INTRODUCTION

Regarding Criminal Law Historically

MARKUS D. DUBBER AND LINDSAY FARMER

1. New Trends in the History of the Criminal Law

Around thirty years ago the history of crime and punishment was transformed by the publication of two books. While markedly different in their style and ambitions, the books had an immediate and continuing impact through their combination of fresh theoretical perspectives and compelling historical narrative. Both exerted a significant influence in areas that go far beyond their subject matter, but both were especially important to the study of the criminal law.

The first of these books was *Albion's Fatal Tree*,[1] which grew out of the work of the Centre for the Study of Social History at the University of Warwick under the direction of E. P. Thompson. This was a series of studies of eighteenth-century English law and society that demonstrated the centrality of the criminal law, and in particular the Bloody Code, as an instrument of government at both the local and national level. Particularly influential was Douglas Hay's essay "Property, Authority and the Criminal Law," which looked at the use of the criminal law to protect the property interests of the aristocracy and small gentry. Hay argued that a combination of terror and mercy was used by the landowning classes to reinforce the authority and legitimacy of the law and to extract deference from the unpropertied classes. This theme was developed in the other essays, which showed how the criminal law served particular class interests and reinforced a particular ideological vision of social order. And notwithstanding E. P. Thompson's famous remarks about the double-edged quality of the rule of law, the essays demonstrated how the criminal law was central to the preservation and control of property rights in eighteenth-century England.[2] This approach was immensely influential because it placed the question of whose interests the law served at the center of inquiry, and it showed how the criminal law was central to the exercise of political and social power. This led to an explosion of studies in the history of criminal justice and policing in eighteenth- and early

nineteenth-century England that addressed the questions of the relationships between criminal law, social class, and state power.[3]

The influence of Michel Foucault's *Discipline and Punish* has arguably been even more pervasive.[4] As a study of the birth of the prison and the transformation of the criminal law in early nineteenth-century France, the book has been heavily criticized by historians who point to a cavalier attitude toward the sources and a tendency to read too much significance into texts by minor authors. However, the true importance of the book lies in the theoretical questions that it opens up about the relation between law, power, and knowledge in modern society. While it is notoriously difficult to summarize Foucault's complex argument, the central question of the book concerns the techniques through which power is exercised in modern society. Challenging those perspectives that take the state and law as central to the understanding of the operation of power, Foucault argues that the exercise of power in modern society is characterized by a combination of disciplinary techniques and what he terms *biopower*.[5] While the former operates on individuals located in institutions such as prisons, factories, schools, and hospitals by surveillance and control with the constant aim of the more efficient distribution and use of power, the latter is concerned with the management of populations through the science of statistics and techniques of political economy. The prison was seen as central in the network of institutions through which social control was exercised in modern society, offering the means by which individuals could be disciplined and the population of actual and potential delinquents could be supervised. The criminal law was a tool through which the "economy of illegalities" could be regulated. It defined norms of behavior and degrees of deviation, making possible the operation of the new forms of discipline and legitimating the power to punish.[6] Foucault's work, then, demanded recognition of how the control of delinquency through the criminal law was continuous with operations of power in other institutions of modern society.

Both books taught criminal lawyers that the history of their discipline could not be understood as the unfolding of reason through the development of doctrine, as a simple progression from a barbaric and irrational past toward a humane and enlightened present[7]—or, for that matter, as a simple regression in the opposite direction. The criminal law was a means by and through which class power was exercised or legitimated or was to be understood as one technique among others through which modern forms of criminality were constructed and social control was exercised. These approaches to the history of the criminal law raised a range of novel questions for criminal law scholarship. Whose interests did the criminal law, or particular criminal laws, serve?

What ideological functions were performed by general theories of criminal responsibility? How central was the criminal law to certain modes of governance in modern society? And how is the power of the criminal law exercised in different social and geographical contexts? The attempts to answer these questions have stimulated a huge amount of new scholarship in the history of criminal law and punishment.

