Chapter 1

Towards Criminology

John Braithwaite[1]

Almost all societies that we know of, from all periods of history, have developed rather elaborate systems of rules for securing social order. Criminal laws are the most sanctified of these rules in contemporary societies. They are simply the rules, the breach of which the state defines as a crime. There is nothing inherent in a particular kind of act that makes it a crime. What is a crime is a matter of how the state uses its power to define crime. Of course criminal laws defined by the state have not always been the most sanctified rules. In medieval Christendom, before centralised states had evolved, the most sanctified rules were those laid down by the church. Many Australian citizens today continue to view secular crimes as less serious than breaches of the law of the church, or God's law, as they would view it. In the West, the tension between church and state is not a very deep one because, for example, murder is forbidden by both the Ten Commandments and the state's criminal law.

The Idea of Crime

Since the state's criminal law has its historical roots in church law, there is a high degree of convergence between them, at least with regard to the basic crimes against persons and property. Some areas of divergence, however, such as whether abortion is a crime, remain central debates of our time. Obviously, there are sharper divides between the criminal law of Western states and Islamic law or Australian Aboriginal law (Hazlehurst 1985). There is nothing inherent in the act of injecting opiate into one's arm that makes it a crime. If you do it, the state can define it as criminal drug use. If a doctor does it, the state can choose to call it therapy or medical practice. Usury (charging interest on a loan) can be a crime in one period of history (for example, the ancient world) or in some kinds of contemporary societies (for example, some Islamic societies), while in other societies the law can require

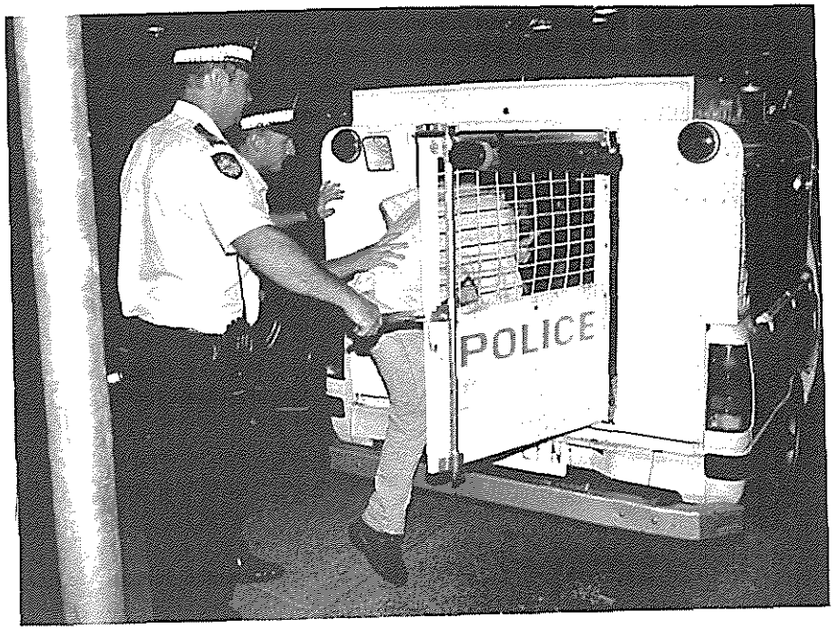
banks to charge higher interest rates as an instrument of monetary policy intended to reduce inflation.

Nevertheless, the research evidence shows a global consensus about a set of core offences which are regarded as crimes by citizens everywhere: murder, assault, rape, robbery, theft, fraud. Citizens of Kuwait agree that most of the offences we criminalise in Australia should be criminalised, and vice versa. While there is disagreement between cultures about how we should punish them, there is a surprising degree of cross-cultural consensus about which are the most serious crimes (deserving the toughest punishment) and which are the least serious crimes (Newman 1976; Scott and Al-Thakeb 1977; Broadhurst and Indemaur 1982; Grabosky et al 1987).

Most criminologists and most political leaders believe it is normally unwise, or even morally wrong, for the state to define something as a crime when there is not a community consensus that it should be a crime. This widespread policy perception is part of what delivers the criminal law to us as a tool about which there is strong consensus. A consequence of this is that the criminal label is an extremely powerful source of order in contemporary societies. When parents raise their children, simply explaining that a type of conduct is criminal tends to evoke in the child a profound sense of the wrongfulness of the conduct. This effective communication of the wrongfulness of crime is what makes it possible for us to walk down most streets in Australian cities without fear that we are likely to be killed, robbed, or raped.

