

OF WEEVILS AND WITCHES: WHAT CAN WE LEARN FROM  
THE GHOST OF RESPONSIBILITY PAST?

*Kimberly Kessler Ferzan*\*

NICOLA Lacey presents a subtle and searching inquiry into the relationship between history and legal theory.<sup>1</sup> The final portion of her article, with which I shall engage, criticizes the scholarship on criminal responsibility for being too concerned with “its conceptual contours and moral foundations,” “rather than with what it is for[:] its social roles, meaning, and functions.”<sup>2</sup> Lacey then states, “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.”<sup>3</sup>

Lacey offers an account of criminal responsibility in the context of the institutions that existed, the ideas the people had, and the interests that the criminal law was to serve.<sup>4</sup> This article is part of her more general research agenda that can be thought to contain the following claims: Criminal responsibility is a concept grounded in the practice of law. It is a social, institutional, functional practice, and the outcome of this practice—the usage of the label of “responsibility”—is the appropriate object of inquiry. Moreover, because this object of study is grounded in a practice, and that practice has changed over time, our understanding of criminal law’s concept of responsibility has shifted over time. It simply makes no sense to Lacey to think about fine-grained accounts of mental states as fixed constants as if that idea was instantiated in the practice of criminal law before people even thought about culpability that way or before they had the institutional mechanisms to realize such ideas.<sup>5</sup> To

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\* Caddell and Chapman Professor of Law, University of Virginia School of Law. I thank Charles Barzun for helpful comments and discussion.

<sup>1</sup> Nicola Lacey, *Jurisprudence, History, and the Institutional Quality of Law*, 101 Va. L. Rev. 919 (2015).

<sup>2</sup> *Id.* at 937.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 920.

<sup>5</sup> *Id.*; see also, e.g., Nicola Lacey, *The Jurisprudence Annual Lecture 2013—Institutionalising Responsibility: Implications for Jurisprudence*, 4 *Jurisprudence* 1, 6 (2013) (“The liberal, democratic and humanist sentiments that necessitate an appeal to individual responsibility to legitimise criminal law were unevenly spread in England at the start of the eighteenth century . . .”); Nicola Lacey, *Psychologising Jekyll, Demonising Hyde: The Strange Case of Criminal Responsibility*, 4 *Crim. L. & Phil.* 109, 118 (2010) [hereinafter

her, responsibility is not a “constant through time and space,” as such an approach is “in some deep sense . . . antithetical to the very enterprise of historical scholarship.”<sup>6</sup>

Here is what she is arguing against. There are theorists, myself included, who think of questions of responsibility in philosophical terms. These moral truths are not socially or historically contingent; they are constant questions to which we seek answers. My work abstracts away from the fact that most cases are resolved by plea bargain (very much part of the practice of criminal law) and certainly from the mechanisms by which insanity could be assessed in the 1800s (which is part of the history of responsibility findings).<sup>7</sup>

In some ways, this is a (boring) methodological debate. What I care about as responsibility is not what she cares about as responsibility. However, I take Lacey to be placing pressure on the philosophical approach in two ways. First, there is the implicit claim that it is altogether odd to claim to be looking at criminal law if one does not care about *law*. As she states, “Normative criminal law theory purports, after all, to have some grounding in the reality of criminal law: to offer an account of the implicit normative structure of an actually existing social practice.”<sup>8</sup> And, second, there is the concern that one cannot make important contributions to the real world if one’s work is not grounded in the real world.<sup>9</sup>

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Lacey, *Psychologising*] (“My argument is that the institutional mechanisms needed to render subjective responsibility an object of proof in a criminal trial were not yet in place in the eighteenth Century . . .”); Nicola Lacey, *The Resurgence of Character: Responsibility in the Context of Criminalization*, in *Philosophical Foundations of Criminal Law* 151, 154 (R.A. Duff & Stuart P. Green eds., 2011) [hereinafter Lacey, *Resurgence*] (critiquing criminal law theory “which locates its interpretation of criminal responsibility primarily within a conceptual analysis of legal doctrine in isolation from its context”).

<sup>6</sup> Lacey, *supra* note 1, at 926.

<sup>7</sup> For Lacey on plea-bargaining, see Lacey, *Resurgence*, *supra* note 5, at 175. For Lacey on insanity in the 1800s, see generally Lacey, *Psychologising*, *supra* note 5, at 111 (arguing that “mental derangement defences in late nineteenth Century England” demonstrated the importance of character evaluation in criminal trials).

