

THE OXFORD HANDBOOK OF

CRIMINAL LAW

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CHAPTER 1

CRIMINOLOGY

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I. INTRODUCTION TO CRIMINOLOGY

OVER the past half century or so criminological teaching and research has grown exponentially, a fact that would normally give rise to optimism and collective self-congratulation. But paradoxically, many of the field's leading lights, especially theorists, feel that the subject is in a state of deep fragmentation and suffers from a loss of purpose. Some of the pessimists—who often cite the field's very success in attracting government and university resources as a symptom of the collective illness—are currently leading campaigns to “save” true or scientific or “critical” criminology.¹ Others are more or less quietly abandoning criminology by attempting to morph it into a broader and more timely and/or theoretically interesting enterprise, such as the study of regulation and order, the study of risks and risk management, or the study of security management.²

¹ James Williams and Randy Lippert, “Governing the Margins: Exploring the Contribution of Governmentality Studies to Critical Criminology in Canada,” (2006) 48 *Canadian Journal of Criminology and Crim. Justice* 5 ff.

² Jennifer Wood and Clifford Shearing, *Imagining Security* (2013); Richard Ericson and Kevin Haggerty, *Policing the Risk Society* (1997); Pat O'Malley, *Risk, Uncertainty, and Government* (2004); Lucia Zedner, *Security* (2010).

In one of many worried “state of the union” essays produced in 2007 by leading theorists, Oxford criminologist Lucia Zedner asks whether criminology can adapt and innovate and thus maintain its relevance in a world that is focused more on risks and security than on criminal acts.³ And in a move that is typical of the general shape of theorists’ crisis discourse, Zedner exhorts colleagues to deepen criminological inquiries by learning from a variety of disciplines, from economics to moral philosophy—while, oddly, neglecting to even mention criminal law scholarship, despite the fact—or perhaps because of the fact—that she is a professor in a renowned law faculty.⁴

This chapter does not provide a new and improved diagnosis, much less a new prescription, for the field’s collective malaise. Any general argument about what criminology should become would be quite at odds with our own analysis of the historical roots of the current identity crisis. The reason why we do not join in the hand-wringing about what criminology should become or how it can be saved is that, in our view, there is no such thing as “criminology” as a whole—there is no one entity the future of which one can discuss.

That criminology is not and has never been a coherent discipline, but is rather a field or a topic area upon which bits of various disciplines (law, psychology, sociology, etc.) converge is a long-established view—the view that gave rise, in the 1950s and 1960s, to such interdisciplinary research centers as the Cambridge Criminology Institute and the Centre for Criminology at the University of Toronto (now Centre for Criminology and Sociolegal Studies). But our point here is a more novel one. We recognize that criminology is a topic area rather than a discipline; but we also point out, based on a survey of the history and current shape of the field, that even as a topic area criminology lacks clear boundaries and a shared mission. Perhaps once upon a time one could say that criminology was the scientific study of (a) the causes of crime and (b) the best way to address crime through criminal justice measures. However, for several decades now academic criminologists have been reconceptualizing their field in ways that undermine the “crime” focus, either by shifting attention to forms of social regulation that are outside the criminal law or by burying crime in a much broader category (risk; security; regulation).

While criminology’s turn away from criminality is of relatively recent vintage, if one looks at the history of the enterprise one sees that well before “crime” began to be supplanted by such broad categories as security and risk, researchers working under the banner of criminology were actually pursuing quite different projects, many of which were not primarily concerned with crime or criminality. We thus argue that it is helpful to see “criminology” as a bundle of several distinct enterprises

³ Lucia Zedner, “Pre-Crime and Post-Criminology,” (2007) 11 *Theoretical Criminology* 261 ff.

⁴ Zedner, (2007) 11 *Theoretical Criminology* 261 ff., 272.

that had separate (though often intertwined or at least connected) historical trajectories. In what follows we will provide a brief sketch of four different projects which are all plausible meanings for the word “criminology,” thus emphasizing divisions and divergences that we feel are minimized in most general accounts of the history or the current state of “criminology.”

For the purposes of the present chapter it is important to point out that only one of the four principal criminological research traditions—the second one, namely the empirical study of criminal law and criminal justice mechanisms undertaken with a view to reform—has the criminal law, and criminal justice policy, at its core. When criminology is dismissed by law professors as nothing but applied policy studies, this is the tradition that they have in mind. Criminal law scholars, especially theorists, who dismiss or simply ignore empirical research on criminal justice policies and techniques because they lack theoretical depth may believe that this disposes of the whole criminological question. This chapter shows, however, that while the policy-oriented study of particular criminal justice mechanisms, useful as it is, has little theoretical sophistication (for the most part), it should nevertheless not be neglected. Furthermore, there are other important research traditions huddling under the criminological umbrella with which criminal law scholars should be acquainted. While in turn often guilty of avoiding legal and political questions, these research traditions have made very significant contributions to our understanding of social ordering processes, regulatory logics, and the human dimensions of breaking and enforcing rules—that is, the larger social dynamics of order, disorder, governance, and compliance that criminal law scholars neglect at their peril.

Criminal law scholars and teachers can indeed learn something from all the research traditions that have since the beginning contributed to “criminology.” Some of the studies carried out by criminologists shed light on unintended effects of criminal law reforms and are thus informative albeit atheoretical. Others, for instance most of those in the mainstream American sociological tradition, studiously avoid discussing law and state power in general, but could nevertheless be used by criminal lawyers to question the rational-choice, individualist assumptions about “persons” and “acts” that are generally taken for granted in criminal law writings. And because sociological research traditions have done the most to explore the dynamics of stigma, coercion, compliance, and governance in general, we will spend most of the chapter describing largely sociological research traditions—though the term “sociological” is somewhat of an awkward fit, since urban geographers and anthropologists have in recent years emerged as leading scholars whose work is read by younger sociologists. Our brief survey will conclude that criminal law scholarship and teaching can benefit from closer interactions with various types of empirical and theoretical work that shed light on key questions about regulation, coercion, and state power—even if such work does not directly address criminal law’s own questions about itself.