Fear of punishment also plays a role in keeping our streets safe. Incarceration or fines, however, are less powerful deterrents against crime than the belief of citizens that crime is wrong (Braithwaite 1989). Punishment by pangs of conscience can be both more certain and more immediate than apprehension by police officers who have difficulty in being in the right place at the right time (Wilson and Herrnstein 1985). The preventive power of the criminal label causes many criminologists to express concern about diluting its power through criminalising too many things (Sherman 1993). For example, some criminologists regard it as unwise that we have made breach of copyright, such as by copying a computer program or a television programme, a crime, because community consensus here is wanting. When we criminalise too much, according to this view, we devalue the currency of the criminal law. We put at risk the moral consensus that keeps our streets comparatively safe.

Here we must remember that most rules are not criminal laws. Without defining crimes, rules can nevertheless work rather well at securing valuable social purposes. The private (non-state) rules of golf can secure the social order necessary to make possible the communal enjoyment of golf-playing. The social benefits of golf are not so large and the problems of non-compliance not so deep for there to be any reason to criminalise cheating at golf. Indeed, in this case a perfectly satisfactory level of compliance is achieved without criminalisation, without state prohibition of any kind, and even without private punishment for non-compliance.



Police putting suspect in paddy wagon. (Photo courtesy of *The Courier Mail*.)

The state can make it illegal under civil law to copy a television programme without paying for it. This enables the copyright owner to sue us for damages if we do. Because the damages will be trivial when we copy a television programme to show it to our criminology tutorial group, the copyright owner is not likely to bother suing us. But if we own a hotel chain and make the programme available to all rooms in the hotels, it will be worthwhile for the copyright owner to sue.

Some criminologists, such as Norval Morris (1981), believe in a principle of parsimony. This principle means that if a policy-maker is in doubt about how much state intervention is needed to solve a problem of social control, it is better to do less. Hence, if a social problem can be dealt with satisfactorily by privately enforced rules, this is better than resorting unnecessarily to civil law, and civil law is preferable to solving the problem by criminalisation. Many types of conduct which we disapprove of very strongly — like lying, cheating, infidelity, or failure to show love to our children — are subject to social control only through privately enforced norms. According to the principle of parsimony, this is a good thing.

Even when we decide that it is necessary to define a type of harmful conduct as a crime, the criminal justice system will often choose not to enforce the criminal law against a particular instance of that conduct. For example, it is necessary in order to secure the safety of our cities to view assault as a crime. But this does not mean that the police must arrest and

punish every person whom they know to have swung a punch at another in a pub or on a football field or in a bedroom. They might be satisfied to pull assailants apart and move them on or to allow some other citizen (like a referee) to do so. Again, according to the principle of parsimony, it is a good thing to solve a problem without resort to state punishment even when the conduct is criminal conduct. The fact that the principle is controversial, however, is well evoked by the question of assault in the bedroom. Some feminists argue that the principle of parsimony should not be applied to violence in the home, that punishment should be the standard response to acts of domestic violence, not a last resort.

Two Types of Criminological Theory

In criminology, we find two broad types of theories — explanatory theories and normative theories. Explanatory theories are ordered sets of propositions about the way the world is. Normative theories are ordered sets of propositions about the way the world ought to be. Most of our discussion so far has been in the domain of normative theoretical propositions: criminalisation should only be used when there is community consensus to do so; we should be parsimonious about what we criminalise and about when we punish conduct that has been criminalised, and the like. The republican theory of criminal justice developed by Philip Pettit and myself is an example of a normative theory that arranges a number of "ought" propositions like these into an integrated view of how criminal justice systems should be designed (Braithwaite and Pettit 1990). This theory says that it is right to criminalise, to deploy police, to prosecute, to imprison, only when doing so will increase freedom (republican liberty) in the society. Therefore, under this republican normative theory, crime control policy is resolved out of a dialogue about how to balance the liberty lost by state intervention — such as imprisonment — against liberties gained, through safer streets, for example.