<sup>8</sup> Lacey, *Resurgence*, *supra* note 5, at 176. After noting that criminal law theorists write about a “small proportion of criminal law,” she states that,

This self-imposed limitation enables many of them to retain an attachment to the idea . . . of a unitary theory of criminal law—an aesthetically pleasing idea, but one which is seriously at odds with the legal and social reality of both the substance and the source of criminal law—the supposed object of analysis.

*Id.* at 175.

<sup>9</sup> See Lacey, *Psychologising*, *supra* note 5, at 131 (noting the need to understand the influence of character to fight against its resurgence); Lacey, *Resurgence*, *supra* note 5, at 156

I want to spend the vast majority of this Commentary placing our two different approaches into perspective, but before so doing, I want to deny Lacey's implicit claims that the philosophical approach to criminal law theory is too ivory tower. Unlike general jurisprudence, wherein the debates might be seen as utterly disconnected from the actual practice of law,<sup>10</sup> criminal law theorists consistently engage with legal practice, whether taking issue with the relevance of neuroscience,<sup>11</sup> offering principles to limit overcriminalization,<sup>12</sup> arguing against preventive and preparatory offenses,<sup>13</sup> or articulating a conception of consent for more just standards for sexual assault.<sup>14</sup> Lacey rightly worries about the rise of "enemy criminal law," the view of some people as "not us," and she takes this approach to be a resurgence in the interest in character-based responsibility instead of in capacity-based responsibility (a focus on who someone is rather than the contours of her choice).<sup>15</sup> But Lacey is not a voice in the wilderness here. Criminal law theorists are part of this discussion, including those whom she singles out as being too occupied with criminal law's moral foundations.<sup>16</sup> Criminal law theorists care

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(arguing that "the dynamics which shape the practice of criminal law and criminal justice, and the socially received meaning of criminal conviction, are no respecters of philosophical integrity").

<sup>10</sup> See Frederick Schauer, *The Force of Law* (2015) (arguing against the general jurisprudence approach that searches for necessary and sufficient conditions because, although coercion is not necessary for law, sociologically coercion is very much a part of law). Lacey seems to think both groups are guilty of the same vice. Lacey, *supra* note 1, at 936 ("As in jurisprudence, so in criminal law theory . . ."). She takes criminal law theorists to focus "primarily on ideas." *Id.* For my part, I think she reads too much jurisprudence into the methodology of criminal law theorists, and I worry that it is only because she reads criminal law theory through the prism of general jurisprudence's methodological claims that she views criminal theory to be askew. (This isn't to say that theorists are never guilty of ungrounded analysis, simply that I fail to see the evidence that it is pervasive.)

<sup>11</sup> See, e.g., Stephen J. Morse, *Lost in Translation? An Essay on Law and Neuroscience*, *in* *13 Law and Neuroscience* 529 (Michael Freeman ed., 2011).

<sup>12</sup> See, e.g., Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (2008).

<sup>13</sup> See, e.g., Larry Alexander & Kimberly Kessler Ferzan, with Stephen J. Morse, *Crime and Culpability: A Theory of Criminal Law* 199 (2009).

<sup>14</sup> See, e.g., Peter Westen, *Some Common Confusions About Consent in Rape Cases*, *2 Ohio St. J. Crim. L.* 333, 333 (2004).

<sup>15</sup> "Preventive in temper; disproportionate in reaction; indifferent to normal procedural protections, 'enemy criminal law' is essentially a police power which treats its objects as dangers to be managed, as distinct from citizen criminal law, which responds to subjects invested with rights." Lacey, *Resurgence*, *supra* note 5, at 168.

<sup>16</sup> Lacey mentions Duff, Gardner, Tadros, and the contributions to a volume on criminal law's philosophical foundations. Lacey, *supra* note 1, at 937 n.48 and accompanying text. These theorists are very much a part of the discussion about the overreaching of the current

about law, and specifically the extent to which the law can, does, and should embody our best moral theories. Ultimately, Lacey does not seem to have made the case for methodological superiority.

However, rather than just rejecting Lacey's methodological critique, I thought I would take up her challenge. I decided to read historical accounts of responsibility practices and see whether I found that our understanding of responsibility is deeper and more nuanced for having undertaken such an inquiry. I thought I would read histories that challenged most what I take to be required for criminal responsibility.

I started with *The Criminal Prosecution and Capital Punishment of Animals*.<sup>17</sup> In a fabulously interesting exploration, E.P. Evans first provides a historical analysis, and then, in the second part of his book, he compares animals' trials with the "modern" concerns of Evans's day (so modern is 1906).

