Making Historical Sense of Responsibility

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Abstract

This review essay centers on the relationship between history and theory in Nicola Lacey’s *In Search of Criminal Responsibility*. Placing Lacey’s work in the context of recent methodological debates within the field of legal history, it is argued that her emphasis on the contingency of responsibility is in significant tension with the causal story the book tells and the broader normative aims it seeks to further. Questions are also raised about the criteria of accountability that Lacey insists must govern the relationship between social phenomena and their theoretical conceptualization, with particular attention drawn to her own schema, which does not fully capture the religious and psychological stakes of everyday adjudication about the subject of responsibility. It is suggested by way of conclusion that the historical roots of contemporary problems such as over-criminalization and mass incarceration are best located in the liberal legal model of the responsible self rather than any particular configuration of responsibility-attribution.

The rational study of law is still to a large extent the study of history.

Oliver Wendell Holmes, Jr. (1897)

I. History and Theory

The recent past has witnessed a revival of interest in history’s place in the study of law and the field of legal theory more particularly. There remains, of course, a significant cadre of theorists who delimit the province of jurisprudence so as to exclude history. Following Hans Kelsen, they insist that jurists and historians (or social scientists engaged in causal analysis) are concerned with “completely different problems.” In the drawing of these lines, many also imply the existence of a hierarchy, conceiving of the enterprise of legal philosophy as “an essential preliminary,” insofar as it clarifies the concepts deployed in historical and sociological studies of the law. As John Gardner puts it, “[O]ne must already know what counts as law before one can make either empirical or evaluative observations about it *qua* law.” Challenges to this view have proliferated of late in the

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work of a widening array of theorists, historians, and social scientists, with some reversing the priority between theory and history or social science, while others speak in terms of complementarity, arguing for the importance of dialogue across disciplinary divides.

Nicola Lacey’s *In Search of Responsibility: Ideas, Interests, and Institutions* is a signal contribution to this perennial debate and to the historiography of Anglo-American criminal law and justice as well. The culmination of years of research and writing about the subject of responsibility in English criminal law, Lacey’s wide-ranging monograph uses history to pursue critical ends, provocatively rethinking “the relationship between the analytic, explanatory, and normative tasks of legal scholarship” (176). Described at the outset as “a project in social theory as much as in legal history” (vii), Lacey’s reconstruction of “the shifting practices of responsibility- attribution in criminal law over time” (24) is presented as “a case study of methodology in legal scholarship more generally” (viii) which is designed to demonstrate the relevance of history to legal theory, revealing as it does the contingency of legal classifications, institutions, and practices as well as the patterns of legal development and the underlying forces that drive them. Holding analytical jurists to account for their failure to attend to these “conditions of [the law’s] existence” (20), she contends they will not fully comprehend the meaning and normative significance of the objects of their own inquiry—of concepts like responsibility and more fundamentally the nature of law itself—unless and until they widen the intellectual boundaries of their theoretical enterprises so as to reckon with legal change and its causes. “Only by broadening its horizons and methods in this way,” Lacey concludes, “will jurisprudence be capable of illuminating not only doctrinal analysis within particular jurisdictions at particular times, but also comparative and historical scholarship which engages with law as one important phenomenon in the social world” (203).

While there are reasons to doubt that Lacey’s argument will persuade the legal theorists to whom it is directed, the “reflexive jurisprudence” she models and defends in

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4 See, e.g., Lindsay Farmer, Making the Modern Criminal Law: Civil Order and Criminalization 1 (2016) (“Instead of beginning by asking what principle or principles should guide us in defining or limiting the scope of state action, I ask what I see as the prior question of how it is that the question of criminalization has come to be framed in these terms. And, going further, I want to look at the development of the institutional conditions that underpin and make possible our contemporary understanding of criminalization.”); Chloë Kennedy, Immanence and Transcendence: History’s Roles in Normative Legal Theory, 8 Jurisprudence 557 (2017).