Most criminological theory is explanatory rather than normative. Let me illustrate the concept of an explanatory theory again with one of my own — the theory of reintegrative shaming (Braithwaite 1989). The key propositions of this theory are the following. Societies with low crime rates are those that shame criminal conduct effectively. While there are socially effective ways of shaming to reduce crime, which we can call "reintegrative shaming", there are other ways of shaming that can make crime problems worse. I call the latter stigmatisation or disintegrative shaming. Reintegrative shaming is social disapproval expressed within a continuum of respect for the offender as a person. It focuses on the evil of the deed rather than the evil of the person. Ceremonies to certify the wrongfulness of the act are terminated by ceremonies to decertify deviance (reintegration ceremonies to bind the offender back into a community of care). When persons are stigmatised, they are treated as evil

persons rather than as good persons who have done a bad deed. They are permanently cast out from the circle of respectable society. Permanent branding on the cheek of criminals (as was common in medieval Europe) is an extreme form of stigmatisation. A parent admonishing a loved child and later terminating disapproval with an apology from the child and a hug from the parent illustrates reintegrative shaming.

> Stigmatisation encourages the formation of criminal subcultures. Branded criminals who are spurned by respectable society seek solace with others who have been similarly branded (Cohen 1955). Groups of criminals solve their status problem collectively by rejecting their rejectors. In the criminal subculture, it can become good to be "bad". In the criminal subculture, outcasts learn how to become more competent criminals (for example, how to disable alarm systems), and they learn how to excuse the wrongfulness of crime (for example, the shoplifter who learns in the criminal subculture that it is okay to steal from shopkeepers who make their own money by "ripping people off"). These then are some of the mechanisms within the theory that connect propositions about stigmatisation to propositions about criminal subculture formation. Remember that a theory is an *ordered* set of propositions.

Sound policy analysis involves a combination of explanatory and normative theory. An explanatory theory of "when deterrence works" must be combined with a normative theory of "when punishment is morally unacceptable" even if it does deter. Similarly, an explanatory theory that shows how shaming can prevent crime requires a normative theory of when shaming is and is not morally right. In this case, Pettit's republican normative theory provides the account of when it is right and wrong to shame (Pettit 1993a, 1993b). By republican rights, it is wrong to shame when doing so will reduce the level of enjoyment of republican liberty or freedom in the society. Shaming is right when shaming increases freedom (where freedom is conceived in the republican way that Pettit and I call "dominion" — freedom as non-domination).

Testing Theories

Many theories of crime are false. A major task of criminology is to conduct research to discover which theories are false. Historical evidence (across time), cross-cultural comparisons (across space) and psychological experiments (across individuals) are some of the types of tests than can be applied. For example, if we are testing a deterrence theory, we can examine whether crime rates go down during periods of history when punishment is

tougher and up during periods when punishment gets weaker. For example, do crime rates go up when capital punishment is abolished? The answer is that they are as likely to go down as up (Schuessler 1952; Sellin 1967).

At the cross-cultural level, we can examine whether nations that punish criminals severely enjoy lower crime rates than societies that are soft on crime. Within societies, we can test whether cities with police forces that are very efficient at locking up criminals have lower crime rates than cities that do not put many criminals behind bars. At the individual level, we can conduct an experiment in which we randomly assign individuals who have committed equal crimes to greater versus lesser levels of punishment. The outcome which interests us in this kind of research is whether individuals randomly assigned to greater punishment commit less crime after their punishment than individuals assigned to reduced punishment.

These and other research methods can help weed out the many criminological theories that are false. But they will not help us to discover the one true theory of crime because there are many true theories, or rather, many theories that are partly true. While the evidence is very weak that capital punishment reduces the murder rate, and while the evidence is weak that putting more police on to the streets reduces the crime rate, the theory of deterrence is far from completely false. We also know that in historical periods when the police have gone on strike, crime rates have gone up. So if we had no deterrence at all, there would certainly be more crime. The problem is that changes at the margin in the level of deterrence usually do not make a difference. One reason is that increasing police on the street by say 10% is not something that most of us will notice. Hence, it will not affect our subjective calculations of the chance of getting punished. Similarly, why should we expect a 10% increase in average punishment for shoplifting to affect crime when most of us have no idea of the pre-existing average punishment for shoplifting?

