

Penal Contextualism and Ideational Frameworks: A Guide for the Perplexed

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Abstract

In my paper, I attempt a critical review of Nicola Lacey's book *In Search of Criminal Responsibility*, by arguing, firstly, that she gives the categories of "character responsibility" and "capacity responsibility" an over-inclusive account, which results from her filling each of them with views that are not only disparate but also based, at least in part, on conflicting principles; and, secondly, that Lacey's spelling out of various conceptions of "criminal responsibility" necessarily entails an underlying unitary definition of its subject matter, that is, the concept of "criminal responsibility," which seems to conflict with her (version of) penal contextualism.

I. Lacey's Penal Contextualism

Nicola Lacey is today one of the leading and most influential supporters of what might be called "penal contextualism," that is, very briefly said, the idea that structures and contents of criminal law—including those of the so-called "general part," which are frequently seen as having a universalistic dimension—should not be seen as disembodied from their historical context, but instead as the result of historically contingent factors:¹ cultural and ideological factors, but also economic, social and politico-institutional factors. For a long time now Lacey has been developing and refining her contextualist approach,² alongside other important British scholars such as, for instance, Alan Norrie³ and Lindsay Farmer.⁴ For approximately seventeen years,⁵ Lacey has been applying her contextualist approach (which she also calls "reflexive or interpretive" (13) and elsewhere "contextual and inter-

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¹ Nicola Lacey, *Philosophy, History and Criminal Law Theory*, 1 *Buff. Crim. L. Rev.* 295, 308-09 (1998): "I shall . . . argue that an endorsement of this contextual method opens up a vision of an integrated approach to criminal law theory as a task of social theory of which historical method is a central part."

² In addition to Lacey, *supra* note 1, and to the other works I will be citing in this paper, see, e.g., *Abstraction in Context*, 14 *Oxford J. Legal Stud.* 255 (1994); *Legal Constructions of Crime*, in *The Handbook of Criminology* (Mike Maguire et al. eds., 3d ed. 2002); *What Constitutes Criminal Law?*, in *The Constitution of the Criminal Law* 12 (R.A. Duff et al. eds., 2013).

³ See, e.g., Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (1993).

⁴ See, e.g., Lindsay Farmer, *Making the Modern Criminal Law: Civil Order and Criminalization* (2016).

⁵ *Responsibility and Modernity in Criminal Law*, 9 *J. Pol. Phil.* 249 (2001); *In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory*, 64 *Mod. L. Rev.* 350 (2001).

pretive”)⁶ more specifically to the concept of *criminal responsibility*. The book I am here commenting on⁷ constitutes the crowning moment of this long and fruitful path. In Lacey’s own words, it revolves around the following argument:

Criminal responsibility, in short, is an idea which is located within a social practice of criminalization, which itself is necessarily located within an institutional framework and structured by the imperatives of legitimation and coordination. . . . It follows that what is needed in order to fully explicate ideas of criminal responsibility is a broad account of the co-evolution of legal doctrine, criminal process, and political economy (190).

From a certain perspective, a contextualist account of criminal responsibility is a truism: criminalization being an institutionalized social practice, it is obvious that its rules, principles and implications have to change in accordance with important changes in the social and institutional environment. It is obvious, for instance, that the rules and principles of criminal responsibility under the Nazi regime, in Germany, or the Fascist regime, in Italy, were significantly different from those that today in both countries—since their post-second World War constitutions have fully come into force—constitute the dominant models of criminal responsibility.

What is impressive in Lacey’s book, however, is her familiarity with so many different scientific terrains, generally seen as entailing sharply separated areas of expertise (history of criminal law and process, history of legal and political institutions, sociology, jurisprudence, law and literature): this allows her to grasp links and underlying structures, which instead remain mostly obscure to those who stay tied to their sectorial perspective. Historical reconstruction clearly lies at the heart of this project:⁸ not, however, as an end in itself, but as “genealogic” analysis, as “history of the present,”⁹ which is aimed at better understanding the meaning and the dimensions—hence the relativity—of institutions that, being familiar to us, we tend to see as having universal and unchanging content and form, while instead they are steadily anchored to our time.¹⁰

⁶ Lacey, *supra* note 1, at 308.

⁷ Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (2016).

⁸ See Lacey, *supra* note 1.