If initially the focus of criminal justice history was the social context of crime and law enforcement, this has now broadened to include the concepts and categories of the criminal law itself. And, from being a matter that was of interest only to historians, work is now emerging from a range of different intellectual and disciplinary traditions. Social historians of crime have looked at the changing contours of criminal liability to show how certain categories that have been taken as given by criminal lawyers, such as homicide or assault, have been constructed and how changing patterns of enforcement have shaped the social meaning of these crimes.[8] They have looked at defenses such as insanity to trace the relationship between legal and medical understandings of mental abnormality and the way that these have shaped our understanding of criminal responsibility.[9] And some recent important work has begun—investigating the history of criminal procedure and evidence in the context of the criminal trial—to enhance our understanding of how crimes were prosecuted.[10] From within cultural studies there have come a number of readings of particular trials or historical episodes that have thrown light on the social and cultural assumptions that ground ideas and concepts. This scholarship has looked, for example, at the relationship between the form of the novel and the development of the penitentiary idea or at the development of ideas of interiority in literature and modern concepts of subjective legal responsibility.[11] Postcolonial theory has examined the place of the criminal law in the imperial project and has shown how legal concepts or practices of enforcement were developed in the imperial context.[12] It has used this to show how apparently universal concepts of liability could be shot through with assumptions about race and how the rule of law could play a central role in the sustaining of practices of oppression and control. And criminal lawyers themselves have begun to take a closer interest in the historical development of concepts of criminal liability as a way of challenging certain taken-for-granted assumptions about responsibility.[13]

This work has been important to challenging and transforming both the method and content of criminal law scholarship; the chapters in this book represent all of these strands in recent criminal law historiography while moving beyond them to raise new questions and open up fresh perspectives on the discipline of criminal law.

2. *Gaining Perspectives on the Criminal Law*

The chapters in this book can be read in many ways. As readers bring their own perspectives and interests to bear on them, any number of connections across problems, theories, doctrines, countries, and systems may emerge before their eyes. Here we will highlight some of the strands that we see running through the various chapters.

One of the central goals of this book is to capture the variety of contemporary scholarship in the history of criminal law. Indeed, it is notable that while exciting work is being done in various disciplines, including work described as being interdisciplinary in nature, it is not always the case that there is engagement or debate among these bodies of work—or indeed with the discipline of criminal law. The aim then is both to reflect the plurality of approaches in this area and to illustrate how drawing on these different perspectives can stimulate new and critical perspectives on the modern criminal law.

This approach raises the methodological question of what is to be gained from disciplinary pluralism. This matters both as a problem of research method—how a historian or literary theorist or sociologist, for example, might be able to incorporate the insights or methods of other disciplines in their own research—and as an issue of how the insights that are gained might be brought to bear on the analysis of the criminal law. The first of these, while important, requires no further discussion at this point, as the chapters themselves provide an excellent illustration of some of the diverse ways academics working in different disciplines have addressed this problem. The second requires further discussion, however, for lawyers are notoriously disinterested in history. Even in common law systems, which rely on precedent, lawyers will approach the interpretation of historical texts in terms of how they might be used as resources for the resolution of contemporary problems, rather than worrying about any sensitivity to historical meaning or context. Law, it might be suggested, is impervious to the criticisms of historians.

One response to this kind of concern might be that disciplinary pluralism is a proper end in itself, because it shows us how certain concepts are contingent rather than given and are socially constructed rather than representing a natural state of affairs.[14] This is undoubtedly important in challenging the taken-for-granted assumptions of a discipline such as law where there is a long-standing tendency to equate its understanding of human nature or social order with the way the world must be. But this is hardly a complete response, for it does little to show how these categories or concepts have been constructed or how they shape, or are shaped by, the role of law in the production of social order.[15] It is, in other words, necessary to go further. We

can point here to a number of further tasks for the critical historical analysis of law. First, it is necessary to trace the genealogy of particular concepts or crimes to analyze how their significance might shift over time and how the development of a particular offense is shaped by changes in enforcement, prosecution, or punishment.[16] Offenses must be understood in terms of their place within a body of criminal law, whose internal order or rationality is itself shifting over time. These conceptions of law or social order are then linked to broader social or cultural understandings of wrongdoing, responsibility, or the self. And, finally, it is necessary to examine the role that law plays in the legitimation of forms of governmental practice—and the uses to which history is put in the legitimation of the criminal law. This is all the more pressing because criminal law—particularly in the common law world—has relied so heavily on history and tradition for legitimation in place of a more sustained effort at a principled normative justification of state punishment in light of an understanding of the purposes and institutions of the modern democratic state.[17]

