

COMPARATIVE CRIMINAL JUSTICE: AN INSTITUTIONAL APPROACH

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INTRODUCTION

There is a rich tradition of scholarship in the areas of comparative criminal law, comparative criminal procedure, and comparative criminal justice policy and practice.¹ But these literatures do not always speak to one another, and they are unevenly related to comparative literature in the social sciences. This lecture, in memory of Herbert L. Bernstein, makes a case for studying comparative criminal law and criminal justice with close reference to the distinctive cultural contexts and the particular institutional settings in which rules and policies are developed and implemented in different countries. Accordingly, both historical and political-economic approaches are worthy of further development in this field and complement the ambitions of the comparative method. Conversely, the comparative method offers the most promising means of testing general hypotheses emerging from historical and socio-legal studies.

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1. See, e.g., MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986); *THE HANDBOOK OF COMPARATIVE CRIMINAL LAW* (Kevin Jon Heller & Markus D. Dubber eds., 2011).

In a lecture devoted to comparative law, the area of criminal justice is, today, a highly apposite focus. Notable shifts in many parts of the world since the 1970s in the boundaries of criminalization and in the scope of punishment and changes in the procedural protections surrounding the application of nation states' criminalizing and penal powers² speak to some very basic legal ideals: notably to the quality of the rule of law and to how completely the values embodied in its tenets about the role of law in mediating the relationship between individuals, groups, and the state are realized. Increasingly, developments are also observable at a transnational level, as supranational political and legal orders move into the business of criminalizing and sanctioning states, corporations, and individuals.

But can comparative scholarship systematically shed light on criminal law and criminalization in late modern societies? Or does national and regional variation and variation across time and institutional levels rule out a more synthetic or general project? As conceptions of crime and ideals of legality are necessarily inflected by their specific origins in continental European and Anglo-Saxon legal and political traditions, respectively, do they invite a more particularistic treatment?

In building a case for an institutional approach to comparative legal scholarship, I focus on the issue of criminal responsibility. My aim is to provide an overview of the idea of responsibility in criminal law and its development over time in English criminal law and to sketch a hypothesis about what drives that development. Additionally, by applying a socio-legal methodology to the analysis of one concept in a particular system over time, I aim to provide a case study of methodology in legal scholarship more generally. I argue that this method is capable of extension to a comparative context and also that the thesis developed in my overview of English criminal law could most effectively be tested by subjecting it to critical comparative examination. In developing this method, I attempt to escape the narrowness of doctrinal scholarship by aligning myself with a long line of traditions that resist the idea of legal scholarship as autonomous and that insist on the importance of studying law and legal practices in a social, historical, and institutional context: the Process School in the United States, Law and Society and socio-legal scholarship, and critical legal scholarship. Equally, however, I avoid several unhelpful oppositions that have sometimes characterized critical or

2. See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); NICOLA LACEY, *THE PRISONERS' DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* (2008); Nicola Lacey, *The Resurgence of Character: Responsibility in the Context of Criminalization*, in *PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* 151 (R.A. Duff & Stuart P. Green eds., 2011).

socio-legal, cross-disciplinary studies of law by acknowledging a concern with agency and structure, focusing on cultural and material forces as important factors in the explanation of how law evolves and works, exploring law's autonomy while also attending to its heteronomy, and recognizing the importance of intellectual and material history for explaining the evolution of law.

My argument sets out from two very simple assumptions. 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 behavior, a task that it accomplishes in part by specifying the sorts of information or knowledge that have to be proven in the trial process precedent to conviction. Second, I assume that three main aspects of its environment shape responsibility: ideas, interests, and institutions. These three contextual aspects affect its conceptual contours and its role or what is required of it.

I understand ideas as prevailing social narratives, knowledges and understandings of the normative contours and significance of responsibility. As such, ideas form the dominant frame for accounts of criminal responsibility in the philosophy of criminal law and indeed in standard doctrinal histories. They are, however, inadequate in themselves to explicate the trajectory and significance of responsibility because they are in turn shaped by, and have influence on, interests.

I understand interests as prevailing structures of power and their dynamics (often legitimized by ideas). Interests in this sense form the dominant explanatory frame in economic, political, and some legal history. As such, they focus on the key influence on criminal law and criminalization of patterns of social status and the distribution of wealth, resources, social, and political voice and influence. Yet interests too are both filtered through and shape institutions.

I understand institutions as the political system, economic institutions, courts, trial process, and judicial system more generally (the legal profession, the judiciary, the media, and other relevant professions—e.g., the police, prosecutors, and criminal justice officials of various kinds); the civil service; the penal system; and, increasingly in many countries, corporate interests. Many, though not all, of these institutions loom large in criminal justice and political histories and in some (but by no means all) legal histories. They both constrain and enable developments emerging from ideas and interests. Yet their independent importance has been poorly

incorporated into most criminal law (and indeed other legal) scholarship. This is equally true, moreover, of much comparative scholarship, which has also tended to focus largely on legal doctrines—a puzzling fact, given that the different features of legal procedure that have attracted so much comparative attention are realized through systematically different institutional frameworks, which are themselves embedded in broader institutional features of the relevant social and political systems.

I will therefore argue that an account premised on the coevolution of these three spheres in the production of doctrines and practices of criminal responsibility attribution is needed, one that assumes a mutually constitutive relationship between these three broad spheres rather than privileging any one of them. In other words, the underlying notion of a responsible subject is shaped by an interlocking set of conditions that change over time and place in tandem with factors such as the human situation, prevailing ideas, institutions, and the distribution of power. This implies that legal scholarship has to be historical and comparative in outlook and located within a social, political, and economic framework if it is to build a broad interpretation of the developing relationship between concepts such as responsibility and the factors that explain their shifting influence over time.

I. THE CONDITIONS OF RESPONSIBILITY

A. Ideas

A number of more or less discrete ideational frameworks for the understanding of criminal responsibility have influenced English criminal law over the last 250 years. Each of them is shaped by assumptions about the nature of human (or corporate or indeed animal) agency, and each has implications for the relationship between that agent and the state or other body that wields criminalizing power, in particular for the accountability or answerability of that agent and the conditions thereof. Two principal questions arise: the question of legitimation, or what is seen as justifying the calling to account of individuals or other bodies in the name of the criminal process (or the state), and the question of coordination, or what information must be marshaled to invoke that legitimated practice of calling to account, including matters such as rules of evidence and procedure and the substantive doctrines of criminal law.

Criminal responsibility has developed through four principal ideational frames: capacity, character, harmful outcome, and risk.³ The

3. Nicola Lacey, *Space, Time and Function: Intersecting Principles of Responsibility Across the*

underlying justification and legitimating narratives of these four frames are philosophically distinct, and the frames draw on different political and social knowledge and come in varied versions that hold greater or less sway at different times. Yet they nonetheless can and do coexist in particular systems of criminal law at particular times. After tracing the four ideational frames, I will consider the question of how they relate to one another in the development of English criminal law. I will do so by tracing the changing interests, power, and distribution of resources that condition these ideational frameworks and the institutional arrangements that underpin them: not only criminal justice processes such as policing, prosecution, trial, and proof but also broader social and political institutions.