6 See, e.g., Kimberly Kessler Ferzan, Of Weevils and Witches: What Can We Learn from the Ghost of Responsibility Past?, 101 Va. L. Rev. 947 (2015), providing a commentary on Nicola Lacey, Jurisprudence,
the book under review might be expected to find a more receptive audience among legal historians, not least because its emphasis on contingency more or less expresses the disciplinary common sense that has developed within the field over the last quarter century. Termed “critical historicism” by its leading expositor, Robert W. Gordon, it is an approach that treats “legal ideas, rules, institutions, and procedures” as “contingent products of time and circumstances: contested in their content, multiple in their forms, variable across time, place, and social groups in the ways they are put to practical use.” History is thus destabilizing and potentially liberating on the critic’s analysis, showing inherited legal forms to be “more plastic, more amenable to present re-imagination and change” than is conventionally presumed by practitioners and theorists. Of course, this critical mode of thinking about our legal past is not an entirely new departure, as Gordon recognizes, identifying Oliver Wendell Holmes, Jr. as an especially important precursor whose “aspirations for theory” were “grounded in cosmopolitan historical learning and intended to treat law as a cultural expression of the felt necessities, power struggles, and ideals of actual human beings in social life.”

Yet the role Holmes accorded to history in “the rational study of law” was chiefly negative and skeptical, as he famously described the nature and stakes of the endeavor: “When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.” By contrast, the critical mode that has since come to predominate has engendered more constructive lines of historical analysis, ones that not only “invert or scramble familiar narratives of continuity, recovery, or progress,” but also “advance rival perspectives” and “posit alternative trajectories,” sustaining belief in the “redemptive power” of such scholarly pursuits. Still, this paradigm has attracted its share of critics, who complain that the historicist rendering of the law as “plural, contested, socially constructed, vernacular” has made a fetish of complexity and “paralyzed generalizing inquiry,” displacing causal analyses with thick descriptions which offer only “an illusory route to meaning.” In the estimation of Christopher Tomlins, “[T]otalized contingency is a deeply tragic form of subversion, for it does not discriminate in the paralysis it metes out. In undermining the authority of all narratives, it spares none, not even those that may be precious to the powerless, those whom we once desired to liberate.”

History, and the Institutional Quality of Law, 101 Va. L. Rev. 919 (2015), in which Lacey distills the main features of her methodology.


8 Gordon, supra note 7, at 74.

9 Id. at 4 (quoting Holmes’s 1897 address, “Path of the Law”).

10 Id. at 8, 300-08; Catherine L. Fisk & Robert W. Gordon, Foreword, “Law As . . .”: Theory and Method in Legal History, 1 UC Irvine L. Rev. 519, 541 (2011).
accordingly urges scholars of law and history to “find other fish to fry,” ones that will “gratify the yearning for improvement.”11

My contextualization of In Search of Criminal Responsibility may simply evidence the inveteracy of this disciplinary habit of mind. Nonetheless, it should not escape notice that Lacey’s emphasis on law’s contingency does not prevent her from making generalizations about the concept of criminal responsibility, nor from telling a causal story about shifts in attribution principles and practices in English society from the eighteenth century to the present, from which she draws implications for normative theorizing by way of conclusion. In the space of this commentary, I cannot begin to do justice to the intricacies of the formidable arguments Lacey advances as she skillfully tacks between conceptual analyses and social practices across time and space to make sense of the present-day problems of over-criminalization, mass incarceration, and the structural inequalities they reflect and reinforce. And because she has expressly stated that her use of history is instrumental to these ends—advising the reader that “this is not, evidently, historical scholarship, but it draws on historical research to drive its interpretive project” (12)—it is important for me to stress at the outset that even as I endeavor to evaluate the work on its own terms, I do so as a legal historian rather than a social scientist. In what follows, I will accordingly focus on the substance of the claims the book makes with respect to responsibility’s past, though in the spirit of critical reflexivity I will also consider the advantages and disadvantages for legal history of the “pluralist” methodology Lacey deploys in her pursuit of criminal responsibility.

II. Responsibility’s Multiplicity

Taking critical aim at those who would pursue an “a priori unitary approach to theorizing criminal responsibility” (vii), Lacey contends that “we cannot understand what responsibility is, or has been, unless we also ask what it has been ‘for’ at different times and in different places.” Her historicized account nonetheless proceeds upon the basis of “two very simple assumptions” which are not made to rest on historical grounds. As they set the parameters for the study as a whole they are worth quoting in full:

First, I assume that responsibility is best thought of as a set of ideas that play two major roles in the development of modern criminal law: legitimation and coordination. In other words, conceptions and elaborated doctrines setting out the conditions of responsibility serve to legitimate criminal law as a system of state power, this in turn being a condition for criminal law’s power to coordinate social behaviour, a task it accomplishes in part by specifying the sorts of information or knowledge that have to be proven in the trial pro-

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While the propositions about legitimation and coordination are contestable as empirical claims, Lacey emphasizes that what is on offer here is historically informed social theory in the tradition of scholars from Marx, Weber, and Durkheim to Foucault and Luhmann. She regards the diachronic perspective of history as indispensable to the work of social theorists, providing a critical vantage from which to assess their own conceptualizations and causal hypotheses about the workings of human societies. Relying for the most part on secondary sources, she summons up illustrative examples and other evidence from these works to support a number of “interpretive claims which are driven by an analytic framework rather than worked through in each historical period” (23).

