Criminal Responsibility and Its Histories: New Perspectives for Comparative Legal History

Michele Pifferi*

Abstract

This article discusses the implications for comparative legal history of Nicola Lacey’s In Search of Criminal Responsibility. I emphasize the importance of both diachronic comparison and comparison between different legal systems to analyze the changing patterns of responsibility-attribution, focusing on four themes: (1) the rationalization of a general part of criminal law by late-medieval European doctrine; (2) the growth of regulatory offenses and the changing boundaries of criminal law in the nineteenth century; (3) the role of character in sentencing and the creation of security measures under the influence of scientific criminology; and (4) the political meaning of capacity-based responsibility and the underlying idea of individual freedom in authoritarian penal systems.

Nicola Lacey’s In Search of Criminal Responsibility is premised on the key idea that, “in terms of method, legal scholarship is ideally historical and comparative in outlook” (3). Lacey makes it clear that the book is not a legal-historical investigation, but rather one in which history is used “in support of an analysis driven primarily by the social sciences” (12), and her approach, based on the importance of historicizing criminalization, is extremely fertile for legal historians specializing in different (and often separate) branches of criminal law. Lacey argues that criminal responsibility “has to be understood in the context of more general patterns and practices of criminalization” (14) and that criminalization itself is a complex phenomenon, whose understanding passes through a comprehensive consideration of how legal constructions are shaped by cultural, political, social, and economic patterns. By revisiting the autonomy-of-law approach (22), Lacey suggests studying criminal responsibility not just as an idea, a purely abstract formula decontextualized from a broader intellectual and institutional environment in which it is thought of and applied, but as a

* Michele Pifferi, Associate Professor of Legal History, University of Ferrara, Faculty of Law. I would like to thank Lucia Zedner for helpful comments on an earlier version of this paper.


2 The methodological importance of an inclusive concept of criminalization had already been discussed in Nicola Lacey, Legal Constructions of Crime, in The Oxford Handbook of Criminology 179, 197 (Mike Maguire et al. eds., 4th ed. 2007): “The term ‘criminalization’ constitutes an appropriate conceptual framework within which to gather together the constellation of social practices which form the subject matter of criminal law on the one hand and criminal justice and criminological studies on the other”; see also Nicola Lacey, Historicising Criminalisation: Conceptual and Empirical Issues, 72 Mod. L. Rev. 936 (2009).
concept changing over time, “as a reflection not only of the history of ideas but also of systematic changes in interests and institutional dynamics, fundamentally affecting the nature and scope of criminal law as a system producing social meaning and social governance” (135).

By investigating the interplay of ideas, interests and institutions in structuring patterns of responsibility-attribution from the eighteenth to the twenty-first century, in terms of both their legitimation and coordination, Lacey rethinks Fletcher’s historical account of a progressive shift from a pattern of manifest criminality to a conception of subjective criminality. Rather than being a coherent and one-way evolution, “from ‘external’ to ‘internal’ practices, from principles based on character to ones based on choice and capacity,” the trajectory of responsibility-attribution “reveals not so much linear development as a complex and shifting alignment of apparently competing principles” (161-62).

In Search of Criminal Responsibility’s central thesis is that character-based attribution of responsibility, characterizing the eighteenth century and the first half of the nineteenth century, did not completely disappear either in the era dominated by capacity and outcome-based responsibility (from the mid-nineteenth century to the latter part of the twentieth century), nor in the welfare state framework from the early twentieth century on. In particular, when a technical doctrine of *mens rea* prevailed, “the patterns and principles based on character declined as autonomous forces, though they did continue to shape decision-making at the prosecution and sentencing stages” (143). The “subterranean survival of character” (148) has turned into a “revival of character” in contemporary English and American criminal law, due to “the emergence of a pattern of responsibility-attribution founded in bad character understood as the presentation of risk” (166): terrorist suspects, migrants and asylum seekers, considered as dangerous categories, are criminalized because of their status.

