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## JURISPRUDENCE, HISTORY, AND THE INSTITUTIONAL QUALITY OF LAW

*Nicola Lacey\**

*“Of the connection between history and jurisprudence we shall have to speak on many occasions. It may be sufficient to state now that history cannot be contrasted with the theoretical study of law because it provides one of the essential elements of legal method.”<sup>1</sup>*

AS Charles Barzun and Dan Priel note in their prospectus for this symposium, the question of how jurisprudence and history relate to one another arises in a number of distinctive forms, and raises a range of interesting and consequential questions. And yet the parallel lines between jurisprudence and the history of legal ideas, which they lament in particular, are reproduced across several of these questions—notably between philosophical theories of law and historical analyses of the development of laws and legal institutions, as well as of the other social institutions and circumstances which provide the environment and framework for that development. Moreover, the historical jurisprudence to which Vinogradoff aspired<sup>2</sup>—a discipline which would bring history, psychology and the social sciences into dialogue with philosophical analysis of law—stands, a century after its conception, as little more than a footnote in contemporary study of the history of jurisprudential ideas (and as yet less than that in conventional jurisprudential study).

The reason, certainly, lies in the incomplete success with which Vinogradoff was able to articulate his vision of the intellectual linkages underpinning the desirability of that dialogue; and more generally in the association of historical jurisprudence with discredited or outmoded ideas, such as the relationship between the identity of particular legal orders and the essential spirit of a people articulated by Savigny,<sup>3</sup> or on generalizations grounded in broad-brush historical anthropology, such as that

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<sup>1</sup> Paul Vinogradoff, *Introduction to Historical Jurisprudence* 10 (Batoche Books 2002) (1920).

<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., Frederick Charles von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* 174 (Abraham Hayward trans., The Legal Classics Library 1986) (1831).

of Maine.<sup>4</sup> But, whatever the weaknesses of that broad (and itself diverse) nineteenth- and early twentieth-century tradition in the history of legal theory, there is strong reason to think that something important was lost with its decisive and lasting marginalization at the hands of an analytical jurisprudence which has no use for a careful analysis of either its own or law's genealogy.<sup>5</sup> Indeed, as Gerald Postema argues in his contribution to this symposium,<sup>6</sup> there is further reason to think that this loss also implies an impoverished conception of philosophy and of its contribution to legal theory.

In this Article, after setting out some of the key ways in which the intellectual lines of history and jurisprudence intersect, I will approach the question of whether, and why, history deserves a more central place in jurisprudential thinking in terms of a broad understanding of law as having a fundamental institutional dimension, as well as being a product of social power and interests. Since law realizes itself in terms of intersecting institutional arrangements, and since these change over time, institutional history is central to the very idea of law which jurisprudence aspires to illuminate. Moreover, the history of institutions is fundamental not only to positive jurisprudence but also to normative jurisprudence: Understandings of law and legality structure the conditions of existence for the realization of moral or political ideals in and of law.

After reviewing this argument in relation to a key question of general jurisprudence—that of the quality of legality, understood as the distinctive modality of law—I will pursue it through a more detailed case study in special jurisprudence: an analysis of the trajectory of ideas of criminal responsibility in English law since the eighteenth century. I will argue that, while a broad family resemblance among ideas of responsibility in different eras can be identified, the variations on those ideas—and their particular inflection, relative importance, and impact—depend funda-

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<sup>4</sup> See, e.g., Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas* (London, John Murray 1861); Henry Sumner Maine, *Lectures on the Early History of Institutions* (New York, Henry Holt & Co. 1875); Henry Sumner Maine, *Village-Communities in the East and West* (New York, Henry Holt & Co. 1871).

<sup>5</sup> For illuminating discussion of what was lost in the broadly positivist tradition as a result of this disciplinary amnesia, see the contributions to this symposium by Dan Priel, *Toward Classical Legal Positivism*, 101 *Va. L. Rev.* 987, 990 (2015); Alice Ristroph, *Sovereignty and Subversion*, 101 *Va. L. Rev.* 1029, 1029 (2015); and Frederick Schauer, *The Path-Dependence of Legal Positivism*, 101 *Va. L. Rev.* 957, 957–58 (2015).

<sup>6</sup> Gerald J. Postema, *Jurisprudence, the Sociable Science*, 101 *Va. L. Rev.* 869, 887 (2015).

mentally on historically contingent constellations of ideas, institutions, and interests. Furthermore, I will argue that this historical insight into the evolution of law itself maps onto the history of twentieth-century jurisprudence, with three broad—and all-too-often mutually indifferent or even contemptuous—traditions concerning themselves with each of the three broad, law-shaping dynamics, in contrast to the more generous reach of jurisprudential—including philosophical—thinking of earlier eras. This narrowing focus of jurisprudential study, doubtless, has been to some degree a consequence of the increasing specialization and sophistication of the relevant disciplines. But, like the rejection of the bold vision of some versions of historical jurisprudence, it has not been without intellectual cost.

Before moving on, I should perhaps preface my argument, forming part of a symposium in which some distinguished historians of law and legal ideas are represented, with something of a confession. In the early part of my career, legal history and the history of legal ideas were closed books to me, as I made my way in a field of criminal law scholarship dominated by doctrinal scholarship and by concept-focused philosophical analysis of the foundations of criminal law. These two very different paradigms have one big thing in common: They tend to proceed as if the main intellectual task is to unearth the deep logic of existing legal doctrines, not infrequently going so far as to read them back onto history, as if things could never have been other than they are. The reasons for this intellectual disposition vary, but it is, to me, a very unsatisfactory one, and from quite early on I found it necessary to temper my reading of criminal law's conceptual arrangements in the light of sociological information about the context in which they emerge and operate. But in more recent years, I have increasingly found myself turning to historical resources to motivate a more critical examination capable of revealing, first, the contingency of particular legal arrangements, and second, the patterns of development over time which may help us to develop causal and other theses about the dynamics which shape them and hence about the role and quality of criminal law as a form of power in modern societies. So, in a sense, I have been using history in support of an analysis driven primarily by the social sciences.

This is not always a palatable approach to historians. Historians are by disciplinary temperament, after all, closely attentive to detail and particularity; hence their reservations about the construction of general theories which inevitably flatten out detail or nuance are understandable.

Yet history is of central importance to social theory, and it is no accident that all of the great social theorists, from Marx to Foucault via Weber, Durkheim, and Elias, among others, have incorporated significant historical elements into their interpretations of the broad factors shaping societal development. Indeed, without the diachronic perspective provided by history (or the perspective offered by comparative study) we could have no critical purchase on social theory's characterizations of or causal hypotheses about the dynamics of social systems. Hence, while recognizing that not all historians feel comfortable about the deployment of historiography in the service of social theory, I would argue for its appropriateness and indeed necessity (as well as adding—by way of plea in mitigation!—my boundless gratitude to the historians whose meticulous research makes this sort of interpretive social theory possible).

#### I. TRACING THE LINKAGES BETWEEN HISTORY AND JURISPRUDENCE

Before going on to set out and defend my claim that law's institutional quality makes a historical perspective an essential component of any satisfactory approach to legal theory, it will be useful to distinguish three rather different ways in which history relates to jurisprudence.

The first, and probably the most obvious, is that to which Vinogradoff alludes in the epigraph to this Article: The reference point of legal reasoning in modern Western legal systems being (depending on one's broader legal theory) either law-creating acts in the past (as in legal positivism) or preexisting reasons or principles (as in natural law), the core operation of law entails an invocation and interpretation of the past. Take, for instance, two influential—and rather different—examples from analytical jurisprudence of the late twentieth century. First, in Hart's positivism, a judicial decision applies rules whose validity lies in their origins: their creation in accordance with a rule of recognition which is itself a social fact persisting within a particular territory at a particular time.<sup>7</sup> And second, in Ronald Dworkin's vision of law as a system of principles, the judge is bound not only by legislatively and judicially announced rules and concrete standards, but also by a larger institutional history that carries and expresses threads of value or principle.<sup>8</sup> Hence while both Hartian positivism and Dworkinian law-as-

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<sup>7</sup> H.L.A. Hart, *The Concept of Law* 110 (2d ed. 1994).