The critical, as opposed to the legitimating, potential of criminal law historiography has yet to be fully realized.[18] The same is true, if to a slightly lesser extent, of comparative studies of criminal law. Gaining spatial, or jurisdictional, distance helps to highlight the critical purchase of temporal distance.[19] The chapters in this book explore histories of criminal law without regard to traditional domestic or systemic boundaries. Issues in Canadian, English, German, Indian, and U.S. criminal law are explored, with criminal law norms drawn from precedent, statutes, codes, and jury verdicts in common law and civil law countries. While none of the chapters is explicitly comparative, collectively they add up to a stimulating study in comparative criminal law history.[20]

However, even here the aim goes beyond that of using the comparative method as a means of demonstrating the plurality or contingency of different understandings of criminal law. Systems of criminal law do not develop in isolation from each other but are embedded in power relations between different states or between states and their colonies,[21] and as a consequence it is necessary both to trace the movement of different concepts between systems as part of a project of colonial or imperial governance and to acknowledge that the same law might have a different meaning or significance applied in a colonial context. Several chapters in this book expose the need to investigate more carefully this, often neglected, aspect of the history of criminal law. Postcolonial theory can thus help us gain a fresh, and more nuanced, understanding of the sociopolitical context of the operation and enforcement of the criminal law. The role of criminal law and other state-sanctioned violence

in colonial governance, moreover, reveals fruitful, if disturbing, continuities with criminal law in postcolonial settings and, more generally, in governance under conditions of war or emergency.

The lessons of postcolonial theory or a comparative historical methodology go beyond the obvious context of, say, the imperial governance of British India and might usefully be applied to a study of the relations between the criminal law in England and the United States.[22] There is a tendency in criminal law scholarship to refer to something called "Anglo-American" criminal law. Though a convenient shorthand, this term may be taken to suggest an identity between the laws of England and the United States on the basis of their common law roots and a certain affinity between the concepts of criminal liability. However, the precise nature of this affinity is rarely subject to analysis, and subsequent divergences in the uses of criminal law as a tool of certain governmental practices are ignored. What, it must be asked, is the function of the continuing deference among American criminal lawyers to both the English roots of the law and to the kind of theorizing that has grown up under its head? Why, given that American criminal law has existed as a distinct, and distinctive, system since at least the late eighteenth century, is there still felt to be a need to refer to cases and academic writings from the "motherland"? This may be thought to imply the universality of these concepts of fault and liability—one that is hardly borne out in practice. Several of the contributors address the question of how the universality was constructed—in India and in the United States, as well as in Canada—and how this project was linked to certain practices of enforcement and the need to legitimate government. The essays show how the criminal law cannot simply be understood as a collection of concepts relating to fault but must be understood within the context of a framework of political institutions and practices of enforcement.

More fundamentally, several chapters in this book explore the oddly understudied question of modernity in criminal law. Criminal law, while remaining deeply rooted in its antiquated taxonomy of *mens rea* and *actus reus*—malice aforethought and malignant heart—wantonness, willfulness, and the depraved mind, is revealed both to resist and to reflect modernity in its substantive conceptions of crime and responsibility and in its procedural mechanisms and modes of disposition. Where the language of fault often suggests continuities that reflect the unchanging character of human nature or wrongdoing, this frequently masks quite substantial transformations in legal practice. It is now accepted that there were radical transformations in policing and punishment in the early part of the nineteenth century as the development of the modern state brought about huge transformations in criminal justice.[23] However, there is far less understanding of how these changes were both

enabled and in turn transformed by the substantive criminal law. A key argument here is that of differentiation. Several contributors point to how the development of modern concepts of subjective criminal liability was accompanied and underpinned by the development of the police power, of summary jurisdiction, or, in the colonial context, of special jurisdictions and powers that enabled the state to enforce the criminal law in different ways in different contexts.[24] The modern conception of the responsible legal subject is shown to have played a crucial role in legitimating the operation of state power; unraveling and interrogating that conception thus should help us better understand the place of criminal law in modern society.