An important caveat here is that the focus of our chapter is social science research; we are not in a position authoritatively to comment on the work of biologically oriented psychiatrists, molecular biologists, neuroscientists, etc. who are exploring biochemical and other physiological processes that may have a bearing on people's propensity to commit crimes. It has been traditional for social construction-oriented criminologists to cast aspersions on biological and biomedical approaches to crime and to polemicize in favor of nurture and against nature; but we prefer to avoid unnecessary large-scale polemics and instead focus on criminological research located within social science, which is already a complex and heterogeneous field.

But the biomedical and natural sciences were not always as separate from the social sciences as they have become in today's academy. We will, therefore, begin with a very brief commentary on knowledges of crime and criminality that Foucault called the "psy" knowledges. This term refers mainly to psychology and psychiatry but also covers psychologically informed projects such as those found in clinical social work. The section on the psy knowledges is largely historical and meant primarily to contextualize the "social" knowledges described in the rest of the chapter; as mentioned previously, it is not possible within the confines of this chapter to cover current developments in forensic psychology and psychiatry.

II. THE RISE OF PSY KNOWLEDGES

The criminal law has traditionally been focused on particular acts to be judged mainly according to the seriousness of the crime and/or the evil intentions of the offender. As Foucault famously pointed out, the logic of criminal law thus clashes with the logic of the late nineteenth-century enterprises of psychology and psychiatry, which focused on the person and his/her identity—that is, on the delinquent, not the offender.⁵ If the history of sexuality saw, in the late nineteenth century, a shift away from acts such as sodomy and toward inner identities (the homosexual being the paradigm case)—with the "case history" replacing the single act as the target of both knowledge and power—so, too, did the history of criminal justice undergo a shift whereby crimes began to appear as relatively unimportant symptoms of an underlying "abnormal" identity.⁶

⁵ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (1975).

⁶ Michel Foucault, *The History of Sexuality: An Introduction*, Vol. 1 (1980); David Garland, *Punishment and Welfare: A History of Penal Strategies* (1985).

While the struggle between the criminal law and the psy knowledges is very important to understand trends in modern governance, its impact, at a practical level, within criminal justice settings, has been exaggerated, not least by Foucault himself. In fact, from the beginning of the “psy” sciences—around the 1860s—until today, psychiatrists have intervened in very few cases—mainly horrific murders in which economic motives were not thought to play a role.⁷ While the process known as the medicalization of deviance acquired traction at various points (especially in the immediate postwar period, a time in which it was easier than at any time before or since to garner new resources for medical as well as correctional institutions), the vast majority of offenders have never been “psychiatrized” or “medicalized.” Indeed, while early feminist criminologists argued that women’s crime and deviance has generally been historically subject to more medicalization than men’s,⁸ empirical studies of women’s imprisonment have shown that doctors of any kind, psychiatric or not, have played but a very small role in the criminal justice system, especially within correctional settings.⁹ Religious organizations such as the Salvation Army and the Catholic Church, and lay, non-expert groups and individuals such as Elizabeth Fry and John Howard, were crucial actors in the development of the penitentiary system and still play a much larger role in defining personal problems and reforming prisoners than psychologists or physicians.

The “mad vs. bad” question has therefore played a less important role in the history of criminal law and criminal justice than many people believe. It continues to raise its head in particular situations (e.g. today, cases of abused women murdering their abusers); but if we are to venture a generalization we would have to say that psychiatry has been and still is a minor player in the realm of criminal justice. The psy experts, of course, have their own networks, their authoritative texts, and their channels for influencing public opinion; but they directly challenge standard criminal law accounts of criminality only in special situations.

If psychological and psychiatric theories of the human soul have challenged criminal law’s emphasis on personal responsibility for acts in a direct way only occasionally, there are nevertheless some psy “inventions” that have become integral to the working of criminal justice, and that should therefore be understood by criminal lawyers. Today, the most important “psy” contribution to criminal justice is a set of tools designed not to probe and diagnose deep psychological abnormalities but simply to gather actuarial data on crime and recidivism. The hope that

⁷ Martin J. Wiener, *Reconstructing the Criminal: Culture, Law, and Policy in England, 1830–1914* (1990); Joel Peter Eigen, *Witnessing Insanity: Madness and Mad-Doctors in the English Court* (1995); Joel Peter Eigen, *Unconscious Crime: Mental Absence and Criminal Responsibility in Victorian London* (2003).

⁸ See e.g. Russel R. Dobash and Sue Gutteridge, *The Imprisonment of Women* (1986).

⁹ See e.g. Kelly Hannah-Moffat, *Punishment in Disguise: Penal Governance and Canadian Women’s Imprisonment* (2001).

gave rise to the actuarial project was that such aggregate data, if properly analyzed, would have some predictive value—in respect of the population in general, at any rate; actuarial data's lack of ability to predict any individual's future acts is, as ever, its Achilles heel.

Risk assessment scales are now used everywhere: to sort those convicted of crimes into various institutions and programs, to gauge the risk that society incurs when releasing someone on parole, and, more generally, to try to manage the risks of reoffending. More worrisome from a criminal law perspective is the use of aggregate data preventively to target people who fit certain “risk profiles”—as carried out in airport screening as well as in street law enforcement.¹⁰

Risk assessment scales are produced by psychologists who gather data on such “risk factors” as poverty, unsettled family structure, low educational achievement, drug and alcohol habits, etc. and link these to data on crime. However—and this is an important reason for the popularity of such tools—once created, the risk assessment scales do not need much if any expertise to be administered. Any probation officer can check off the boxes and generate a workable result, one that usually takes the form of a high-risk, medium-risk, or low-risk designation. Indeed, any school teacher could use the same scales to “predict,” with some accuracy—at least in regard to a sufficiently large sample—what type of pupil from what type of family is likely to end up in trouble with the law. The risk scales do not tell us anything we would not know from other sources, since it has long been known that engaging in criminal activity, especially on a regular basis, is not something that is randomly distributed in the population. But having a checklist and a “risk score” on paper helps authorities to justify their decisions, to the public as well as to their superiors—with managing any reputational risks to the institution playing a more important role than either treatment or justice, in this age of “audit cultures.”¹¹ A further feature that explains the ubiquity and popularity of risk assessments is that those scores are not hardwired to any one political or legal project: they can be used to help the risky offender or the child at risk access needed resources, but they can also be used to take coercive measures for the security of the institution (or both).