<sup>8</sup> Ronald Dworkin, *A Matter of Principle* 2 (1985); Ronald Dworkin, *Law's Empire* 225–28 (1986); Ronald Dworkin, *Taking Rights Seriously* 41–43 (1977).

integrity privilege what Raz has called the “momentary legal system”—in other words, the contribution of jurisprudence to the determination of what the law is, or how to identify the set of valid laws in a particular jurisdiction at a particular moment—the “non-momentary legal system”—the legal system as a more complex and persisting entity shaped by political, historical, cultural and other social forces—cannot be completely evacuated from the concerns of legal theory.<sup>9</sup>

This relationship between history and the key jurisprudential topic of legal reasoning is, of course, particularly evident in common law systems that deploy structured mechanisms of binding precedent.<sup>10</sup> But it is an underlying fact of nonprecedential systems too, insofar as they refer to preexisting standards whose status as law has persisted over time and has some form of origin or source. And even in systems which have operated primarily in terms of secondary rather than primary rules—in other words, by giving a particular person or group the power to adjudicate on disputes or pronounce legal decisions on the basis of their legal authority—that authority itself has a source in the past, and must persist over time if it is to fulfill any social function.<sup>11</sup> Hence that authority’s exercise depends upon and in some sense reenacts a distinctive past.

In some forms of historical jurisprudence, this recognition of the past-orientation of legal method has engendered more ambitious claims about the links between legal theory and history: claims that, in effect, assert that the substantive qualities of the non-momentary system leak into the identification of the momentary system. These claims have come in various forms. Some have equated the evolution of law with a distinctive ethos of a people (a claim whose essentialist overtones sit somewhat ambiguously with their apparent historical orientation, but which features in different ways in both the writings and judgments of common lawyers like Coke, Hale, or Blackstone and the jurisprudence of Savigny and his followers). In this vision, law is not so much a system of articulated general rules as a system of custom and convention generated by,

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<sup>9</sup> Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* 34–35 (1970).

<sup>10</sup> See Neil Duxbury, *The Nature and Authority of Precedent* 4 (2008).

<sup>11</sup> This is discussed in a number of anthropological works. See, e.g., *Law and Anthropology* (Peter Sack & Jonathan Aleck eds., 1992); Simon Roberts, *Order and Dispute* 7–16 (Quid Pro Books 2d ed. 2013) (1979). For a nuanced legal anthropology account of the complex modes of legality coexisting in one African setting, see John L. Comaroff & Simon Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context* (1981); see also Fernanda Pirie, *The Anthropology of Law* 1–51 (2013).

expressing, and continuing a particular cultural identity and a distinctive spirit or set of values. Others have attempted to link the evolution of legal systems with particular forms of society (a tendency evident both in Maine's work in the second half of the nineteenth century<sup>12</sup> and in the very different instance of Roberto Unger's early work in the 1970s<sup>13</sup>). In these latter theories, the question of law's linkages with a wide range of social, political, economic, and cultural institutions and value systems arises, and with it, questions about law's specificity and autonomy which have sometimes taken to be threatening to the very enterprise of theorizing law as a distinctive social phenomenon.

Second, we need to distinguish the claim that history and jurisprudence are related in the sense that an understanding of historical context is important to an intelligent interpretation of theories, especially of theories that have emerged in worlds whose social, political, and religious dimensions are very different from our own. (Note that this argument applies with equal force in a comparative context: If context is important to the way in which ideas develop and it affects their significance, it follows that wherever our understanding of that context is impoverished by historical, geographical, or cultural distance, we need to reach for broader intellectual resources to inform and enrich our understanding.) We cannot understand, in other words, the contemporary or local appeal of any legal theory—whether Savigny's notion of *Volksgeist*, medieval natural law theory, current theories of Sharia law, Austin's legal positivism, or Kelsen's pure theory of law—without understanding something of the political, social, and intellectual culture in the context in which they were developed.<sup>14</sup> This is equally true of the conditions underpinning theories produced in our own time and place. Indeed, we have to make a particular effort to contextualize our reading of these theories, precisely because their institutional and other conditions of existence are so familiar to us that they are barely visible.

At one level, this claim seems simply commonsensical. But it can generate both controversy and genuinely difficult questions. We can regret the arrogance of a form of analytical jurisprudence that asserts its independence of context, eschews any interest in the "incorrect" theories

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<sup>12</sup> See *supra* note 4 and accompanying text.

<sup>13</sup> Roberto Mangabeira Unger, *Law in Modern Society: Toward a Criticism of Social Theory* 47–48 (1976).

<sup>14</sup> See Wibren van der Burg, *The Dynamics of Law and Morality: A Pluralist Account of Legal Interactionism* 8 (2014).

of the past, and appropriates any aspects of past theorizing useful to its own schema with scant attention to its historical origins. But we may also, for example, struggle to articulate the distinctively jurisprudential significance of the (in my view undoubted) fact that Hart's legal theory is shaped by an underlying vision of impersonal legal authority appropriate to a developed constitutional democracy, and would have looked very different had it been written by a scholar whose political experiences and allegiances had been different.<sup>15</sup> Much the same is true of the claim—like many of the relevant claims in this field, it is one to which biographical evidence may be particularly relevant<sup>16</sup>—that the distinctively apolitical, logical, dry linguistic philosophy which dominated post-war philosophy in England, and which was one (but not the only) influence on Hart's legal philosophy, was in part a reaction to what were, rightly or wrongly, perceived as the contribution which some forms of German philosophy had made to German politics in the 1930s and 1940s.<sup>17</sup> So while it seems obvious that we should be interested in the link between theorists' experiences, worldviews, and the theories that they create, there is a genuine risk of reductivism here.

This leads us to the third—and perhaps most difficult but also most important—relationship among intellectual lines that needs to be understood: that between the philosophical enterprise of building a theory or concept of law and the historical analysis of law and legal institutions. To put this in the terms of Barzun and Priel's prospectus for this symposium, much philosophical theorizing about law proceeds on the basis of the assumption—or sometimes of the fully articulated claim—that law, along with associated ideas like legality or rule, is like “fire” or “electron”: in other words, something which is a constant through time and space. Of course, the content and even the social functions of law are acknowledged to change over time, but there is assumed to be, nonetheless, some core concept of law that forms the agreed-upon and unprob-

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<sup>15</sup> Compare the suggestion that the “purity” of Kelsen's theory was shaped not only by distinctive strands of German philosophy but also by his experience of gross political interference in the legal system and in legal education. Hans Kelsen, *Pure Theory of Law* (Max Knight trans., Univ. of Cal. Press 1967) (1934).

<sup>16</sup> See, e.g., Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (2004); William Twining, *Karl Llewellyn and the Realist Movement* (2d ed. 2014); G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (1993); G. Edward White, *Oliver Wendell Holmes, Jr.* (2006).

<sup>17</sup> See Lacey, *supra* note 16, at 141.



lematic basis for our theoretical endeavors.<sup>18</sup> A historical approach, by contrast, will be unlikely to set out with such a fixed assumption about the unchanging “essence” of law: Indeed, to do so would in some deep sense be antithetical to the very enterprise of historical scholarship. Rather, it will content itself with fixing on some agreed, broad definitional parameters, but will proceed on the basis of constant reexamination of those parameters, and with keen antennae attuned to changes in the way law is conceived and its instrumental and symbolic significance, as well as in what it contains, its institutional form, and the interests which shape it.