Finally, and most straightforwardly, the chapters in the book can be read as providing illuminating historical context to some of the familiar core questions of criminal law doctrine that structure not only criminal law scholarship but also criminal law teaching—from the general part of criminal law (e.g., rationales for punishment, involuntariness, *mens rea*, culpability, responsibility, self-defense, insanity, diminished capacity) to its special part (e.g., homicide, theft, possession, homosexual offenses, perjury). As a result, they can be regarded as a set of supplementary readings for courses and seminars on criminal law.

3. Chapter Overview

While there are many crosscutting themes in the chapters in the book and there is a risk that imposing artificial groupings might obscure some of these, we see the chapters as falling into three main groups: the history and theory of criminal responsibility and agency, general theories of crime and punishment, and the comparative history of criminal law.

The first group (Lacey, Farmer, Eigen, Binder) examines the nature of responsibility in law and in other disciplines, such as medicine, that interacted with law in the setting of the criminal trial. These chapters show how the modern legal conception of responsibility and agency developed in particular legal settings, drawing on broader cultural conceptions of agency while in conflict with other important disciplinary understandings of the person.

Lacey argues that the attribution of criminal responsibility historically has balanced principles of character and capacity, rather than privileging one to the exclusion of the other as is often silently presupposed in debates among criminal law theorists. Moreover, she urges that the precise application of the ideas about the nature of criminal responsibility, whether they focus on character or capacity, must be understood within the broader context in which the criminal law is used to produce social order. The histories of crime and punishment, in

other words, are always also histories of state power, just as criminal law is but one, albeit a particularly intrusive, form of state action.

Farmer cautions that students of the attribution of responsibility must look more closely at the history of the central institutional locus of that attribution, the criminal trial. The history of the subjective element of criminality is also the history of epistemological difficulties raised by inquiries into mental states. Farmer thus illustrates how the development of concepts in substantive criminal law is linked to changes in the procedure, the law of evidence, and the prosecution of crime.

Drawing on extensive research into the role of medical testimony in nineteenth-century English insanity trials, Eigen examines the instability of the traditional legal conception of agency in the face of the development of new medical knowledges of the person. Historically, criminal law has spent considerably more energy on exploring the myriad ways an accused may be said to lack the capacity to commit crimes than on setting out just what it means to possess the requisite capacity. Eigen's essay is of surprising, or perhaps telling, contemporary significance, particularly in the United States where the law of insanity bears an uncanny resemblance to nineteenth-century English law, as was recently confirmed by the U.S. Supreme Court in an opinion that might be mistaken for a treatise on nineteenth-century English insanity law.[25] The tension within concepts of agency and its absence that Eigen exposes continues unresolved to this day.

Finally, in an important rereading of the development of the law of homicide, Binder challenges the commonly held modern view that different forms of homicide can be distinguished only on the basis of the mental state of the accused. A central argument of his paper is that this emphasis on mental states has closed off our understanding of how early homicide law was based on a fundamentally different understanding of culpability. He shows how developments in the doctrine of *mens rea* in the late eighteenth and early nineteenth centuries paralleled reformulations of the *actus reus* of the crime. He thus demonstrates how ideas of agency and responsibility—that is, of subjective aspects of criminal liability more broadly—cannot be read in isolation from conceptions of action or the definitions of particular crimes—that is, objective prerequisites.

The second group (Dubber, Smith, Hett, Leonard, Valverde) shifts the focus of historical analysis from the conditions of individual criminality to the construction of crime and its punishment, either in general or in relation to particular crimes and thus to the nature of criminal law as a state enterprise.