Yet, you might say, surely everyone notices when capital punishment is introduced. True. But the effect of capital punishment is a battleground between two competing theories. One is the deterrence proposition that capital punishment will deter better than the alternative of life imprisonment. The other is a brutalisation theory — that governments with brutal regimes for punishing criminals brutalise their people by lending the approval of the state to the idea that the best way to fight violence is with violence. According to this theory, violence will be more acceptable, less shameful, and more common in societies where the state punishes criminals violently. It may be that the introduction of capital punishment is about as likely to increase crime rates as to reduce them because both the deterrence theory and the brutalisation theory are true. That is, the *reduction* of crime, from execution being a stronger deterrent than life imprisonment, is more or less balanced by an *increase* in crime from executions lending legitimacy to violence.

Hence, criminological research leaves standing a lot of theories that are not completely false. Yet most of these theories most of the time are likely

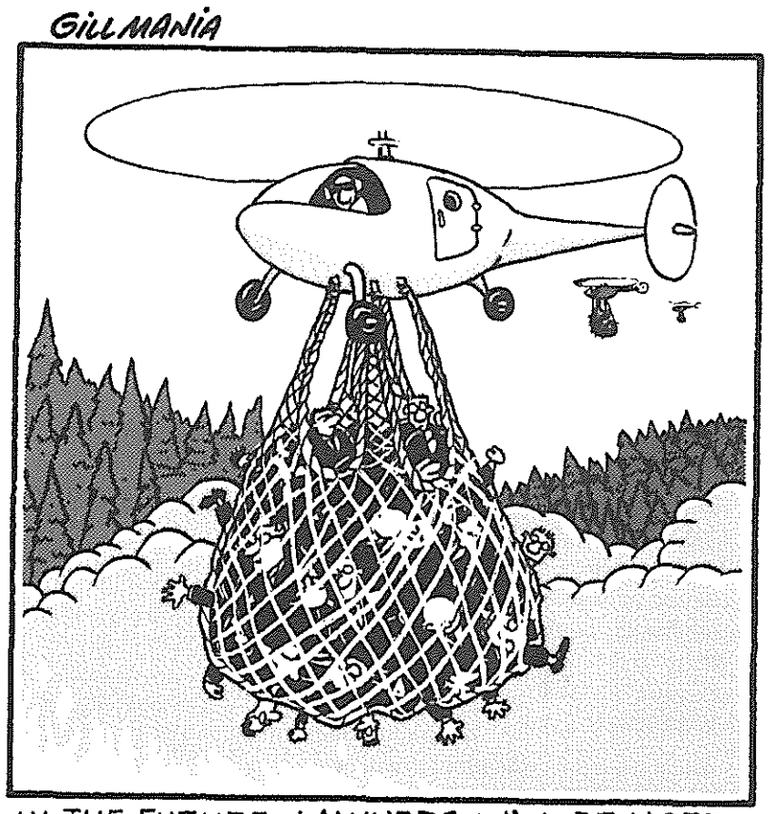
to make false predictions about the effect of policies on crime. A theory will make false predictions if the criminologist who believes the theory is so narrow-minded as to consider only the implications of this one theory. The reason that the consistent application of a theory (like deterrence) that has some truth may cause us to increase rather than reduce crime is that this is not the only theory that is partly applicable. Often these other partly true theories will make opposite predictions about the effect of a policy — just as deterrence predicts that capital punishment will reduce violence, while brutalisation predicts that it will increase violence.

The Art of Criminal Justice Policy

One reason for studying criminology is to learn how to become part of the huge scientific enterprise of sorting out which theories of crime are false and what are the contexts in which partially true theory X has more explanatory power than partially true theory Y. Another reason for studying criminology is to learn how to become a wiser analyst of criminal justice policy. The wise policy analyst knows that social science (be it economics or criminology or any other discipline) will rarely be able to supply definitive research evidence on which policy will work and which will not. However, criminology will sometimes be able to tell the policy analyst that the programme contemplated has been tried before and never found to have reduced crime or that the programme is based on a theory that has been found to be false. Obversely, if the programme proposed has in the past been found sometimes to work, sometimes not, and to be based on a theory that has some explanatory power, scientific criminology can give the policy analyst some feel for the strength and limitations of the theory and for the contexts where the programme might be most likely to work.