So—and this is the issue to which the case study that I will develop in the second Part of this Article speaks—the question arises as to whether philosophical jurisprudence would be best advised to adopt or live with this form of critical reflexivity about the contours of key concepts, underpinned by the question of historical contingency, or whether it is best advised to stick with its conceptual essentialism about “the very nature of law.”<sup>19</sup> For only if an openness to a degree of historical contingency in law and other legal concepts is accepted can we hope for historical and philosophical lines to intersect rather than run in parallel, and for jurisprudence to be, as Gerald Postema, echoing Coke, has put it, a “social science,”<sup>20</sup> recognizing law as embedded in a cluster of social practices and relations, open to the relevance of a number of disciplines, including history, to the broad jurisprudential endeavor, and as much interested in the analogies between law and legal methods and other social phenomena as in their distinctiveness.

## II. LAW AND LEGAL CONCEPTS: IDEAS, INTERESTS, AND INSTITUTIONS

How, then, might we think about the most appropriate way to build theoretical understandings of law? In this Part, I will sketch a map of the main dynamics that shape law, legal phenomena, and legal practices, relating each of them to particular paradigms in legal theory, before presenting an argument for the complementarity of the various approaches. I will argue that we may usefully think of law as shaped by three rela-

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<sup>18</sup> For a recent example, see John Gardner, *Law as a Leap of Faith: Essays on Law in General* 270 (2012); for further discussion, see Nicola Lacey, *The Jurisprudence Annual Lecture 2013—Institutionalising Responsibility: Implications for Jurisprudence*, 4 *Jurisprudence* 1, 11–12 (2013).

<sup>19</sup> I take the expression from Gardner, *supra* note 18, at 270.

<sup>20</sup> Postema, *supra* note 6.

tively distinctive yet intersecting elements—ideas, interests, and institutions—and that each of these elements has formed the principal object of particular traditions in legal theory.<sup>21</sup> And once we think of law as shaped by these intersecting elements, it becomes plain that a theoretical understanding of law—in the sense of an explanation of not only what it is but its social role and effects, and its development—requires an analysis informed by an understanding of the different forms, roles, and modalities of law at different times and in different places—in other words, a jurisprudence that opens itself to both historical and comparative analysis.

Law as an idea, or rather, law as best understood in terms of a complex set of ideas such as rules, norms, commands, reasons, and so on, has been the principal object of analytical jurisprudence. Of course, this is not to say that analytical jurists do not think of law as a practical phenomenon, but rather that their enterprise has been to elucidate the deep structure of the concepts that structure the phenomena of law, legal doctrines, and legal argumentation. The main focus has accordingly been the conceptual elegance and coherence of the relevant ideas, as well as the ideals that, in some versions of analytical jurisprudence, are implicit in the very concepts of law and legality. As this form of jurisprudence has become increasingly dominated by sophisticated forms of analytic philosophy, its disciplinary discreteness and closure has become greater,<sup>22</sup> the assumption being that a philosophically adequate conceptualization of law is independent of its history, while conversely there is no reason to be interested in earlier theories which are less philosophically satisfactory (by the criteria of current philosophy). The question of the criteria of accountability of these theories to the social phenomena about which they theorize has, accordingly, become increasingly obscure, and the fascinating and complex questions concealed within the apparently simple claim to be offering a theory of law or particular legal phenomena have become radically underexamined. Notwithstanding this *déformation professionnelle* of much analytical jurisprudence, however, the ex-

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<sup>21</sup> My argument here bears comparison with van der Burg's recent suggestion that the concept of law's ambiguous existence as both a practice and doctrine implies pluralism in legal theory, though my tripartite framework cuts across his distinction between practice and doctrine in that, on my model, ideas, interests, and institutions shape both law as a social practice and law as a set of doctrines. Van der Burg, *supra* note 14, at viii.

<sup>22</sup> This is discussed in illuminating detail by Postema, citing in particular the "obsession with disciplinary boundaries" which characterizes contemporary analytical jurisprudence. Postema, *supra* note 6, at 876–77.

istence of legal phenomena and practices in linguistic terms, as well as the role of ideas and ideals such as rights, justice, and legality in shaping the development of law over time and space, indicate that some form of conceptual analysis is appropriately a key component of legal theory.

If law is, from one point of view, usefully understood in terms of its conceptual or ideational structure, another set of traditions in legal theory has focused instead on the vectors of interest and power that shape law—what it is, its effects and functions. While widely criticized by those persuaded of law's autonomy and specificity, power- or interest-based theories of law have played an important role in illuminating aspects of law that are concealed within its technical, apparently neutral or objective conceptual structure. From the development of Marxian theories of law onward, accounts of the ways in which legal ideas, institutions, and practices are systematically structured by political, economic, and cultural power—power which is then rendered invisible through law's ideological function in presenting legal outcomes as produced by neutral or objective rules and as constituting a form of truth of knowledge—have prospered. Influential traditions in twentieth-century legal theory that have focused on the impact of power and interest on law have included some versions of legal realism, Foucauldian analysis, feminist legal theory, critical race theory, and critical legal studies.<sup>23</sup>

Of the three broad dynamics that I have argued to be fundamental to our understanding of law, interests have probably caused the greatest methodological controversy, not least because they are threatening to some of the core epistemological assumptions of analytical jurispru-

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<sup>23</sup> On Foucauldian analysis, see Foucault and Law (Ben Golder & Peter Fitzpatrick eds., 2010); Alan Hunt & Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (1994). On feminist legal theory, see Joanne Conaghan, *Law and Gender* (2013); Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (1998); Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (1989); Carol Smart, *Feminism and the Power of Law* (1989); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *Stan. L. Rev.* 581 (1990); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 *Calif. L. Rev.* 1279 (1987). On critical race theory, see Patricia J. Williams, *The Alchemy of Race and Rights* (1991); Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 *Harv. Women's L.J.* 1 (1988). On critical legal studies, see Duncan Kennedy, *A Critique of Adjudication {fin de siècle}* (1997); *The Politics of Law: A Progressive Critique* (David Kairys ed., 3d ed. 1998); Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (1986). I am sympathetic to Brian Leiter's suggestion in his contribution to this symposium that, adequately understood, positivist legal theories are more compatible with Marxian and indeed other interest-based approaches than has usually been recognized. Brian Leiter, *Marx, Law, Ideology, Legal Positivism*, 101 *Va. L. Rev.* 1179, 1179 (2015).

dence.<sup>24</sup> Evidently, broad interpretations of law as shaped by underlying power structures have surfaced regularly in social theories of law. Probably the most influential—as well as the most controversial—tradition reaches back to Marx and Engels, and finds expression in a variety of forms. A key example is Pashukanis's analysis of the form of bourgeois law as expressing commodified social relations through the mechanism of the formally equal contracting legal subject.<sup>25</sup> Another is Alan Norrie's application of Pashukanis's commodity exchange theory to criminal law in *Law, Ideology and Punishment*, which emphasized the contribution of the construction of the responsible subject in the modern general part of criminal law as ideological: as legitimating the repressive and unequal system of criminalizing power through the form of the capable, choosing, responsible subject.<sup>26</sup>

As one of the most influential and searching analysts of the power dynamics of law, the historian and social theorist E.P. Thompson, acknowledged in his classic work *Whigs and Hunters*, there are, however, some obvious drawbacks to interest-based analyses of law.<sup>27</sup> First, they tend to be reductive in that they simply assume that phenomena such as law have no autonomy, in the process interpreting those who have aspired to use law to resist power as, in effect, the dupes of ideology.<sup>28</sup> As Thompson famously observed, things are more complicated than this, and can be seen to be so even from the perspective of an interest-based analysis.<sup>29</sup> If law was no more than a cover for underlying interests, and served them consistently even when announcing safeguards or entitlements capable of being used in opposition to those interests, it would lack the credibility and legitimacy which are in fact key to its

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<sup>24</sup> For discussion of one such controversy in the theory of constitutional law, surrounding Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (1913), see John Mikhail's contribution to this symposium. John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 *Va. L. Rev.* 1063, 1065–67 (2015).

