FORUM: COMMENT

The Historical Analysis of Criminal Codes

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Students of Anglo-American criminal law, historians included, have traditionally had very little to say about criminal codes. This omission is startling in the face of ongoing efforts to codify criminal law since the late eighteenth century, not only in England and the United States, but also in Canada and India. The only historical study of criminal codification in the United States is a survey article that is, strictly speaking, not about codification at all, but about the great men who made codification possible, in particular the forefathers of Herbert Wechsler, the main drafter of the Model Penal Code.¹ The Model Penal Code itself gave no clues as to its historical antecedents, if any. It is regarded, and portrayed itself, as having invented the wheel by starting from scratch, the raw material of the common law.

This omission is symptomatic of a general failure to place criminal law and its history within the context of the modern state and its history. In the theory of criminal law, this failure leads to its classification as a subspecies of moral (or perhaps social), rather than political, theory. In the doctrine of criminal law, it translates into a disjointed consideration of particular rules, aping the narrow focus of the judge dealing with a specific case and controversy. And the history of criminal law is either a doctrinal history of these rules (that is, of the judicial opinions announcing these rules) or, more recently, a “social history” of property, bourgeois (that is, mostly judges) wielding the criminal law (that is, the Bloody Code) as a weapon of class warfare.

In recent years, British legal historians have begun to pay more attention to criminal legislation than to common case law.² Their U.S. counter-


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parts have yet to catch up, in spite (or perhaps because?) of the fact that criminal codification was phenomenally more successful in this country than in Britain, thanks largely to the aforementioned Model Penal Code, with its exhaustive consideration of every angle of the codification issue (except the historical one).

Lindsay Farmer’s provocative essay belongs to the second wave of English historical scholarship on criminal legislation. It narrows the focus from criminal legislation to its most modern form, the code. In so doing, Farmer powerfully illustrates the benefits of turning one’s historical attention to the significance of criminal codes, thereby reconnecting the analysis of law to the analysis of the state, jurisprudence to politics. This comment explores how one might put his new (yet old) “conceptual tools”3 to use, paying particular attention to two analytic distinctions, between private and public law, and between criminal and civil law.4

**Private vs. Public Law**

Farmer begins by pointing out that Anglo-American criminal law scholarship still treats its subject “as an adjunct of private law; that is, it is concerned primarily with the definition and protection of private rights and interests.”5 This is a sad fact. It is unfortunate, to say the least, that even after a century of the expansion of criminal law to police every aspect of public life in the name of public interests, the unreflected perception of Anglo-American criminal law (and American criminal law in particular) as the protector of one individual’s interests against interference by another individual survives in such concepts as the “core criminal law,” “ordinary criminal law,” or “traditional criminal law.” It does not help matters that all of these concepts either remain tantalizingly undefined or point in the general direction of those common law malum in se crimes that mysteriously separated themselves from torts—to which they nonetheless retain an uncomfortably close resemblance, as we shall see.

Even in this anachronistic view, the core of criminal law appears to be covered increasingly with an unsightly growth of peripheral and suspiciously modern “regulatory offenses,” “malum prohibitum offenses,” “public

welfare offenses,” “police offenses,” and the like. These offenses, however, are not really crimes (they are, well, offenses, perhaps violations, or even only contraventions). Never mind that they by now easily outnumber real crimes. It is quality, not quantity that matters. As a result, the explosion of these public, yet faux, crimes has done little to challenge the myth of the criminal law as private law.

Only when the curious beginning law student, not yet schooled in the watertight separation between doctrinal categories, inquires innocently about the difference between, say, act, voluntariness, causation, duty, harm, intention, recklessness, negligence, consent, self-defense, necessity, interests, assault, battery, and trespass in the law of crimes and the law of torts, does the contemporary criminal scholar have recourse to the public dimension of criminal law, which suddenly reveals itself as its distinctive feature. It makes little difference that the overlap between torts and criminal law in fact has nothing to do with the criminal law’s protection of public interests as it is precisely the interference with individual interests that gives rise both to tort and criminal liability. There can be no tort liability for so-called victimless crimes or public offenses. Harm to the flow of commerce or the administration of justice, or for that matter to “public morals,” does not a tort make, though it frequently makes a crime.

The problem with modern criminal law scholarship therefore is not only—or at least so much—that it fails to recognize the public law aspect of criminal law. The problem goes deeper. Modern criminal law scholarship fails to recognize that its subject in large part no longer represents a species of law at all. The category mistake, in other words, transcends that of law and extends to the range of coercive methods available to the modern state. Insofar as criminal law has been transformed into a mode of regulation, it has been transformed into a species of police, rather than of law. So-called peripheral criminal law therefore is neither private nor public law, but police. Unlike the legal subject-object, that is, the addressee of legal norms, the object of policing is no subject at all, but a problem which needs “addressing.” The paradigmatic police provision does away with mens rea precisely because it is not addressed at a being capable of autonomous choice, but rather at a nuisance whose origin may lie with such a being or simply with a rabid dog or a fallen tree.

