Criminal Responsibility and the Idea of Historical Progress

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Abstract

Nicola Lacey's book *In Search of Criminal Responsibility* provides an illuminating vantage point from which to consider the place of the idea of progress in the historiography of criminal law. This essay examines the book's contribution to the problematization of a cluster of interpretive, epistemological and normative underpinnings of historical claims regarding the progressive implications of the development of distinctively modern forms of attributing criminal responsibility. It shows how the genealogical approach that informs Lacey's analysis exposes the perspectivity of dominant philosophical conceptualizations of criminal responsibility and places new normative questions on the agenda of criminal law theory.

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The idea of progress has played a key role in shaping the self-understanding of modern society. With its roots in classical antiquity,[1] the idea of progress underpins a conventional way of narrating past events and explaining their relation with present-day conditions on the basis of an interpretive schema that portrays a gradual movement toward a fuller realization of a desirable telos.[2] As a salient theme in the historical scholarship on the nature of modernization processes, this idea has often been associated with the interpretation of past events and trends as facilitators of a linear move toward more advanced forms of social organization, institutional design and scientific inquiry. Echoing this narrating mode, much of the scholarship on the relationship between modern law and its antecedents tells a story about the dissolution of earlier forms of legal thinking and their replacement by new assemblages of codes, doctrines, principles, and institutional practices that are better capable of advancing the democratization and rationalization of social and political relations. In the field of penal history, this narrating mode has come under serious strain over the last decades. Beginning in the late 1960s, revisionist historical works began problematizing key aspects of penal welfarism that were previously regarded as unequivocal manifestations of modern society's steady march toward more humane and

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1 Ludwig Edelstein, The Idea of Progress in Classical Antiquity (1967).

2 The literature exploring the impact of the idea of progress on the intellectual development of Western scientific and social thought is extensive. Seminal works on the topic include Rethinking Progress: Movements, Forces, and Ideas at the End of the Twentieth Century (Jeffrey C. Alexander & Piotr Sztompka eds., 1990); J.B. Bury, The Idea of Progress: An Inquiry into Its Origins and Growth (1920); Robert Nisbet, History of the Idea of Progress (1980).

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effective forms of responding to social deviance.[3] The revanchist character of penal policymaking in the late twentieth century has further led scholars to call into question earlier assumptions concerning the intrinsic relationship between modernization processes and the liberalization of penal attitudes and practices.[4] Yet in other areas of criminal justice research, the idea of a gradual advancement toward more rational and benevolent forms of legislation and enforcement has remained powerful.

The publication of Nicola Lacey's magisterial new book *In Search of Criminal Responsibility*[5] provides an illuminating vantage point from which to consider the place of the idea of progress in the historiography of criminal law. The book explores the transformation of the rules and institutional mechanisms that have governed the attribution of responsibility in English criminal law from the mid-eighteenth century to the present. It considers how the development of doctrines and practices of responsibility attribution has been responsive to structural problems of coordination and legitimation faced by the criminal justice system in light of changes taking place in the social, political, and intellectual environments in which it operated. By placing the development of modern conceptions of criminal responsibility in this broad context, Lacey provides us with an exceptionally rich, innovative and wide-ranging political and intellectual history of this pivotal legal concept. Among its many contributions, the book invites us to rethink a cluster of interpretive contentions and normative assumptions that have shaped the conventional wisdom regarding the development of modern criminal law.

The dominant narrative regarding the formation of modern criminal law emphasizes the rise to dominance of the *capacity paradigm* of responsibility attribution.[6] The triumph of this paradigm has led to the institutionalization of a wide range of rules, doctrines, and procedures scrutinizing the extent to which the accused had exercised her cognitive and volitional capacities while committing the offense. Over time, it is argued, the triumph of this paradigm led to the demise of an older tradition, which premised criminal convictions on evidence regarding the offender's character and used such evidence to reinforce presumptions of guilt rooted in a conception of manifest criminality. This conventional story about the transition from character- to capacity-based conceptions of responsibility credits modern criminal law with the adoption of more reliable and fairer methods of determining individual guilt. Aided by the scientific advances reached by the behavioral and forensic sciences, and by the new moral sensibilities that the spirit of

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[3] Michel Foucault, Discipline and Punish: The Birth of the Prison (Alan Sheridan trans., 1977); Anthony M. Platt, The Child Savers: The Invention of Delinquency (1969); David J. Rothman, The Discovery of the Asylum: Social Order and Disorder in the New Republic (1971).

[4] See, e.g., Jonathan Simon, Poor Discipline: Parole and the Social Control of the Underclass, 1890-1990 (1993).