<sup>25</sup> Evgeny B. Pashukanis, *Law and Marxism: A General Theory* 109–14 (Barbara Einhorn trans., Ink Links Ltd. 1978) (1929).

<sup>26</sup> Alan W. Norrie, *Law, Ideology, and Punishment* 7–14 (1991); see also Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* 27–33 (1993) [hereinafter Norrie, *Crime, Reason, and History*] (further explaining the tensions created by the concept of individualism in criminal law).

<sup>27</sup> E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* 258–69 (Pantheon Books 1975) (1924).

<sup>28</sup> *Id.* at 259.

<sup>29</sup> *Id.* at 262, 264.

power. The very deployment of law and legal concepts in the service of interests is premised, therefore, on its relative autonomy: Hence understanding the distinctive forms and modalities of legal power remains important. Law cannot be reduced to a crude matter of interest alone.

Second, interest analyses such as Marxian theories of law tend to assume a rather monolithic structure of power, with economic power mapped onto a class structure typically understood as the main determinant of legal arrangements. Relevant though the distribution of economic power has been to the development of law, it is in fact fragmented by other vectors of power which have a distinctive importance: gender, race, and social status to name but the most obvious.

Finally, interest analyses are often either vague or unconvincing when it comes to the explication of the causal links between interests and outcomes in the law or in legal arrangements. In the case of Marxist analysis, these arguments take the form of either an implausible form of class instrumentalism, which itself assumes unified and organized classes which are rare and in any event contingent on opportunities and constraints created by institutional and other environmental factors; or of a rather vague assertion of the way in which “material forces” are “reflected” in the structures of allegedly superstructural phenomena such as law and ideology.<sup>30</sup> Note that the structural version of Marxist analysis implies, ironically in view of its historical thesis, a certain ahistoricism reminiscent of analytical jurisprudence.

These are real difficulties with interest analyses of law—from Marxist legal theory to the cruder versions of legal realism. But these difficulties have, unfortunately, occasioned a significant overreaction which is itself problematic. This is the reaction of more or less evacuating the analysis of interests from the study of law and legal development, resulting in the evacuation of questions of power and interest to other disciplines such as political science or sociology. I would argue that, notwithstanding the methodological problems just canvassed, we need to reinsert a concern with interests into legal theory and legal scholarship. For power is key to shaping law and its operations, and the fact that interests are mediated by institutional structures and realized and rationalized in terms of ideas, often realized in the institutional form of legal doctrines, alleviates the

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<sup>30</sup> See generally Hugh Collins, *Marxism and Law* 17–34 (1982) (outlining elements of historical materialism pertinent to law which have been common to various strands of the Marxist tradition).

problem of reductivism. (Indeed, however conceptually clear the distinction, it is difficult to separate the analysis of interests and of the institutions through which they are realized in our interpretive analysis of particular developments.) Moreover, the origins of law in political decisions renders it not merely strange, but inadequate, to evacuate the study of interests from the study of general jurisprudence. To the extent that interests are important to our understanding of law's changing modalities and social functions, then, the need for a historical approach becomes evident.

Third, we have the fact that law's existence takes not only the linguistic form of ideas and doctrines, but is inevitably, as a structured social practice, embedded in a range of institutions which both constrain and enable the pursuit of the relevant interests and the realization of the relevant ideas. Law is produced by lawmaking institutions such as legislatures. It is interpreted by judges and magistrates who have been trained in institutions of legal education; who work within institutions such as courts, tribunals or, increasingly, frameworks for varying forms of arbitration and mediation; and whose decisions are enforced by further sets of professionals operating within further networks of institutions. So the proposition that an analysis of these institutions has no place in general jurisprudence seems extraordinary. And, accordingly, a lengthy and distinguished tradition in modern legal theory has concerned itself with precisely law's institutional form and its relationship to the changing form, substance, and social functions of law: sociological jurisprudence, legal realism, the process school, institutional theories of law, and anthropological and, to some extent, historical jurisprudence.<sup>31</sup>

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<sup>31</sup> See, e.g., Comaroff & Roberts, *supra* note 11; Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (1995); Roger Cotterrell, *The Sociology of Law: An Introduction* (2d ed. 1992); Massimo la Torre, *Law as Institution* (2010); *Law as Institutional Normative Order* (Maksymilian Del Mar & Zenon Bankowski eds., 2009); Niklas Luhmann, *A Sociological Theory of Law* (Martin Albrow ed., Elizabeth King & Martin Albrow trans., 1985); Niklas Luhmann, *Law as a Social System* (2004); Neil MacCormick & Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (1986); Neil MacCormick, *Institutions of Law* (2007); Roscoe Pound, *An Introduction to the Philosophy of Law* (1922); Dick W.P. Ruiters, *Institutional Legal Facts: Legal Powers and Their Effects* (1993); Julius Stone, *The Province and Function of Law: Law as Logic Justice and Social Control: A Study in Jurisprudence* (1946); Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (2001); Gunther Teubner, *Law as an Autopoietic System* (Zenon Bankowski ed., Anne Bankowska & Ruth Adler trans., 1993); William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (2009); William Twining, *Globalisation and Legal Theory* (2000); van der Burg, *supra* note 14; Jeremy Waldron, *Law and*

To sketch even a brief and relatively abstract list of law's institutional dimensions such as the one given above is immediately to be brought face-to-face with the fact of law's historical- and system-specificity. For even societies at relatively similar stages of economic and political development, with relatively similar cultures, exhibit significant differences in the form which their law-making, law-interpreting, and law-applying institutions take. (Conversely, very different societies can exhibit institutional similarities, precisely as a result of the operation of power and interests, as in the case of colonialism.) Indeed, the very terms in which comparative lawyers think about family resemblances between legal systems—such as the civilian and common law traditions—refer to institutional as much as or more than to doctrinal differences as identifying distinctive types.

Analytical jurists sometimes claim that, while the content of law of course changes, law's modality, which is the true subject matter of general jurisprudence, has a core which transcends historical and spatial variation.<sup>32</sup> Yet law's modalities are evidently affected by institutions. Conceptions of legality make an interesting case study here,<sup>33</sup> not only because of the persistence of a recognizable discourse of legality over many centuries in the common law, but also because legality is, in the view of some influential analytical jurists, the distinctive modality of law.<sup>34</sup> At a sufficiently high level of abstraction, we can of course pro-

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Disagreement (1999); Ota Weinberger, *Law, Institution and Legal Politics: Fundamental Problems of Legal Theory and Social Philosophy* (1991); Neil MacCormick, *Law as Institutional Fact*, 90 *Law Q. Rev.* 102 (1974). On institutional approaches to criminal law, see Lindsay Farmer, *Criminal Law as an Institution: Rethinking Theoretical Approaches to Criminalization*, in *Criminalization: The Political Morality of the Criminal Law* 80, 80 (Anthony Duff et al. eds., 2011).

<sup>32</sup> See Gardner, *supra* note 18, at 198–220.