Students of criminology, in other words, need to learn the art of searching the criminological literature for this kind of wisdom. It is the art of searching rather than the fact of knowing a body of scientific evidence that is important. This is because criminological research grows at such a rapid rate that we can get on top of a body of literature today only to be sorely out of date in a few years. What it is important for criminologists to learn and know is criminological theory, at least those theories that can make some credible claim to a partial truth. For any given policy question, the good criminologist is able to scan through a range of theories that may make either contradictory or mutually reinforcing predictions about the likely effect of the policy. It is this ability to think through the implications of different theories for a given policy question that informs strategic searches of the criminological literature to cast as much light as possible on the policy question. Often that will not be a lot of light. Then the practical policy analyst must make the best judgment, based on a thoughtful balancing of the competing theories, as to what policy package to support. At this stage, policy analysis is more an art than a science. It is hoped, however, some

evaluation methods will be put in place to monitor whether the policy seems to be working or failing, and science is then brought back into the picture.



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In suggesting that one must exercise the art of judgment, illuminated by limited scientific evidence as to which theories will and will not drive successful policy outcomes, I am not saying one necessarily has to make a choice between competing theories. A policy package may be viewed as robust precisely because a number of competing theories all make the prediction that the package will work (for different, even mutually contradictory, reasons). More commonly, good criminologists think about how to design policy packages so that the weaknesses of one theory are covered by the strengths of another.

Let me illustrate this point by reference to the enforcement of the Australian *Trade Practices Act*. To take a problem the Trade Practices

Commission has faced, consider an insurance company whose agents have criminally misrepresented the benefits of insurance policies to people in remote Aboriginal communities. One way of proceeding, which has been used with insurance companies in cases of this sort, is to apply the theory of reintegrative shaming. Require the top management of the insurance company to travel to the remote Aboriginal community to confront the victims of their crime. Through a process of dialogue with the victims and with the Aboriginal Community Council, have them confront the shame of imposing terrible economic hardship on lives that are already so very hard. Then see what proposals the company can come up with to requite this shame: compensation for the victims, setting up an Aboriginal Consumer Education Fund to prevent future such victimisations by other companies, discipline of those responsible within the company, a trade practices compliance programme to prevent future law violation by the company, a press conference at which a public apology is offered, and development of proposals to reform the regulation of the industry. Allow the insurance company to negotiate these proposals for righting the wrong with the Aboriginal Community Council, the victims and the government regulators.

Now what if some companies and some guilty individuals involved in such conduct are beyond shame, as has also been true in some recent cases of this sort? They refuse to co-operate meaningfully in a reintegrative shaming process of the kind outlined in the previous paragraph. When that happens, our policy package can provide for applying the theory of deterrence. We take them to court and get penalties as heavy as can be secured to deter future such conduct. In some recent Aboriginal insurance cases, the Trade Practices Commission has resorted to this when settlement negotiations were frustrated.

What then of when the theory of deterrence fails? It often does with corporate crime, where the probabilities of detecting any single future instance of the illegal conduct are very low. Where social control fails to work either through the state or the community persuading offenders that the conduct is shameful, and also fails to work through deterrence, a third strategy is incapacitation. When we put violent people in jail, we sometimes do this less as a deterrent and more to incapacitate them from inflicting further violence on the outside community. When we lock up insurance agents or executives who can be neither shamed nor deterred, we effectively prevent them from selling insurance policies for the period of their imprisonment. Following the principle of parsimony, however, we can achieve the same incapacitation in a less drastic way by simply taking away the insurance company's licence to sell insurance. Or we might incapacitate the existing management through a management restructuring order imposed by a court (Fisse 1973). The order might throw out the old management team and replace it with a new one and with a new set of management controls over law breaking.

In this way, we can put in place what is called a responsive or dynamic regulatory strategy. Under this strategy, we try reasoned dialogue and reintegrative shaming first; when that fails, we try deterrence; when that fails,

we try incapacitation. Because of the normative theory of parsimony, we try them in that order. That is, we try the least intensive state intervention first and have recourse to the most drastic intervention as a last resort. We design a policy package that sees reintegrative shaming, deterrence, and incapacitation all as theories that have a degree of explanatory power and all as theories that can be used selectively and justly under a parsimonious normative theory of criminal justice. Yet we see the explanatory power of each theory as very partial indeed. So much so that we want to cover the weaknesses of one theory with the strengths of another in our integrated policy strategy. Hence, we use the explanatory power of deterrence to cover the explanatory weakness of the theory of reintegrative shaming for actors who are shameless profit maximisers. We cover the practical difficulties of making a fair system of deterrence work with a more ruthless policy of incapacitation for offenders with whom both shaming and deterrence have failed on multiple occasions.