Drawing on his recent work on the police power,[26] Dubber traces the failure to distinguish between the police power (which is committed to order)

and law (which requires a commitment to respect for the citizen as an autonomous subject) to the writings of Thomas Jefferson on this subject. He argues that modern American criminal law can usefully be viewed as a system that derives from the state's long-standing power to police, which in turn is rooted in the householder's discretionary power to discipline members of his household. He suggests that this is an important context for understanding the punitiveness of modern American criminal law and, further, that a consequence of the blurring of these two categories is that the question of the legitimation of punishment of the autonomous citizens of a republic remains unseen and unaddressed.

Something of this autonomy-based conception of criminal law might be thought to have survived in English law, which for a long time conceived of crime as an interpersonal conflict between the offender and his victim. This quaint conception fits uneasily with modern procedural mechanisms for processing crime that pit the state (or the people) against the defendant. This tension has certainly escaped many historians of English criminal law who have assumed that the prosecution of crime was, until recently, largely conducted by private individuals. Smith directly challenges this assumption in a revealing study of the widespread prosecution in early nineteenth-century London of metal theft and unlawful possession in police offices by police officers before police magistrates and without identifiable victims. His work thus suggests that, even as the modern conception of the responsible subject was emerging in criminal law doctrine, it was accompanied by sweeping changes in the definition, enforcement, and prosecution of crime.[27] Like Dubber's, his work suggests that our understanding of the modern criminal law must account for these practices, as well as the prosecution of higher crimes, and that they provide an important context for understanding changes in the attribution of responsibility in the modern law.

In an illuminating study of political trials in Weimar Germany, Hett illustrates the interplay between political uses of the criminal law, on the one hand, and the use of the criminal law to depoliticize political conflicts, on the other. In Hett's telling, the activist lawyer Hans Litten emerges as a figure who insists on the rule of law as an essential guarantor of stability in the sphere of crime and punishment and seeks to destabilize the existing political regime through that very insistence. Litten is seen as both resisting the transformation of criminal law into a tool of oppression by a police state and recognizing—and exploiting—the necessarily political nature of criminal law.

Both as a judge and as a jurist, Oliver Wendell Holmes was keenly aware of the need to approach the task of producing and adapting ostensibly objective legal norms within the context of the political might of the state (though he

would not have put it in quite this way). Leonard offers an original reassessment of Holmes's views on criminal law which, until this point, have escaped systematic attention, in startling contrast to his views on virtually every other subject. Holmes set out not only to turn (consequentialist) punishment theory into (substantive) criminal law doctrine, but also—and just as unusually—to locate the criminal law within legal science as a whole, thus addressing important—and historically little considered—questions regarding the relationship between criminal law and, most notably, the law of torts. Leonard shows how Holmes's remarks on criminal law both have been misread by many modern commentators and marked an important point of departure for the development of modern American criminal law.

Finally, in this section, Valverde examines the construction of homosexual offenses within the history of English, U.S., and Canadian criminal law. By documenting the various efforts at criminalizing homosexual behavior and thereby normalizing the "abnormal," she shows how a conception of the crime as one "against nature" continues to wield significant power even within a modern law that claims to respect sexual autonomy under the rule of law.

The chapters featured in the third section (Wiener, Kolsky, Schneider) can be seen as offering a commentary on, and a critique of, the chapters in the previous two sections while extending the history of criminal law beyond its conventional field of inquiry. They illuminate the conventional historiography of crime and punishment by removing it from—and thereby exposing the implicit limits of—its familiar geographic and social setting and thus exemplify the considerable, and as yet largely untapped, critical potential of comparative analysis in general and comparative history in particular in the field of criminal law.

All three chapters examine the operation of the penal process in the British Empire, and specifically British India. All three are more than rich exercises in colonial history; they invite an exploration of the interdependence of the parallel histories of criminal law in India and criminal law in England and, more broadly, of the significance of colonial criminal law for a more nuanced understanding of modern criminal law as a whole.