The overarching argument for contextualizing legal concepts is built upon a series of chapters (2-4) devoted to the ideas, interests, and institutions that have most decisively influenced the development of the doctrines and practices of criminal responsibility, the historical dynamics and methodological significance of which are then addressed in two concluding chapters (5-6), which account for the patterns of attribution that emerge from this analysis and draw out the implications of these findings for the study of the criminal law and legal scholarship more broadly. Lacey’s discussion of ideas begins by delineating “the four principal ideational frames” (25) within which conceptions of criminal responsibility have been elaborated in the modern era: capacity, character, outcome, and risk. The field of vision is then widened to encompass the shaping effects of a broader set of cultural and intellectual influences before consideration is given to the interests and institutions that further conditioned how these competing conceptions of responsibility have come into currency and been put to use as governing ideas across space and time. Having framed the analysis to comprehend “the coevolution of these three spheres in the production of doctrines and practices of criminal responsibility attribution” (3), the moving parts of which are concretized through the use of case studies, Lacey maps out and provides a causal explanation for what she describes as “a broad move through four configurations of responsibility from the early eighteenth to the early twenty-first century” (136). The first configuration, which was rooted in shared understandings of what constituted good and bad character, founded responsibility upon the “manifest criminality” (38) of the defendant’s conduct. It was gradually displaced in the Victorian era by more subjective notions of criminality rooted in an Enlightenment conception of individual agency, which premised responsibility upon the possession and engagement of the defendant’s

12 An important exception is Nicola Lacey’s own *Women, Crime, and Character from Moll Flanders to Tess of the D’Urbervilles* (2008), an innovative and richly suggestive study of novels as indexes of socio-legal change and shifting patterns of responsibility-attribution in particular. It is worth adding that Lacey also specially references and draws extensively on Lindsay Farmer’s more comprehensive and systematic historical study, *Making the Modern Criminal Law*, supra note 4, indicating that it might serve as something of a companion volume, providing evidentiary support for her working assumptions concerning legitimation and coordination (23-24).
cognitive and volitional capacities. This configuration was partially eclipsed by the turn of the twentieth century with the development and growing use of more objective outcome- and risk-based approaches that were primarily concerned with preventing or reducing harm. The capacity configuration was further compromised by “the subterranean survival of character” and its resurgence and recombination with risk-based techniques in our own times, facilitating and legitimating the rounding up of the usual suspects and thereby unleashing “the most dangerous aspects of criminalization and punishment as forms of social power” (162). Put differently, the trajectory of responsibility has not necessarily bent toward justice.

Placing criminal responsibility within this complex of contexts, Lacey illustrates both the strengths and limitations of critical legal history as a tool of normative theorizing. Her general orientation towards history shares much in common with the approach Holmes commended, insofar as it regards its study as “the first step toward an enlightened scepticism,” providing “the means by which we measure the power which the past has had to govern the present in spite of ourselves, so to speak, by imposing traditions which no longer meet their original end.” As Lacey pursues responsibility’s past in this spirit, luring it out of its proverbial cave, she gains some critical purchase on the notion of capacity-based responsibility that has come to dominate criminal law theory even as (or perhaps because) it is increasingly observed in the breach. Looking backward and chronicling its coexistence with competing conceptions of responsibility over the course of English legal history, she shows that its ascendency was the product of contingent and shifting social purposes, emphasizing that its reign is not as complete as it is often made to appear in contemporary casebooks and treatises; these works obscure and often operate to enable the survival and repurposing of doctrines and practices that deviate from or wholly contradict the capacity principle, at least insofar as their authors perpetuate the notion that status crimes are antithetical to modern criminal law. In recounting the tangled past of this principle, this book also bears the imprint of the critical approach that has become conventional within the field of legal history. For hers is emphatically not a linear narrative of the law progressing in accordance with an internal logic or teleology; the analysis she offers “suggests that we are seeing not so much a replacement of one paradigm of responsibility by another, but rather an accumulation of conceptions or ‘technologies’ of responsibility, as new legitimation problems and resources emerge without necessarily obliterating the older ones” (203). The twists and turns of Lacey’s story more particularly call to mind one of Gordon’s renderings of law-in-history, evocatively likening it to “biological evolution. Multiple forms are continually being produced; some disappear, killed off by predators or random external shocks; some survive for contingent reasons; some are selected for certain functional purposes, then sidetracked and coopted for other purposes entirely.” Yet to the extent that her