First, and most obviously, in modern legal discourse we are familiar with the idea that criminal responsibility is founded in capacity. At the heart of this vision of criminal responsibility sits the notion of an agent endowed with powers of understanding and self-control.⁴ This notion was most fully developed in post-Enlightenment social philosophy but existed in thicker and thinner versions in earlier and later philosophies. It was developed primarily in relation to human beings but was susceptible to extension to, for example, corporate entities and animals. Under this notion of capacity responsibility, respect for agency and individual freedom is central. Capacity theories hence assume either freedom of the will or some version of compatibilism, under which the idea that human conduct is to some degree determined is not inconsistent with genuine responsibility. Capacity responsibility implies a very stringent set of legitimating requirements for state criminalization and punishment. Only when criminal law is addressed to human beings as choosing subjects capable of conforming their actions to the criminal law can it be compatible with individual freedom.

Two significantly different legal versions of capacity responsibility need to be distinguished. On one hand, there is capacity as choice, which generally appears through subjective mens rea or fault requirements: legal rules guarantee respect for agency by making intention, knowledge, or foresight the paradigm conditions for criminal liability. On the other hand, there is capacity as fair opportunity, which appears in a broader conception of mens rea that includes negligence and “objective” recklessness: respect

Terrain of Criminal Justice, 1 CRIM. L. & PHIL. 233 (2007).

4. See Nicola Lacey, *In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory*, 64 MOD. L. REV. 350 (2001); Nicola Lacey, *Responsibility and Modernity in Criminal Law*, 9 J. POL. PHIL. 249 (2001).

for agency is satisfied so long as the agent has a fair chance to conform his or her behavior to the requirements of criminal law. Both versions of the capacity theory of responsibility also imply a generous panoply of defenses encompassing circumstances under which the normal conditions of choice or opportunity-taking are disrupted by external circumstances or the behavior of third parties (or a combination of the two) and by exempting conditions, such as forms of mental incapacity that deprive the agent of minimum levels of cognitive and/or volitional power. A paradigm example of capacity responsibility would accordingly be the case of someone who intentionally causes grievous bodily harm to another. Excusing conditions, such as duress, or exempting conditions, such as mental incapacity, further refine the compatibility of doctrinal arrangements with the underlying conception of responsibility.

Second, there is the notion of responsibility as founded in character, itself an idea with diverse philosophical origins as different as Aristotelian philosophy and its intellectual descendant, virtue ethics; Christian doctrines; and the empiricism of David Hume.⁵ There are at least three different senses in which assumptions about, or evaluations of, character have informed attributions of responsibility in English criminal law. There is the most fundamental sense of “character responsibility,” or the idea that an attribution of criminal responsibility is in some sense a judgment of a bad or vicious character and is legitimized by that fact. This sense of character responsibility itself consists of two distinct components: a moral or quasi-moral judgment and the projection of that moral judgment onto the quality of individual character.

Character responsibility in this second sense occupies a rather wide spectrum. The more robust senses of character responsibility invite us to condemn not merely the sin—a judgment that could in itself be strongly evaluative—but also, and fundamentally, the sinner. At its most extreme, moreover, character responsibility proper exhibits “character essentialism” and “character determinism.” In other words, it proceeds from a view— theological or, increasingly in an era marked by secularization, scientific or quasi-scientific—of human character or identity as fixed, or at least as relatively stable, and it regards character as determining conduct. At the other end of the spectrum, there is character responsibility as a view of criminal conviction grounded in the manifestation of a vicious characteristic or character trait or a disposition hostile to the norms of criminal law, which might be out of character and which does not

5. See NICOLA LACEY, *WOMEN, CRIME, AND CHARACTER: FROM MOLL FLANDERS TO TESS OF THE D'UBERVILLES* 12–40 (2008).

necessarily mark a propensity to express such characteristics. Between these ends of the spectrum, there are intermediate positions in which criminal conduct expressing vicious characteristics gives rise to a stronger or weaker presumption of bad character in the sense of propensity. The impulse to move from an evaluation of conduct to the sort of evaluation of character that marks the more extreme versions of character responsibility has surfaced at key points in the history of English criminal justice.⁶ It has large implications for the extent to which criminal law exhibits a stigmatizing temper and for how much it is seen as addressing free and equal subjects as opposed to managing a threat posed by particular categories of subject, whether identified in terms of past behavior, neuroscientific or psychological evidence, or otherwise. And the different versions of character responsibility have, of course, different implications in terms of the doctrinal preconditions of guilt (as well as for how it might be proven): the mental states and choices that are central to the capacity notion of responsibility continue to matter as evidence of or proxies for features of character, expressed dispositions, neural conditions, or attitudes hostile to the norms of criminal law. Thus, patterns of attribution founded in character are concerned with judging the defendant within a distinctive evidential and temporal frame.

Third, criminal law has not infrequently invoked a notion of outcome responsibility, attributing responsibility primarily or purely on the basis of the defendant having caused an outcome proscribed by the criminal law. Here, the underlying philosophical frame is consequentialist: criminal law is conceived as a distinctive system of regulation oriented to public harm-reduction. Again, outcome responsibility comes in more and less stringent forms. For example, pure causal responsibility, as in a doctrinal system of absolute responsibility, founds its legitimating narrative not only in the moral importance of causing harm but also in the idea that the effects we cause in some sense become part of our identity.⁷ Even if we are less responsible in one sense for an accidentally caused harm, such as injuring someone after being jostled and losing one's balance, most of us would find it inappropriate if a person who had inadvertently caused harm in this way simply shrugged his or her shoulders and said, "That has nothing to do with me." In practice, however, most outcome responsibility in criminal law is less stringent than this, mitigating absolute liability by means of the application of general defenses and/or of a specific "due diligence" or "no negligence" defense. Alternatively, there is outcome responsibility in

6. Lacey, *supra* note 2.

7. See TONY HONORÉ, RESPONSIBILITY AND FAULT 14–40 (1999).

terms of the special duties that attach to particularly dangerous activities, such as driving cars and engaging in potentially harmful industrial processes and other commercial activities.

Finally, and overlapping with both outcome responsibility and character responsibility, there is responsibility as founded in risk. Again, responsibility as risk comes in several different versions, with risk being conceived in either clinical or actuarial terms. The idea of attaching responsibility to clinical risk or pathology shades into the more extreme versions of character responsibility. Risk-based responsibility also equates to a more inchoate version of outcome responsibility and might indeed be regarded as a product of the emergence of disciplines such as statistics or of a range of medical techniques that enable, or purport to enable, the prediction of outcomes.

Each of these four overlapping yet distinctive ways of thinking about criminal responsibility have sounded in English criminal law over the last 250 years. But they themselves, and the relative influence that they hold within the criminal law, have also been shaped by broader cultural ideas that make up the environment in which ideas of responsibility develop. Among these, the most salient include attitudes towards violence and towards the proper relationship between the individual and the state; ideas about democracy and forms of governance; beliefs about human nature, specifically social Darwinism, eugenics, and early criminology, and about sex and gender; and the process of secularization and the accompanying decline in the significance of religious symbols in legitimating criminalization and punishment. Changes in legal ideas about responsibility are the product of a much broader set of ideas about the self and about relations between the self and society that significantly affect both the legitimation challenges faced by criminal law and the opportunities for legitimation and coordination that are available.⁸ Hence they need to be contextualized within intellectual and social history. For the purposes of this lecture, I will focus on just three of these broader ideas: those about the nature of individual agency and the role of environment in shaping subjectivity, the growth of the psychological and social sciences since the mid-nineteenth century, and the emergence of utilitarian thinking.