Risk factor analysis is inherently deterministic—those whose fathers were unemployed and/or alcoholic end up with higher risk scores, and nothing they do in their own life changes that score. Such determinism is clearly at odds with the logic of the criminal law, which takes it for granted that every person who is not insane or incapacitated could indeed have chosen to do otherwise. This direct conflict,

¹⁰ Bernard Harcourt, *Against Prediction: Profiling, Policing, and Punishment in an Actuarial Age* (2007); Kevin Stenson and Robert Sullivan (eds.), *Crime, Risk, and Justice: The Politics of Crime Control in Liberal Democracies* (2001); Pat O'Malley, *Crime and Risk* (2010).

¹¹ Marilyn Strathern (ed.), *Audit Cultures: Anthropological Studies in Accountability, Ethics, and the Academy* (2000).

however, is swept under the rug by means of a division of labor embodied in the temporal progress of a criminal case. The verdict itself, the core of criminal law, is arrived at using almost exclusively legal means: by contrast, what we could call the anti-legal logic of risk profiling plays a large role *before* the person is charged (e.g. as police officers decide which drivers to pull over and stop) and *after* the verdict (in sentencing and in correctional settings).

If one takes a doctrinal perspective on the criminal law one is likely to focus almost entirely on what is or is not a crime and on what determines or should determine verdicts. In doing so, the larger governance processes that bring disproportionate numbers of certain kinds of people into court in the first place, and the processes that afterward determine offenders' specific, post-conviction fate, are both obscured from view. It is these pre-prosecution and post-conviction phases that have come to be dominated by risk profiling, in both its commonsense versions (racial profiling and bail court decision-making) and in the expert-produced risk tools, such as the checklists used to make decisions about sentencing, parole, and correctional programs. Therefore, those criminal lawyers who want to expand their studies to include more than the traditional questions of guilt and responsibility—those who appreciate that courts only see those people who are apprehended by police for what are often risk-profiling reasons, and that courts' verdicts send people into a system that will then use profiling logics that reinforce and harden social inequality—should acquaint themselves with some of the vast literature on risk management and risk profiling. These tools—not the old-fashioned psychiatric diagnosis of Hitchcock's *Psycho* fame—are, indeed, central to criminal justice today, even if their importance is often hidden from defense lawyers and judges, who only see offenders one at a time and in the context of either a plea bargain or a trial, neither of which use actuarial data or risk predictions systematically. Bernard Harcourt's highly critical survey of the history and current deployment of risk information and risk assessment tools, tellingly entitled *Against Prediction*, would be a good place to start.¹² Critical studies of risk assessment practices are much more relevant to the everyday working of criminal justice and criminal law than the classic studies of medical vs. legal theories of responsibility produced by scholars studying unusual trials featuring unusual criminals (mothers who kill their children, psychotic serial killers, etc.), trials that shed no light at all on the run-of-the-mill cases. The run-of-the-mill case has never featured psychiatry; but it now may indeed feature a risk assessment score that may have more impact on the offender's future life than the verdict itself.

This brings us to the first of the more or less sociological research traditions that we believe are important for criminal lawyers: empirical studies of criminal law and

¹² Harcourt (n. 10).

criminal justice that have an implicit or explicit reformist agenda and shun philosophical questions in favor of policy analysis.

III. EMPIRICAL STUDIES OF CRIMINAL LAW/CRIMINAL JUSTICE

One moment often cited as the beginning of criminology is the European Enlightenment effort to rethink criminal law and state punishment. As is well known, Cesare Beccaria and his contemporaries, sharing the late eighteenth-century's general enthusiasm to reform state power in a humanist and liberal direction, thought that the key function of criminal law and criminal justice was not, or no longer, to promote and uphold "the king's peace" by sheer fear of physical punishment. Instead, criminal law and the associated system of state punishment could function, they believed, rationally to deter individuals from offending and implicitly to gain the consent of the people being punished to their own punishment. A criminal justice system based on social contract theories of sovereignty and utilitarian views about inflicting only as much pain as is absolutely necessary to deter would, it was felt, include the offender in the polis instead of excluding or shaming him/her. It would, simultaneously, also educate the general population in the civic ideals of rational choice and individual freedom, thus building a state that would finally unite "sense and sensibility," rationality and human fellow-feeling.

While Beccaria's vision can be said to be one of the foundations of modern criminology, and indeed is still the unofficial creed of most criminal justice researchers (even those who never read either legal or social theory), Beccaria's own work proceeded primarily philosophically, not empirically. Although he was interested in acquiring information about criminal law and justice, when discussing such topics as the brutalizing effects of harsh punishments he did not refer to empirical studies of either offenders or the general public—not surprisingly, since statistics was in its infancy, public opinion surveys were unknown, and neither psychology nor any of the other social sciences had yet been invented.

Later developments in the Beccaria tradition—such as the limitation of the death penalty to fewer crimes, and the attempt at graduating sentences to fit the gravity of the crime (mainly by establishing specific prison terms for specific crimes, and to a lesser extent through graduated fines)—were also motivated more by philosophical beliefs than by anything resembling what would now be called social science evidence. It was only toward the end of the nineteenth century, when tools from psychology and sociology began to be used both by correctional officials and by the

small number of academic researchers who were interested in criminal justice, that “evidence-based” criminal justice policy can be said to have begun.

In France, social “facts” pioneers, notably Adolphe Quetelet, began to examine crime as a social phenomenon, by which was meant that examination of crime statistics could reveal the extent to which crime could be understood as something other than the product of free will. His identification of correlations between crime and such factors as age, gender, poverty, and education founded what was to become a powerful tradition of positivist criminology which dominated criminology until the mid-twentieth century, and even later in many places. In this approach, crime came to be understood as socially (and psychologically) determined. In effect, this not only challenged the free will assumptions of Beccaria and of most criminal justice, but clearly established what was thought to be a scientific basis for the governance of crime through the manipulation of psychological, social, and population factors. While most of this early work was pursued in France and elsewhere on the continent, it was to be in the United States that it was to grow most prolifically and become highly influential.¹³ Indeed, as David Garland has mapped out for Britain,¹⁴ a major struggle emerged between policies that assume free will and moral culpability attract punishment and, on the other hand, a “scientific” vision of crime as the effect of social or psychological determinants thus attracting therapeutic, educational, and social alleviation interventions.