The confusion of law and police, however, assumes an attempt to distinguish the two. Unfortunately, not only the distinction between public and

6. For a provocative exploration of this issue in German criminal law, see Wolfgang Naucke, “Vom Vordringen des Polizeigedankens im Recht, d.i.: vom Ende der Metaphysik im Recht,” in Recht, Gericht, Genossenschaft und Policey: Studien zu Gundbegriffen der germanistischen Rechtshistorie, ed. Gerhard Dilcher and Bernhard Diestekamp (Berlin: Erich Schmidt Verlag, 1986), 177–87.
private law remains unclear and unexplored in Anglo-American scholarship. So does the definition of law and its differentiation from other modes of state coercion. One concept that may help distinguish the law is that of legitimacy. One might think, for example, that law makes different claims to legitimacy than does, say, the regulation of air traffic. One difference may lie in the communicative nature of that legitimation: law is addressed to persons, not problems. While Farmer repeatedly raises the question of law’s audience, he is anxious to separate it from that of law’s legitimacy. Eager to work out the “Englishness”7 of the English code commissioners, he stresses that they did not have legitimacy in mind. Instead, they single-mindedly pursued the sole goal of deterrence. That the legitimacy question is settled, however, does not mean that it is insignificant. Therefore, the peculiar Englishness of the English codifiers of the time may have lain not in their failure to recognize the centrality of the question of legitimacy that still agitated some of their continental contemporaries well into the nineteenth century.8 Rather, it may have been in their assumption that the answer to that question was settled.

Once the legitimacy question behind the question of deterrence comes into view, the political significance of codification reveals itself as a process of constant legitimation. The codification process is the process of legitimation because it constantly subjects the power of the state to first- and second-order legitimacy scrutiny. First-order, or internal, scrutiny is directed at the consistency or coherence9 of the rules of criminal law with its principles. Second-order, or external, scrutiny, checks the principles against the ultimate ground of legitimation. In the case of nineteenth-century England, that was the prevention of interference with the autonomy of the constituents of the British state community. Simplicity,10 intelligibility,11 clarity,12 and accessibility13 similarly are formal principles that permit constant legitimacy scrutiny.

One would expect to find legislativity, that is, the origin of the principles and rules of criminal law in the elected representatives of the people, among the formal legitimation requirements. According to Farmer, the connection between legitimation and legitimacy, however, does not turn on the concept of representation. Instead, for the English codifiers the legislator simply becomes the enforcer of the requirements of legitimacy just

8. Ibid., 423–24.
9. Ibid., 409.
10. Ibid., 410.
11. Ibid., 411.
12. Ibid., 410.
13. Ibid.
outlined. To spin out Farmer's brilliant image, it is the legislator who, as the spider at the panoptical position, constantly spins, scrutinizes, and repairs the web of principles and rules that is the law. This theory of legislation would seem to abandon the advantages of a system of mutual legitimacy checks among separate branches of government without grounding the now merely self-scrutinizing legislature in a representational theory of legitimacy. This formal concept of the legislator makes room for that person or set of persons (a code commission, perhaps) best able to perform its panoptical function in the name of prevention. Such a view of codification-legislation as scrutiny thus is refreshingly honest about a fact that should cause considerable discomfort to nonelected elite code commissions toiling in the name of democratizing the criminal law.

It is also undemocratic. English codification not only assumed a consensus on the legitimacy question, it also answered that question without reference to the concept of democracy. It is no surprise, then, that the greatest successes of English criminal codification would be criminal codes drafted by wise Englishmen (some of whom were experts in criminal law [Stephen], others not [Macaulay]) for various colonies, Canada and India in particular. In the English model of codification outlined by Farmer, the man on the street matters only as the object of law, not its subject. The subject of law is the panoptical legislator. The man on the street does not scrutinize the legitimacy of law. He obeys it and leaves the scrutiny to the legislator-expert, in whose ability he trusts (another very English thing?). The legislator thus not only scrutinizes himself without the assistance of other branches of government, but also without the benefit of public scrutiny. Unable to derive procedural or substantive legitimacy either from the process of his appointment or from the scrutiny of his actions by others within and outside government, the English codifier faces a lonely and unenviable task.

Civil vs. Criminal Law

And what a formidable task it is! After all, the English legislator must keep his eye on the web of law, rather than the web of criminal law alone. Another conceptual tool that Farmer excavates from Bentham via the English codifiers manqués is the formal distinction between substantive—or civil—and adjectival—or criminal—law. As with any of the other formal concepts already mentioned, this distinction too is a functional one, in that it is designed to simplify the legislature's panoptical task. According to this

distinction, legal norms are defined by civil law and the consequences of their violation by criminal law. Restricting the definition of norms to the civil law and their enforcement to the criminal law simplifies the first- and second-order scrutiny of both categories of law since the correspondence between civil and criminal law is not perfect: a norm defined in the civil law may be enforced by several enforcement provisions in the criminal law, and vice versa, while some norms remain criminally unenforced.