First, ideas about the nature of individual agency and the role of environment in shaping subjectivity are shifting over time and are at issue in prevailing understandings of responsibility. In his exploration of the “sources of the self,”⁹ Charles Taylor shows how the key elements of

8. See Lacey, *supra* note 5, at 25–34.

9. CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY (1989).

modern individual selfhood—notably, the idea of selfhood as involving a sense of inwardness—were assembled over many centuries, with marked developments associated with Augustine, Descartes’ *Cogito*, and Locke’s sensational psychology.¹⁰ Glimpses of a reflexive human self focused on its own interior are visible in Shakespeare’s plays, in Montaigne’s essays, and in innumerable diaries and letters of the early modern period. But, Taylor argues, it continued to develop up to the philosophies of the Enlightenment and indeed beyond. Taylor focused his attention exclusively on the development of ideas of selfhood within philosophical texts, a focus which, as he acknowledged, omitted any assessment of the social institutions within which these ideas evolve.

More recently, historian Dror Wahrman has investigated the institutional context of Taylor’s argument, analyzing the “making of the modern self” through a mesmerizing array of cultural practices, including beekeeping manuals, novels, theater, fashion, portraiture, and translations of the classics.¹¹ Wahrman argues that the Enlightenment philosophies of the seventeenth century, most notably Locke’s view of the individual as “tabula rasa” (to be shaped by experience) and the decline of faith in an essential human nature located in a divinely ordered universe, gave birth to a new and fluid conception and social practice of identity, whose defining feature was that identity had to be created and assumed. As a social construct, an individual could be modified through the adoption of different clothes, different manners, or different associates. In the 1780s, this external, socially constructed notion of selfhood began to be displaced by the “modern regime of identity,” in which individual personhood is believed to inhere in the unique and stable inner self that ultimately found its most complete expression in Romanticism. While the older ideas of identity resonated with the idea that responsibility attribution resides primarily in the assessment of visible indices of character, the idea that the self resides in an authentic psychological self implied a need to investigate the interior world of the defendant as a means of assessing responsibility. Only then did an investigation of the psychological interior become

10. Taylor’s is not a radically relativist position. In his account, core aspects of selfhood were already in place in ancient Greek philosophy and have been in a process of development from this core across the centuries, hence the recognizability to modern readers of figures like Moll Flanders. *Id.*

11. DROR WAHRMAN, *THE MAKING OF THE MODERN SELF: IDENTITY AND CULTURE IN EIGHTEENTH-CENTURY ENGLAND* (2004). For other important works historicizing selfhood and exploring the conditions under which emerging ideas of selfhood operate and by which they are enabled, see *REWRITING THE SELF: HISTORIES FROM THE RENAISSANCE TO THE PRESENT* (Roy Porter ed., 1997); NIKOLAS S. ROSE, *GOVERNING THE SOUL: THE SHAPING OF THE PRIVATE SELF* (1990); RICHARD SENNETT, *THE FALL OF PUBLIC MAN* (1977); PATRICIA MEYER SPACKS, *IMAGINING A SELF: AUTOBIOGRAPHY AND NOVEL IN EIGHTEENTH-CENTURY ENGLAND* (1976).

generally important to the legitimation of criminal law.

Second, the growth of the psychological and social sciences since the mid-nineteenth century has been a key factor in the development of the late modern idea of criminal responsibility founded in cognitive and volitional capacity. The idea that criminal responsibility can be enunciated in terms of states of mind—intention, foresight, belief, and so on—is premised on a dualistic vision of a human being that can be traced to Descartes and on the idea that the interior world of human individuals can be the object of social knowledge and, indeed, of proof in a criminal court. In this context, the development of what we now call psychology was of general assistance to the development of the subjective theory of mens rea that is so influential in English criminal law today.

This development pulled in different directions, however, which helps to explain the slow, uneven, and incomplete development towards a subjective notion of capacity responsibility. For example, the idea that the subjective mental states of human beings could be the object of investigation in a criminal court promised a “factualization” of criminal responsibility that would make it less dependent on local knowledge or shared evaluations and hence, crucially, less controversial.¹² On the other hand, it also threatened to undermine the project of developing a discrete and technical, legal conception of criminal responsibility because it appeared to assume a privileged position for medical and psychological evidence. The well-documented turf wars between the judiciary and the nascent psychiatric profession throughout the nineteenth century,¹³ the continued place of older discourses of madness as manifest in the sense of being recognizable to lay observers,¹⁴ and the persistence of value-laden mens rea terms such as “maliciously” well into the twentieth century¹⁵ are eloquent testimony to the courts’ concern with establishing their own autonomous professional expertise and to their continuing commitment to and confidence in the idea of legal judgment as evaluative rather than factual or scientific. Moreover, the development of the social and human

12. See ALAN NORRIE, *CRIME, REASON AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW* 15–32 (2d ed. 2001).

13. See, e.g., NORRIE, *supra* note 12; ROGER SMITH, *TRIAL BY MEDICINE: INSANITY AND RESPONSIBILITY IN VICTORIAN TRIALS* (1981); Joel Peter Eigen, *Lesion of the Will: Medical Resolve and Criminal Responsibility in Victorian Insanity Trials*, 33 *LAW & SOC’Y REV.* 425 (1999).

14. See ARLIE LOUGHNAN, *MANIFEST MADNESS: MENTAL INCAPACITY IN CRIMINAL LAW* (2012).

15. See Jeremy Horder, *Two Histories and Four Hidden Principles of Mens Rea*, 113 *LAW Q. REV.* 95 (1997) (discussing the historical and continuing importance of the principle of malice in English criminal law); see also Lacey, *supra* note 4.

sciences,¹⁶ most obviously those genetic or social Darwinian arguments that appeared to undermine the idea of individual freedom and hence, potentially, that of the capacity-based responsibility for crime, prompted another interesting accommodation of character and capacity models in criminal policy. It underpinned the frequent attempts from the 1860s on to identify and subject to special, character-based policies certain groups of offenders—habitual inebriates, habitual offenders, the weak-minded, the vagrant, and the juvenile delinquent¹⁷—while assuming the existence of freedom and hence capacity responsibility for other offenders.

Third, the emergence of utilitarian thinking, in both its pure Benthamite form and in the modified form developed in John Stuart Mill's famous essay, *On Liberty*, had a key influence on conceptions of criminal responsibility. As has been widely discussed, it became a powerful impetus for law reform,¹⁸ but it also underpinned the powerful model of rational agency that informed the emerging doctrines of capacity responsibility. Additionally, it provided a harm-reduction framework to legitimate the regulatory offenses that were emerging as key solutions to the problems of rapid urbanization and industrialization.