<sup>33</sup> For recent theoretical work on the rule of law, see Waldron, *supra* note 31, at 94–101; Tatsuo Inoue, *The Rule of Law as the Law of Legislation*, in *Legislation in Context: Essays in Jurisprudence* 55, 55–74 (Luc J. Wintgens & Philippe Thion eds., 2007); Nicola Lacey, *Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate*, 83 *N.Y.U. L. Rev.* 1059 (2008); Jeremy Waldron, *Positivism and Legality: Hart's Equivocal Response to Fuller*, 83 *N.Y.U. L. Rev.* 1135 (2008); Jeremy Waldron, *The Concept and the Rule of Law*, 43 *Ga. L. Rev.* 1 (2008). For a fascinating assessment of forms of legalism in vastly differing times and contexts, see *Legalism: Anthropology and History* (Paul Dresch & Hannah Skoda eds., 2012). For a philosophical approach defending the relevance of empirical knowledge to Hart's conceptual project, see Veronica Rodriguez-Blanco, *A Defence of Hart's Semantics as Nonambitious Conceptual Analysis*, 9 *Legal Theory* 99 (2003).

<sup>34</sup> Gardner, *supra* note 18, at 199, 207–08; Scott J. Shapiro, *Legality* (2011).

duce conceptions of “law” or “legality” which are quite widely applicable. But note that, in relation to any particular theoretical question, there is a judgment to be made about the most appropriate level of generality at which to work. And it is one that should be addressed openly as an issue of method<sup>35</sup> rather than swept aside as a matter of perverse misunderstanding of the rules of the game.<sup>36</sup> Nor is it a question to which there is one right answer.

At a relatively high level of abstraction, we find the idea of legality reaching back to ancient times.<sup>37</sup> Working at this level, a thin concept of the rule of law as signifying regular constraints on political power and authority might plausibly be seen as “the central case” of the concept. But if we switch levels and look at thicker, richer conceptions of the concept—and at not only the different purposes for which it has been invoked, but also the different ways in which it has been understood and has operated—historical specificity quickly enters the picture. Let us take a few examples. In a highly centralized and authoritarian system such as the monarchies of early modern England, the operative concept of the rule of law cannot intelligibly be read as implying the universal application of law, reaching even to the sovereign. This idea—central to modern notions of legality—was the object of long political contestation, and took centuries to be institutionalized. The conception of universality is itself tied up, in other words, with the emergence of a certain idea of limited government. The interpretation of the requirement that laws should be reasonably susceptible of compliance has similarly changed in tandem with shifting notions of human autonomy and entitlements. Right up to the early nineteenth century, English law, while priding itself on its respect for the rule of law and the “rights of free-born Englishmen,” included a variety of criminal provisions—notably

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<sup>35</sup> Simon Roberts, *After Government? On Representing Law Without the State*, 68 *Mod. L. Rev.* 1, 1–4, 23 (2005). Roberts argues that pluralist conceptions of law beyond the state risk diluting the analytic purchase of the concept of law, depriving comparative social science of tools to make important distinctions between centralized, hierarchical, and governing-oriented normative systems and genuinely negotiated normative orders. *Id.* While the first part of his argument is sympathetic from the point of view of analytical jurisprudence, his argument that particular conceptions of law can and must claim empirical support is entirely persuasive and consistent with my argument in this Article. See also Pirie, *supra* note 11, at 135–57, 217–29 (using empirical case studies to argue that the emergence of legalistic thought and practice must be understood within its particular social context).

<sup>36</sup> See Gardner, *supra* note 18, at 270–301.

<sup>37</sup> See Martin Krygier, Philip Selznick: *Ideals in the World* 76–81, 129–96 (2012); Judith N. Shklar, *Legalism* 1–28 (1964).



those on vagrancy—which manifestly violated, in relation to certain subgroups of the population, today’s conception of possibility of compliance. This, crucially, was not just a question of a practical inability to match up to acknowledged ideals: It was also a matter of whether this inability was seen, normatively, as a problem.

In other cases, it is not so much the historical development of the political values underlying legality as the institutional preconditions for realizing them which underpins their changing contours. An example here would be the tenet, widely shared in today’s constitutional democracies, that the law should be publicized and intelligible. Even today, this ideal is difficult to realize. But it would have been a far more distant ideal in societies with low levels of literacy and without developed technologies of communication such as printing—conditions which fit more easily with customary modes of legality. A further example of this kind relates to the ideal that official action should be congruent with announced law. It seems obvious that this tenet must have a significantly different meaning in today’s highly organized, professionalized criminal justice systems than in a system like that of England prior to the criminal justice reforms of the early nineteenth century—a system in which criminal justice enforcement mechanisms were vestigial, with no organized police force or prosecution, and much enforcement practice and indeed adjudication lying in the hands of lay prosecutors, parish constables, and justices of the peace.

These institutional features of eighteenth-century English justice also had significant implications for the law’s aspiration to achieve coherence. While the system of precedent of course conduces to both substantive coherence and evenhandedness in enforcement, the relatively disorganized mechanisms for appeal and law reporting, particularly in relation to criminal cases, gave rise to the possibility of significant regional variations—especially in criminal adjudication handled by lay justices rather than assize judges. (To get a sense of the relative scales here, it is worth knowing that it has been estimated that in the mid-eighteenth century, there were about 5,000 justices, as opposed to just twelve assize judges.<sup>38</sup>) Again, debates about what ought to count as ad-

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<sup>38</sup> See 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, 32 (V.A.C. Gatrell et al. eds., 1980); see also Peter King, *Crime and Law in England, 1750–1840: Remaking Justice from the Margins* 47 (2006) (detailing the challenges the lack of consistent legal reporting had for the development of legal treatises at

equate standards of legality played an important role in underpinning the modernizing reform movement from the late eighteenth century on. But the fact is that, for many decades, these sorts of discretionary arrangements, inimical to our view of adequate levels of coherence and congruence, were regarded as perfectly consistent with a respect for legality. For the rule of law was, at that time, embedded within a highly personalized model of sovereign authority in which the discretionary power of mercy was a core rather than a penumbral feature.<sup>39</sup> Ideals do, of course, underpin arguments for reform; but ideals themselves are constrained by existing institutional capacities.

Hence I concur with E.P. Thompson among others in concluding that it would be wrong to infer from the evidence rehearsed here that the rule of law in eighteenth-century England was an empty ideological form, an aspect merely of the rhetoric of those in power.<sup>40</sup> Rather, it seems appropriate to speak not only, as Judith Shklar did in introducing her treatise, of “degrees”<sup>41</sup> of legalism, but also of “variet[ies]” of legalism, themselves strongly shaped by the institutional arrangements within which law is developed, interpreted, and enforced. This implies that, to take a contemporary example, a shift in the balance of dispute resolution from court-based to wholly or partially negotiated settlements within more diffused institutional fora such as mediation bodies has an upshot for law’s modality. But this, it should be noted, gives no cause for skepticism about the enterprise of general jurisprudence interpreted in the broad way understood by, for example, William Twining in his book on the subject.<sup>42</sup> Rather, as I have argued in more detail elsewhere,<sup>43</sup> it indicates the need for a reflexive approach in which definitional parameters are agreed provisionally and revisited critically, in light of the law’s

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the start of the nineteenth century); Norma Landau, *The Justices of the Peace, 1679–1760*, at 7–8 (1984) (explaining the origin and structure of the Assizes).

<sup>39</sup> Douglas Hay, *Property, Authority and the Criminal Law*, in *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England* 17, 40–49 (Douglas Hay et al. eds., 1975).

<sup>40</sup> Thompson, *supra* note 27, at 259–62.

<sup>41</sup> Shklar, *supra* note 37, at 223.

<sup>42</sup> William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* 12–13 (2009). Similarly, Wibren van der Burg has noted that one can criticize universalism in legal theory without abandoning the aspiration to produce general theory. Van der Burg, *supra* note 14, at 162–63.

<sup>43</sup> See generally Lacey, *The Jurisprudence Annual Lecture 2013*, *supra* note 18, at 3–4, 14–19 (arguing for the changing social function of the law to inform larger scholarship on analytical jurisprudence).

changing institutional structure and cultural and material environment, on a regular basis.