There is a lot to be said both for and against such an approach to designing a responsive regulatory strategy. This kind of dynamic package will turn out to be a good one for some kinds of crime problems and not for others. I do not want to defend a view here about the degree of generality of application such a responsive package enjoys. Rather, I simply want to make the point that learning how to make judgments about the contextual usefulness of different criminological theories is not necessarily about choosing theory A over theories B and C. It can be about applying policy wisdom to the sequencing of flawed and partial interventions based on A, then B and then C.

Learning to Be a Criminologist

In learning to become a criminologist, it helps to start by pondering concrete questions rather than abstract theories. The next chapter will give you a brief introduction to the scope of criminological theory. Then the book moves on to thinking about many of the concrete questions that occupy the attention of criminologists. My advice is that three questions should be asked after reading each chapter:

- What conception of "what is crime" is advanced or implied in this chapter?
- What normative theory of criminal justice is implied by this conception and by the treatment of policy questions in the chapter?
- What are the explanatory theories of crime advanced in the chapter?

By asking these questions, you will be building the conceptual armoury you need to engage with the field of criminology as a researcher, critic, or policy analyst. Ultimately, you will learn how to view the same problem through the lenses of different theories and then to acquire the nuanced understanding

that comes from being able to view it through a number of different lenses at the same time.

Issues and Questions

1. "Most criminological theory is explanatory rather than normative." Explain this statement.
2. Disintegrative shaming or stigmatisation makes the crime problem worse. Compare this with processes of reintegrative shaming, giving illustrations for each.
3. The principle of parsimony means that if you are in doubt about the benefits of criminalising conduct, or of enforcing the criminal law, it is best not to criminalise or not to enforce the law. Is this principle compatible with a feminist philosophy of criminal justice?
4. Explain the difference between a deterrence theory of the effect of capital punishment and a brutalisation theory.
5. How can we design integrated policy packages that cover the weaknesses of one criminological theory with the strengths of other theories? What might be an integrated policy package of this type to deal with the problem of family violence?

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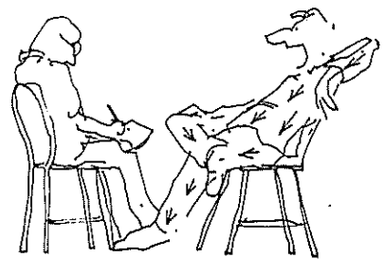
NOTES

1. John Braithwaite, Professor of Law, is employed in the Research School of Social Sciences, Australian National University, and has published widely on criminological theory and corporate crime. His most recent books include *Corporations, Crime and Accountability* (Cambridge, 1993) with Brent Fisse; *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford, 1990) with Philip Pettit; and *Crime, Shame and Reintegration* (Cambridge, 1989).

Chapter 2

From Shamans to Shaming: A History of Criminological Thought



Brett Mason[1]

Crime is a subject about which everyone has a view. When asked "what causes crime?" Australians are quick to venture an opinion. Unemployment, drunken fathers, the breakdown of family values, or lenient courts are all proffered as explanations for crime. In earlier times our ancestors would have blamed the devil or other evil supernatural forces for criminal behaviour. History teaches us that our understanding of crime, or other social phenomena, depends upon our social context. Society has, of course, changed dramatically over the last 200 years. As society grew more sceptical during the 18th century, and as the importance of science and empirical inquiry increased, supernatural views of criminality waned. Theories of crime have evolved to reflect this change. Each generation has bought with it new certainties — the "key" to explaining crime and criminality.

Introduction

This chapter will survey the major criminological theories of the last 200 years. Why all the history? Because, as Clarence Jeffrey reminds us, "Twentieth century criminology is a product of the theories of the 18th and 19th centuries. An historical evaluation of criminology is of no value unless we relate it to the things which criminologists are doing today" (Jeffrey 1972: 458). So 18th century criminology emerged as an enlightened reaction to the barbaric punishments meted out during that era largely in the name of religion, and 19th century criminology evolved as thinkers of the time re-examined the idealism of the 18th century only to find that it did not cope with the cruel reality of crime. And so on. The history of criminological theory is a study of progress and regression.