B. Interests

Each of the ideational frames discussed are familiar to any student of criminal law. But what determines which of these ideas prevails or dominates, when, and over which aspects of criminal law? The legitimation of criminal law depends on a discourse of justice, right, or appropriateness, which, increasingly in democratic times, has come to involve the idea that all are equal before the law. Yet the reality is that criminal law is generally shaped by powerful interests: it is made by elites, while it is disproportionately enforced against non-elites. The structure of these patterns of interest and power have changed over time, however, with

16. See MARTIN J. WIENER, *RECONSTRUCTING THE CRIMINAL: CULTURE, LAW, AND POLICY IN ENGLAND, 1830–1914*, at 185–306 (1990); see also Markus Dirk Dubber, *The Right to be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 *LAW & HIST. REV.* 113 (1998) (arguing that Enlightenment conceptions of autonomy have been lost from criminal law's discourses of responsibility since the turn to rehabilitation and scientific models).

17. See LEON RADZINOWICZ & ROGER HOOD, *THE EMERGENCE OF PENAL POLICY IN VICTORIAN AND EDWARDIAN ENGLAND 172–400* (1986); see also MARIANA VALVERDE, *DISEASES OF THE WILL: ALCOHOL AND THE DILEMMAS OF FREEDOM* (1998) (discussing shifting Victorian conceptions of the individual will in the context of alcohol policy); LUCIA ZEDNER, *WOMEN, CRIME, AND CUSTODY IN VICTORIAN ENGLAND 219–64* (1991) (discussing women specifically).

18. COLEMAN PHILLIPSON, *THREE CRIMINAL LAW REFORMERS: BECCARIA, BENTHAM, ROMILLY* (1923); K. J. M. SMITH, *LAWYERS, LEGISLATORS AND THEORISTS: DEVELOPMENTS IN ENGLISH CRIMINAL JURISPRUDENCE 1800–1957* (1998).

decisive consequences for doctrines and practices of criminal law. A full discussion of the influence of these factors is beyond the scope of this lecture, but it is useful to review the major factors in the development of English criminal law.

Perhaps the most obvious form of power relevant to the development of criminal law is political power. The modern period was, after all, an era in which there was a steady growth of legislation as a source of English criminal law and of the resort to criminalization as a tool of governance. With the further development of the nation-state in the UK during the nineteenth and early twentieth centuries, the modern project of governance has grown in both complexity and intensity.¹⁹ As democratic institutions gradually emerged and widened their scope, there was a decisive shift of power from landowners to merchants and the emergence of an urban bourgeoisie; at the turn of the twentieth century, with the development of the party system, specifically the emergence of the Labour party, new interests entered the political arena, along with significantly changing demographics in the legislature. Given the rise of political power, criminal law and criminal justice were liable to become objects of political contest. This development occurred with particular intensity in the last decades of the twentieth century, fostered by the system of winner-takes-all, adversarial, majoritarian politics dominated by two main parties.²⁰ The politicization of criminal law through legislation's gradual domination over the common law implied shifting power relations between judges and politicians, while the gradual emergence of criminal law as an object of electoral competition rendered politicians' approach to criminal responsibility more and more relevant to how they attained and kept power.

Equally, if less directly, the distribution and scope of economic power has important implications for patterns of criminal responsibility attribution, as structural economic exclusion arguably renders patterns of attribution based on stereotypes of bad character appealing. During the last 250 years, formal distinctions of status hierarchy based on class, gender, and, later, ethnicity have gradually eroded, with important implications for the distribution of symbolic or cultural power. Yet the persistence—and, in

19. See S. E. FINER, *THE HISTORY OF GOVERNMENT FROM THE EARLIEST TIMES III: EMPIRES, MONARCHIES, AND THE MODERN STATE* (1997). For an account of the development of the administrative apparatus of the British state and for an instructive refutation of the view that its development is mainly to be attributed to the influence of Benthamite ideas, see Oliver MacDonagh, *The Nineteenth-Century Revolution in Government: A Reappraisal*, 1 *HIST. J.* 52 (1958).

20. See LACEY, *supra* note 2 (discussing the implications of political systems for criminal justice); see also Nicola Lacey, *Political Systems and Criminal Justice: The Prisoners' Dilemma After the Coalition*, 65 *CURRENT LEGAL PROBS.* 203 (2012).

recent years, acceleration—of the gap between those in the top and middle thirds of the distribution of wealth and those in the bottom third, many of them trapped in intergenerational cycles of low education, poor housing, and poverty, has arguably created a new form of status hierarchy: radical inequality is closely associated with a de facto differential social status that sits ill with ideals of legality. Yet more directly, the growth of professions and the attendant emergence of professional power during the nineteenth century had a key impact on criminal responsibility. Most notably, the growth and increasing professionalization and power of the legal profession provided both the incentive and the mechanism for the development of refined legal doctrines of responsibility. Likewise, the growing power and organization of a range of other professions (including the medical profession, the “psy” professions, and the civil service)—each of which were drawing on new knowledge in science, criminology, medicine, statistics, demography, and other disciplines—has fundamentally changed the conditions under which ideas of responsibility are formed and put into practice.²¹ Yet, more obviously, specialized criminal justice professionals emerged in this period: the police in the late eighteenth and early nineteenth centuries; the welfare-oriented criminal justice professions, such as probation officers, in the early twentieth century; and the experts in assessing various kinds of risks in the latter part of the twentieth century. In different ways, each of these organized and influential professions had some impact on the development and implementation of conceptions of responsibility. Last but not least, the growth of the power of the media has undoubtedly had an impact on ideas of criminal responsibility and patterns of responsibility-attribution, particularly in the media’s capacity to legitimize and delegitimize particular ideas of responsibility in the criminal process.

C. Institutions

The vectors of power just discussed do not, however, exist in the abstract but rather work through institutional frameworks. The institutional structures available for the realization of the legitimation and coordination roles of criminal responsibility have changed over time and hence have differently conditioned the ways in which those roles can proceed, both constraining and providing opportunities. A vast range of institutions has been directly or indirectly involved in the development of criminal responsibility. During the period under consideration, the pretrial process shifted from a system dominated by lay voices in the form of grand juries

21. *See supra* note 14.

and justices, sometimes operating from their own homes, to a system dominated by lawyers and police officers operating in police stations and magistrates' courts. The trial shifted from trial by altercation—an institutional structure that, despite this description, involved an active role for the judge reminiscent of the inquisitorial system on the continent of Europe—to trial by lawyers, in which jury and judge became passive decision-makers rather than active participants and defendants were increasingly silenced.²² As the twentieth century passed, the rapid growth of plea bargaining ushered in a significant (if not always acknowledged) change in criminal procedure, implying as it did a decisive growth in prosecutorial power and a more bureaucratized system. Legal training shifted from oral tradition and social gatekeeping to formal gatekeeping through an increasingly organized and increasingly regulated set of professional structures. The police shifted from village constables to a professional force whose relationship to political power itself changes over time. The developing institutional form of the political system—the structure and power of the legislature, its relationship with the executive and the judiciary, the scope of the franchise, and the mechanisms for registering votes and allowing votes to shape the development of the law—are also of relevance. Moreover the structure and influence of the professional bureaucracy, not only criminal justice professionals but also welfare professionals and a range of civil servants whose advice is part of the policy process, also affect the trajectory of ideas of criminal responsibility.