In my contribution, I will apply an inverse methodology to Lacey’s: while Lacey has profitably used legal history as a heuristic tool to critically develop a social science and philosophical interpretive framework of criminal responsibility, I suggest employing Lacey’s approach to legal history. My aim is to demonstrate the significance and potentiality for legal history of Lacey’s historicization of criminalization by looking at the interaction of ideas, interests and institutions in terms of legitimacy and coordination. In particular, I will focus on four themes discussed in In Search of Criminal Responsibility (the rationalization of a general part of criminal law; the growth of regulatory offenses; the role of character in sentencing under the influence of scientific criminology; the political meaning of capacity-based responsibility and the underlying idea of individual freedom) to

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3 I.e., the doctrines and practices used to legitimate criminal law as a system of state power.

4 For Lacey this is “the sort of information or knowledge that have to be proven in the trial process precedent to conviction” (2).

5 Lacey stresses this point even at 166: “In the end, the capacity principle gained a serious foothold in the law governing the more serious criminal offences, displacing explicit character attribution onto the less visible areas of the prosecution and sentencing process.”
elaborate and question some of the book’s findings. Specifically, I emphasize the importance of (historical) legal comparison both in its diachronic dimension, as Lacey already does, and in its spatial dimension as manifested between different legal systems, a point whose significance is only briefly mentioned (e.g., 90, 169) but scarcely developed in the book.6

I. Late-Medieval Doctrine and the “General Part” Before Codification

Lacey argues that key concepts of responsibility-attribution such as *mens rea*, criminal capacity and voluntary conduct “have come over the last century to form an increasingly predominant part of what is known as the ‘general part’ of criminal law” (31). “English criminal law of the eighteenth century had neither a comprehensive Code nor even a systematic process of case reporting” and it also “lacked anything approaching the sort of ‘general part’ which is argued to form the doctrinal backbone of criminal law today” (32). Influential jurists discussed in their treatises ideas of intention, malice or the will not as general principles but in relation to specific offenses or cases (33): without general doctrines of capacity and *mens rea* and “in a society structured by status hierarchy and a decentralized social order whose institutions of both informal and formal social control were situated importantly at the local level and in lay hands” (136), capacity and responsibility were assumed. Even in late eighteenth-century England, the criminal trial was “highly decentralized,” “lay-dominated” and “trained for the most part on facts rather than on law” (111): in this context “findings of criminal liability turned on moral, conventional, and pragmatic considerations as much as on legal standards” (112). It was only in the late nineteenth and twentieth centuries, when the question of wrongdoing became separate from attribution of responsibility, that doctrinal conceptions of *mens rea* as founded on intention, knowledge or foresight were developed within a more egalitarian society; “as a result, the burden of legitimating criminal culpability was borne to an ever greater extent by the general part, in which increasingly elaborate psychological doctrines of *mens rea* and defence came to occupy a significant larger proportion” (140).

If we look at the continental history of criminal law, the trajectory is different. The Europe of the late Middle Ages, from the twelfth to the fifteenth century, was still a “society without a state,” characterized by a lack of central sovereignty and locally diffused and fragmented legal powers.7 Criminal justice, shaped by dialectic tensions between negotiated justice and hegemonic justice, between accusatorial and inquisitorial procedure, and between ordinary and extraordinary rules, was based on the relevance of the communitarian dimension of the offense and was dominated by the pivotal role of the judge’s

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6 Lacey addresses this at two points: with reference, first, to the European distinction between administrative infractions and criminal law (90), and second to the nexus between particular forms of capitalism and mechanisms of responsibility-attribution (169).

discretion (arbitrium iudicis).\(^8\) It lacked not only definite and clear rules, because of the plurality of multi-level legal sources, but also general principles about culpability, due to the vagueness and uncertainty of the notion of malice derived from Roman law (sometimes intended as a specific offense—crimen doli—and sometimes as a constituent element of every crime).\(^9\) But the sixteenth century represented, especially for criminal law, both a cultural and legislative turning point. Criminal law started being taught in many universities as an autonomous discipline; theoretical definitions and concepts were refined by jurists; sovereign legislators in the German Empire, France, and the Spanish Netherlands, trying to achieve their state-building purpose, enacted comprehensive and authoritative laws to regulate and control criminal law and criminal procedure.\(^10\)

In this changing cultural and political framework, some jurists started elaborating a general part of criminal offenses, in which capacity in terms of intention (voluntas) and knowledge (animus delinquendi) was considered a condition and an essential requisite of any criminal offense. Tiberio Deciani, a sixteenth-century jurist teaching at the University of Padua, was the first to write an extended and specific part of a criminal law treatise dedicated entirely to the generalia delictorum.\(^11\) Considered by some legal historians to be the father of the general part of criminal law,\(^12\) his original contribution shall be historicized.