On the basis of a close study of two interracial killings and their procedural aftermath, Wiener looks at the significance of rule-of-law precepts in the face of racial discrimination and class prejudices. Wiener finds a penal process that neither perfectly manifests the abstract equality associated with the rule of law nor simply brings to bear the colonial state's superior power. Instead, what emerges is a system of criminal law at odds with itself, unable to conform to either model—liberal objectivity or despotic oppression, law or police.

Focusing on similar criminal cases, Kolsky examines the efforts of Indian

nationalists to bring European subjects in India within the criminal jurisdiction of local courts. She thereby reveals the dialectic between subject and object in imperialist governance that is often obscured by an exclusive focus on the practices and proclamations (and even qualms) of the governors rather than the governed. Her chapter thus reminds us that the history of modern criminal law is not only one of the unremitting assertion of state punitive power but also of individual and communal resistance to it.

Schneider zeroes in not on specific cases but on a specific crime. She investigates the development and adaptation of the law of perjury in India as the colonial power struggled to transform racial prejudices regarding the exceptional mendacity of local-process participants into abstract legal norms while enlisting local custom to maximize the deterrent effect of penalties threatened and inflicted. The conception of the addressees of these norms and threats as not only "other" but also inferior informed the choice of penal control methods, presumably rendering a strict adherence to rule-of-law norms less attractive than the seemingly more straightforward use of more blunt instruments of behavior modification, a phenomenon that is quite familiar from the history of modern criminal law in general.

4. Looking Back to Look Ahead

Unlike *Albion's Fatal Tree* and *Discipline and Punish*, this book is not driven by a single vision of the right way to do criminal law history. Rather than claiming to be an illustration of proper criminal law historiography, it is a showcase of various disciplinary, methodological, and theoretical approaches that, taken together, promise to make a contribution to our understanding of the history of criminal law. If we have a broader aim, it is that of raising awareness of the work that is being done by historians, lawyers, theorists, and sociologists on the history of the criminal law and of the resources that these offer for the critical analysis of the modern criminal law. The historical analysis of crime and punishment is not a freestanding inquiry into a distinct institution or body of legal doctrine, but in the end amounts to a daunting, yet exhilarating, venture into the webs of governance and control that constitute social and political life.

Notes

1. Douglas Hay et al., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London: Allen Lane, 1975); arising out of the same project and having a

comparable influence was E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London: Allen Lane, 1975).

2. Thompson, *Whigs and Hunters*, pp. 258–269.

3. See, e.g., J. M. Beattie, *Crime and the Courts in England, 1660–1800* (Princeton, N.J.: Princeton Univ. Press, 1986); Peter King, *Crime, Justice, and Discretion in England, 1740–1820* (Oxford: Oxford Univ. Press, 2000). Much of the work is reviewed in Joanna Innes and John Styles, "The Crime Wave: Recent Writing on Crime and Criminal Justice in Eighteenth Century England," *Journal of British Studies* 25 (1986): 380–435.

4. Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Pantheon, 1977). The argument was further developed in *The History of Sexuality*, vol. 1, *The Will to Knowledge* (New York: Pantheon, 1978).

5. See Michel Foucault, "Governmentality," in *Essential Works*, vol. 3, *Power*, James D. Faubion and Paul Rabinow, eds. (New York: New Press, 2000), pp. 201–222, at p. 219.

6. See ibid., pp. 298–306.

7. A charge famously made about Sir Leon Radzinowicz's celebrated *A History of English Criminal Law and Its Administration from 1750*, 5 vols. (London: Stevens, 1948–1986). For a more recent account of English law stressing doctrinal development see K. J. M. Smith, *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence, 1800–1957* (Oxford: Oxford Univ. Press, 1998).

8. See, e.g., Martin J. Wiener, *Men of Blood: Violence, Manliness, and Criminal Justice in Victorian England* (New York: Cambridge Univ. Press, 2004); Shani D'Cruze, *Crimes of Outrage: Sex, Violence and Victorian Working Women* (DeKalb: Northern Illinois Univ. Press, 1998). See also King, *Crime Justice, and Discretion in England*; Beattie, *Crime and the Courts in England*.