By way of illustration, it is worth focusing on perhaps the most obviously relevant institutional factor: the professionalization, expansion, and autonomization of criminal law and the criminal process during the nineteenth century, followed by the criminal justice system's increasing association with welfarist aspirations in the twentieth century and its ultimate blending with risk-based modes of governance in the late twentieth and early twenty-first centuries.²³

Most histories of criminal law in the nineteenth century are dominated by discussions of the long struggle to rationalize criminal law through codification, represented by the reports of the various criminal law commissions that have been established since 1833.²⁴ None of these attempts were successful, and the substantive criminal law of the 1900s,

22. JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* (2003).

23. Nicola Lacey, *What Constitutes Criminal Law?*, in *THE CONSTITUTION OF THE CRIMINAL LAW* 12, 29 (R. A. Duff et al. eds., 2013); see also DAVID GARLAND, *PUNISHMENT AND WELFARE: A HISTORY OF PENAL STRATEGIES* (1985).

24. See, e.g., SMITH, *supra* note 18.

though containing vast amounts of new legislation, was hardly more coherent (according to the Commissioners' criteria) than that of the 1800s. The work of the Commissioners did, however, represent the first systematic governmental attempt to give coherent form to the criminal law: to explicate it as a body of doctrine in relation to certain general principles. The rule of law ideals of rationality, coherence, and predictability that informed these unsuccessful attempts and the Benthamite view of the rational, deterrable subject of criminal law that underpinned them continue to resonate in English criminal law nearly two centuries later. The Benthamite model also implied a distinction between the deterrability of those who committed offenses advertently and that of those who committed them inadvertently—hence arguably providing the foundations for a gradual elaboration of what we now understand as the distinction between the subjective and objective forms of mens rea in criminal law.²⁵

This impulse to systematize criminal law—to reconstruct it as a coherent body of doctrine capable of being applied in an even-handed and impersonal way²⁶—is closely related to the developing project of modern governance already discussed. Furthermore, two other contemporaneous and more fully realized reform projects were also of significance to the development of criminal law in this period. These were the centralization and professionalization of enforcement²⁷ and penal processes²⁸ and the articulation of rules of criminal evidence. Each of these changes expressed a need to autonomize criminal justice by specifying distinctive personnel, institutions, processes, responses, and special kinds of knowledge that came within its purview. For example, the specification of distinctive rules for assessing and filtering evidence received from the social world imply a very basic change in conceptions of knowledge and proof: the move towards an adversarial trial as the best process for the discovery of truth marked a gradual move away from a system in which jury perceptions via common sense, local knowledge, the testimony of witnesses, and the

25. See SMITH, *supra* note 18, at 67–123. In contemporary criminal law doctrine, a subjective principle of fault is one that judges the defendant in terms of his or her own beliefs, capacities, intentions, and so on, while an objective principle judges the defendant in terms of the beliefs, capacities, or intentions that a reasonable person would have had in the circumstances. See NICOLA LACEY & CELIA WELLS, *RECONSTRUCTING CRIMINAL LAW: TEXT AND MATERIALS* 39–47 (2d ed. 1998).

26. See Randall McGowen, *The Image of Justice and Reform of the Criminal Law in Early Nineteenth-Century England*, 32 *BUFF. L. REV.* 89 (1983).

27. See, e.g., DAVID PHILIPS, *CRIME AND AUTHORITY IN VICTORIAN ENGLAND: THE BLACK COUNTRY 1835–1860* (1977).

28. See RADZINOWICZ & HOOD, *supra* note 17.

statement of the defendant was the best source of proof.²⁹ Furthermore, the development of legal representation in the criminal courts, accelerated by the Prisoners' Counsel Act 1836, which entitled, for the first time, all defendants to be represented by lawyers at every stage of the trial, including the address to the jury, led to a significant professionalization of criminal legal practice.³⁰ Finally, the gradual development of systematic law reporting and, significantly later, a system of criminal appeals, provided further foundations for the development of a rationalized system of criminal law doctrine.³¹ Each of these forces can reasonably be inferred to have militated in favor of the gradual development of technical conceptions of responsibility articulated in terms that did not rely on shared, lay evaluations.

The institutions that affected the course of criminal responsibility were not confined to those of the criminal process or even the political process, however. For example, industrialization and urbanization³² fundamentally altered the resources available for the criminal justice system to coordinate and legitimate judgments of responsibility. Greater social mobility—in both the geographical and socioeconomic senses—weakened the local basis for judgments of character and reputation and complicated the shared evaluation of serious wrongs that had arguably underpinned the relatively restricted criminal justice system in the seventeenth and eighteenth centuries.³³ As the regulatory ambitions of the state increased and as the expansion of summary jurisdiction and the explosion of regulatory offenses from the mid-century on facilitated the pursuit of these ambitions through the criminal justice system,³⁴ these problems of legitimation and

29. See J. M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660–1800*, at 634 (1986) (tracing the emergence of the criminal standard of proof, the presumption of innocence, and the law of evidence in the eighteenth and early nineteenth centuries); DAVID J. A. CAIRNS, *ADVOCACY AND THE MAKING OF THE ADVERSARIAL CRIMINAL TRIAL 1800–1865* (1998); J. M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 *LAW & HIST. REV.* 221 (1991).

30. See CAIRNS, *supra* note 29, at 126–76 (detailing the effects of the Prisoners' Counsel Act).

31. SMITH, *supra* note 18, at 42–54, 361–68.

32. See BEATTIE, *supra* note 29, at 637; J. J. TOBIAS, *CRIME AND INDUSTRIAL SOCIETY IN THE 19TH CENTURY* (1967); Beattie, *supra* note 29; Bruce Lenman & Geoffrey Parker, *The State, the Community and the Criminal Law in Early Modern Europe*, in *CRIME AND THE LAW: THE SOCIAL HISTORY OF CRIME IN WESTERN EUROPE SINCE 1500*, at 11, 38 (V. A. C. Gatrell et al. eds., 1980).

33. THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800* (1985) (arguing that under the “communitarian view” the jury’s operation in the later modern period was grounded in a high level of consensus about the central norms governing offences against the person and against property—a consensus that did always not extend to political cases such as treason—and about the indices of character and reputation that rendered the application of the capital sentence unjust).

34. See LINDSAY FARMER, *CRIMINAL LAW, TRADITION AND LEGAL ORDER: CRIME AND THE*

coordination became ever more intense. As confidence in substantive evaluations of character diminished, demands for legitimation increased. Therefore, the criminal process was in search of a conception of criminal responsibility that could be explicated in legal, technical terms and hence legitimated as a form of specialist knowledge underpinning an impersonal mode of judgment.³⁵ The full articulation of such a system depended, however, on a number of other institutional features that developed gradually from the late eighteenth century on: an adversarial trial dominated by lawyers, a sophisticated law of evidence, and a further professionalization of legal practice. In short, interests and ideas shaped these institutional changes, along with many others, yet they also shaped the way in which those ideas could be expressed and those interests pursued.