⁹ As David Garland famously puts it with regard to his own approach, “In describing this work as a ‘history of the present’ . . . [m]y primary concern is analytical rather than archival. That concern is to understand the historical conditions of existence upon which contemporary practices depend, particularly those that seem most puzzling and unsettling. Historical inquiry—together with sociological and penological analysis—is employed here as a means to discover how these phenomena came to acquire their current characteristics.” David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* 2 (2001).

¹⁰ See Nicola Lacey, *Character, Capacity, Outcome: Toward a Framework for Assessing the Shifting Patterns of Criminal Responsibility in Modern English Law*, in *Modern Histories of Crime and Punishment* 16 (Markus D. Dubber & Lindsay Farmer eds., 2007).

II. Some Perplexities About Lacey's Tripartition of the Ideational Frameworks of Responsibility

Lacey's book is very well constructed, instructive and masterfully argued. There are, nonetheless, two major points which I find perplexing.

The first one has to do with the ideational frameworks on the basis of which Lacey categorizes the evolution of criminal responsibility in Britain since the second half of the eighteenth century:

Three main sets of ideas have shaped conceptions and practices of criminal responsibility—character, capacity, and outcome—with “character” standing in for a particular conception of how criminal evaluation attaches to persons and relates to identity; “capacity” standing in for a concern with agency, choice, and personal autonomy; and outcome standing in for a concern with the social harms which agents cause and/or the risks which they create (2).¹¹

Though, as Lacey herself acknowledges elsewhere,¹² subdivisions of this kind are not uncommon among criminal law scholars,¹³ what I find perplexing here is the way in which Lacey interprets the relevant categories—in particular, those of “character responsibility” and of “capacity responsibility”: as I will try to spell out in more detail, she gives an over-inclusive and ambiguous account of these categories which risks compromising the accuracy of her conceptual reconstruction.

A. *Personalistic vs. Stereotyping Versions of Character Responsibility*

A first case in point is so-called “character responsibility,” under which conceptual umbrella Lacey gathers very different approaches (33-41): such normative theories as that of Victor Tadros¹⁴ or that of Lacey herself,¹⁵ but also such stigmatizing strands of criminalization as those based—in Lacey's own terms—on a combination of “character essentialism” (“a view of human character . . . and of identity as fixed, or at least as relatively stable”) and of “character determinism” (a view that “regards character as determining conduct”) (35), or as the various forms of status responsibility (the “common prostitute,” the “habitual offender”)¹⁶ which are now re-emerging, for instance, in so-

¹¹ Moreover, “[i]n recent years, a further pattern founded in assessment of risk has also emerged” (26).

¹² See also Lacey, *supra* note 10, at 26.

¹³ Think of the widespread tendency to contrapose “character” and “choice” theories of excuses, or of R.A. Duff's distinctions among “character-based,” “choice-based” and “action-based” theories of liability (to which I will return shortly), or of George Fletcher's tripartition between “manifest criminality,” “subjective criminality” and “harmful consequences” (which is, in many respects, a landmark for Lacey's own approach). George P. Fletcher, *Rethinking Criminal Law* chs. 1-5 (2000 [1978]).

¹⁴ Victor Tadros, *Criminal Responsibility* (2005).

¹⁵ Nicola Lacey, *State Punishment: Political Principles and Community Values* (1988).

¹⁶ Lacey, *supra* note 7, at 35 (“conceptions of criminal responsibility as founded in status formalized in categories”).

called crimmigration practices¹⁷ or, as Lacey underlines (147-72), in many institutions of anti-terrorism law. While Lacey presents these approaches as situating themselves on the same—though “wide”—“spectrum” (35), in reality they embody radically different—even antithetical—visions of criminal responsibility: (what I would preferably call) “personalistic versions” or (with Lacey) “cautious versions” are inspired by the need for an adequate individualization of criminal responsibility;¹⁸ what is relevant to them is the offender’s position *as an individual*. In the other “versions,” instead—which I would preferably call “stereotyping versions” and which Lacey calls “extreme versions” (or, elsewhere, the “overall-character principle”)¹⁹—the offender does not enter the picture as an individual, but only as a type of person, or better still *as a stereotyped person*.²⁰