[5] Nicola Lacey, In Search of Criminal Responsibility: Ideas, Interests and Institutions (2016).

[6] Given the scope and focus of this review essay, the presentation of the dominant narrative is inevitably formulated in a level of generality that leaves many details unilluminated. Indeed, scholars who accept the core premises of this narrative nevertheless disagree with one another on many questions of periodization and interpretation regarding the timing, pace and the driving forces of the modernization of criminal law.

the Enlightenment had constituted, criminal law is believed to have abandoned its earlier reliance on social mechanisms of (status-based) stigmatization in favor of methods of proof that are premised on liberal notions of choice and agency.

My main aim in this review essay is to illuminate and evaluate the contribution of *In Search of Criminal Responsibility* to the problematization of three constitutive components of this story: first, the notion that the transformation of criminal law into an autonomous system of principles, rules and procedures eliminated its reliance on "external" markers of the offender's social status; second, the tendency to treat the rise of the *capacity paradigm* as the major endogenous driving force of the modernization of criminal law doctrine; and third, the tendency to assume that the criteria used to assess the "progressive" character of certain doctrinal developments have universal validity. The discussion considers how Lacey's contribution to the problematization of these issues helps to reframe both interpretive and normative questions that are at the heart of criminal law theory.

I. The Egalitarian Implications of the Construction of Criminal Law's Autonomy

The historical analysis in Lacey's book sheds important light on how modern criminal law established its self-identity as an autonomous body of norms. This account also provides a fresh perspective to consider why, contrary to the expectations of modernist reformers, the securing of criminal law's (relative) autonomy was not followed by a move toward a fuller realization of the egalitarian ideals of the Enlightenment. Lacey's position regarding the age-old question of whether legal norms and institutions can be autonomous from social and political imperatives takes its cue from thinkers such as Weber, Althusser, and E.P. Thompson, who have recognized the relative autonomy of law and demonstrated that such autonomy provides important preconditions for the effective operation of law as a tool of social ordering and political legitimation.[7] On the basis of this interpretive approach, the book moves beyond the conventional dichotomy between external and internal positions in its analysis of how the complex interplay between endogenous and exogenous drivers of doctrinal development shapes the internal logic of criminal law and the social functions that it performs.

As Lacey shows, the modern understanding of the autonomous nature of criminal law has been particularly influenced by the extensive formalization of judicial practices of responsibility attribution from the nineteenth century onwards. By formalizing the evidentiary and normative requirements that have to be satisfied in order to convict someone of a crime, legal and political actors have sought to transform criminal law into an autonomous system of norms and procedures, capable of insulating professional and lay decision-makers from external social pressures. The formalization of responsibility attribution processes is understood as both a product and a driving force of the emergence of a novel way of thinking about what criminal responsibility means and how it ought to be

[7] On the history of this debate, see Christopher Tomlins, How Autonomous Is Law?, 3 Ann. Rev. L. Soc. Sci. 45 (2007).

proven. In a world in which responsibility attribution rested in large part on the personal knowledge of the offender's reputation, there was little need to establish formalized procedures for determining individual guilt. By contrast, a system that aspires to making such determinations on the basis of reliable evidence regarding the offender's capacity to choose whether to conform to the criminal law standard faces the constant need to clarify and refine the rules that inform these complicated interpretive decisions.

However, despite its association with some of the most cherished ideals of Enlightenment thinking, the extent to which the formalization of criminal law doctrine has been able to attenuate the impact of social hierarchies on the administration of criminal justice must be called into question. Throughout the modern era, the English legal system (as well as many other legal systems that followed a similar path toward the formalization of criminal law) has continued to design and enforce criminal prohibitions in a way that both reflects and reinforces social hierarchies along interlocking axes of class, race, and gender. The book offers two explanatory frames to elucidate the roots of this failure.

The first frame focuses on the interrelationship between different fields of praxis within the criminal justice system. As Lacey demonstrates, the trend toward formalization has had an uneven impact across different institutional fields in which responsibility attribution practices take place. While the lure of formalization has been highly influential on the development of modern forms of doctrinal thinking and trial procedure, its impact on the pre-trial and post-conviction phases of the criminal process was and remains considerably more modest. As a result, even if the egalitarian values that underpin notions of capacity responsibility became embedded in the formalized doctrinal structures that inform judicial decision-making and the conduct of the trial, their influence on the decisions of key institutional actors such as police officers and prosecutors has remained limited. In these institutional fields, assessments of the offender's character, which tend to rely heavily on common stereotypes regarding group traits, continue to play a central role. To the extent that judicial determinations of guilt are premised on numerous interpretive decisions made during earlier stages of the criminal process (e.g., police decisions regarding whom to stop, search and arrest, and prosecutorial decisions regarding which cases have the highest chances of conviction), the extensive formalization of capacity principles in criminal law doctrine could not have blocked the reentry of considerations regarding the offender's social status through this "back door."