II. THE SHIFTING ALIGNMENT OF IDEAS OF RESPONSIBILITY IN THE VORTEX OF INTERESTS AND INSTITUTIONS: A THESIS

I have argued so far that, while the apparently competing ideas of criminal responsibility reviewed earlier can and do coexist in criminal law, their alignment and relative influence changes over time. Moreover, we should see those shifting alignments as a reflection of systematic changes in interests and institutional dynamics, fundamentally affecting the nature and scope of criminal law as a system of social meaning creation and social governance. If this broad approach is right, approaches to legal scholarship that place emphasis on the autonomy of law are fundamentally misconceived. While legal doctrines and ideas have a certain independent force, with the closure of legal reasoning providing a certain insulation for legal ideas, the larger intellectual, institutional, and interest-based environment has a decisive bearing on the changing shape of legal concepts over time.

How then might we characterize, schematically for the purposes of this lecture, the trajectory of criminal responsibility in modern English criminal law? I would like to suggest that there has been a broad move through four configurations of responsibility from the early eighteenth to the early twenty-first century. In the eighteenth century, the terrain of responsibility was dominated by the pattern of attribution based on evidence or assumptions about bad character (in particular the malice principle in the common law). Capacity in its subjective sense was shaping

GENIUS OF SCOTS LAW, 1747 TO THE PRESENT 57–99, 119 (1997) (discussing summary jurisdiction and character evidence at the start of the nineteenth century).

35. See McGowen, *supra* note 26, at 89.

the slow development of defenses (notably the emergence of emotional distress defenses) and the attribution of responsibility in some of the most serious offenses, notably murder and treason. And outcome responsibility was on the margins, often manifesting itself in local regulation of particular activities through bylaws and specific legislation, such as the memorably named “Bumboat” Acts.³⁶ As I have argued in more detail elsewhere,³⁷ this configuration reflects both opportunities for and limits on legitimation and coordination within a non-democratic political system, 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.

With ever greater centralization, professionalization, and systematization during the nineteenth century and with the diffusion of democratic ideas about individual agency and more psychological views of human subjectivity, the patterns and principles of attribution based on capacity were strengthened and refined. Additionally, 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. They also became intertwined in interesting ways with notions of capacity. Since the early nineteenth century, the growth of centralized state power and the increasing ambition of the state’s governance of its population has given rise to a certain confidence in the possibility of shaping the habits and dispositions of citizenship through the development of institutions such as criminal justice, the poor law, and later education and health systems. This at first effected an interesting compound of moralism and utilitarianism in criminal policy and of character and capacity as bases for criminal responsibility.³⁸ In the early nineteenth century, the English state explicitly thought of criminal law as a key character-building institution. Within both utilitarian and evangelical traditions, subjects were assumed to be capable of shaping their characters according to the secular or religious incentive system provided by a reformed, rationalized criminal law and by the disciplinary framework of the modern prison—and hence to become law-abiding citizens. This was a

36. Bruce P. Smith, *The Presumption of Guilt and the English Law of Theft, 1750–1850*, 23 *LAW & HIST. REV.* 133 (2005).

37. See LACEY, *supra* note 5; Lacey, *supra* note 2, at 151–78.

38. See JOHN BENDER, *IMAGINING THE PENITENTIARY: FICTION AND THE ARCHITECTURE OF THE MIND IN EIGHTEENTH-CENTURY ENGLAND* (1987) (discussing the notion of character informing the penitentiary movement); FARMER, *supra* note 34, at 119; RADZINOWICZ & HOOD, *supra* note 17, at 35–36 (addressing the role of character in the shaping of social policy); WIENER, *supra* note 16, at 14–158.

project of modernization in the service of moralization. Changing social and political structures posed new challenges for the criminal process, however. In an increasingly, albeit tentatively, democratic political culture that moved slowly towards the idea of universal citizenship, the question of whether the conviction and punishment of the free individual could be justified became increasingly pressing as the liberal ideas, most vividly expressed in J.S. Mill's *On Liberty*, infused political sensibilities, altering the structure of the legitimation problems facing government.³⁹ Both the expansion and the increasing secularization of governmental authority accentuated the legitimation problems faced by the criminal justice system. At the same time, patterns and principles based on outcome began to occupy a larger terrain as a result of the growing regulatory ambitions of the nation state, notably in the expansion of summary jurisdiction, facilitating the implementation of criminal law in areas such as factory legislation and licensing.⁴⁰

Character principles and patterns experienced a limited but important revival with the emergence of ideas of social and psychological pathology in the latter part of the nineteenth century. But they were gradually modified by their association with welfare principles: criminal justice assumed a capable, responsible subject whose agency was susceptible to being deployed in the service of ameliorative projects premised on reform, rehabilitation, and efforts at social inclusion, albeit within a still relatively hierarchical system of social ordering. With the growth of organized legal education, including universities, and the consequent diffusion of systematic texts and treatises, the idea of capacity responsibility assumed dominance in the first half of the twentieth century⁴¹ alongside a continuing edifice of outcome-based practices grounded in a parallel, and very different, set of legitimating principles and coordinating practices. Moreover, the line between the objects of regulation encompassed by capacity and outcome practices has never been stable; both drug and traffic offenses are good examples of areas in which no clear line between regulatory and core terrains can be drawn.⁴² The two ideational and practical worlds were, however, related via the fair opportunity version of the capacity principle, in the form of both negligence offenses (such as

39. JOHN STUART MILL, *ON LIBERTY* (David Bromwich & George Kateb eds., Yale Univ. Press 2003).

40. See FARMER, *supra* note 34, at 57–99.

41. See Lacey, *supra* note 23.

42. The radical instability of the distinction between “real” and “regulatory” crime was brought into sharp relief in the late twentieth century by persistent moral panics about serious offenses in the areas of fraud, tax evasion, and insider trading.

involuntary manslaughter) in the “core” of criminal law and due diligence offenses (such as health and safety offenses, either premised on proof of lack of due diligence or subject to a due diligence defense) on the periphery of regulatory offenses based on harmful outcomes. The existence of both groups of offenses has moreover implied a struggle between objective and subjective forms of capacity-based mens rea, finding significant expression in appellate cases in the last third of the twentieth century.