As functional and entirely formal, the distinction between substantive and adjectival law claims applicability beyond English law. In fact, the German criminal law scholar Karl Binding independently developed a similar distinction in the late nineteenth century based on a thorough analysis of German law and codes. Bentham distinguished legal norms from criminal laws. Like Bentham and the English codifiers, Binding noted that legal norms were defined outside the criminal code. He also remarked that they differed formally from criminal laws. They established duties of the form “do X” or “do not do X” in contrast to criminal laws, which provided that “whoever does X will be punished by Y.” This distinction had—and continues to have—doctrinal significance. For example, according to Binding, ignorance of a norm exculpated, whereas ignorance of its criminalization did not. A criminal law threatening punishment for the violation of a norm not elsewhere defined was null and void. Binding also famously attacked the nulla poena principle, insofar as it was extended beyond the proscription of retroactive norms to that of their criminalization. Once the state had communicated a norm to its constituents, it was free to determine and to alter the consequences of its violation.15

The distinction between substantive and adjectival law has significance for several reasons. First, it exposes a central question in the history of modern criminal codification: to whom are criminal codes addressed? Farmer stresses that the English codifiers set out to make the criminal law “accessible to all,” including lay magistrates,16 rather than merely lawyers, judges, and legislators. The distinction between substantive and adjectival law now allows for a distinction among different audiences, with the law of norm definition addressed to the general public (which presumably would include the professionals and the public officials, as the very English “rule of law” demanded)17 and the law of norm enforcement ad-

dressed to the enforcers. The point here is not to endorse this dualistic model or to suggest that the English codifiers endorsed it, as they clearly did not, but to illustrate how the distinction between substantive and adjectival law might be used to frame an inquiry into the nature of codification throughout the history of modern criminal law, in England and elsewhere.¹⁸

Differentiated answers to the question of audience have been invoked to elucidate a distinction within the sphere of adjectival law, namely that between material and procedural criminal law. Again, the distinction is reflected in the law of mistake and of retroactivity, with mistakes regarding the former being as inconsequential as retroactive amendments of the latter are permissible. As Farmer shows, the distinction between substantive and procedural law also was crucial to the English codifiers’ task, as material law (that is, the law of norm definition) first had to be extracted from the all-dominating procedural law (that is, the law of norm enforcement) before the panoptical legislator could monopolize its creation.

Still, the discovery of substantive criminal law and the concomitant shift of attention from the individual application to the abstract definition of norms also bears within itself a serious threat to the continuous scrutiny—and therefore the legitimation—of punishment. The great strength of the common law always has been its concern for individual justice. Its great weakness has been that this focus on the individual case has come at the expense of systematic justice, which—among other things—helped to obscure punishment’s identity as a weapon in the coercive arsenal available to the state and to undermine such important legitimating principles as cross-personal, -temporal, and -spatial equality. Nonetheless, the need for legitimacy of a particular punitive practice is inversely proportional to its proximity to the legislative function. As Bentham pointed out, the mere definition of penal norms with its concomitant proscription of behavior and its threat of punishment for their transgression required legitimation insofar as it caused pain. Still, the displeasure caused by the mere threat of punishment pales in comparison to that caused by its imposition and especially its actual infliction. A system of punishment therefore that places excessive emphasis on the coherence of its abstract norms may lose sight of those very aspects of punishment that require legitimation most urgently. The development of German criminal jurisprudence over the past two

centuries illustrates this shift from imposition to definition, accompanied by the disappearance of lay participation in the imposition of punishment.19

Second, the distinction between subjective and adjectival law focuses attention on the relationship between criminal law and civil law. The absence of a comprehensive, yet detailed, account of the substantive (rather than merely procedural) distinction between the law of crimes and the law of torts, for instance, helps to account for the explosion of modern Anglo-American criminal law over the past century or so. The full extent of the tremendous coercive potential of that explosion has remained hidden because it is perceived as a mere expansion of law generally speaking, or even of benign (police) regulation, which only incidentally requires the infliction of punitive pain in the course of dealing with one issue or another. Given the absence of a separation of criminal and law, the common legislative practice of avoiding legitimacy questions by classifying criminal as civil law thus turns out to be overkill.

Finally, the separation of subjective from adjectival law guides one's analysis of modern criminal law to its ultimate object, the state. Modern criminal law is a mode of state coercion and, as such, primarily a political, not a moral or ethical or religious, phenomenon. It is one of the means by which the state exercises its power and, ideally, fulfills its function. It therefore cannot be studied, historically or not, without reference to the other means at the state's disposal, to the extent and nature of the state's power, and ultimately to the state's function, that is, the ground of its legitimacy.

The form of modern law, however, is the code, the visible manifestation of the state's attempt to achieve and maintain legitimacy through constant and comprehensive scrutiny. It is for this reason that codes, criminal and otherwise, deserve the full attention of analysts of the law, historical and otherwise. Lindsay Farmer's lasting contribution lies in the recognition of this central fact.