Writing in a period in which, as in the English case described by Lacey, there was neither a penal code nor an idea of it, Deciani among others (e.g., the German Peter Dietrich and the Dutch Anthon Matthes\(^13\)) was convinced that the time was ripe for a purely doctrinal general part. It is worth noting, first, that it is possible to think of generalia delictorum even before and without codification, so the very meaning of “general part” needs to be contextualized. By adopting Lacey’s heuristic tools it is possible to examine which ideas, interests and institutions shaped Deciani’s work. Deciani studied and taught in Padua and was part of a cultural elite that looked with great interest at the new methodological proposals claimed by the adherents to the school of “legal humanism,” who asserted the need for systematization and rationalization of law. The identification of general principles, rules, and elements characterizing all of the crimes and their formulation in terms of

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\(^8\) See Massimo Meccarelli, Dimensions of Justice and Ordering Factors in Criminal Law from the Middle Ages till Juridical Modernity, in From the Judge’s Arbitrium to the Legality Principle: Legislation as a Source of Law in Criminal Trials 49 (Georges Martyn et al. eds., 2013).


\(^11\) Tiberio Deciani, Tractatus criminalis (1590).

\(^12\) This was argued for the first time by the Nazi criminal law scholar and legal historian Friedrich Schaffstein, Tiberius Decianus und seine Bedeutung für die Entstehung des Allgemeinen Teils im gemeinsen deutschen Strafrecht, in Deutsche Rechtswissenschaft 121 (Karl August Eckhardt ed., 1938).

\(^13\) Peter Dietrich (Theodoricus), Judicium Criminale Practicum (1671); Anton Matthes, De Criminibus ad Libros XLVII et XLVIII Digestorum Commentarius (1772).
“general part” was therefore driven by a cultural shift. But it was also influenced by political interests: the doctrinal building of the principle of responsibility and the emphasis on the legality of offenses, namely the insistence on the fact that every crime must be created and fixed by a written law, were both instrumental in reinforcing the ruler’s supremacy (whether a king, an emperor, or a ruling elite) to the detriment of judicial and feudal powers. And institutional patterns also played a role because trial rules (on the duties and limits of judicial discretion) and rules of evidence pressed for (and at the same time were modelled by) new notions of responsibility-attribution.

The sixteenth-century “golden age” of Italian criminal law doctrine confirms Lacey’s claim that “the general part itself has distinctive institutional and historical conditions of existence” (20). Deciani’s treatise and its *generalia delictorum* embody the move from an analytical, casuistic, and communitarian system of criminal justice, driven by the judge’s discretion and grounded on doctrinal interpretation of Roman law, to a more hegemonic and centralized system directed by rational principles and founded on the authority of sovereign positive laws. A broader temporal and spatial comparison reinforces Lacey’s argument and provides further insights into the historical development of a general part of criminal law in England and in continental Europe.

II. Regulatory Offenses and the Changing Boundaries of Criminal Law

The emergence of a pattern of responsibility-attribution based on the causation of harmful outcomes together with the growth of strict-liability regulatory offenses are “generally associated with the idea of criminal law as oriented to harm-reduction, with utilitarian theories of punishment, and with the development of these ideas at the hands of the nineteenth-century regulatory, legislative state and the mid-twentieth-century welfare state” (42). Though Lacey points out that offenses of strict liability did already exist in English law since the fourteenth century (43), it is undeniable that the multiplication of summary offenses and the related development of summary jurisdiction were responses to new regulatory needs brought about by the industrializing and urbanizing economy of the mid-nineteenth century. Following Norrie’s analysis, Lacey argues that this extension of the boundaries of criminalization regardless of capacity led to the distinction between “real” and “regulatory” crimes with very different legitimation and coordination mechanisms, albeit both were contained within the same field of criminal law (89-90). Lacey depicts this historical development of English criminal law as very different from the European