13 Oliver Wendell Holmes, Jr., Path of the Law (1897), in Collected Legal Papers 167, 187 (1920); Oliver Wendell Holmes, Jr., Law in Science and Science in Law (1899), in id. at 210, 225.

14 Gordon, supra note 7, at 306.
historical account is intended to be deployed “in service of social theory” (203), Lacey does not fully elaborate the principles of selection that ought to guide theorists in their efforts to contextualize their conceptual analyses, sometimes suggesting the environmental influences she singles out are “the most salient,” but other times indicating they are “just some among many factors which might have been selected as examples” (49). And she does not squarely confront the ways in which her reliance on the deconstructive methods of critical legal history may work against the normative project her pursuit of the past is ultimately intended to further, one aimed at combatting the dangers posed by the resurgence of character-based patterns of responsibility attribution (4, 162, 192). For as Gordon himself observes and concedes, “the notion that every form of legality is a constructed artifact rather than a natural determined fact is useful for understanding the genealogy of current conditions but at the same time tends, understandably, to deprive people of any strong basis for confidence in transcendent standpoints for critique of the present order.”

There is, then, a certain irony in the way Lacey makes the case for history in In Search of Criminal Responsibility. While she deftly charts a middle way between the competing tendencies to universalize and particularize in the study of law, the book on the whole has remarkably little to say about “the criteria of accountability” that ought to govern the relationship between social phenomena and theoretical conceptualizations of them (13, 200 (emphasis added)). A strong argument for historicizing responsibility is presented in and through its pages, but as persuasively as Lacey demonstrates history’s relevance to jurisprudence, she might have been more explicit about how the theorist is to choose among the multitude of contexts within which responsibility is embedded, and to determine how thick the description of the relationship between legal concepts and social phenomena must be. Situating criminal responsibility within the separate but mutually constitutive spheres of ideas, interests, and institutions proves effective as an organizational strategy, but ambiguities remain with respect to the contours, interrelations, and contents of these categories of analysis. Depending upon a distinction between law and society even as she blurs the line between them (as well as those separating the three spheres), Lacey renders it exceedingly difficult to distinguish causes from effects. Indeed, the contingency argument the book seeks to advance is in significant tension with the causal story it aims to tell, one that promises to identify “the drivers of the shifting patterns of responsibility-attribution over time” (23-24 (emphasis added)). Moreover, it is not entirely clear what constitutes an idea as opposed to an interest, nor is it easy to see where values and beliefs fit within this schema. Consider, for example, the perennial problem of free will, which loomed larger in the period under consideration than is reflected in this volume, where it is addressed in passing and mainly under the rubric of ideas.16

15 Id. at 308.
16 Questions might also be raised about Lacey’s treatment of “sex and gender” (55-57), which are accorded a heading in the chapter on ideas, whereas race, ethnicity, and class receive less sustained attention, though they are listed along with gender in one of the chapter’s case studies as “the social axes” around which
ing a secularization narrative that problematically understates the continuing influence of theological doctrines and religious belief systems, organizations, and practices more broadly, Lacey accords only brief consideration to a succession of determinisms—moral insanity, Social Darwinism, and eugenics—which are said to pose challenges to the character and capacity configurations of responsibility, paving the way for the risk-based configuration. The genealogies of the ideas in play here—character, capacity, risk, and responsibility itself—nonetheless remain rather obscure as her analysis does not fully integrate the historiography tracing their shifting usage and significance over time as they registered in thought, action, and experience; each of these keywords carried multiple connotations—religious as well as philosophical, legal, political, socio-economic, and medical—that were expressive of varied and variable ways of thinking about the relationship between divine and human agency as well as the constitution of moral and legal personhood, implying the existence of spiritual, psychological, and cultural stakes not adequately captured by the notion of interests as it is used in this volume.17