In part I, Evans introduces us to a world as bizarre as it is familiar. Rats were represented by counsel, and indeed, their attorney not only claimed that they needed proper service of process but also sought to excuse their absence on the grounds that the journey was long and included the peril of facing cats along the way.<sup>18</sup> Notice mattered. In 1487 in Autun, public announcements were made for three days in every parish entreating slugs to exit the territory.<sup>19</sup> And consider the defendants below, who were entitled to due process of law:

Quite recently in China fifteen wooden idols were tried and condemned to decapitation for having caused the death of a man of high military rank. On complaint of the family of the deceased . . . the culprits . . . [were] brought before the criminal court . . . , which *after due process of law* sentenced them to have their heads severed from their bodies and then to be thrown into a pond.<sup>20</sup>

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criminal law. See, e.g., John Gardner, Crime: In Proportion and in Perspective, *in* *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* 213, 236–37 (2007) (discussing the "major legitimization crisis" in criminal law which he attributes to the "ideology of consumerism"); Victor Tadros, Justice and Terrorism, 10 *New Crim. L. Rev.* 658, 664 (2007) (analyzing the United Kingdom's terrorism laws); R.A. Duff, Pre-Trial Detention and the Presumption of Innocence 14 (unpublished manuscript, available at <http://ssrn.com/abstract=2103303>) (analyzing whether the practice of pretrial detention is compatible with the presumption of innocence).

<sup>17</sup> E.P. Evans, *The Criminal Prosecution and Capital Punishment of Animals* (1906).

<sup>18</sup> *Id.* at 18–19.

<sup>19</sup> *Id.* at 36–37.

<sup>20</sup> *Id.* at 174 (emphasis added).

One has to wonder what bizarre beliefs individuals held as one reads Evans's details of the use of animals as witnesses,<sup>21</sup> the possibility of pigs being on the hook as accomplices to the principal perpetrator (also a pig),<sup>22</sup> the torture of animals by the French to get confessions,<sup>23</sup> the prosecution of corpses by the Chinese,<sup>24</sup> and the "punishment" of trees by deodand, as set forth by none other than Blackstone.<sup>25</sup>

Of course, these beliefs were inextricably intertwined with religion. The prosecution of many animals was through the Church.<sup>26</sup> There was concern that one could not distinguish between locusts that were the embodiment of the devil and those that were sent by an angry deity.<sup>27</sup>

Nevertheless, the defense attorneys did not offer a "the devil made me do it" defense, but instead opted for something far closer to the "um, it's a bug" defense. Excusing conditions obtained. One fascinating case was the treatment of weevils in the 1580s. The weevils were eating crops. "[T]wo points are presented with great clearness and seem to be accepted as uncontested: first, the right of the insects to adequate means of subsistence suited to their nature."<sup>28</sup> Accordingly, experts were sent to find a tract of land upon which the weevils could munch.<sup>29</sup> Second, "no one appears to have doubted for a moment that the Church could, by virtue of its anathema, compel these creatures to stop their ravages and cause them to go from one place to another."<sup>30</sup> The weevils could not help but eat, but they would need to eat on designated land.

Still, rationality excuses were viewed with skepticism. In another case, the locusts' defense attorney argued that "a procedure implies that the parties summoned are endowed with reason and volition and are therefore capable of committing crime," but with locusts the defender implored, "[T]he rational faculties essential to the capability of committing criminal actions are wanting."<sup>31</sup> The defense attorney's "scepticism does not seem to have been taken seriously, but was evidently smiled at

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<sup>21</sup> Id. at 11.

<sup>22</sup> Id. at 144.

<sup>23</sup> Id. at 139.

<sup>24</sup> Id. at 110.

<sup>25</sup> Id. at 186.

<sup>26</sup> Id. at 3.

<sup>27</sup> Id. at 5.

<sup>28</sup> Id. at 50.

<sup>29</sup> Id. at 48.

<sup>30</sup> Id. at 50.

<sup>31</sup> Id. at 98–99.

as the trick of a pettifogger bound to use every artifice to clear his clients.”<sup>32</sup>

In the second part of the book, we see that the same puzzles that dog criminal law theorists today troubled them then. Evans observes that, “From the standpoint of ancient and mediaeval jurists the overt act alone was assumed to constitute the crime; the mental condition of the criminal was never or at least very seldom taken into consideration.”<sup>33</sup> Evans celebrates his modern criminal law, which “looks primarily to the psychical origin of the deed, and only secondarily to its physical effects.”<sup>34</sup> “Where [normal freedom of will] is wanting, there is no culpability, whatever may have been the consequences of the act.”<sup>35</sup> Still:

A point of practical importance, which the criminal anthropologist has to consider is the relation of moral to penal responsibility. If there is no freedom of the will and the commission of crime is the necessary result of physiological idiosyncrasies . . . over which the individual has no control and by which his destiny is determined, then he is certainly not morally responsible for his conduct. But is he on this account to be exempt from punishment? The vast majority of criminalists answer this question unhesitatingly in the negative, declaring that penal legislation is independent of metaphysical opinion, and that punishment is proper and imperative so far as it is essential to the protection and preservation of society.<sup>36</sup>

Evans bemoans that “future generations will condemn as equally absurd and outrageous our judicial treatment of human beings, who can no more help perpetrating deeds of violence, under given conditions, than

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<sup>32</sup> *Id.* at 108.