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14 The same trajectory can be seen in the doctrinal construction of general principles and fundamentals of the law of contract by late-medieval continental jurists. See, e.g., Paolo Cappellini, *Sulla formazione del moderno concetto di “dottrina generale del diritto,”* 10 Quaderni fiorentini 323 (1981).


situation, characterized by “a formal distinction between administrative infractions and criminal law which has underpinned a rather different pattern of responsibility attribution in the civilian systems” (90).

On this point, however, if we apply Lacey’s historicizing approach to criminalization with an emphasis on comparative analysis, it turns out that the European legal landscape is much more similar to the English one. For the sake of brevity, I will refer only to the Italian debate of the late-nineteenth/early-twentieth century about the notions of contravvenzioni (contraventions or regulatory offenses) and measures of security. After lengthy discussion, and unlike some pre-Unitarian legislations (e.g., in Tuscany), contraventions were included in the first Italian Penal Code of 1889 alongside felonies (delitti).

As the lawmaker pointed out, between these two categories of criminal offenses, there were substantial ontological differences: while felonies were real or natural offenses, contraventions were prohibited for utilitarian reasons and on the basis of political considerations of opportunity. Contraventions were strict liability offenses, punished regardless of the offender’s intent, but only by reason of harmful outcome or dangerous behavior. Legitimation ideas and coordination rules were radically different, but felonies and contraventions were both criminalized. Even though administrative in character, contraventions were formally penal: they were preventive, rather vaguely defined, sometimes implying the transgression of administrative orders, and were based on dangerousness rather than wrongdoing; yet their transgression implied (more lenient) penalties applied by a judge after a criminal trial, though with shortcuts to proof.

At the turn of the century, many jurists assessed the growth of regulatory offenses as an unavoidable consequence of a more complex industrialized society governed by a growing welfare state. The increasing amount of regulatory offenses, as well as their dissemination in expanding areas of economic and social life, raised questions about the changing boundaries of criminal law, the effectiveness of its liberal guarantees, and the widening and unbalanced governmental power to control society through criminal law. In Italy, and in Germany too, the debates over the existence of administrative criminal law as a distinct branch from criminal law, as well as the discussions of the consistency of regulatory offenses with the fundamental principles of criminal law (responsibility and legality), follow the same socio-historical trajectory described by Lacey. There were different, parallel though contrasting patterns of responsibility-attribution, not only within the boundaries of criminal law but also within the penal code itself. As Lacey points out, from the middle of the nineteenth century through to the middle of the twentieth century in the

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17 See Tullio Padovani, Il binomio irriducibile: La distinzione dei reati in delitti e contravvenzioni, fra storia e politica criminale, in Diritto penale in trasformazione 421 (Giorgio Marinucci & Emilio Dolcini eds., 1985).
18 See e.g., Luigi Lucchini, La giustizia penale nella democrazia 18 (1883).
19 See Francesco De Luca, La contravvenzione (Tentativo d’una costruzione giuridico-sociologica), 8 Riv. dir. pen. e soc. crim. 271 (1907).
UK, while a psychological conception of *mens rea* was “regarded as a *sine qua non* for culpability” (139), “patterns and principles based on outcome began to occupy a larger terrain as a result of the growing regulatory ambitions of the nation state” (143). The same situation was experienced in continental Europe, where penal codes were centered upon the idea of criminal responsibility founded in capacity, surrounded nonetheless by a rising wave of strict liability regulatory offenses.