### III. CRIMINAL RESPONSIBILITY: IDEAS, INTERESTS, AND INSTITUTIONS

As we have seen, even in the case of the most general concepts—notably that of legality, the distinctive modality often claimed by analytical jurists to constitute the key to “the very nature of law”<sup>44</sup>—there is strong reason to think that historical forces beyond the law shape the understanding of what the concept requires and hence, in a real sense, its meaning. In this Part, I will suggest that this relative heteronomy of law becomes yet more evident when we turn to concepts which animate and structure particular areas of legal regulation, such as criminal law. Drawing on my previous work in this area, I will take criminal responsibility as my case study, but we might easily extend the discussion to encompass analogous concepts such as causation,<sup>45</sup> conduct, and their more specific components.<sup>46</sup>

Significantly, and not surprisingly, the division of labor noted above in relation to the field of legal theory is mirrored in specific areas of legal scholarship such as criminal law. As in jurisprudence, so in criminal law theory: The field divides into conceptual or philosophical work of an analytic and/or normative kind which focuses primarily on ideas; historical or sociological work focused on institutions; and criminological, sociological, or (more rarely) political science scholarship which focuses on interests. And once again, each approach has important insights to deliver; but each taken on its own misses out on key aspects of the social reality of criminal responsibility. While conceptual analyses of criminal responsibility belong to the tradition of analytical jurisprudence in philosophical mode, the analysis of criminal responsibility as an institutionalized social practice resonates with the traditions of sociological jurisprudence, the sociology of law, and indeed the Process School, which was influential in the United States after the Second World War. And the idea that criminal responsibility is shaped by interests resonates with the diverse traditions of Marxist legal theory, some versions of legal real-

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<sup>44</sup> Gardner, *supra* note 18, at 270.

<sup>45</sup> See Nicola Lacey, *Analytical Jurisprudence Versus Descriptive Sociology Revisited*, 84 *Tex. L. Rev.* 945, 963–69 (2006).

<sup>46</sup> See Lindsay Farmer, *Criminal Wrongs in Historical Perspective*, in *The Boundaries of Criminal Law* 214, 214 (R.A. Duff et al. eds., 2010).

ism, and, at the other end of the ideological spectrum, law and economics.

With a few honorable exceptions (notably Oliver Wendell Holmes<sup>47</sup>), most of the scholarship on criminal responsibility has been primarily occupied with what it is—with its conceptual contours and moral foundations<sup>48</sup>—rather than with what it is for—its social roles, meaning, and functions. By contrast, I will argue that we cannot understand what responsibility is, or has been, unless we also ask what it has been “for” at different times and in different places. My argument will set out from the assumptions that responsibility is best thought of as a set of ideas which plays two roles in the development of modern criminal law: legitimation and coordination. Doctrines setting out the conditions of responsibility serve to legitimate criminal law as a system of state power, which is in turn a condition for criminal law’s power to coordinate social behavior—a task which it accomplishes in part by specifying the sorts of information or knowledge which have to be proven in the trial process precedent to conviction.

The state’s proof of an offender’s responsibility for his or her offense is generally regarded as the cornerstone of criminal law’s legitimacy. So it is hardly surprising that analyses of what responsibility means or requires have flourished in criminal law scholarship. Yet the implications of a historical analysis of the development of ideas and doctrines of responsibility over the long-term have been little remarked. This is sur-

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<sup>47</sup> O.W. Holmes, Jr., *The Common Law* (G. Edward White ed., Harvard Univ. Press 2009) (1881); see also Peter Cane, *Responsibility in Law and Morality* (2002) (adopting a comparative institutional approach to the relationship between law and morality, arguing that law and morality influence each other); George P. Fletcher, *Rethinking Criminal Law* (1978) (arguing for an understanding of criminal law based on its social function); Nicola Lacey, *Women, Crime, and Character: From Moll Flanders to Tess of the D’Urbervilles* (2008) (detailing how changes in female literary characters reflected broader social changes about female criminality); Norrie, *Crime, Reason and History*, supra note 26 (understanding the criminal law as responding to and shaped by broader social changes); K.J.M. Smith, *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence 1800–1957* (1998) (detailing the development of the substantive criminal law in England amidst wide disagreement among legislators, lawyers, and jurists over concepts of fault, moral agency, and attempt).

<sup>48</sup> See, e.g., R.A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (2007); R.A. Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (1990); John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007); Jeremy Horder, *Excusing Crime* (2004); *Philosophical Foundations of Criminal Law* (R.A. Duff & Stuart P. Green eds., 2011); Victor Tadros, *Criminal Responsibility* (2005).

prising, for even a simple historical analysis reveals that both the role and the content of criminal responsibility has shifted markedly, even within a single system—that of England and Wales—over the modern period. In the rest of this Part, I will take three different examples of contextual forces which have fundamentally affected the very concept of English criminal responsibility in the modern era: the influence of institutions on what understandings of subjectivity and responsibility could be operationalized; the influence of the ideas associated with what we would now call psychology and psychiatry on our conception of the responsible subject and on legal conceptions of mental incapacity; and the influence of interests on the expansion of the summary jurisdiction in the mid-nineteenth century.

*A. The Institutional Context of Responsibility-Attribution*

The most influential strand of criminal law theory dealing with criminal responsibility in late twentieth-century analytical jurisprudence derives from H.L.A. Hart's influential essays, collected together and published as *Punishment and Responsibility* in 1968.<sup>49</sup> This book, which has given rise to a veritable industry of jurisprudential analysis of criminal responsibility, propounded a notion of responsibility as founded in cognitive and volitional capacities. Notwithstanding the disagreements and variations which have emerged in post-Hart literature, Hart's basic conception of mens rea as founded in either the defendant's subjective choice or her fair opportunity to conform her behavior to the requirements of the law is generally regarded as the moral and practical kernel of the general part of criminal law. Even in relation to contemporary criminal law, this attractive vision has its limits, because it tends to write off the significant areas of strict or outcome-based criminal responsibility in contemporary criminal law as either morally mistaken or unworthy of philosophical analysis.<sup>50</sup> This is, surely, an inappropriate attitude for any theory having descriptive, explanatory, or interpretive goals, as most analytic jurisprudential scholars in the analytic tradition would claim for their enterprise. But a historical analysis of even a relatively brief period of English legal history, reaching back to the mid-eighteenth century,

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<sup>49</sup> H.L.A. Hart, *Punishment and Responsibility* (2d ed. 2008).

<sup>50</sup> For an honorable exception, see Tony Honoré, *Responsibility and Luck: The Moral Basis of Strict Liability*, 104 *Law Q. Rev.* 530, 530 (1988), *reprinted in* Tony Honoré, *Responsibility and Fault* 14 (1999).

helps to reveal a yet more fundamental—and related—flaw in the “purely” analytic approach which focuses exclusively on the concept rather than its contextual and purposive aspects: the fact that capacity responsibility as conceived by Hart depends for its realization on a set of institutions which were slowly assembled in the English legal system through the eighteenth and nineteenth centuries.

Ideas of intentionality and agency were most certainly at work in English criminal law well before the eighteenth century, as is particularly evident in the case of serious offenses such as treason and murder, as revealed by reports of the state trials. But, as meticulous historical research by scholars such as John H. Langbein,<sup>51</sup> J.M. Beattie,<sup>52</sup> and Peter King<sup>53</sup> has revealed, and as reports of the more numerous Old Bailey cases in the Sessions Papers confirm,<sup>54</sup> standard eighteenth-century felony trials, which have been estimated to have lasted an average of around thirty minutes,<sup>55</sup> were lay-dominated fora, largely presided over by local justices of the peace, which in effect operated on the basis of a presumption of guilt, and afforded the defendant an opportunity to exculpate himself by means of his testimony in response to that of the prosecution witnesses. In effect, as I have argued in more detail elsewhere,<sup>56</sup> the trial process operated on the basis that criminal responsibility was founded in bad character: Anyone brought to trial was assumed to have expressed bad character in committing a crime; character evidence predominated

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<sup>51</sup> *The Origins of Adversary Criminal Trial* (2003); *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263, 282–85 (1978); *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1, 123 (1983).