All that the “cautious” and “extreme” approaches have in common is: first, the argument that criminal responsibility should not be derived punctually and immediately from the commission of a specific act, but always entails an evaluation of the offender him- or herself (wherefrom derives a location of the “attribution of responsibility within a broader time frame than that implied by the capacity principles”);²¹ second, the label—*character*—with which, in both cases, this dimension of the “author-beyond-the-act” is expressed. Is this sufficient to justify their being taken as instances of the same conception? My answer is decidedly no: in the two cases, indeed, this (allegedly) common element of “character” is given very different meanings. In the personalistic versions, it means the set of *effective* dispositions of the offender’s individual personality (in the Cambridge Dictionary’s terms: “the particular combination of qualities in a person . . . that makes [him or her] *different from others*”; in Merriam-Webster’s terms: “one of the attributes or features that make up and *distinguish an individual*”); used in the context of stereotyping versions, the term “character” is given instead a literary or cinematographic sense (in Merriam-Webster’s terms: “a short literary sketch of the qualities of *a social type*”), as a mere—standardized, stereotyped, not necessarily corresponding to any subject’s inner traits—representation of a type of person.

But there is more to be said on this point. Not only do the personalistic and stereotyping versions use the concept of “character” in radically different—in fact, opposite—ways; they also give this “same” element (the author-beyond-the-act) radically different roles in judgments of criminal responsibility. According to the stereotyping versions, the

¹⁷ See, e.g., Alessandro Spena, *Iniuria Migrandi*: Criminalization of Immigrants and the Basic Principles of the Criminal Law, 8 Crim. L. & Phil. 635 (2014).

¹⁸ Lacey, *supra* note 15, at 71: “[I]t does seem that all citizens can legitimately demand of a criminal justice system that it respond punitively only to actions which are in a real sense *their own*.” This is exactly what—in Lacey’s view—character responsibility is meant to favor: “[I]his conception is concerned with the degree to which an action reflects the settled personality traits of the agent.” *Id.* at 72. Elsewhere, Lacey underlines how her version of “character responsibility” is to be associated with the value of autonomy. *Id.* at 77.

¹⁹ Lacey, *supra* note 10, at 29.

²⁰ More in detail on this approach, see Spena, *supra* note 17, at 641-47.

²¹ Lacey, *supra* note 10, at 30.

offender's character—his/her being a certain *type of offender* (*Tätertyp*), his/her (alleged) status, according to a certain pseudo-scientific or social classification—represents the intentional object of his/her being made criminally responsible, that *for which* s/he is criminalized and punished, with conduct only entering the picture as a symptom of the offender's character, or, at most, as a condition on which punishment for character is made dependent.²² According, instead, to personalistic versions—or at least to some of them, such as, for instance, Lacey's own or Kyron Huigens's—character does not properly constitute the intentional object of criminal responsibility and punishment: as Lacey herself acknowledges, “In its more cautious forms, . . . character-responsibility restricts itself to an evaluation of the specific conduct which forms the basis for the present allegation” (36); conduct, not character, is the intentional object of criminalization and responsibility here,²³ even though the conduct itself is given relevance only as an expression—or, at most, as a constitutive part²⁴—of a “settled criminal disposition” in the individual personality of the specific offender.²⁵ character, in this case, only serves as a means to fill the offender's conduct with personalistic-individualistic meaning. Once again, Lacey herself lucidly expresses this difference between the two approaches:

The relevant question becomes not, “Is the defendant's conduct evidence of criminal character?” but rather “Does the defendant's conduct in causing the victim's death or having sexual intercourse with the victim express a settled disposition of hostility or indifference to the relevant norms of criminal law, or at least acceptance of such a disposition?” (36).

If these observations stand, then Lacey is grouping too distant—even conflicting—views under the same conceptual category, which, far from being useful, ends up rendering her account of “character responsibility” intrinsically inconsistent.

B. Capacity, Choice, Action

The suspicion that Lacey is filling her ideational frameworks with things that are too different from each other to justify their assimilation within one and the same category also holds, in my view, for “capacity responsibility.” She introduces it as follows:

²² For the distinction between “intentional objects of liability” and “conditions of liability,” see R.A. Duff, *Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law?*, 6 *Buff. Crim. L. Rev.* 147, 155 (2002).

²³ See Kyron Huigens, *On Aristotelian Criminal Law: A Reply to Duff*, 18 *Notre Dame J.L. Ethics & Pub. Pol'y* 465, 482, 484 (2004).

²⁴ See R.A. Duff, *Choice, Character, and Criminal Liability*, 12 *Law & Phil.* 345, 372-74 (1993).