In the first years of the twentieth century the sociology department at the University of Chicago, which also, and not coincidentally, pioneered urban sociology, teamed up with the state of Illinois department of corrections to undertake some of the world’s first actuarial studies of crime and recidivism.¹⁵ But in the postwar era in American criminology (which strongly influenced criminology elsewhere in the English-speaking world), approaches growing out of the Chicago tradition and the macrosociological tradition established by Quetelet began to link crime to major features of social structure. “Anomie” or “strain” theory explained high crime rates among the working classes by reference to disjunctions between strongly emphasized and pervasive social values underlining material success and “blocked” opportunity structures.

The potentially radical overtones of the “strain” model were later tempered by a reinterpretation in which American society was understood to be “norm deficient,” so that the values of individual success were not matched by equally strong norms reinforcing legitimate means to success. In turn, this was frequently hypothesized to give rise to “delinquent subcultures,” particularly among new immigrant populations and their children, who were represented as having even weaker attachment to American norms of legitimate behavior. Thus, what became by far the predominant sociological approach in the Anglophone world after World War II shifted ground

¹³ Harcourt (n. 10).

¹⁴ Garland (n. 6).

¹⁵ Harcourt (n. 10) 40–45 ff.

from a potentially radical account, to one that became quite compatible even with law-and-order politics. Either way, perhaps precisely because its focus was on broad sociological processes, the “strain” model had very little visible impact on criminal justice and, especially, on criminal law.

In Britain, early social science methods also began to be used to study criminality and recidivism, though there sociology was less advanced (due to the intellectual conservatism of the major universities), whereas the paradigm of racial/national “degeneration” was very powerful, being promoted by many leading physicians as well as public intellectuals. Thus, the focus was less on the mechanisms of criminal justice and more on the body and soul of the criminal, thought of as a distinct and degenerate human type.¹⁶

In Britain, too, research into criminal justice remained a marginal enterprise for many decades, indeed for most of the first half of the twentieth century. In Britain, for example, criminological teaching started only in the 1940s (with the London School of Economics’ Hermann Mannheim, a German émigré judge with a great interest in criminal justice policy, playing a key role); and criminological research only became established after the Home Office agreed to support the creation of the first criminological institute, at Cambridge University, in 1958. Strongly influenced by the postwar developments in American sociological criminology, Mannheim came to the view that criminal justice had changed its function to one of social defense—but, as a result, that it could never achieve effective results in this new function. Instead, he advocated large-scale social reconstruction to deal with the structural determinant of crime.¹⁷ This approach was to predominate in British sociological criminology thereafter—in more and less radical visions—and was linked closely with the development of the welfare state in that country after World War II. However, despite Mannheim’s own involvement in law reform, as a result of its acceptance of social determination of crime, British criminology, too, began to cut itself adrift from questions of criminal law and criminal justice. Sociological criminology on both sides of the Atlantic was thus, in a sense, condemning itself to irrelevance in the minds of those focused on criminal law and practice—who in turn increasingly came to be seen sociologically as part of the problem of crime rather than part of the solution.

In the United States, research on criminal justice has never been dominated by the federal government (which has very limited criminal law powers as well as a minimal role in university governance, in contrast to most European countries). In addition, the U.S. university system has been and remains much less centralized and hierarchical than is the case in European countries: therefore, generalizations about research trends are risky. But it is fair to say that the same impetus that eventually gave rise to the U.S. Model Penal Code also fostered empirical research promoting

¹⁶ Garland (n. 6).

¹⁷ Hermann Mannheim, *Criminal Justice and Social Reconstruction* (1946).

innovations in studying and “treating” both offenders and “delinquents” who had not yet been charged with offences. As is well known, postwar welfare-state innovations tended to promote rehabilitation and medicalization, or psychologization at any rate, rather than retribution. Such “enlightened” mechanisms as pre-sentence youth diversion programs had existed since the creation of the first specialized courts (for youth, for women, etc.) in the early years of the twentieth century. But they only flourished in the post-World War II period, when, as the welfare state apparatus grew, welfarist and rehabilitative programs of all types began to receive serious funding. What Roscoe Pound famously called “sociological jurisprudence,” an approach to law and lawbreaking that contextualized crime with studies of urban poverty, overcrowded housing, child neglect, and so forth, had led to major institutional innovations in the United States in the period before World War I, but almost exclusively at the local level (e.g. the complex Chicago system of specialized municipal courts¹⁸). Sociological jurisprudence did not disappear completely, but was largely invisible in national-scale politics and in academic research in the period from the 1920s to the 1950s, reviving, often at a national rather than local scale, only as part of the overall growth of the postwar welfare state.

For some decades—until approximately the Thatcher–Reagan revolution of the 1980s—the same spirit that led to the Model Penal Code and, in Britain, the Wolfenden Report, also permeated what one could call the lower reaches of criminal law/criminal justice. But a sea change in both criminal law and criminal justice policy, in the United States especially, began to be felt as President Nixon declared a “war on crime”—whereas his predecessor, Lyndon Johnson, had famously declared a war on poverty.¹⁹ It is important to note that events in the United States were not necessarily representative, however. Much of Western Europe was greatly affected by neoliberal economics but remained largely immune to the Reagan-era approach to criminal justice; to this day, many European countries have sentencing practices and correctional systems that are more or less continuous with the postwar rehabilitative ideal. But in the United States, and to a lesser but nevertheless significant extent in the United Kingdom,²⁰ “tough on crime” politics, such as California’s “three strikes and you’re out” policy, reversed some, perhaps many, of the postwar innovations, and eventually gave rise to policies that would make Beccaria, Mannheim, and the entire Chicago School turn in their respective graves.