<sup>52</sup> *Crime and the Courts in England 1660–1800*, at 340–41 (1986); *Policing and Punishment in London, 1660–1750: Urban Crime and the Limits of Terror* 259–64 (2001); *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 Law & Hist. Rev. 221, 221 (1991).

<sup>53</sup> *Crime, Justice, and Discretion in England 1740–1820*, at 223–25 (2000); *Crime and Law in England, 1750–1840: Remaking Justice from the Margins* 26–27 (2006).

<sup>54</sup> See Old Bailey Online, <http://www.oldbaileyonline.org> (last visited Jan. 25, 2015).

<sup>55</sup> Beattie, *Scales of Justice*, supra note 52, at 222; see also Peter King, *Punishing Assault: The Transformation of Attitudes in the English Courts*, XXVII J. of Interdisciplinary Hist. 43, 50–51 (1996) (arguing that the change of assault trials from informal proceedings to more formalized criminal trials decreased the prevalence of guilty pleas); Langbein, *The Criminal Trial Before the Lawyers*, supra note 51, at 263 (explaining that the lawyerized criminal trial did not begin to emerge until the second half of the eighteenth century); cf. Langbein, *Shaping the Eighteenth-Century Criminal Trial*, supra note 51, at 115 (noting that the Ryder sources refer to sixteen trials conducted over three days). King also notes the low level of not-guilty verdicts and the emphasis on informal settlement in the late eighteenth century. King, supra, at 50–51.

<sup>56</sup> Lacey, supra note 47, at 16–17.

in the ensuing altercation. This was not a criminal process that was set up to deal with proof or analysis of refined conceptual states of mind in the mens rea sense of intention, knowledge, foresight, or recklessness. In less democratic times, the need for the state's criminalizing power to be legitimated in terms of discharging a heavy burden of proof of individual agency being engaged was unnecessary. Conversely, the locally based eighteenth-century trial system was able to draw on resources of local knowledge and assumptions about character which were gradually to be diluted by urbanization, democratization, and the move to a more individualistic, less deferential social order.<sup>57</sup>

Equally important, alongside these deep social and political changes which were reshaping English society from the late eighteenth century on, was a range of innovations which took the form of building institutions which are so central to the way our current criminal process works today that they have become almost invisible to us, and their significance for the concept of criminal responsibility accordingly obscured. For the development and consistent application of principles of mens rea expressing and respecting capacity responsibility requires an organized and relatively specialized social practice facilitated by a range of institutional arrangements: a legal profession trained in the relevant doctrines representing both sides of the case, a law of evidence structuring testimony and real evidence around the relevant criteria, a system of law reporting or professional communication to guarantee common knowledge of the relevant doctrines as interpreted in courts, legally trained adjudicators, and a system of appeals through which points of law can be tested and authoritative interpretations made. Without these interlocking institutional arrangements, it was simply impossible for a trial to focus on the investigation and proof of mens rea in the sense we understand it today, or indeed to operate consistently on the basis of general legal principles.<sup>58</sup> But this, I would argue, does not mean that no conception of responsibility was at issue; rather, it implies that criminal law can—and has—worked with multiple conceptions of responsibility, often operat-

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<sup>57</sup> V.A.C. Gatrell, *The Hanging Tree: Execution and the English People 1770–1868*, at 515, 589–90 (1994); see also David Garland, *Punishment and Modern Society: A Study in Social Theory 1–2* (1990) (arguing for a social approach to punishment that focuses on its historical foundations, social role, and cultural significance).

<sup>58</sup> There were, of course, trials whose institutional conditions approximated far more closely to those we take for granted today, notably treason trials and misdemeanor trials; here, it makes sense to speak in terms of a substantial form of capacity responsibility.

ing over different parts of the criminal law at the same time, each of them depending for their operation on not only a set of ideas but also on a constellation of institutional arrangements.

The institutional developments which underpinned the growing sway of capacity responsibility were slowly assembled through the late eighteenth and the nineteenth centuries, with the formalization of the law of evidence reaching its apogee in 1898, the creation of a court of criminal appeal in 1908, the introduction of full representation for felony defendants in 1836, and the systematization of law reporting and of legal education at various points through the nineteenth century. These institutional dynamics must, I would argue, be part of the subject matter of jurisprudence properly so called. Without attention to their importance, jurisprudence tends to ignore part of the terrain which it should be theorizing, lack nuance in its analysis of core legal ideas, and read, inaccurately, a twenty-first century view of law back onto legal history in what we might call a chronologically ethnocentric way.<sup>59</sup>

*B. The Idea of the Responsible Subject: Mind Doctors, Psychology, and Changing Conceptions of Mental Incapacity*

Clearly, the conception of responsibility as founded in volitional and cognitive capacities is premised on a certain broader conception of human selfhood (just as the idea that those capacities can be objects of proof in a criminal trial depends on the existence of accepted doctrines and established professions to attest to their veracity—further evidence of the intimate interconnection between ideas and institutional arrangements in the realization of criminal responsibility). And while, as Charles Taylor has shown in his magisterial survey *Sources of the Self*, certain core ideas about human selfhood can be traced far back into ancient philosophy and their paths followed through the Middle Ages into the modern era, it is equally the case, as Taylor acknowledges, that beliefs about human selfhood are modified in significant ways over time right up to the present day.<sup>60</sup> A fascinating case study here is Dror Wahrman's *The Making of the Modern Self*, which traces a shift in so-

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<sup>59</sup> See generally Langbein, *The Criminal Trial Before the Lawyers*, supra note 51 (discussing these and other developments).

<sup>60</sup> *Sources of the Self: The Making of the Modern Identity* 27–32 (1989); see also Charles Taylor, *Modern Social Imaginaries* 1–2 (2004) (tracing the development of a distinct social imaginary focused on the economy, public sphere, and self-governance).



cial conceptions of personhood through the eighteenth century from a notion of selfhood as residing in the external—demeanor, dress, comportment, actions—to selfhood as residing in an interior depth.<sup>61</sup> This difference, which I have argued at greater length elsewhere to have been associated with a shift of emphasis from criminal responsibility founded in ideas of bad character to criminal responsibility as residing in the engagement of human psychological capacities, is evoked by the contrast between Locke’s and Wordsworth’s conceptions of childhood.<sup>62</sup> For Locke, the child is a *tabula rasa*, to be formed by its environment and experiences; for Wordsworth, the child is “father of the man”: his distinctive selfhood residing in a depth of personality independent of environment or experience.

Changing arrangements for criminal law’s incorporation of what we would today call mental incapacity defenses is a particularly clear example of the relevance for criminal responsibility of changing ideas of personhood and human being, as well as of their inextricable linkage with the institutional arrangements through which legal concepts are actualized. Until the beginning of the nineteenth century, there was no statutory basis for an insanity defense, and an elaborated common law definition had to wait until the mid-nineteenth century. As Arlie Loughnan has argued,<sup>63</sup> before the inception of the McNaghten rules, courts were operating with a concept of “manifest madness”: In other words, the operative assumption was that a jury knew a mad person when it saw one, and that this was a matter of lay understanding and common sense rather than of technical, medical judgment. Interestingly, as Dana Y. Rabin has shown,<sup>64</sup> as the eighteenth century wore on, along with the slow incursion of lawyers for the defense, courts were gradually becoming more receptive to defense evidence of mental disturbance via states of “emotional distress”—a development which, as Rabin argues, was it-

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<sup>61</sup> The Making of the Modern Self: Identity and Culture in Eighteenth-Century England 275–78 (2004).

