Nicola Lacey, In Search of Criminal Responsibility. Ideas, Interests and Institutions, Oxford: Oxford University Press, 2016 (205 p.)

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In this book, Nicola Lacey develops some of the major themes in her work. She explains how ideas of criminal responsibility in the last 250 years have been shaped by institutions, interests and the social functions of criminal law and punishment. Typical for Lacey, is the multidisciplinary, socially grounded jurisprudential approach. As she admits in the preface, this book is as much about analysing criminal responsibility as about proposing a pluralist methodology, which she calls 'reflexive jurisprudence'.

The book consists of six chapters. The first chapter introduces the pluralist methodology and contains a preliminary analysis. Lacey explains why an analysis of criminal responsibility requires more than a focus on its conceptual contours and moral foundations (what it *is*). Equally important is understanding criminal responsibility's social role, meaning and functions (what it is *for*) (p. 2). She then proceeds by explicating three core assumptions that underlie her analysis. *First*, that criminal responsibility fulfils distinctive roles: of legitimation and coordination. Legal doctrines and underlying ideas of responsibility, serve to legitimate criminal law as a system of state power. This, in turn, is a condition for criminal law's power to coordinate social behaviour. This proposition had already been presented by Lacey in 2001 in a paper in the *Modern Law Review*[1] and is one of the major ideas underlying the analysis. The *second* assumption pertains to the contextual aspects that influence the conceptual contours and the role of criminal responsibility: ideas, interests and institutions. Responsibility, according to Lacey, has to be understood in the context of a more general pattern and practice of criminalization, incorporating all stages: articulation of offences, investigation, diversion, prosecution, trial, sentencing, the royal prerogative and the execution of punishment. Placing criminal responsibility within the broader context of criminalization makes that the analysis of criminal responsibility is historically and system specific. It follows, then, that different attribution principles may co-exist and play a role in interpreting criminal responsibility. The co-existence of different conceptions of responsibility at particular times, and in particular places, is the *third* assumption that underlies Lacey's analysis.

In the chapters two to four, each of the three contextual aspects/influences that feature in the subtitle - ideas, interests and institutions - are discussed. The structure of these chapters follows a similar pattern; the first part discusses the contextual aspect itself while the second part, through case studies, illustrates the importance of the contextual factor at particular points in modern English legal history.

Chapter two starts with setting out four discrete ideas that underpin the principles and practices of responsibility-attribution in England and Wales: capacity, character, outcome and risk. The division of attribution principles into the groupings: capacity, character and outcome is not new as is the agreement that attribution of criminal responsibility often follows a combination of these principles. Lacey, however, adds a fourth: attribution through risk-responsibility by pointing to the practices of

[1] N. Lacey, 'In Search of the Responsible Subject: History, Philosophy and Criminal Law Theory', *Modern Law Review* (2001), 350-371.

preventive criminalization that emerged in the late twentieth and early twenty-first century.[2]

The capacity theory, which can be traced back to the period of the Enlightenment, is premised on the idea of agency, of choice and personal autonomy. The character theory, which has been influential in criminal law discourse through the work of Michael Bayles[3] and Lacey's own work[4], is premised on the idea that causing harm expresses a person's usual character. The outcome-theory is founded on the harm principle. Criminal responsibility is attributed because the defendant caused a public harm; an outcome proscribed by the criminal law. Risk-based responsibility grounds criminal responsibility on the assessment of risk (in clinical or actuarial terms).

In the second part of the chapter (case-studies), Lacey considers the broader cultural, intellectual context in which the attribution-principles developed. She discusses the relationship between the individual and the state, the understanding of selfhood, religion, gender, and developments in psychological and social sciences. Multiple conceptions of responsibility have co-existed at various times in England and Wales. Capacity responsibility plays a dominant role in attribution of responsibility while risk, outcome, and character-based assessment play a role in the prosecution and sentencing stages (bad character evidence).

Chapter three looks at how shifting interest and power relations impact upon criminal responsibility. The interests that have been most influential are: economic power (shifting patterns of inequality appeal to attribution based on stereotypes of bad character), professional power (legal, medical and 'psy' professions impact on conditions of criminal responsibility), cultural/symbolic power and the power of the media (power to legitimize and delegitimize particular ideas of responsibility), political power ("tough on crime" policies). In the second part of the chapter, on the case-studies, Lacey mentions concrete examples of how interest impacts on attribution-principles. For instance, a change in government power since the nineteenth century and the process of industrialization accounts for an expansion of summary jurisdiction (creating 'regulatory crime' as opposed to 'real crime') and the emergence of strict liability. The latter leads to prominence of outcome-responsibility to the detriment of character, and capacity responsibility. In a fascinating analysis, in which she engages in a debate with George Fletcher, Lacey analyses how the modern law of theft has been influenced and shaped by the changing interests of a capitalist economy. She further discusses the increased scope of criminalization, driven by political interests. This has lead to (i) pre-inchoate and preventive offences (terrorism)(ii) the creation of hybrid, civil-criminal offences (ASBO) and (iii) criminalization beyond the formal area of criminal law, e.g. immigration detention. Lacey concludes the chapter by noting that an increase in criminalization leads to a growing social polarization, a growing social and economic inequality, increased individualism and the stigmatizion of certain groups.