Policing and prosecution practices are structured (61-62). “Gender, race, and social status” appear together again in the next chapter on interests, where they are referred to as “vectors of power” (81) which are said to manifest themselves in cultural and symbolic as well as economic, professional, and political forms, thus serving as illustrations of “the interplay between interests and ideas” in the generation of “race, class, or gender stereotypes” which are reflected and reinforced in and through the criminal justice system’s “patterns and principles of responsibility attribution” (85). Yet the historical dynamics of these forces are never fully fleshed out (particularly in relation to the sex offender registers summoned up as a key indicator of the resurgence of character responsibility) and they recede from view in the following chapter on institutions, as large-scale developments such as secularization, urbanization, industrialization, and professionalization come to the fore.

17 While Lacey does cite important works by Margot Finn, Deidre Lynch, Dana Rabin, and Martin Wiener on character as both an idea and a cultural phenomenon, and she also draws upon her own contribution to this literature, see Lacey, supra note 12 (where these matters are considered in greater depth and in relation to other pertinent works, most notably, Lisa Rodensky’s The Crime in Mind: Criminal Responsibility and the Victorian Novel), the volume here under review generally casts character as a survival from the eighteenth century with a moralistic tinge that is carried forward into the nineteenth century via the “evangelical tradition” (54), becoming intermixed with utilitarianism in legal discourse and coloring determinations of capacity responsibility that would otherwise have been rendered in factual rather than evaluative terms. Religion on this analysis mainly figures as an “incentive system” (54) that is used by the English state as a tool of social control. For alternative perspectives on the formative role of religion in the development of ideas of character, capacity, and responsibility (albeit focused on the U.S.), see Karen Halttunen, Murder Most Foul: The Killer and the American Gothic Imagination (1998); Susanna L. Blumenthal, Law and the Modern Mind: Consciousness and Responsibility in American Legal Culture (2016); see also Jan-Melissa Schramm, Testimony and Advocacy in Victorian Law, Literature and Theology (2000) (cited by Lacey in a different context (122 n.14)). On the interpenetration of character and capacity discourses in the history of the human sciences more generally, attending to the factors of race and ethnicity as well as gender and class, see John Carson, The Measure of Merit: Talents, Intelligence, and Inequality in the French and American Republics, 1750-1940 (2007). For an especially insightful exploration of the history of the idea of risk, see Jonathan Levy, Freaks of Fortune: The Emerging World of Capitalism and Risk in America (2014). On the profound stakes of the free will issue with particular attention drawn to its psychological as well as its political and legal dimensions, see Thomas A. Green’s magisterial Freedom and Criminal Responsibility in American Legal Thought (2014), which is cited but not mobilized to this end, as well as Jerrold Seigel’s incisive overview, Necessity, Freedom and Character Formation from the Eighteenth Century to the Nineteenth, in Character, Self, and Sociability in the Scottish Enlightenment 249 (Thomas Ahnert & Susan Manning eds., 2011), and Thomas L. Haskell’s penetrating and far-reaching essay, Persons as Uncaused
To introduce these complicating factors is not to argue for greater complication for its own sake. Rather, it is to suggest that Lacey’s venture *In Search of Criminal Responsibility* is potentially limitless, so far as the provision of historical contexts is concerned.\(^{18}\) While she resists the conclusion that we must speak in terms of *responsibilities*, maintaining there is a singular sense that can and should be studied, her emphasis on the contingency of such legal concepts has a corrosive effect on this claim. Still, the book as a whole might be read as a demonstration of an historical analysis of a legal concept pitched at “a reasonable level of generality” (190), and it also quite effectively historicizes the very impulse to generalize within the English criminal justice system. What emerges from its pages is a fascinating account of how the capacity-based configuration rose to dominance, owing in no small part to the work of criminal law theorists, whose casebooks and commentaries performed important cultural work as they elaborated the fundamental principles constituting “the general part.” In so doing, they perpetuated the notion that “modern criminal law eschews the criminalization of status” (137), thereby providing ideological cover for the expansion of summary jurisdiction and the authorization of various “shortcuts” to criminal conviction, grounded upon “a new sense of bad character, not as religiously inflicted sinfulness but rather as the status of presenting risk or being ‘dangerous’” (147). But to speak of this “resurgence of character” (161) as constituting a new form of an older idea is of course to beg all sorts of important questions about whether and to what extent history is repeating itself. There are, as alluded to above, reasons for thinking that Lacey’s use of the keyword *character* in this context obscures as much as it reveals about the changes and continuities in the patterns and practices of responsibility-attribution over the last 250 years. In this regard, the book serves as a valuable provocation to historians and historically-inclined theorists, productively setting an agenda for further research into the legalities of responsibility and its broader social consequences and cultural significance. As I will briefly suggest below by way of conclusion, these lines of inquiry may lead us to conclude that the “‘dangerous’ offender” policies of the present (64, 148) are rooted in the model of personal responsibility that has become embedded in Anglo-American systems of criminal justice rather than the survival, resurgence, or reconstitution of any particular variant. We may find, in other words, that it is our deep attachment to a post-Enlightenment vision of the autonomous self that has inclined us to talk about criminal defendants in ever more abstract and punitive terms, regardless of the shaping effects of structural inequality.