Lacey's powerful critique of the manner in which the "division of labor" between scholars of criminal doctrine and scholars of law enforcement processes has perpetuated their respective blind spots provides a powerful key to understanding why historical claims regarding the progressive character of doctrinal developments have ignored the elephant in the room. Yet even when we move toward a deeper understanding of how historical narratives focusing on the formalization of doctrinal arrangements are inclined to provide not only a partial but also a misleading picture of the extent to which criminal law can be insulated from wider mechanisms of social stratification, we are still left with open (and perhaps irresolvable) questions regarding the causes of this problem. To what

extent is this a result of the neglect of pre-trial and post-conviction forms of responsibility attribution on the part of liberal reformers?[8] To what degree is this a product of the misplaced design of reform initiatives that have been promoted in this context (e.g., determinate sentencing laws and judicial mechanisms of reviewing police practices)?[9] Conversely, is it an inescapable product of the differences inherent to the nature of the decisions made in different phases of the criminal processes (e.g., due to differences in the levels of uncertainty and urgency faced by decision-makers, the information at their disposal, and the forms of reasoning that they are expected to provide)?[10] In no small part, our limited ability to trace the sources of this problem derives from the fact that elements of discretion, which are inherent to these practices of responsibility attribution, are impervious to empirical analysis and raise intricate conceptualization challenges.[11]

A second interpretive frame for elucidating why the move toward more formalized practices of responsibility attribution failed to insulate criminal law from social and political mechanisms of perpetuating social hierarchies focuses on the legitimizing functions of these processes of institutional change. In the premodern period, criminal law was premised on models of legal reasoning and trial procedure that manifested the interweaving of legal practices of responsibility attribution and social practices of stigma distribution. The offender's social status was openly (and often, ritualistically) regarded as a factor that ought to determine both the substantive standards according to which his behavior was judged, and the types of penal sanctions to which he was liable.[12] The modernization of criminal law has sought to separate legal and "non-legal" forms of responsibilization, largely on the ground that only the former can deliver impartial justice within a stratified social order. However, in an era in which patterns of criminality and law enforcement have been decisively shaped by the systematic mechanisms of social stratification that were built into the structure of the urbanized and industrialized capitalist economy, the formalization of discursive techniques of denying the relevance of the offender's social status has served to reconcile the factual involvement of the criminal justice system in reinforcing social hierarchies with the declared commitment of modern states to egalitarian citizenship. Rather than insulating criminal law from the influence of "external" factors regarding the offender's social status, the formalization of doctrinal

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[8] Cf. William Stuntz, Plea Bargaining and Criminal Law's Disappearing Shadow, 117 Harv. L. Rev. 2458 (2004).

[9] Ely Aharonson, Determinate Sentencing and American Exceptionalism: The Underpinnings and Effects of Cross-National Differences in the Regulation of Sentencing Discretion, 76 Law & Contemp. Probs. 161 (2013).

[10] Markus Dubber's theorization of *law* and *police* as two distinctive forms of state power illuminates the conceptual and normative implications of these differences. See Markus D. Dubber, Paradigms of Penal Law, in The Oxford Handbook of Criminal Law 1017 (Markus D. Dubber & Tatjana Hörnle eds., 2014).

[11] See, e.g., Exercising Discretion: Decision-Making in the Criminal Justice System and Beyond (Loraine Gelsthorpe & Nicola Padfield eds., 2003); Ronald Dworkin, Taking Rights Seriously 31-34 (1977); H.L.A. Hart, The Concept of Law 272 (2d ed. 1994).

[12] James Q. Whitman's *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* (2003) provides one of the classic discussions of the logic underlying these forms of symbolizing status differentiation.

structures has neutralized the ability of the actors operating within the criminal justice system to recognize, let alone to address, the central role that this system plays within broader processes of class-based marginalization. The perspective that Lacey develops is sufficiently nuanced to allow distinctions among different cases of formalization depending on the extent to which they even seek to achieve egalitarian goals. However, the depth of this diagnosis brings one to reflect on whether egalitarian reformers of criminal law can ever escape the iron cage of the formalized structures in which they have to operate.