The return of the death penalty in the early 1980s was also an important marker for our purposes, in that this major change in policy went against the findings of criminological research. Researchers were and are unanimous that the death penalty does not necessarily deter more than other penalties, and that its administration

¹⁸ Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* (2003).

¹⁹ Johnathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (1997).

²⁰ David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001).

serves as a mechanism to further and compound the anti-black racism that had long characterized U.S. criminal justice. Its revival is thus one of the many indicators of the loss of prestige and authority suffered by American policy experts both inside and outside government. As Jonathan Simon documents, law-and-order prosecutors began to use their prosecutorial credentials to win political office, including becoming governors of a number of key states²¹—and prosecutors have never had much time for soft-on-crime sociological, psychological, or medical experts.

Indeed, for a good two decades after the 1980s, U.S. criminal justice researchers could only throw up their hands in despair. Study after study showed that the drop in the crime rate was not the result of imprisoning vast numbers of actual and potential offenders, since the drop was just as noticeable in countries (e.g. Canada) in which prison populations remained constant and the death penalty remained illegal. But such studies were largely ignored by U.S. politicians.

Nevertheless, while having little or no impact on criminal law itself, on sentencing and on parole mechanisms researchers did contribute to some changes that took place in the period from the 1980s to the early 2000s. One was the spread of specialized, more or less therapeutic, courts mainly for drug users, homeless, and aboriginal offenders, but also for abusive men, who began to be sent to anger management or other “treatment” programs (though mainly instead of receiving a caution from police, rather than instead of jail). On another front, fairly radical changes in police and prosecutorial policies in regard to domestic violence were initiated by feminists (often supported by feminist research) but were then incorporated into state practices. For many criminal justice researchers, especially women, the innovations in this field provided one of the few hopeful avenues for both policy engagement and research during an otherwise bleak time, although it has been argued that feminists succeeded only to the extent that they supported a tough-on-crime agenda. There was also a powerful international movement, which had some resonance even in the United States, promoting “restorative justice” as an enlightened and humane alternative to standard criminal justice.

Criminal justice researchers thus had some opportunities to engage productively with state officials even during the darkest days of neoconservative crime policy, but mainly on the margins of the system (as in restorative justice pilot projects or specialized domestic violence courts). Throughout this period, prison populations were growing while the crime rate was dropping, even if no other country matched the United States’ astounding levels of what has been called “mass incarceration.”

Since the 2008 financial crisis, fiscal pressures in many U.S. states, and more recently court decisions putting limits on prison overcrowding, have combined to moderate these trends. There have also been states that have stopped using the death penalty. While it is not possible to generalize about the drivers of change that

²¹ Simon (n. 19).

in many cases were not deliberate policy choices but simply the final vector sum of various uncoordinated games of political football, we would venture the generalization that research has played a small part in the current narrative. Researchers can and do document the effects on inmates of prison overcrowding, and such studies (like those of the racial bias of the death penalty) are introduced as evidence in constitutional challenges to current law; but the question of how much unpleasantness and suffering ought properly to be tolerated in a state prison system is not one for which science can provide a definite answer. The question of the state's right to kill its citizens is also one that is fundamentally ethical, not factual.

This brief overview suggests that while research on criminal justice and the implementation of policies has sometimes been used to make or reform policy, it is not unreasonable to conclude that on the whole criminal justice research has served only to make slight adjustments to programs the existence and ultimate fate of which do not depend on research. For example, the legal changes in the United States and the United Kingdom that have made it nearly impossible for sex offenders to return to the community after sentence, through draconian registration and community notification measures, are completely at odds with everything that sociological and psychological research on stigma, labeling, and social exclusion has told us. But, by contrast, the "treatment" that is delivered to sex offenders in the prison system is based on forensic psychology, and in-prison treatment programs are evaluated and refined constantly (though, if Canada is at all representative, the research is carried out in-house by correctional authorities themselves, which have grown very wary of independent researchers). Along the same lines, the proliferation of drug treatment courts has made but a tiny dent in the number of offenders in prison for drug and drug-related offences.

The often minimal improvements that are eventually implemented, often for special, small populations, after years of research showing the flaws of the system certainly give good grounds for the collective pessimism mentioned at the outset. The limited reach of evidence-based changes has also fueled left-wing university-based researchers' denunciations of what they call "administrative criminology."²² Such denunciations are self-righteous and often use straw-man arguments; but even if one takes a respectful attitude toward the hard-pressed researchers who are trying to make improvements in the system, it is difficult to avoid the conclusion that for most of the past century, the important changes in criminal law and criminal justice have not been evidence-based.

This does not mean, however, that criminal law scholars and students can afford to ignore criminal justice research. Criminal law is sometimes taught as if it were a branch of political theory. But the criminal law has far more impact on the lives of ordinary people, particularly those who are already disadvantaged before they

²² See e.g. Williams and Lippert (n. 1); Kevin Haggerty, "Displaced Expertise: Three Constraints on the Policy-Relevance of Criminological Thought," (2004) 8 *Theoretical Criminology* 2 ff.

break the law, than any other theory, including economic theory. It is, therefore, only sensible for those interested in the criminal law to read studies that shed light on the often unintended consequences of particular areas of criminal law and criminal procedure. Admittedly, criminal justice policy conducted for or within the state apparatus is often conservative in tone and purpose; but there are many researchers who are using their social science training to try to keep Beccaria's dream alive in often hostile political climates. Turning up one's nose at such research on the basis that it is either insufficiently radical or insufficiently theoretical is not particularly helpful: if the criminal law is indeed to be truly reformed, this will not happen through the efforts of either philosophers or left-wing critics.