**III. Sentencing and Security Measures: Was Character Really Subterranean?**

*In Search of Criminal Responsibility* demonstrates how lines of continuity and rupture in the developing patterns of responsibility-attribution are interwoven. For Lacey “an interesting precursor of the current revival of a character-based pattern of responsibility-attribution can be found in the criminal classification statutes of the late nineteenth and early twentieth centuries” (165). This “dual track era,” coinciding with the rise of penal welfarism, is characterized by a combination of capacity for real crime and outcome for regulatory crime, “with character mainly displaced from the substantive law to the prosecution and sentencing process” (145). The consolidation of criminology as a discipline played a crucial role in legitimating criminal classification statutes targeted, e.g., at the “feebleminded,” inebriates, vagrants, habitual offenders, and prostitutes. These statutes can be seen as “early manifestations of the character/risk hybrid pattern of responsibility-attribution” typical of the late twentieth century, but, in the light of the reformatory theory of punishment, “they were gradually modified by their association with welfare principles” that assumed a “capable, responsible subject” as the target of rehabilitative sentencing (146). The dominance of *mens rea* to the detriment of character is, therefore, a trajectory obstructed by many tensions, ambiguities and contradictions.

As Lacey argues, behind the shifts from character to capacity and risk, there was the epistemological struggle for primacy among specialists in medicine, anthropology, psychology and others developing scientific expertise in understanding human behavior and inclination and, on the other hand, the defense of legal, professional education and “the continuing commitment to and confidence in the idea of legal judgment as evaluative rather than factual or scientific” (52). The issue of who is competent to assess responsibility involves the problems of how it is determined and proved, when it shall be assessed (pre-trial, trial, sentencing), and, fundamentally, what responsibility is (character, outcome, risk, capacity). The rise of scientific criminology, together with the conviction that criminal behaviors can be explained in deterministic terms (sociological, biological, racial), entailed the bifurcation of patterns and the duplication of levels of responsibility-attribution. First, it gave rise to two types of offenders: those labelled as degenerate or dangerous, whose free will had been deviated, defeated or biased by many different causes, and who were

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22 Defined as “the weak ones,” whose natures do not “have enough strength to subdue their criminal impulses.” Antonio Marri, Il delinquente incorreggibile e la condanna indeterminata, 22 Riv. di disc. carc.
“subject to special, character-based policies . . . while assuming the existence of freedom and hence capacity responsibility for other offenders” (52). So, aside from the fact that scientific criteria to identify criminal pathology were “themselves imbued with evaluations of moral character” as exemplified by the pseudo-medical concept of “moral insanity” (68), for normal and abnormal offenders, culpability was assessed in different ways. Even the blurred cases of multiple personality, unconscious crimes, mesmerism, hypnosis and sleepwalking, discussed by Lacey through an insightful analysis of Stevenson’s The Strange Case of Dr. Jekyll and Mr. Hyde (71-78), reveal the swinging boundaries between capacity and character, free will and determinism, and unveil the fragility of scientific discourses on the discovery and control of the self. These cases, widely debated by criminologists even in Italy and France, demonstrate the utility of extending Lacey’s approach to the comparative history of criminology in order to study global tendencies and local peculiarities, to contextualize how national doctrines, legislations and ideas were influenced by an international reform movement.

Secondly, as Lacey shows, criminology emphasized the bifurcation between trial and sentencing, favoring different kinds of compatibilism in the UK, the US and even in Europe. As Thomas Green has argued with reference to the American experience, “the bifurcation of criminal process reflected the differing ways in which jurists and behavioral scientists conceptualized criminal responsibility. Despite determinism’s inroads elsewhere, at the trial stage, the traditional concept of guilt—mens rea premised on free will—retained most of its force for intent-based crimes.” A broader comparative analysis reveals that the need to avoid dismantling the core idea of human agency and the principle of accountability for conduct, upon which not only the criminal law system but the whole liberal society was grounded, was equally felt by European jurists. The search for theoretical compromise is exemplified by Saleilles’s distinction between legitimation and assessment of punishment: every penalty, although justified by the idea of responsibility,

480 (1897), these offenders were considered deviant by inclination or acquired habit, or presumed to suffer from mental abnormality and to have dangerous organic constitutions or chronic behavioural disorders. See also Michel Foucault, About the Concept of the “Dangerous Individual” in 19th Century Legal Psychiatry, 1 Int’l J. L. & Psychiatry 1 (1978).