II. The Pluralist Structure of Criminal Law: Sociological Reflections

The story of the rise to dominance of the *capacity paradigm* of criminal responsibility captures a central place in the conventional histories of modern criminal law. Lacey problematizes this notion and offers a new way of understanding the role that capacity principles play *alongside* other frames of thinking about criminal responsibility. This analysis exposes the limitations of monist theories of criminal law. It also offers fresh insights into the relationship between the pluralist structure of criminal doctrine and the social forces that shape its evolution.

Lacey criticizes the tendency to regard the *capacity paradigm* as the epitome of modern thinking about criminal responsibility. Her analysis does not contest the claim that capacity principles have had a profound impact on the development of various areas of substantive and procedural criminal law. However, she emphasizes that this paradigm has never been able to exclude alternative frames of responsibility attribution, including those premised on evaluations of the offender's character. The distinction between the evaluation of an act and of the character of the actor proves more elusive than is usually admitted by proponents of capacity-based approaches. Moreover, key aspects of modern criminal doctrine, including the extensive reliance on standards of reasonableness and on the evidentiary presumption that a defendant has intended the natural consequences of her actions, invite decision-makers to integrate substantive evaluations of the offender's character in their judgments.

The persistent impact of character-based elements has been somewhat obscured by the development of jurisprudential theories that seek to reconcile them with capacity principles. A prominent example of such an attempt can be found in the approach that rationalizes the replacement of the requirement of proving the offender's subjective culpability with a demand to establish her (presumed) enjoyment of a "fair opportunity" to conform to the criminal law standard.[13] The rise of such theoretical models has narrowed some of the gaps between the philosophical formulations of criminal responsibility and actual doctrinal practices. However, it has also enabled criminal law theorists to avoid hard questions concerning the political and budgetary feasibility of institutionalizing capacity principles. A similar tendency to neglect the pervasiveness of objectivist standards in criminal law doctrine has been produced by theoretical approaches that treat outcome-

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[13] H.L.A. Hart, Punishment and Responsibility (2d ed. 1968).

and risk-based practices of responsibility attribution as "doctrinal outliers" rather than as integral components of a pluralist normative structure. As Lacey observes, the recent amplification of theoretical and political concerns regarding the problem of over-criminalization rests, in part, on a narrow historical understanding of the extensiveness and variability of the forms of responsibility attribution that criminal law has come to encompass throughout the development of the nineteenth century's regulatory state and the twentieth century's welfare state.

This account suggests that, instead of serving as the bedrock of the entire conceptual structure of criminal law, capacity principles have played the much more modest (though by no means insignificant) role of counterbalancing the influence of illiberal creeds that are inherent to the other three modalities of responsibility attribution. In part, the incomplete institutionalization of capacity responsibility has been a product of budgetary constraints. The development of doctrinal arrangements that relieve the state of its burdens to prove the defendant's engagement of his cognitive capacities in each and every case has proven indispensable in enabling the criminal justice system to perform its regulatory tasks (or at least to reassure public opinion of its ability to perform them) within reasonable levels of public spending.

However, alongside this economic explanation, one can draw from the historical evidence regarding the coevolution of distinct (and in some respects incompatible) frameworks of responsibility attribution broader sociological lessons regarding the multiple functions that criminal law is expected to perform in modern society. While it is true that the liberal values embedded in the *capacity paradigm* have played an important role in constituting public sentiments and norms in modern society, these values have never gained the levels of dominance that Whiggish histories attribute to them. Throughout the modern era (though with considerable variations across time and place), liberal values have vied for influence with illiberal models of governing behavior and forming collective identities. The pluralist structure of criminal doctrine took shape through constant processes of accommodating the conflicting ideational components of modern political thought. In particular, the accelerated development of outcome- and risk-based modalities of responsibility attribution throughout the nineteenth and twentieth centuries had been incorporated within criminal law styles and logics of governance aimed at improving the coordinative and bureaucratic capacities of the modern state in ways that can hardly be reconciled with principles of individual autonomy. The modernization of character-based responsibility attribution practices has served to accommodate new forms of social stigmatization driven by changes in the class structures of industrialized society, and (later on), by the rise of modern ideologies of *race*.