This dual system began to be disrupted in the latter part of the twentieth century with the increasing politicization of criminal justice and an intensified focus on insecurity.⁴³ This period accordingly saw the emergence of a new alignment of principles, with capacity responsibility still occupying a secure role among core criminal offenses but a new discourse of responsibility founded in the presentation of risk promoting a hybrid pattern and practice of responsibility based on a combination of putative outcome and a new sense of bad character, not as religiously inflected sinfulness but rather as the status of presenting risk or being “dangerous.”⁴⁴ Arguably driven not only by the feelings of insecurity associated with life in late modern societies⁴⁵ but also by rapidly developing technologies of risk assessment in medicine, psychiatry, geography, and demography, this pattern has been particularly evident in the areas of both terrorism and drug regulation, in the de facto revival of status offenses, and in the construction of a vast area of preventive justice through the expansion of inchoate and the creation of “pre-inchoate” offenses.⁴⁶

III. DEVELOPING AND TESTING HYPOTHESES ABOUT WHAT DRIVES PATTERNS OF CRIMINAL RESPONSIBILITY

How, finally, might we make sense of these shifting patterns in the English system? Consider the following model, which may be oversimplified but perhaps suggestive. A pattern of responsibility attribution based on character made a great deal of practical and cultural sense in an environment that was stable, relatively homogeneous, non-democratic, and based on status hierarchy. Furthermore, in that environment, the state had limited ambitions and capacities but was able to draw on considerable local resources of knowledge, norm enforcement, and regulation. Local

43. See LUCIA ZEDNER, *SECURITY* (2009); Lacey, *supra* note 2.

44. *Id.*

45. ANTHONY GIDDENS, *MODERNITY AND SELF-IDENTITY: SELF AND SOCIETY IN THE LATE MODERN AGE* (1991).

46. See Andrew Ashworth & Lucia Zedner, *Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions*, 2 CRIM. L. & PHIL. 21, 21–51 (2008).

knowledge provided evidence of character in relation to insiders. Although the wandering mobility of the poor was long regarded as a significant social problem to be curtailed by the town watch and the structure of the poor law, the simple fact of being an outsider carried with it a stigma of presumptive criminality. Character evidence was key to the conduct of the trial, criminality was readily associated with status (an association also reflected in stigmatizing physical punishments that left marks on the body), criminal prosecution was based on an assumption of bad character, and criminal conviction gave an official imprimatur to that assumption.⁴⁷

With a move to a more individualized, mobile, anonymous, and democratic world, the shape of legitimation and coordination problems changed. The subject of criminal law gradually became a rights-bearing agent, entitled to be judged in terms of his or her own particular capacities, intentions, and knowledge.⁴⁸ At the same time, local resources for knowledge coordination diminished, and a formalized system of policing and criminal trials had to be gradually constructed to facilitate gathering evidence necessary for trial. Furthermore, the gradual domination of the trial by lawyers allowed the refinement of technical doctrines of culpability, as the prevailing legal and political culture, influenced by Enlightenment conceptions of agency and utilitarian theories of human psychology, attached special importance to individual mental states.⁴⁹ This psychological and essentially factual view of responsibility diverted attention from any contested issues of values in an environment that urbanization, social mobility, and democratization were already rendering less morally homogeneous.

This trajectory—at least across the terrain of “serious” criminal law—towards an advertence-based standard of responsibility proceeded relatively smoothly due to the creation of many strict liability regulatory offenses, which allowed the emerging state to pursue its instrumental goals cheaply and efficiently, and to the extraordinary success of the early Victorian state’s creation of a modern criminal justice system featuring, in particular, a regular police force and an extensive prison system.⁵⁰ Crime, especially in the rapidly expanding cities, became a serious social concern. But this spurred further institutional innovation. In a fascinating amalgam of character and capacity cosmologies, the penal system of the first two-thirds of the nineteenth century organized itself to shape convicts’ own capacities

47. LACEY, *supra* note 5, at 34–40.

48. *Id.* at 51–97.

49. SMITH, *supra* note 18.

50. RADZINOWICZ & HOOD, *supra* note 17.

to work on their characters as declining crime rates fostered the perceived legitimacy and effectiveness of the gradually modernizing system.⁵¹

But, as the case of the regulatory offenses reveals, this move towards the investigation of individual capacity responsibility was never complete, not least because the costs of fully realizing the ideal of capacity responsibility proven beyond a reasonable doubt would have been prohibitive, even had the newly created criminal justice infrastructure been extensive enough to deliver it. Shortcuts to proof, such as the presumption that a defendant has intended the natural consequences of his or her actions, and indeed more radical reversals of the purportedly inviolate presumption of innocence expressed in the usual burden of proof remained important, even in relatively peaceful and optimistic times. In more difficult periods, when the costs of determining individual capacity responsibility were particularly high (for example, because of the scale of perceived crime problems), the shortcuts seemed particularly tempting. And such shortcuts tended to be nested, explicitly or implicitly, within a legitimating framework of criminal character shaped by scientific or religious doctrines. Hence, the historical trajectory towards proof of individualized capacity responsibility was not unbroken. For example, in the wake of widespread economic insecurity during an extended recession and the cultural anxieties over the first hints of the collapse of the British Empire and the Fenian challenge in Ireland from the 1870s through the 1890s, governments reverted to a concern with the idea of criminal types who might be targeted and identified, with consequent improvements to public safety. In a frightening time, the quasi-Darwinian, eugenic view of crime as pathology gave birth to a new conception of criminal character, a scientific character essentialism, and appeared in legislative arrangements that identified particular criminal classifications with the goal of separating and managing a distinct criminal class.⁵² The epitome of this moment is Lombroso's criminology, with its fantasy of the existence of stable types of criminal character and of being able to identify those types in terms of physiognomy, and Francis Galton's equally vivid fantasy that by superimposing many photographs of offenders he would be able to identify the essence of criminal personality.⁵³

51. See WIENER, *supra* note 16.

52. See ZEDNER, *supra* note 17.

53. See Nicola Lacey, *Psychologising Jekyll, Demonising Hyde: The Strange Case of Criminal Responsibility*, 4 CRIM. L. & PHIL. 109 (2010) (arguing that the Darwinist form of these character classifications was juxtaposed against a revived concern with criminality based in "evil": a concern vividly reflected in contemporary fiction, including Robert Louis Stevenson's *Strange Case of Dr. Jekyll and Mr. Hyde*, Oscar Wilde's *The Picture of Dorian Gray*, and Bram Stoker's *Dracula*).

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. Criminal types legislation gradually fell into disuse, and at the turn of the century, there gradually assembled the political, institutional, and procedural bases for the “penal welfarist” settlement, which endured until the 1970s, sustained by a relatively stable social culture that had perhaps been fostered by the First and Second World Wars.⁵⁴ And just as the penal system was being reconstructed on more reformist and inclusionary lines, so were capacity-based and subjective principles of responsibility continuing their steady progress in the courts and the legislature during the major part of the twentieth century. They found their intellectual acme in Glanville Williams’s *Criminal Law: The General Part*⁵⁵ and their fullest legislative support in Section 8 of the Criminal Justice Act 1967, which, by effectively reversing *Director of Public Prosecutions v. Smith*,⁵⁶ finally and decisively abandoned the presumption that natural consequences are intended.

As many commentators have argued,⁵⁷ this penal welfarist settlement began to break down in the early 1970s, under pressure from increased crime and a welter of economic, demographic, and cultural changes that were fundamentally altering the structure of criminal justice politics in the UK and in many other countries, including the United States. This is not the place to rehearse the familiar story of how, amid a “culture of control,” penal welfarism gave way to increasing punitiveness: to “penal populism,” creating a “prisoners’ dilemma” for politicians and a tendency to “govern through crime.”⁵⁸ The power of the narrative is, sadly, attested to in the soaring imprisonment rates in the liberal market economies that have seen this trend. I suggest that these factors, charted so persuasively by criminologists in relation to criminal justice arrangements such as policing and punishment, also explain the changing patterns and principles of criminal responsibility charted in the previous section, in particular the reemergence of patterns of attribution based on a version of character

54. GARLAND, *supra* note 23.

55. GLANVILLE L. WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* (1953). At the turn of the century, one of the most influential texts was still conflating objective and subjective mens rea standards, blurring the boundary between the two. COURTNEY STANHOPE KENNY, *OUTLINES OF CRIMINAL LAW* 40 (1902).