24 Thomas Andrew Green, Freedom and Criminal Responsibility in American Legal Thought 35 (2014). Green further explains that the criminal trial thus represented a first stage in the criminal process at which the law, reflecting general social mores, insisted on the existence of free will despite the fact that, increasingly, those found guilty were immediately turned over to a sentencing process wherein their relative unfreedom might be widely construed and they were often viewed in part as victims of biological or social circumstances.

Id. at 37.
should not be measured thereby, but “must be apportioned to the subjective criminality of the agent and made to reflect not a quantitative but a qualitative factor of the will.”

Finally, the criminological movement brought about the formation of the dual-track system, with a supplementary form of indefinite preventive detention to be added to ordinary punishment: while the latter was justified by retributive theory, the former was based on social defense. This duality of punishment and measures of security, the first premised on capacity, the second on dangerousness, even though just hinted at by Lacey, confirms the book’s thesis of a complex mixture of responsibility-attribution patterns, which is further reinforced by a comparative analysis beyond the history of (only) English (or American) criminal law. Under the influence of criminological theories, disguised as scientific or medical achievements, character did not disappear from criminal law, but rather was reinforced and legitimated as the key element of prevention, which became, together with repression, the second fundamental pillar of criminal justice. Character did not simply survive in a subterranean way or mentality, but was assumed as the cornerstone of the criminalization of the “others,” those for whom economic, political, racial prejudices were labelled as dangerous and targeted by social defense policies. Since special prevention—i.e., the adoption of measures to avoid recidivism and to correct or neutralize the criminal’s dangerousness—became part and parcel of penal justice, the notion of criminal liability was necessarily extended to include (albeit to a different degree) capacity and character.

IV. The Political Meaning of Criminal Responsibility

Lacey’s study demonstrates that legal concepts such as responsibility and legality do not remain unchanged over time, nor are they isolated from the legal and cultural environment within which they operate. Therefore, their meaning can be understood only

25 Raymond Saleilles, The Individualization of Punishment 275 (1911). According to Saleilles,

[T]he judge must thus apply two points of view and two very different principles. He must determine the length of the punishment according to the active criminality that characterizes the crime, thus considering the principle of penalty; and he must determine the nature of the punishment according to the passive criminality of the agent, according to his character, thus considering the principle of the underlying purpose and of the individualization of punishment.

Id. at 278.

26 See Michele Pifferi, Reinventing Punishment: A Comparative History of Criminology and Penology in the 19th and 20th Century ch. 6 (2016).

27 On the new conception of criminal law encompassing both repression and prevention, see Silvio Longhi, Repressione e prevenzione nel diritto penale attuale (1911); Adolphe Prins, La défense sociale et les transformations du droit pénal (1910). Though Lacey claims that “with the resolution of the economic and social crisis in the 1890s, positivist criminology was, at least in England, gradually consigned to the academy rather than the prison or reformatory” (166-67), Evelyn Ruggles-Brise’s commitment to reform both at home, with the Prevention of Crime Act 1908, and on the international stage with his active attendance of International Prison and Penitentiary Congresses, suggests a different and more long-lasting repercussion of criminological proposals even in England.
through the lens of historicization, because “to see the intimate links between the development of legal concepts and their institutional basis, we have only to engage in some fairly basic historical or comparative research” (179). Legal history relativizes and permits us to critically rethink some legal assumptions, and, in so doing, reveals how law cannot be thought of as an abstract entity. Although peculiar in ways and autonomous in form, it is the product of historically determined social, cultural, and political conditions.