<sup>33</sup> *Id.* at 200.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 210–11. Evans seems to embrace not only determinism but also incompatibilism: Criminal propensities . . . are the resultants of race, temperament . . . and other pre-natal and post-natal influences and agencies, to which the individual did not voluntarily subject himself and from which he cannot escape. The acts, therefore, which he performs, whether good or evil, are as independent of his will as the colour of his hair or the shape of his nose; for while they are apparently volitional impulses, the will itself, from which they seem to proceed, is determined by forces as fixed and free from his control as are those which rendered him blue-eyed or snub-nosed.

*Id.* at 214–15.

locusts and caterpillars.”<sup>37</sup> Here, Evans rages against the death penalty for a nonculpable actor:

[An animal] was put to death not because it was culpable, but because it was harmful; and this is the ground on which the radical wing of criminal anthropologists would repress and eliminate a vicious person without regard to his mental soundness or moral responsibility; . . . he is a microbe injurious to the social organism and must be destroyed.<sup>38</sup>

Before charting out the lessons we might extract from Evans, let me turn to my other historical venture. I probed another point in our criminal law’s history—the Salem witchcraft trials. I have been fascinated by these trials since college. How could anyone really be prosecuted for being a witch?

So, again, I read a book. And, I should mention my first concern. Although Lacey begins with a confession to historians that she deploys their work for sociological study,<sup>39</sup> Lacey essentially advocates that we all take history more seriously. My confession is that I am not quite sure how she wants me to do this. As Lacey notes, there has been increasing specialization and sophistication in the relevant disciplines. What that means is that there is quite a bit of work to do to be good at any of them. I spend my life reading philosophy. But to take Lacey seriously, was I supposed to read *all* the books on the Salem witchcraft trials? Is it enough to get a flavor, or must I go to the original sources? After all, reading criminal law theory concepts into history requires not only historical expertise but also a strong handle on criminal law theory. Accordingly, ought I to rely on a historian’s description of what mattered at a given moment?

Still, *A Storm of Witchcraft* has great reviews and so off I read.<sup>40</sup> The first thing to note is that *people really believed in witches*.<sup>41</sup> *Even the “heroes” of this historical travesty believed in witches*. I have not believed in witches since I was about four. That fear was the fault of Disney, not the devil.

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<sup>37</sup> Id. at 222.

<sup>38</sup> Id. at 222–23.

<sup>39</sup> Lacey, *supra* note 1, at 921.

<sup>40</sup> Emerson W. Baker, *A Storm of Witchcraft: The Salem Trials and the American Experience* (2015).

<sup>41</sup> Id. at 285.

Emerson Baker helpfully details the fragile moment in Salem's history. The citizens were stressed. A once powerful colony was facing economic troubles, was losing political power vis-à-vis England,<sup>42</sup> and was home to many colonists who had survived frightful battles against the French and Native Americans.<sup>43</sup> The town had terrible factions, and the minister in Salem Village ultimately substantially exacerbated tensions amongst the townspeople.<sup>44</sup> Although Baker makes room for "a considerable amount of deliberate fraud,"<sup>45</sup> he also seems sympathetic to post-traumatic stress disorder, sleep paralysis, and even mass hysteria, pointing to other outbreaks, including an analogous case of the disorder that arose in Le Roy, New York in 2011–12.<sup>46</sup> He rejects convulsive ergotism, encephalitis, and Lyme disease as none of these medical accounts fit the data.<sup>47</sup>

The story exceeds what we might think. Although witches typically "tended to be poor and marginalized women,"<sup>48</sup> women of high religious, economic, and political standing; men; and even Puritan ministers fell within the scope of those accused, convicted, and executed.<sup>49</sup> These were not women with carrots tied to their noses.<sup>50</sup>

Animals in France got better treatment than American witches. Criminal defendants did not have defense attorneys.<sup>51</sup> They were questioned by judges, not prosecutors.<sup>52</sup> Of the twenty-eight people tried, all twenty-eight were found guilty—"a prosecutorial success rate unparalleled in American history before or since."<sup>53</sup>

The primary debate was truly about scientific evidence. The "touch test" was performed wherein if the afflicted person was touched by the offending witch, the suffering was thought to immediately stop.<sup>54</sup> And, individuals were convicted based on spectral evidence; that is, seeing the

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<sup>42</sup> Id. at 56, 66–67.