56. [1961] A.C. 290 (H.L.) (appeal taken from Eng.).

57. See, e.g., GARLAND, *supra* note 2; JOHN PRATT, *PENAL POPULISM* (2006); ROBERT REINER, *LAW AND ORDER: AN HONEST CITIZEN’S GUIDE TO CRIME AND CONTROL* (2007); JOCK YOUNG, *THE EXCLUSIVE SOCIETY: SOCIAL EXCLUSION, CRIME AND DIFFERENCE IN LATE MODERNITY* (1999).

58. LACEY, *supra* note 20; JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007).

aligned with a new conception of risk. The example of the late Victorian criminal types legislation—the feeble-minded, the inebriate, the vagrant, and the fallen woman⁵⁹—is hence a real clue to the explanation for waxing and waning patterns of character responsibility. Amid a crisis of security analogous to that experienced at the end of the nineteenth century, legislators today are reaching for definitions and mechanisms that can reassure an anxious public that their concerns are being taken seriously and that “the criminal threat” can be contained. The construction of criminal classifications is a tempting mechanism, and just as the late nineteenth century classifications reflected prevailing anxieties, scientific theories, and technologies, so today’s categories—the anti-social youth, the sex offender, the migrant and, above all, the terrorist—are appropriate symbols of “otherness” relative to contemporary anxieties and technologies.

These anxieties and the technologies available to meet them have of course changed. In the wake of the collapse of Fordism, the partly-associated attenuation of social solidarity, and the dilution of the welfare state, and amid an economic crisis that seems likely to further intensify concerns about insecurity that have underpinned developments such as the readmissibility of character evidence and the invention of what amounts to a new generation of criminal status offenses, there is reason to fear that those who form easily identifiable objects of anger, fear, or resentment will find themselves increasingly the target for what we might call character-facilitated criminal responsibility-attribution. Non-citizens in general and recent immigrants and asylum seekers more specifically are obvious potential targets, particularly where their origins may be associated in popular or police consciousness with either terrorism or drug production.⁶⁰ More speculatively and potentially more nightmarishly, new technologies in fields such as neuroscience and genetics, and computer programs that identify crime “hot spots” that might be taken to indicate “postcode presumptive criminality” have potential implications for criminal responsibility. They will offer, or perhaps threaten, yet more sophisticated mechanisms of responsibility attribution based on notions of character essentialism, just as the emerging sciences of the mind, the brain, and statistics did in the late nineteenth century. Moreover, several of these new scientific classifications exhibit more extreme forms of character

59. ZEDNER, *supra* note 17, at 219–96.

60. Lucia Zedner, *Security, the State, and the Citizen: The Changing Architecture of Crime Control*, 13 *NEW CRIM. L. REV.* 379 (2010); *see also* ALESSANDRO DE GIORGI, *RE-THINKING THE POLITICAL ECONOMY OF PUNISHMENT: PERSPECTIVES ON POST-FORDISM AND PENAL POLITICS* (2006); Loïc Wacquant, “*Suitable Enemies*”: *Foreigners and Immigrants in the Prisons of Europe*, 1 *PUNISHMENT & SOC’Y* 215 (1999).

essentialism than did their nineteenth century forbears.

IV. TESTING THE THESIS: THE VALUE OF COMPARATIVE ANALYSIS

This is a broad hypothesis, but it is based in a rich array of facts about the trajectory of criminal responsibility in a single system. How might the robustness of the hypothesis be tested? The most obvious means is through a comparative analysis that sets the argument about the development of criminal responsibility in the jurisdiction of England and Wales on a similar trajectory to that in other countries with which it shares enough fundamental features to be broadly comparable but that feature a range of institutional and ideational differences and variation in the shape and distribution of interests that will allow us to assess the relative force of the different dynamics. How might such a comparative analysis be made manageable? One approach is to develop a detailed comparison of a limited sample of countries, combining analysis of their current penal policies with analysis of their practices of legal responsibility attribution in selected areas of criminalization, such as homicide (representing the paradigm case of serious crime and susceptible of relatively straightforward comparison), drug criminalization, and public order offenses (both areas sitting on the cusp between serious and regulatory offenses, each a key focus of recent political concern and legislative activity in many countries), framing these within a broad comparative political economy of crime and control.

The UK, Germany, and the United States would represent a good sample for a number of reasons. First, while the UK and the United States are “liberal market economies,” with competitive, adversarial, first-past-the-post electoral systems and increasingly flexible economies, Germany is a “coordinated market economy,” with a consensus-oriented, proportionally representative political system and high long-term investment in education and training, leading to a higher skills economy with, at least until very recently, high levels of employment stability.⁶¹ Second, while Germany has a civil law system, the UK and the United States have common law systems. This combination allows for the exploration of the impact of the type of a country’s political economy and of whether a distinctive legal system and procedure has an independent importance. Third, by focusing closely on the interlocking institutional arrangements in the UK and the

61. See Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, in VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2001).

United States—countries that belong to the same political economy and legal families yet display differences and similarities in recent criminal policy—one could begin to explore further factors that may explain these intra-family differences. An obvious candidate for exploration would be the political system, which (as already mentioned) functions in importantly different ways in the two countries. Fourth, this group of case studies would allow us to give particular consideration to the influence of legal or constitutional variables such as the distribution of power; the scope of constitutional constraints on criminalization; the appointment, tenure, and accountability structure of key officials such as judges; and the existence and form of codification.

The three cases are particularly suitable for exploring legal variables because they encompass a large number of possibly significant differences. The UK has a substantially “unwritten” constitution and lacks a fully federal structure, while the relationship between the criminal jurisdictions of Scotland and of England and Wales provide a focus for investigating intra-country regional variation. Both the United States and Germany have written constitutions and strong traditions of judicial review, but their constitutions imply different constraints on criminal legislation, and judicial review in Germany is restricted to a special constitutional court. Moreover, the two federal systems work in very different ways. For example, whereas in Germany, criminal law is primarily a federal matter, in the United States, federal jurisdiction, though important, is circumscribed; states enact and enforce the vast majority of criminal law, and regional differences in criminal law and punishment are substantial.⁶² In addition, each country has an entirely different system for the appointment and tenure of judges. Whereas many state judges are elected in the United States, British judges are appointed by the Judicial Appointments Commission, and German judges are, in effect, civil servants: career professionals who train specifically for the judicial role. Finally, while codification has never been achieved in the UK, both Germany and the United States have codified criminal law, to different extents and in different forms.

In effect, I am calling for a socio-legal comparative law, grounded in a social theory and in political economy. Within the framework of a single lecture, itself focused on the elaboration of a particular case study, the case that I have made for this approach is necessarily schematic. I hope

62. On regional variation across the United States, see, for example, VANESSA BARKER, *THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS* 25–46 (2009).

nevertheless that I have said enough to indicate the attractions of this approach and the special contribution that comparative scholarship might make to it. I trust that in doing so, I have articulated an aspiration of which Herbert Bernstein would have approved.