Chapter four discusses how institutional structures that serve the legitimation and coordination of criminal responsibility influence responsibility-attribution. During the period under consideration (eighteenth century until now), criminal justice institutions, shifted from a system of lay justice to a system dominated by professionals: lawyers and police officers. At the same time, with the centralization of the state apparatus, criminal justice became a core tool of governance. Painting in broad strokes Lacey links the economic and social restructuring of the 1970s, which lead to abandoning penal welfarism and a tougher stance on crime, to a change in responsibility-attribution. The balance between capacity and outcome responsibility, which had come to displace character responsibility during the late eighteenth and

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[2] A. Ashworth and L. Zedner, *Preventive Justice*, Oxford: Oxford University Press, 2014.

[3] Michael Bayles, 'Character, Purpose and Criminal Responsibility', I *Law and Philosophy* (1982), 5 – 20.

[4] Nicola Lacey, *State Punishment. Political Principles and Community Values*, 65-68 (Chapter 3).

nineteenth centuries, persisted throughout the twentieth century but has recently been accompanied by a revival of character responsibility (as a result of focusing on risk). The section on case-studies, consists of two parts. In the first part, Lacey explains how the institutional features of the eighteenth century criminal process (cases heard in localities (pubs) not courts, by magistrates not judges, a highly decentralized system featuring local variation) lent themselves to the attribution of responsibility on the basis of an assumption of bad character. The second part discusses how the professionalization and systematization of criminal justice in the nineteenth century lead to the rise of capacity and outcome responsibility. The professionalization of the legal profession and the centralization of the criminal justice system, however, enabled the trial to function as a forum for investigation and proof of capacity-responsibility. A decisive change of the structure of the criminal trial was the "infiltration" of defence lawyers in the course of the nineteenth century (p. 122). Professionalization, however, came with a lack of legitimation since there persisted a strong and deep-rooted feeling that the definition of crime and proof of guilt is a matter of common sense. Professionalization, on the other hand, lead to a refinement of criminal law doctrines, which catered to the conception of capacity responsibility. Lacey then links professionalization in the nineteenth century and the subsequent legitimation problem to the process of democratization in the twentieth century:"[o]nce those who decried the power of the lawyer started to have more political power through the ballot box, the criminal law's legitimation problem reduced as a result of the possibility of according technical definitions of crime the imprimatur of democratic origins". (p. 134).

The last two chapters are of an evaluative nature. Chapter five brings together the analysis set out in chapters two to four and offers an interpretation of the trajectory of criminal responsibility in English law. Chapter six discusses the pluralist methodology and its implications for legal theory and legal scholarship.

In chapter five, Lacey makes clear that, while multiple conceptions of criminal responsibility have coexisted, there has been a move through four configurations of responsibility, that she refers to as 'eras': (i) the era of (bad) character, which refers to the eighteenth and early nineteenth century where the criminal trial was based on attribution via concepts such as 'malice' since it could not yet manage evidence of *mens rea* (because of lay justice, speedy trials, lack of legal argumentation) and where the trial was no more than an opportunity for exculpation. (ii) The era of transition, which refers to the partial eclipse of character responsibility and the rise of capacity responsibility through the development of doctrinal conceptions of *mens rea* and individual agency and the rendering inadmissible of character evidence (but that never really disappeared). At the same time, the regulatory ambition of the state resulted in the rise of outcome responsibility. (iii) The dual track era, where the gradual construction of the welfare state brought with it responsibility-attribution via capacity and, for certain regulatory offences, outcome responsibility and where character responsibility was displaced to the prosecution and sentencing process. (iv) The era of resurgence of character responsibility and the emergence of risk as a result of the increasing politicization of criminal justice and an intensified focus on security.