### III. Responsibility in the Legal Sense

*In Search of Criminal Responsibility* traces the history of the idea of responsibility back to Aristotle’s ethics and early Christian theology, though they are cast as the “intellectual

\(^{18}\) See Tomlins, *After Critical Legal History*, supra note 11, at 37.
ancestors” of modern disputations about its conditions, which are said to be grounded in Enlightenment notions of human agency, even as contemporary philosophers tend to treat the concept as if it had a “metaphysical status,” transcending space and time (5-6). Here the task of contextualization might have been taken a step further in order to define the scope of the inquiry with sufficient particularity. For linguistic evidence indicates that responsibility did not come into usage as an abstract noun until the last decades of the eighteenth century, making some of its earliest recorded appearances in the ratification debates over the U.S. Constitution and only slowly migrating from political into philosophical discourse over the first half of the nineteenth century. In view of such evidence, indicating that matters of crime and punishment were most commonly spoken of in terms of “accountability” and “imputation” during the early modern period, it might be questioned whether the eighteenth-century patterns and practices Lacey types as “character responsibility” ought to receive this designation, not least because the book makes such a strong case for analyzing language “in the spirit of the Wittgensteinian precept that such analysis must be set within the context of a social practice or form of life” (203). Tracking these shifts in usage would place responsibility’s legal meanings in sharper relief, clarifying the ways and means by which they were forged and deployed by a professionalizing bench and bar over the course of the nineteenth century. And it would also enhance our ability to assess the historical and normative implications of the words we choose to describe and deal with wrongdoers, both within and outside of the confines of the criminal justice system, to say nothing of the civil side of the docket.

Lacey speaks of this process of differentiation in terms of “autonomization of criminal law and the legal profession” (117 (emphasis in original)). This turn of phrase is meant to refer to the way criminal justice was turned into a system, one with its own “distinctive personnel, institutions, processes, responses, and special kinds of knowledge,” all of which combined to generate “technical conceptions of responsibility articulated in terms that did not rely on shared, lay evaluations” (119), i.e., those grounded in “individual subjective capacity” (121). Described as “closely related to the developing project of modern governance, along with a distinctively modern idea(l) of legality” (118), the concerted efforts to render the criminal law as a coherent set of principles and doctrines, capable of being interpreted and applied in a fair and impartial manner, set it apart from common sense and conventional morality, even as—or perhaps especially because—the making of criminal law was democratized and politicized with the expansion of the franchise. The criminal trial provided a critical staging ground for the performance of professional exper-


20 Andrew Parker et al., Introduction, Subjects of Responsibility: Framing Personhood in Modern Bureaucracies 3 (Andrew Parker et al. eds., 2011).

21 On the legal treatment of deviant behavior in civil as distinct from criminal jurisprudence, see generally Blumenthal, supra note 17.
tise on Lacey’s account, though what is most striking about the story she tells is that practicing lawyers and lay audiences more often than not diverged from their scripted roles. Despite the provision of institutional mechanisms for investigating and proving criminal capacity in the subjective sense, it would appear that the traditional common law presumption that “a defendant . . . intended the natural and probable consequence of her actions” survived into the first decades of the twentieth century as an evidential if not a legal presumption (120-21). Moreover, even with defense lawyers’ “gradual infiltration . . . of the criminal trial” over the course of the nineteenth century, their status as professionals was less than secure, while the proceedings themselves remained “significantly decentralized, and significantly subject to the influence of local norms and customs” (121-22). In fact, Lacey concludes that an “underlying tension about who has the power and authority to define crime—the lawyer or the lay person . . . continues to haunt English criminal law today,” going to show that the subject of criminal responsibility is still “not purely a matter of law” (128-29).