The implications of this analysis extend far beyond the specific historical context that the book covers. In fact, Lacey's argument casts serious doubt on the plausibility of monist approaches in criminal law theory (and even on dualist approaches that are willing to accommodate some forms of character-based thinking alongside the dominant paradigm of capacity responsibility). In stressing that one fundamental principle (or a

particular mode of balancing between several fundamental principles) should guide the entire terrain of criminal law doctrine, monist theories tend to regard doctrinal arrangements that do not conform to this principle as illegitimate intruders into the (presumably coherent) province of criminal law. However, when we understand the development of criminal doctrine as a product of both endogenous and exogenous pressures—and recognize that the former have gradually come to accommodate the logics of different paradigms of responsibility attribution while the latter include diverse (and sometime conflicting) sources of ideological influence—the monist strategy of boundary-drawing simply cannot hold. The reliance on this reductionist viewpoint to ground historical claims regarding the teleological directionality of modern criminal law cannot hold either.

III. The Pluralist Structure of Criminal Law: Normative Reflections

Alongside its contribution to the problematization of some of the interpretive contentions supporting the idea of progress in criminal law history, the book also sheds light on epistemological questions concerning the way in which we define (and assess) "progress" in legal history. In accordance with which criteria, one might ask, can we argue that the legal ideas that prevail in a particular historical era are not only different from—but also superior to—those adhered to in earlier historical periods? On what grounds can we establish the claim that the increasing dominance of capacity principles has not only transformed the doctrinal discourses of criminal law, but also made them more "progressive"? The answer seems to lie in the view that the *capacity paradigm* orients the development of criminal law toward extending the protection of individual rights against state encroachment. However, this mode of grounding the normative foundations of these interpretive claims is not without its problems.

First, as noted above, the extent to which capacity principles have been successful at realizing this normative goal is far from certain. On that score, Lacey's dissection of how conceptions of responsibility legitimize state power suggests that the *capacity paradigm* has not only failed to inhibit the criminal justice system's tendencies toward over-criminalization and mass incarceration. In fact, by constituting a salient normative discourse that diverts attention away from questions regarding the scope and content of criminal prohibitions and the social causes of their unequal enforcement, this paradigm might have contributed to the formation of the political and constitutional conditions that have facilitated the entrenchment of these trends.

Second, there are reasons to contest the assumption that capacity principles are necessarily better equipped than character-based doctrines at protecting individual rights. For example, John Gardner has argued that character evidence can and should be used to ensure that we are not held responsible for things that are "out of character."[14] Dan Kahan and Martha Nussbaum have called for a more expansive and systematic use of character evidence in criminal trials on the ground that such a change might provide a ba-

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[14] John Gardner, The Gist of Excuses, 1 Buff. Crim. L. Rev. 575 (1998).

sis for more accurate and humane judgments of the role of emotions in motivating (criminalized) human action.[15] These arguments suggest that, to the extent that the dogmatic commitment to capacity principles has inhibited the development of particular character-based doctrines, we should be skeptical of narratives that identify them as unambiguous vehicles of progressive thinking. Capacity principles have served both to enable and constrain the move toward more accurate and fair doctrines of responsibility attribution.

Finally, there are reasons to question the justification for treating the liberal values that underpin capacity principles as the normative standards against which we should consider the contribution of criminal law to social progress. For example, those arguing that the proper aim of law should not be understood in terms of the protection of individual rights but, instead, of its contribution to "making men moral,"[16] would contest the premise that the progress of criminal law should be assessed on the basis of its engagement with questions of individual agency and choice.[17] More generally, anti-foundationalist thinkers would question the self-referential logic of this mode of anchoring the supremacy of liberal values.

The genealogical perspective employed by Lacey adds considerable depth to the debate between competing philosophical theories of responsibility. It urges the participants in this debate to recognize that the rise and decline of particular conceptions of responsibility is not driven by the dictates of pure reason. Rather, it is shaped by complex configurations of contingent institutional, social, and political forces that inevitably constrain the extent to which these doctrines prove capable of realizing the normative aspirations of their proponents. This emphasis on the historicity of conceptions of criminal responsibility does not dismiss the value of abstract theorization about legal concepts. However, it requires criminal law theorists to engage more consciously and systematically with the substantive insights that historical and sociological studies of criminal law provide. As a contribution to the ongoing debate about the relationship between historical and philosophical strands of criminal law scholarship, *In Search of Criminal Responsibility* showcases the ability of the genealogical approach not only to highlight the perspectivity of dominant philosophical approaches but also to place new normative questions on the agenda.

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[15] Dan M. Kahan & Martha C. Nussbaum, Two Conceptions of Emotion in Criminal Law, 96 Colum. L. Rev. 269 (1996).

[16] Robert P. George, Making Men Moral: Civil Liberties and Public Morality (1995).

[17] Similar grounds of skepticism can be voiced from the perspective of the republican theories of law and morality. See, e.g., John Braithwaite & Philip Pettit, Not Just Deserts: A Republican Theory of Criminal Justice (1990).