<sup>43</sup> Id. at 63.

<sup>44</sup> Id. at 96–97.

<sup>45</sup> Id. at 113–14.

<sup>46</sup> Id. at 99–104, 108.

<sup>47</sup> Id. at 109–10.

<sup>48</sup> Id. at 20.

<sup>49</sup> Id. at 23, 32, 35, 37.

<sup>50</sup> As famously portrayed in *Monty Python and the Holy Grail* (Python (Monty) Pictures 1975).

<sup>51</sup> Baker, *supra* note 40, at 26.

<sup>52</sup> Id.

<sup>53</sup> Id. at 186.

<sup>54</sup> Id. at 27.



specter of the witches.<sup>55</sup> But if Satan could create a specter of an innocent person, how reliable was such evidence?<sup>56</sup> Though such evidence would now be too unreliable for *Daubert*,<sup>57</sup> it was routinely admitted, despite the possibility of satanic falsification. Indeed, Baker notes that the experiments carried about by the judges “seem laughably simple on the surface, but in carrying them out the judges drew upon some of the latest scientific advances and were supported by some of the leading English religious, legal, and philosophical minds of the day.”<sup>58</sup> None other than Chief Justice Sir Matthew Hale had employed the touch test to convict witches.<sup>59</sup>

What would Lacey say? I suspect that she would see criminal responsibility not as a question of complicated mens rea and doctrine, but as a robust assessment of character, containment, and “enemy criminal law.” The punishment of locusts and the admission of the nature of the weevil are to Lacey, I would suppose, the embodiment of a criminal law that cares about the character or nature of the criminal subject and that takes quelling the masses as the criminal law’s object. The Salem witchcraft trials likewise display the use of power and the fact that fine analytical distinctions in law make little difference if verdicts are determined by the touch test and spectral evidence. The townspeople simply lacked the tools to get to the truth.

That is not what I see. In Salem, I see the evidentiary errors, the procedural improprieties, and the turbulent times at the root of this historical moment. These trials were part of an institutional crisis—considerable unrest and a perfect storm of factors led citizens to accuse and judges to convict. And so I learned what that criminal process was *for*. The citizens were scared, and these prosecutions made them sleep better at night. But I have not learned anything about criminal responsibility. The only thing to say about that is that innocent people died.

Reading Evans, the struggles he articulates—to understand free will and determinism, to define insanity,<sup>60</sup> to determine if culpability is about

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

<sup>58</sup> *Id.* at 117.

<sup>59</sup> *Id.* at 118.

<sup>60</sup> Evans, *supra* note 17, at 226 (“One of the chief difficulties encountered by those who seek to frame and administer penal laws on psycho-pathological principles arises from the fact that no one has ever yet been able to give an exact and adequate definition of insanity.”).

choice or character,<sup>61</sup> and to determine the role of retribution versus prevention<sup>62</sup>—are as pressing today. I do not see a difference; I see the same quest for understanding about when the state can justly punish. I do not see the caterpillars as having criminal responsibility. I see that our best moral theories about what is required for responsibility, rationality, and volitional capacities yield the conclusion that the criminal justice system was being used for misguided ends. What criminal punishment did was to function as a form of social control, quelling the masses by excommunicating insects. But these facts simply have no bearing on what moral responsibility is or whether at root the criminal law ought to punish only those who deserve it.

And so we have two histories. As Lacey says, “each approach has important insights to deliver.”<sup>63</sup> Ultimately, Lacey and I likely condemn the same practices and see the same questions. But we offer two different histories of criminal responsibility. Lacey’s history tells a rich and intricate story of the shape of criminal responsibility in times of unrest and superstition. My history sees responsibility as the fixed star—the constant over space and time—that shines light on the truth of when individuals ought to be punished, and casts shadows when our practices have led us astray.

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<sup>61</sup> *Id.* at 241–43 (describing killings by a nurse who was kind and compassionate during her fifteen years of incarceration, thus prompting Evans to ask whether she ought to be punished when her killings were inconsistent with her character).

<sup>62</sup> *Id.* at 237 (noting that retribution and prevention are “closely intermixed” and “it is impossible to separate them”).

<sup>63</sup> Lacey, *supra* note 1, at 23.