IV. FROM CRIMINAL ACTS TO VICIOUS GROUPS AND SPACES: THE HISTORY OF MISEROLOGY

The conventional account of the history of criminology posits two different and in many ways opposed beginnings. The first is the moment of Beccaria and Enlightenment law reform mentioned earlier. A century later, there was, the story goes, "another beginning and another set of influences," namely, the scientifically oriented work of "criminal anthropologists" and other experts on human abnormality.²³ As Stanley Cohen points out, a major difference between the first beginning (Beccaria) and the second (Cesare Lombroso's "criminal anthropology") was that the first was wholly focused on legal principles, whereas the second moment, born out of hybrid natural-social knowledges of vice and degeneration and continued later by psychologists and sociologists, "managed the astonishing feat of separating the study of crime from the contemplation of the state," and law in particular.²⁴

This generalization is not quite correct: those who agreed with Lombroso that there was such a thing as a "born criminal"²⁵ certainly tried to influence state policy, and succeeded in some instances (e.g. indeterminate sentencing and the development of categories such as "habitual offender"²⁶). But what is important for our purpose and is hinted at in Cohen's description is that as the new social sciences developed, at the end of the nineteenth century, the "acts" that are the focus of the criminal law were of little interest other than as symptoms of deeper problems.

²³ Stanley Cohen, *Against Criminology* (1988), 4 ff.

²⁵ Nicole Hahn Rafter, *Creating Born Criminals* (1997).

²⁴ Cohen (n. 23) 4 ff.

²⁶ Garland (n. 6).

These important problems were thought of as located in the inner psyche, in physiological hereditary characteristics, in human groups, from families to neighborhoods to nations, and/or in spaces of vice, namely the slums of industrializing cities.

For the new “positivists” (i.e. those who believed the methods of the natural sciences ought to be applied to human affairs), the objects of study were twofold. First, physical anthropologists and proto-psychiatrists focused on the deep identities of “deviants” who might commit crimes but were to be targeted even if they did not, since they posed a constant danger to the nation and the race.²⁷ There was a great concern to distinguish various human subgroups from one another—the “feeble-minded” from the normal but also from the “moron”; the “habitual offender” from the ordinary, rational, one-time offender; the ordinary female criminal from the sexualized middle-class kleptomaniac—and so forth. The taxonomies that enthralled these proto-criminologists clearly set them at odds with the Beccaria tradition and with rationalist liberal approaches generally, which emphasize the Lockean common human light of reason.

Secondly, the emerging discipline of sociology, eschewing the study of individuals, borrowed the methods that had been used by explorers and anthropologists to document “savage” tribes abroad, and proceeded to explore and classify the exotic Others at home—the beggars, prostitutes, street swindlers, and assorted tribes of “dangerous classes” living in the heart of the world’s great cities.²⁸

While the sciences of psychology and psychiatry were, indeed, new in the late nineteenth century, the type of sociology that from that time onward has been a mainstay of criminological research—the sociology of underclasses and “bad” neighborhoods—was not a novel invention. There were no official sociologists before the 1880s and 1890s: but the great disruptions wrought by industrial capitalism much earlier in the nineteenth century, certainly by the 1830s, in cities such as Manchester, London, Lyons, and Paris had already given rise to the intellectual enterprise, related to but not subsumed by urban sociology, that we here call “miserology.” Then and for the rest of the nineteenth century, miserological writings were generated outside universities: it is because of that provenance that they have rarely if ever been properly considered as forebears of today’s criminology.

A formal feature of the miserology genre that helps to explain its lack of influence in criminal law circles is that while miserological accounts do feature individuals, the individuals who make appearances in the texts are mere examples of “types.” And the various “types” are in turn shown to be the inevitable products of more or less invisible social processes. In both literary and academic versions of this genre, individuals are portrayed as rising out of their physical environment and their economic situation (either unskilled industrial labor or shady street occupations

²⁷ Garland (n. 6); Rafter (n. 25).

²⁸ Mariana Valverde, “The Dialectic of the Familiar and Unfamiliar: ‘The Jungle’ in Early Slum Travel Writing,” (1996) 30 *Sociology* 493 ff.

including crime) as inexorably as mosquitoes in a swamp. Since the great debt that contemporary criminology owes to early nineteenth century hand-wringing about “les misérables” has not been hitherto acknowledged, we will discuss this early form of social science/social reform briefly before returning to today’s miserological writings.

“Misery,” and its near-synonym, “pauperism,” was in the 1830s said to be something new, something unique to industrializing cities in the most advanced economies in the world.²⁹ Poverty, in the sense of inadequate resources, had always existed and continued to exist in the countryside, it was noted. But when Frederick Engels attempted to explain just what was new and different about the condition of the industrial working class in English cities, he (typically) focused not so much on sheer material deprivation as on the combination of economic, moral, and social factors that created a historically unprecedented population of uprooted and “demoralized” families. Even if individually named (which they are not, in Engels, though they are in more journalistic accounts, such as Henry Mayhew’s) the people and families appear only as examples or instances of the underlying phenomenon that came to be called “the social question”—with “social” acquiring here its modern meaning, as in “social welfare” or “social problems,” which contrasts with the previous pre-1830s meaning of “society” as the “high society” of the society pages.

The “nameless misery”³⁰ of the industrial slums was seen, not only by Engels but by observers of all political stripes, as qualitatively different from the traditional poverty of peasant communities with strong traditions, deep roots in their locality, and a sense both of history and of a collective future. The nature and the urban location of industrial work, Engels tells his readers, creates not so much poverty as “demoralization”;³¹ “demoralization and crime”;³² “crime, misery and disease”;³³ “want and disease” and “demoralization.”³⁴

While miserological writing played a large role in the development of socialism, socialist writers were not the only or even the main contributors to this genre; philanthropists and public health doctors were much more influential. Novelists were also very important, much more important than they are today (since today social science is sharply differentiated from fiction). Key figures in nineteenth-century miserology were Dickens in England and Victor Hugo in France—and Zola to some extent, though he fell under the sway of the degeneration paradigm and wrote multi-generational sagas that focused as much on inherited “taints” as on the social and environmental causes of “vice.”

²⁹ Giovanna Procacci, “Social Economy and the Government of Poverty,” in Graham Burchell, Collin Gordon, and Peter Miller (eds.), *The Foucault Effect: Studies in Governmentality* (1991); Giovanna Procacci, *Gouverner La Misère: La Question Sociale en France, 1789–1848* (1993).

³⁰ Frederick Engels, *The Condition of the Working Class in England* ([1844] 1885), 24ff.