Criminal responsibility is a core concept because it informs both the theoretical foundation and the practice of criminal justice and also because, in Durkheimian terms, it reflects, and at the same time forges, popular feelings about liability and punishment. Lacey claims that “criminal responsibility, in short, is an idea which is located within a social practice of criminalization, which itself is necessarily located within an institutional framework and structured by the imperatives of legitimation and coordination” (190). The notion of criminal liability affects and is at the same time legitimated by the philosophical justifications of the right to punish, the purpose of punishment, the idea of society and individual freedom, and the conception of state power. The outcome of a complex interplay of factors, “the legal realization of responsibility depends not merely on the articulation of a liability rule but on a cluster of other assumptions and discretionary powers which we need to understand if we want to have a full view of the meaning and significance of responsibility in criminal law” (188). Significant changes in political framework, scientific technologies, and philosophical conception of the self bear on patterns of liability, as “developments in the criminal process, in the penal system, and in the political and economic world, in short, affect the meaning as well as the normative significance of criminal responsibility” (185).

The trajectory of this process is not always coherent but is itself driven by progress and regression. Lacey underlines the need to analyze legal concepts while bearing in mind how they are deeply affected by the overarching political system (109). The increasing franchise and “the specific way in which English criminal law developed democratic forms of legitimation through parliamentary democracy in the course of the constitutional development between the seventeenth and the nineteenth centuries” (129) have had a significant impact on responsibility attribution. Given that lawmakers are “very responsive and electorally sensitive to popular opinion,” even the definition of crime and the re-emergence of criminal status or classes to be punished as a vote-driven response to public fears, in particular the revival of character in contemporary English criminal law, seems to be the price to be paid for the (populist) democratization of the criminalization process (129-30). “Hence,” as Lacey notes, “the history of not merely the professionalization of criminal law practice and the formalization of criminal law doctrine, but also of constitutional reform and democratization presents itself as a key resource in our understanding of criminalization” (132).

Again, Lacey’s identification of the nexus between democracy, constitutional framework and the notion of criminal liability can be profitably expanded (and maybe enriched) by broadening the geographical focus of legal historical comparison. Both in Italy
and Germany, for example, the rise of authoritarian penal regimes coincided, at the outset, with a return to the capacity principle and a rejection of the character-based pattern of responsibility-attribution based on dangerousness theorized by positivist criminologists and implemented by legislation or case law. Both the fascist Criminal Code of 1930 and the manifesto of the Nazi authoritarian turn in criminal law of 1933 strongly emphasized a subjective principle of \textit{mens rea} founded on the key idea of human beings as free choosing subjects.\footnote{Georg Dahm & Friedrich Schaffstein, \textit{Liberales oder autoritäres Strafrecht?} (1933).} In this case, the shift from character to capacity was motivated by the spirit of a complete political and legal renovation: ideas of free will and willfulness were considered conditions of liability, and criminal intent was viewed as “the main object of the offensive action of the authorities,”\footnote{Otto Kirchheimer, \textit{Criminal Law in National-Socialist Germany}, 8 Stud. Phil. Soc. Sci. 444 (1939).} also because any liberal and rationalistic distinction between law and morality was denied. According to the key notion of \textit{Willensstrafrecht}, which stresses the crucial importance of intentionality in criminal law, in a totalitarian state any deterministic approach implying bad social influences or external factors upon individual character had to be rejected. In a following phase, however, when totalitarian regimes were firmly established, they made extensive use of criminalization of status and classification statutes to annihilate political opponents, enemies of the race and the community, and other “types” of offender.\footnote{See, e.g., Luis Jiménez de Asúa, \textit{El derecho penal totalitario en Alemania y el “derecho voluntarista,”} 7 El Criminalista 63 (1947); Nikolaus Wachsmann, \textit{From Indefinite Confinement to Extermination: “Habitual Criminals” in the Third Reich, in Social Outsiders in Nazi Germany} 165 (Robert Gellately & Nathan Stoltzfus eds., 2001); Nikolaus Wachsmann, \textit{Hitler’s Prison: Legal Terror in Nazi Germany} 46-54, 128-39 (2004); Thomas Vormbaum, \textit{A Modern History of German Criminal Law} 189-208 (2014).} The political implications of both the discourses on and the practice of responsibility attribution are clear.

This case, only briefly sketched, is just a further confirmation of how Lacey’s book not only provides an insightful socio-historical analysis of the notion of criminal responsibility in English criminal law, but, thanks to its historicization of criminalization, delineates a general methodological approach that will be profitably used and developed by legal historians.