This raises a host of fundamental questions about the nature, location, and contours of law, which are themselves historically and culturally contingent. For neither the lay involvement in criminal proceedings nor their local character necessarily take them outside the domain of the legal. Moreover, as Laura Edwards argues in her important work on the Anglo-American concept of “the peace,” the tendency of legal historians to view “localized law” as lesser than or other than law unduly circumscribes the field and creates problematic hierarchies as well.\(^\text{22}\) Whether the incomplete professionalization and systemization of criminal law that Lacey finds in her study is to be celebrated or lamented is left somewhat ambiguous as she brings the narrative to a close. Certainly, she finds profoundly troubling the electoral politics that have generated tough-on-crime legislation, associating this “vengeful penal populism” (204) with the development of a hybrid mechanism of responsibility-attribution based on character and risk, which “serves to legitimize the impact of structural inequalities based on social cleavages, such as race, by labeling manifestations of allegedly dangerous difference as criminal” (172). But it is far from clear that penal welfarism, and the associated capacity principle from which English (and American) systems of criminal justice are so prone to deviate, provide better means of safeguarding and realizing the “ideals of equality, legality and human rights” (192) towards which she ultimately aims. Indeed, there are those—among whom I count myself—who would locate the source of our present predicament in a set of basic contradictions at the core of the liberal Enlightenment view of individual agency and accountability, which gave rise to this constellation of ideals as well as tendencies to segregate and stigmatize certain human kinds as mental aliens, as if causes of crime were to be found solely within them.\(^\text{23}\) While arguments are periodically made by political theorists and legal philosophers, urging us to rethink or renovate the concept of responsibility so as to make it less


\(^{23}\) See, e.g., Halttunen, supra note 17, at 208-40; cf. Blumenthal, supra note 17, at 267-74.
punitive in its nature and effects,24 their prescriptions are all too often based upon selective readings of the historical record, failing to recognize and grapple with the extent to which this concept has been bound up with the notion of “punishability,” J.S. Mill bluntly declaring that “responsibility means punishment.”25 What sets Lacey apart and renders In Search of Criminal Responsibility a landmark publication in the field of legal history as well as legal theory is her insistence upon a serious interrogation of criminal responsibility’s past and the moral imagination she brings to the endeavor. Although the book is in many respects written to speak most directly to legal philosophers and is more concerned with offering an interpretive analysis than presenting a normative vision, the schema Lacey sets out in its pages provides an invaluable map and a prompt to further historical inquiry, including questions about the interrelations between legal history and normative theorizing. Her work is especially suggestive in its documentation of the efforts of lawyers “to autonomize criminal justice” (119), to construct a legal system of accounting for crime, for it provides a basis for thinking beyond the contingencies of critical legal history and pursuing what Tomlins calls “a materialist jurisprudence,” one that refocuses attention on “the fabrication of law’s difference” exploring “how law might be expressed as technology and artifact, how law as a differentiated category of action is fabricated.”26

This is only to hint at the riches to be found in In Search of Criminal Responsibility, which is most to be admired for delivering on its promise to stake out a via media between abstract conceptualism and radical contingency. In contemplating the work as a whole, I am reminded of what the great intellectual historian Thomas L. Haskell had to say on the subject: “Between the local and the universal there is much middle ground, well suited to human habitation. The trick in achieving balance is to give the devil of convention his due, without abandoning the claims of reason. Balancing acts are, of course, easier to recommend than to perform, but that is no argument for stepping off the wire into the void.”27 Lacey pulls this off with a characteristic blend of analytic rigor and humanistic insight. What remains to be seen is whether the concept of responsibility that Lacey has so brilliantly brought into the daylight can be tamed and turned to the ends of criminal justice.

24 Among the most recent contributions to this literature is Yascha Mounk’s thought-provoking and timely The Age of Responsibility: Luck, Choice, and the Welfare State (2017).
25 McKeon, supra note 19, at 65.
26 Tomlins, Historicism, supra note 11, at 59, 68.
27 Haskell, supra note 19, at 286.