³¹ Engels (n. 30) 119 ff.

³² Engels (n. 30) 121 ff.

³³ Engels (n. 30) 26 ff.

³⁴ Engels (n. 30) 211 ff.

At about the same time as Zola, but using different tools, the amateur English sociologist Charles Booth took the study of urban industrial misery and pauperism to new scientific heights. He can therefore be regarded as a sociologist (though he had no university connections) because he focused not on individuals (as the small number of psychologists then in existence did) but on what later came to be called “communities”—essentially, very small neighborhoods. His multi-year, multi-volume magnum opus, *Life and Labour of the People of London* featured one of the first, or perhaps the first, printed color-coded maps ever made.³⁵ Glued to the back cover of some of the volumes as a special pull-out feature, these street-by-street maps used different colors to represent not just poverty but also the less tangible factors that Engels lumped under the term “demoralization.”

Although income was a key quantitative fact for Booth and his assistants, the black color that—not coincidentally—he used to indicate the lowest grade of street blocks was not a purely economic indicator, but rather a composite, just as the yellow and white used for the “better” streets represented not just a higher income but a purer moral condition (in keeping with Christian iconography). Throughout the work, crime, poverty, and vice are as intertwined as they were in Engels’ account of “demoralization.” When in 1902 he decided to update the massive study produced a decade earlier, he again chose to map conditions that were much more complex than income levels. For example, “Drinking habits and the disorderliness resulting from them could not be but continually mentioned in the course of the long walks taken in all parts of London day after day with the picked police officers who were permitted to assist us during the revision of our maps. . . .”³⁶

Miserology, then, is characterized by enfolding criminality in a hybrid and multifaceted collective condition that is specific to the “bad neighborhoods” of urban industrial capitalism. It is important to note that the miserology writers, then and now, are not necessarily moralistic or judgmental; many of them, again, then as well as now, are quite sympathetic to the slum dwellers, often portrayed as hapless victims of larger social and economic processes. An important subgenre of sociological criminology today, for example, consists of ethnographies of drug-dealing and drug-using urban communities, and these are generally produced by researchers who are as sympathetic to the community they study as Engels was to Manchester’s early proletariat.

Our final example of contemporary miserology comes from an extremely influential author who, while having earned his stripes in a Chicago working-class boxing gym (his intellectual stripes, that is), is currently working primarily at the global level, writing accounts of criminalization and impoverishment influenced primarily by Marxist political economy. This is the French American criminologist

³⁵ Charles Booth, *Labour and Life of the People of London*, Vol. 2 (1891); Charles Booth, *Life and Labour of the People in London*, Vol. 8 (1902).

³⁶ Booth (n. 35) 61 ff.

Loïc Wacquant, author of such influential works as *Urban Outcasts: A Comparative Sociology of Advanced Marginality*³⁷ and *Punishing the Poor: The Neoliberal Government of Social Insecurity*,³⁸ with the latter book, quickly translated into many languages, having become very popular, especially in continental Europe and Latin America. In *Punishing the Poor*, Wacquant takes miserology out of its traditional domain—the local—and shifts its analysis to a global scale, a scale shift which has helped to make Wacquant's account extremely influential among left-wing intellectuals from all manner of disciplines who are grappling with global capital flows, transnational migration, and the variety of phenomena covered by the capacious term “neoliberalism.”

If the individuals encountered by Engels in his walks through Manchester in 1844 were not described as flesh-and-blood, complex characters, but rather treated as mere instances of a larger phenomenon that came to be called “the social question,” so, too, for the kind of left-wing global-scale criminology that Wacquant represents, national and subnational trends in crime or in imprisonment are only mentioned if and when they fit the grand narrative of “neoliberalism.” And yet, even if he falls into functionalism, Wacquant's work can play a useful role, especially as an antidote to the Panglossian perspectives popular in many law schools, especially amongst law-and-economics advocates.

Despite treating people, events, and even whole cities and whole states as mere examples of industrial capitalism's darker side, then, miserology has certainly made many important contributions, from the nineteenth century “social novel” to today's urban ethnographies. This genre has its flaws, such as romanticizing the exploits of intrepid “street-corner” sociologists, but nevertheless the findings are important, since they show that even in the heart of the most prosperous cities in the world, the conditions that produce certain types of crime continue to flourish and will continue to flourish, in the absence of structural socioeconomic changes.

V. THE SOCIAL CONSTRUCTION OF DEVIANCE/SOCIAL INTERACTIONISM

Our fourth and final stream or version of criminology is the “social construction of deviance” tradition. This was rooted in the symbolic interactionism that rose to the fore in the 1960s as an antidote to the conservatism and functionalism of 1950s

³⁷ Loïc Wacquant, *Urban Outcasts: A Comparative Sociology of Advanced Marginality* (2007).

³⁸ Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (2009).

sociology and has remained an important tradition within criminology ever since. This tradition overlaps to a variable extent with miserology; however, it is useful to consider it separately here in order to highlight, for a criminal law audience, the contributions made by social construction/symbolic interactionist scholars to our understanding of how policing and other legal and regulatory mechanisms construct the very “crimes” and forms of deviance that are then subject to state regulation, including criminalization.

Harold Garfinkel and Erving Goffman are two scholars who pioneered this approach. They both emphasized face-to-face interactions and tended to study small-scale phenomena in person, eschewing the grander scale of traditional sociology. Goffman famously studied “total institutions” (especially psychiatric hospitals) in person, and largely confined his analysis to what he could actually observe—instead of relying on documentary sources, policy statements, or medical discourse.³⁹

A hugely influential term generated by this school of sociology was “stigma.” That someone, say, a young person acting out at school, can be turned into a “delinquent” merely through the effects of repeated interactions with teachers and other authorities may be conventional wisdom today, but in the 1960s this was quite a revolutionary insight, since at that time mainstream social science still believed that certain people were inherently different, inherently abnormal.

