, but by a definite social machinery or binding force, based, as we know, upon mutual dependence, and realized in the equivalent arrangement of reciprocal services, as well as in the combination of such claims into strands of multiple relationship. The ceremonial manner in which most transactions are carried out, which entails public control and criticism, adds still more to their binding force. (p. 55)

The anthropologist Hoebel (1954), using a more restricted definition of law in distinguishing between law and other kinds of norms and sanctions, suggested that "a social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting" (p. 28). A definition of law that is even more limited in range is the one proposed by A. R. Radcliffe-Brown (1956): "Law will therefore be regarded as coterminous with that of organized legal sanctions. The obligations imposed on individuals in societies where there are no legal sanctions will be regarded as matters of custom and convention but not of law" (p. 212). In this latter conception of law, some societies have no law, only customs that are supported by other kinds of sanctions. After reviewing the various anthropological definitions of law, Ronald L. Akers (1965) has proposed a formulation for comparative purposes that, while not as restrictive as the definition by Radcliffe-Brown nor as broad as some other definitions, limits law to a normative system that is sanctioned by a third party (person or agency) other than the offender, the offended, or their relatives: "A social norm is law if its breach is met by physical force or the threat of physical force in a socially approved and regular way by a socially authorized third person" (p. 306).

Each definition of law is formulated for a particular purpose. For comparative purposes, either the comparison of highly complex normative orders in modern societies or the comparison of primitive and modern orders, a broad definition of law or legality may be useful. Moreover, what is essential to any definition, in addition to purpose, are the *theoretical assumptions* that underlie the formulation of the definition. For example, an assumption about the importance of rationality in social order will lead to one definition of law; a belief in the importance of sanctions will lead to another definition. And related both to the purpose of the observer

and the theoretical assumptions is a more general theory about the role of law in society and the relation of law to the political and economic organization of the state. (See the most recent extended discussion of the theoretical foundations of law in Milovanovic, 1988.)

THE NATURE OF CRIMINAL LAW

Criminal law is the ultimate form of legal control in the state. With its provisions for punishment and sanction, the criminal law stands ready to repress, among other things, any conduct that threatens the state. The concept of criminal law developed when the custom of private or community redress of wrong was replaced by the principle that the state is injured when it or one of its subjects is harmed. Thus, the right of the community to deal with wrongdoing was taken over by the state as the "representative" of the people. The state could now act by means of the criminal law to protect its own interests and those of the dominant economic class that it served.

In formalized language, what is criminal law and how does it differ from other forms of law? In answering this question, Henry M. Hart, Jr. (1958), has suggested that such inquiry should be approached from the view that criminal law is a "method," a way of doing something. The criminal law "is concerned with the pursuit of human purposes through the forms and modes of social organization, and it needs always to be thought about in the context as a method or process of doing something" (p. 403). What then are the characteristics of this method?

1. The method operates by means of a series of directions, or commands, formulated in general terms, telling people what they must or must not do. Mostly, the commands of the criminal law are "must-nots," or prohibitions, which can be satisfied by inaction. "Do not murder, rape, or rob." But some of them are "musts," or affirmative requirements, which can be satisfied only by taking a specifically or relatively specifically described kind of action. "Support your wife and children," and "File your income tax return."
2. The commands are taken as valid and binding upon all those who fall within their terms when the time comes for complying with them, whether or not they have been formulated in advance in a single authoritative set of words. They speak to members of the community; in other words, in the community's behalf, with all the power and prestige of the community behind them.

3. The commands are subject to one or more sanctions for disobedience which the community is prepared to enforce.
4. What distinguishes a criminal from a civil sanction, and all that distinguishes it, is the judgment of community condemnation which accompanies and justifies its imposition. . . . If this is what a "criminal" penalty is, then we can say readily enough what a "crime" is. It is not simply anything which a legislature chooses to call a "crime." It is not simply anti-social conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a "criminal" penalty. It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.
5. The method of the criminal law, of course, involves something more than threat (and, on due occasion, the expression) of community condemnation of anti-social conduct. It involves, in addition, the threat (and, on due occasion, the imposition) of unpleasant physical consequences, commonly called punishment. . . . The condemnation plus the added consequences may be considered compendiously, as constituting the punishment. (Hart, 1958, p. 403)

The above attempt to distinguish criminal law from other types of law is basically consistent with the long legal tradition that places emphasis on (1) the relation of the act or omission to society and (2) the nature of the reaction to the violation. Thus, Ronald M. Perkins (1957) has defined a crime as "any social harm defined and punishable by law" (p. 5). From this definition it is obvious that not all conduct that may be regarded as "social harm" in a society is regulated by law. For example, the tremendous social harm wrought by unemployment in our capitalist economy is not regarded as criminal according to Perkins's definition. Likewise, not all conduct subject to punishment by the law is recognized in the society as "social harm." These latter forms of conduct, while technically part of the written law, are not usually subjected to formal detection and prosecution by the state. In other words, law consists of more than the written law. There is, in addition, a "law in operation" that relies upon considerable discretion in the interpretation and application of the laws on the statute books. When this living law is considered alongside the written law, it is possible to regard criminal law as strictly formal regulation of behavior that is deemed harmful to society and that is formally subject to punishment by the state. Thus, rules are criminal laws if, and only if, they (1) have been created by the state, (2) contain provisions for punishment to be administered upon substantiation of

their violation, and (3) provide for the punishment to be administered by the state in the name of society.

The basic conceptual difference, then, between criminal and civil law is that criminal law defines conduct that is *believed* to be against the interest of the *society*, whereas civil law refers to conduct that is against the interest of the *individual*. In other words, a *crime* in the legal sense is a social wrong and a *tort* is a civil, or private, wrong. The distinction, however, is not always easy to maintain in practice. The practical difficulty is that any given act or omission may at the same time involve both a criminal and a civil wrong.

> The conventional view is that crime is an offense against the state, while, in contrast, a tort in violation of civil law is an offense against an individual. A particular act may be considered as an offense against an individual and also against the state, and is either a tort or a crime or both according to the way it is handled. A person who has committed an act of assault, for example, may be ordered by the civil court to pay the victim a sum of $500 for the damages to his interests, and he may also be ordered by the criminal court to pay a fine of $500 to the state. The payment of the first $500 is not punishment, but payment of the second $500 is punishment.
>
> This distinction between individual damage and social harm is extremely difficult to make in the legal systems of nonliterate societies, where court procedures are relatively informal. Even in modern society, the distinction is dubious, for it rests upon the assumption that "individual" and "group" or "state" are mutually exclusive. For practical purposes, the individual is treated as if he were autonomous, but in fact an act that harms an individual also harms the group in which he has membership. Also, in modern society the indefiniteness of the distinction between torts and crimes is apparent when the victim of an act which is both a tort and a crime uses the criminal law as a method of forcing restitution which could not be secured with equal facility in the civil courts. (Sutherland & Cressey, 1974, p. 8)

Regardless of the practical problem of administering criminal and civil law, the question remains as to the origin of the legal concept of crime. Some legal scholars maintain, as did Weber (1954, p. 50), that the distinction between tort and crime was unknown in primitive law and in the otherwise complex legal systems of ancient societies. One difficulty in establishing the beginnings of criminal law has been the failure to distinguish between crime as a concept and crime as a term. *The Oxford English Dictionary* gives the fourteenth century as the date of the earliest reference to the word *crime*. If one is looking for crime in the English vocabulary, this may be true. On the Continent, the term *causae criminales* was recorded as early as A.D. 614 in the edict of the Merovingian King Chlotar. Thus,