Lacey's analysis shows that despite the controversy that exists over character responsibility, certainly since the rise of human rights, it never really disappeared in English law. In fact, it enjoys a revival in the twentieth and twenty-first century with a focus on security and risk-management. Examples of this resurgence are, the widespread operation of reasonableness standards, extended concepts of accomplice liability via membership (joint enterprise liability leaning towards guilt by association), liability standards that turn on motive (terrorism) and the use of character as evidence (previous convictions as proof of bad character). An interesting aspect of Lacey's analysis of the resurgence of character responsibility is the suggestion that it could be the product of the diminished confidence in the ability of courts to manage capacity-

based judgments: "In a scientifically knowing world in which we cannot truly be sure of defendants truly had the capacity to do otherwise than they did, it may be tempting to renew our hold on older ideas of rights and wrong, good and evil, hence reconstructing a criminal process which is more explicitly oriented to the moral evaluation of character" (p. 171).

In the last chapter, Lacey takes the opportunity to discuss the merits of a pluralist methodology and the implications of this approach for special jurisprudence (concerned with conceptual analyses of criminal responsibility) and general jurisprudence. This is the most important part of the book. As Lacey admits, the analysis of responsibility in English law is a case study for arguing in favour of a pluralist methodology.

Lacey starts by discussing the critique of a pluralist methodology as undermining the normative value of the concept of capacity responsibility, which, premised on the idea of agency, is grounded in the Enlightenment and as such broadly endorsed in modern legal discourse. The significance of legal doctrine, she rebukes, is equally determined by its descriptive and explanatory power. In a pronouncement capturing the core of the book, Lacey submits: "there is a core to the idea of responsibility, a core related to the idea of human agency and accountability for conduct which acts as a constant thread amid shifting theories of responsibility over time and space. But this core is a relatively small one, and the inflection which it is given by varying social and institutional conditions and practical imperatives is so decisive that no theorist of criminal responsibility, can afford to ignore it". (p. 187). After all, criminal responsibility is an idea which is located within a social practice of criminalization, which itself is embedded in an institutional framework and is shaped by its dual role of legitimation and coordination.

In the part on implications of her methodology for general jurisprudence, Lacey enters into a dialogue with John Gardner, who has criticized her methodology as undermining general jurisprudence. Unlike Lacey, who accepts the idea that law changes because of its changing social function, Gardner is of the view that law's modality is independent of its function and can be taken as an analytical given. Lacey challenges the notion of a single unchanging concept of law. This approach has implications for legal scholarship and jurisprudence and Lacey calls on legal theorists to preserve openness to revising a legal concept. She concludes by proposing the use of 'reflexive jurisprudence', rejecting the idea that legal scholarship is autonomous and operating from the premise that there is an interplay, a reflexive relationship between legal rules and doctrines and ideas and institutional influences.

Nicola Lacey's book is a must read for anyone interested in criminal responsibility and jurisprudence. The importance of her analysis of criminal responsibility and her plea for a pluralist methodology for jurisprudence stretches far beyond English law and legal scholarship. Born and bred in a continental legal system, heavily influenced by German *Doktrin*, I found myself, invigorated, inspired and challenged by this book. Lacey's pluralist approach and proposed reflexive jurisprudence aligns with an interest, or should I say frustration, over scholarship on criminal responsibility in the area of international criminal law (ICL). Scholarship in this field illustrates how an internal doctrinal approach and elegant philosophical conceptualizations fail to explain and legitimize criminal responsibility.[5] Adhering to a theory of capacity responsibility, comporting with principles of agency and the notion of 'control', ICL scholarship fails to explain the concept's nature, which in fact leans towards character-attribution, thus creating a 'disconnect' between theory and practice. The dominance of doctrinal analysis comes with a blind spot for the dual role of responsibility (as legitimation *and*

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[5] E. van Sliedregt, 'International Criminal Law: Over-studied and Underachieving?', *Leiden Journal of International Law*, 2016, 6-9.

coordination) and institutional and interests factors influencing the nature of criminal responsibility. Claiming capacity-attribution to what looks more like character-attribution distorts legal reality, harms the legitimacy of international criminal institutions and makes the concept of criminal responsibility a contested concept with dubious theoretical underpinnings. The problem with this closed doctrinal approach is that in the end it may harm the exact normative values it studies and aims to protect. I found Lacey's analysis of risk-responsibility, enemy criminal law and the resurgence of character responsibility particularly insightful, and her call for legal scholarship that looks beyond doctrinal and philosophical analyses, most persuasive.

The only critique one could have of the book is that its layered structure, employing different frameworks and levels of analysis (dual role of criminal responsibility (legitimation-coordination); ideational frames; case studies) makes it a meandering read in parts. Moreover, because of its rich and concise analysis, mainly developed in previous work, the book is not easily read as a stand-alone monograph. This does in no way detract from the quality of the work. To the contrary, this monograph should be seen as the epitome of Lacey's work in the ambit of criminal responsibility and jurisprudence. I echo Andrew Ashworth's praise of the book[6]: it will rank as a major scholarly work of our time.

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[6] A. Ashworth, 'General Editor's Introduction', p. x.