The symbolic interactionist/social construction tradition did not stop with examining how individuals are stigmatized and therefore burdened with identities that are in large part produced by the powers that be. Researchers using these tools also turned their attention to institutions and organizations engaged in civic politics and social reform, and produced a lively literature on the “social construction of social problems.” A noted author in this regard was Joseph Gusfield, who studied how alcohol and drinking had served as triggers for a variety of reform and policy initiatives that constructed certain acts—mainly, drinking alcohol—as morally and socially problematic for reasons that often had nothing to do with public health. Famously, Gusfield showed that road accidents caused by drinking and driving always lead to efforts to curtail drinking—never efforts to provide better public transport or otherwise curtail driving.⁴⁰ The social constructions approach is represented to this day (in the United States at any rate) by the journal *Social Problems*, and by the academic organization, the Society for the Study of Social Problems. Scholars who work in this tradition show that mainstream assumptions about what is and is not a social problem are embedded in law and policy in such a way as to curtail or foreclose more inventive and possibly more effective solutions (e.g. better

³⁹ Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (1961).

⁴⁰ Joseph Gusfield, *Contested Meanings: The Construction of Alcohol Problems* (1996).

public transit could have a much greater impact on accident rates than any campaign about designated drivers).

The social construction of the social problems approach is not as popular as it once was, having been replaced, to some extent, by newer perspectives, some deriving from the work of Michel Foucault. And yet the approach continues to be influential (though usually not under that name) in current criminal law reform debates, most notably those concerning pornography, prostitution, and illegal drugs. Criminal law scholars working in areas where moral and cultural assumptions play a large role in law and policy would do well to read some of the classic works on “stigma” and the social construction of deviance. Current jurisprudence on the criminal liability of HIV+ for the transmission of HIV/AIDS, for example, is an area that would greatly benefit from understanding how the stigmatization of certain activities and people has worked in the past, often to the detriment not only of the minorities in question but of the public interest as well. Law and policy on illicit drugs is also an important area where this perspective can be brought to bear (as has been the case in the legalization of safe injection sites).

In the social construction of social problems tradition, however, the specificity of law is seldom highlighted: crime and criminals are almost completely dissolved into the larger category of “deviance.” The focus is more on stigma, abnormality, and the obverse process of normalization, rather than on specifically legal processes. One could argue, however, that precisely because it considers criminalization in the broader context of the social construction of deviance, this perspective has a great deal to offer to those who want tools to place the criminal law in the larger cultural and social context within which it exists.

VI. CRIMINOLOGY AND CRIMINAL LAW: CONCLUSION

Criminal law is often taught as a branch of philosophy or political theory. Law students are encouraged to think about the philosophical foundations of state punishment, but not about the governing practices studied by criminologists, which deserve to be understood in their own right because they may or may not accord with the system's supposed principles. The four traditions outlined here offer a variety of resources for criminal law scholars and practitioners who are interested in learning more about “law in practice,” and about what contemporary social science can tell us about the broader dynamics of ordering and sanctioning within which the criminal law is located.

The first tradition, the psy sciences, is today playing an important role in criminal justice. Its importance can be missed by criminal law scholars since it is usually limited to pre-verdict and post-conviction phases, but for anyone interested in the fate of those who are charged and convicted, and not just on the theoretical principles of the criminal law, gaining some knowledge of current psychological tools used in criminal justice is necessary.

The second tradition mentioned here, the empirical study of criminal justice institutions and mechanisms, has long provided important information on the kind of aggregate phenomena (e.g. systemic police racial profiling; the racial bias of U.S. death penalty administration) that cannot be discerned if one limits one's view to the *mens rea* of individual offenders or the particular judgments made by judges. Especially since appeal courts today are more open to social science evidence about aggregate, systemic effects than they have been in the past, criminal lawyers need to have the tools to find and understand relevant studies, as needed; and, contrary to popular belief among law students, it is not necessary to have any technical knowledge of quantitative data analysis in order to appreciate and benefit from much of this research.

A third tradition we call "miserology" is not directly concerned with legal mechanisms, but sheds a great deal of light on the collective life of the urban communities most affected by the type of crime that is of greatest concern both to politicians and to the public: street crime. While much of this literature is marred by a certain voyeuristic exoticism, the best studies in this tradition do offer insights into the practical situation of people living in neighborhoods in which criminal activities may indeed be a rational and sensible career path, given the systematic economic disempowerment that characterizes not so much individuals or families but whole communities. Though this tradition tends to focus on homicides and other violent acts and on street property crime and drug-related crimes, while ignoring domestic violence as well as corporate and other white-collar crime, nevertheless lawyers would do well to sample this literature. It sheds light not only on law enforcement at the coal face but also on the deep problems afflicting the communities in which most criminal accused have been raised.

Finally, a critical tradition that arose out of the symbolic interactionist sociology of the 1960s has emphasized the "social construction of social problems," including the ways in which criminal law has actively constituted the very problems and identities that are then regulated. This tradition can teach criminal law scholars that "the prostitute" is a product of prostitution laws rather than of psychological or sociological processes; it has also pointed out that the distinction between a "drug addict" and a respectable person with an alcohol problem is in large part a product of particular laws. And it has the potential to illuminate the broader social context of such current issues as the criminalization of HIV transmission.

Overall, then, we have here outlined some research traditions that certainly have their deficiencies and flaws, like all areas of scholarship, but that nevertheless

contain valuable resources for anyone wishing to gain a broader perspective on the fundamental issues and dilemmas that shape not only the criminal law but state regulation generally.

REFERENCES

- Cohen, Stanley, *Visions of Social Control* (1985)
- Downes, David et al. (eds.), *Crime, Social Control and Human Rights: Essays in Honour of Stanley Cohen* (2007)
- Foucault, Michel, *Discipline and Punish: The Birth of the Prison* (1975)
- Garland, David, *Punishment and Modern Society: A Study in Social Theory* (1990)
- Garland, David, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001)
- Matza, David, *Delinquency and Drift* (2nd ed., 1990)
- Sumner, Colin (ed.), *The Blackwell Companion to Criminology* (2004)
- Willrich, Michael, *City of Courts: Socializing Justice in Progressive Era Chicago* (2003)
- Wolfgang, Marvin et al. (eds.), *The Sociology of Crime and Delinquency* (1970)