9. See esp. Joel Eigen, *Witnessing Insanity: Madness and Mad-Doctors in the English Court* (New Haven, Conn.: Yale Univ. Press, 1995), and *Unconscious Crime: Mental Absence and Criminal Responsibility in Victorian London* (Baltimore, Md.: Johns Hopkins Univ. Press, 2003).

10. See John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford Univ. Press, 2003); David J. A. Cairns, *Advocacy and the Making of the Adversarial Criminal Trial* (Oxford: Clarendon Press, 1998); Allyson N. May, *The Bar and the Old Bailey, 1750–1850* (Chapel Hill: Univ. of North Carolina Press, 2003).

11. See John B. Bender, *Imagining the Penitentiary: Fiction and the Architecture of Mind in Eighteenth-Century England* (Chicago: Univ. of Chicago Press, 1987); Lisa Rodensky, *The Crime in Mind: Criminal Responsibility and the Victorian Novel* (New York: Oxford Univ. Press, 2003).

12. See "Forum, Colonial Order, British Law: The Empire and India," *Law and History Review* 23 (2005): 589–706; Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (Oxford: Oxford Univ. Press, 2000).

13. For a review, see Nicola Lacey, "In Search of the Responsible Subject: History, Philosophy and Criminal Law Theory," *Modern Law Review* 64 (2001): 350–371. See also Alan Norrie, *Crime, Reason and History: A Critical Introduction to the Criminal Law*, 2d ed. (Cambridge: Cambridge Univ. Press, 2001).

14. This is the kind of approach taken by critical legal studies. See, e.g., Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984): 57–125.

15. For an examination and critique of the idea of social construction, see Ian Hacking, *The Social Construction of What?* (Cambridge, Mass.: Harvard Univ. Press, 1999).

16. See, for example, the chapters by Binder and Valverde in this volume.

17. For a sustained examination of the uses of a conception of tradition in the legitimation of Scots criminal law, see Lindsay Farmer, *Criminal Law, Tradition and Legal Order: Crime and the "Genius" of Scots Law, 1747 to the Present* (Cambridge: Cambridge Univ. Press, 1997).

18. On criminal law history as critique, see Markus Dirk Dubber, "Historical Analysis of Law," *Law and History Review* 16 (1998): 159–162.

19. On comparative criminal law as critique, see Markus Dirk Dubber, "Comparative Criminal Law," in *Oxford Handbook of Comparative Law*, Mathias Reimann and Reinhard Zimmermann, eds. (New York: Oxford Univ. Press, 2006), pp. 1287–1325.

20. For a recent promising example of comparative criminal historiography, see James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (New York: Oxford Univ. Press, 2003).

21. See the chapters in this volume by Wiener, Kolsky, and Schneider for different interpretations of criminal law as part of a project of imperial governance in India.

22. The chapters in this volume by Leonard and Dubber make a start at subjecting this relationship to critical analysis.

23. See, e.g., Foucault, "Governmentality." On policing see Mark Neocleous, *The Fabrication of Social Order: A Critical Theory of Police Power* (London: Pluto Press, 2000) and Markus D. Dubber and Mariana Valverde, *The New Police Science: The Police Power in Domestic and International Governance* (Stanford, Calif.: Stanford Univ. Press, 2006). On punishment see Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750–1850* (London: Macmillan, 1978); David J. Rothman, *Conscience and Convenience: The Asylum and Its Alternatives in Progressive America* (Boston: Little, Brown, 1980).

24. See, e.g., the chapters in this volume by Smith, Dubber, Kolsky, and Lacey.

25. See *Clark v. Arizona*, 126 S. Ct. 2709 (2006).

26. See Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia Univ. Press, 2005).

27. See also Bruce P. Smith, "The Presumption of Guilt and the English Law of Theft, 1750–1850," *Law and History Review* 23 (2005): 133–171.