<sup>62</sup> Lacey, *supra* note 47, at 17–18, 28.

<sup>63</sup> Manifest Madness: Mental Incapacity in the Criminal Law 114, 140–41 (2012); ‘Manifest Madness’: Towards a New Understanding of the Insanity Defence, 70 Mod. L. Rev. 379, 379, 381 (2007).

<sup>64</sup> Identity, Crime, and Legal Responsibility in Eighteenth-Century England 3–4 (2004); see also Lisa Rodensky, The Crime in Mind: Criminal Responsibility and the Victorian Novel 214–15 (2003) (arguing that Victorian literature criticized the notion of a coherent, continuous personality that could be held responsible for its actions).

self a product of changing ideas of the self.<sup>65</sup> In a parallel development, as Joel Peter Eigen has documented, “mad doctors,” “alienists,” and other ancestors of today’s doctors, psychologists, and psychiatrists were gradually finding a footing in the trial as expert witnesses speaking to defendants’ responsibility in terms of their mental capacities and states of mind.<sup>66</sup> Thus the common knowledge of “madness” was transmuted into a set of legal guidelines poised in a fascinating and problematic way between emerging “medical” understandings, older lay understandings, and a particular view of human agency and psychology. The details of these developments have been the object of extensive scholarship which is beyond the purview of this Article.<sup>67</sup> I hope to have said enough simply to establish the proposition that ideas about the nature and etiology of mental incapacity, as one aspect of an emerging conception of human psychology, have had a decisive impact on how criminal law conceptualizes responsibility, as well as how it sets that conception in practical motion. Indeed, however clear this distinction is in theory, where we are talking about a social phenomenon—law—which realizes itself as a practice, the distinction between a concept and its realization becomes elusive in the extreme.

*C. The Expansion of Summary Jurisdiction and the Interests of Government*

It is widely agreed that the mid-nineteenth century saw a significant expansion of summary jurisdiction, enabling the streamlined and relatively inexpensive enforcement of a range of new statutory offenses, many of them oriented to the regulatory needs of a rapidly urbanizing and industrial economy.<sup>68</sup> As I have argued in more detail elsewhere,

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<sup>65</sup> The fascinating story of lawyers’ gradual entry even before their full incorporation in the Prisoners’ Counsel Act 1836 is told in Langbein, *The Origins of the Adversary Criminal Trial*, supra note 51; see also David J.A. Cairns, *Advocacy and the Making of the English Criminal Trial 1800–1865*, at 71–73 (1998) (exploring the rise of defense counsel in criminal trials in nineteenth century England); Jan-Melissa Schramm, *Testimony and Advocacy in Victorian Law, Literature, and Theology* 101–03 (2000) (same).

<sup>66</sup> *Unconscious Crime: Mental Absence and Criminal Responsibility in Victorian London* 23–24 (2003); *Witnessing Insanity: Madness and Mad-Doctors in the English Court* 24–28 (1995); see also Roger Smith, *Trial by Medicine: Insanity and Responsibility in Victorian Trials* 12–14 (1981) (exploring the impact of medical criticism on penal practice).

<sup>67</sup> It is discussed in greater detail in Nicola Lacey, *Psychologising Jekyll, Demonising Hyde: The Strange Case of Criminal Responsibility*, 4 *Crim. L. & Phil.* 109, 119–23 (2010).

<sup>68</sup> See in particular Lindsay Farmer, *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law, 1747 to the Present* 59–60 (1997).

this development also effected a shift in practices of responsibility attribution, giving a new practical importance within the criminal law to the principle that a subject may be responsible for the production of harmful outcomes, even absent proof of responsibility in the sense of bad character or engaged capacity.<sup>69</sup> This willingness to accept a wider practice of outcome-based responsibility was also associated with the diffusion of utilitarian ideas, in which prime moral importance is attached to consequences. And it had an intrinsic institutional component: As Lindsay Farmer has shown, it was the expansion of the summary police courts which made it possible to implement an expanded role for outcome responsibility.<sup>70</sup>

But a full understanding of the emergence of a large area of criminal law dominated by strict liability must also include, I would argue, a grasp of the various interests which shaped the relevant legislative developments. Clearly, much of this legislation was driven by the need of an increasingly sophisticated, centralized, and ambitious government to regulate urban and industrial life, with health and public order as prime considerations; moreover, criminalization was a useful tool for central government in its efforts to coordinate standards amid a system of local government through parish vestries which remained highly fragmented and dominated by parochial interests for most of the nineteenth century.<sup>71</sup> Yet, as Alan Norrie has pointed out, the creation of large numbers of statutory offenses targeted at middle- rather than working-class people—factory owners, shopkeepers, and so on—created a potential legitimation problem for a government whose own power derived from the bourgeois interests newly subject to such regulation.<sup>72</sup> In Norrie's view, the enactment of these new offenses through the distinctive summary process served to solve this legitimation problem by zoning the new offenses out of the category of "real crime," hence enhancing their acceptability to the relatively privileged people subject to them.<sup>73</sup> In this way, a compromise driven by criminal law's legitimation needs, themselves structured in important part by the prevailing balance of power, has left a lasting legacy for English criminal law in its parallel system of sum-

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<sup>69</sup> Nicola Lacey, *Space, Time and Function: Intersecting Principles of Responsibility Across the Terrain of Criminal Justice*, 1 *Crim. L. & Phil.* 233, 247 (2007).

<sup>70</sup> Farmer, *supra* note 68.

<sup>71</sup> Lee Jackson, *Dirty Old London: The Victorian Fight Against Filth* 1–6 (2014).

<sup>72</sup> *Crime, Reason and History*, *supra* note 26, at 85–86.

<sup>73</sup> *Id.*

mary jurisdiction usually focused on outcome responsibility, ostensibly distinct from the terrain of “real crime” and yet genuinely part of criminal law. This important feature of English criminal law, which is thrown into relief by a historical reading, is further illuminated by a comparative understanding of the European systems which effected a very different settlement: a formal distinction between administrative infractions and criminal law which has underpinned a rather different pattern of responsibility attribution in those systems.<sup>74</sup>

#### IN CONCLUSION: LEGAL THEORY AND HISTORY IN DIALOGUE

Throughout this Article, I have argued that since law is a social phenomenon which is embedded in institutional structures, themselves shaped (and constrained) by prevailing ideas and vectors of power, the idea of a purely conceptual, autonomous jurisprudence independent of those social factors makes little sense. And if those social factors, as a part of law’s reality, must be part of—in the sense of being an object of—the theory of law, this entails that legal theory must be historicized, attentive to the historical dynamics which shape law and legal ideas, attentive to historical specificities, and attentive to the historical forces which shape its own development. A conception of law as developing through a co-evolution of ideas, institutionalized social practices, and economic and political interests necessarily implies, to borrow once again Gerald Postema’s term, a “sociable” jurisprudence. Then, rather than complaining that the sociologists need to learn the rules of analytical jurisprudence,<sup>75</sup> it is time for analytical jurists to subject their own methods to a more critical examination, in the light of both sociology and history, and to think again about whether it can possibly make any sense to build formal theories of the “momentary” legal system independent of the dynamic “non-momentary legal system” which is its temporal, social, and institutional bedrock.

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<sup>74</sup> See James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* 80–82 (2003).

<sup>75</sup> See, e.g., A.M. Honoré, *Groups, Laws, and Obedience*, in *Oxford Essays in Jurisprudence (Second Series)* 1, 1 (A.W.B. Simpson ed., 1973) (“Decade after decade, Positivists and Natural Lawyers face one another in the final of the World Cup (the Sociologists have never learned the rules).”).