²⁵ *Id.* at 378:

This is the element of truth in the “character” theory: that the actions for which a person is convicted and punished must be “hers”, in that they must be appropriately related to attitudes or motives that are necessarily aspects of her continuing identity as a person. But this is not to say that the law condemns and punishes offenders for those character-traits rather than for the actions in which they are manifested (which is what “character” theorists seem to claim).

Capacity responsibility makes a strong assumption about what it is that we are responsible *for*: we are responsible not for our selves, for who we are, or for our social status, but—on a quasi-contractual basis—for the specific acts which we (choose to) do or (in limited circumstances) refrain from doing (27).

Thus presented, Lacey's contraposition of capacity responsibility to character responsibility in appearance recalls Antony Duff's distinction between "action-based" and "character-based" theories of liability, where the former is accounted for as claiming, contrary to the latter, "that 'actions' [not characters] are the intentional objects of criminal liability."²⁶ If we go deeper into these conceptual categories, however, we easily realize that the two contrapositions (Duff's and Lacey's) are not perfectly overlapping. Lacey, as we have seen, also interprets as instances of character responsibility some approaches, including her own, which explicitly eschew the idea that character, not action, should be the intentional object of criminal liability: from this point of view, those that Lacey calls "cautious versions of character responsibility" are far nearer to Duffian "action-based" approaches than to "character-based" ones. But this is not what I am interested in here.

More interesting, instead, is the fact that, in his reconstruction, besides the two just mentioned, Duff also includes a third account, which he calls "choice-based" and which he characterizes as "appeal[ing] to the idea of a capacity, or of a fair opportunity, to choose to refrain from the crime."²⁷ Intriguingly, this is, almost literally, the way in which Lacey herself, in her turn, reconstructs "capacity responsibility" once she goes on to present in more detail the contents of this paradigm: according to her, capacity responsibility (which is founded on the idea that "criminal law is [or should be] addressed to human beings as choosing subjects capable of conforming their actions to the criminal law" (27)) has historically taken on "[t]wo significantly different legal versions On the one hand, there is capacity as choice, which generally appears through subjective *mens rea* or fault requirements On the other hand, there is capacity as fair opportunity, which appears in a broader conception of *mens rea* that includes negligence and 'objective' recklessness" (28).

Now, if we take Duff's tripartition as our reference point, it is evident that in her account of "capacity responsibility" Lacey is conflating two different theoretical approaches to criminal responsibility, that is the "action-based" and the "choice-based" ones. Of course, this is not *per se* a good reason to prefer Duff's tripartition to Lacey's. What is troublesome about Lacey's interpretation, however, is the fact that, as Duff convincingly shows, the action-based approach and the choice-based one are founded on mutually exclusive grounds. According to the former, the *actus reus* is the intentional object of criminal responsibility, with *mens rea* only constituting a condition for fair imputation of responsibility (which means that people may only be punished for their actions, insofar as these display the relevant subjective attitude). According to the latter, it is the other way round: the *mens rea* takes on the role of the intentional object of criminal responsibility, while the *actus reus* takes on, at most, that of a fairness condition of imputation (which

²⁶ Duff, *supra* note 22, at 184 & *passim*.

²⁷ *Id.* at 152.

means that people should be punished for their intentions, or choices, but only insofar as these display themselves as action); the first model is an instance of (what, in the language of continental Europe criminal law scholarship, is called) “deed-based criminal law” (*diritto penale del fatto, Tatstrafrecht*), while the other is an instance of “intention-based criminal law” (*diritto penale dell'intenzione o dell'atteggiamento interiore, Gesinnungsstrafrecht*)—which are, at least in their ideal-typical form, politically opposite paradigms of criminal law, with the deed-based ideal-type directly deriving from the liberal view of law as a rule governing, first and foremost, external relationships between citizens (and thus primarily concerned with their external conduct), and the intention-based ideal-type developing instead a view of law as a rule of an essentially moral kind, primarily addressed to the *conscience* of the citizens.

But there is more to be said on this point. Lacey, as we have seen, distinguishes two variants of the “capacity” pattern: one of a subjectivist kind, the key of which is “ad-vertence” and which is focused “on so-called subjective principles of *mens rea*: intention, recklessness or foresight of relevant consequences, knowledge, and so on: forms of *mens rea* which essentially consist in subjective mental states on the part of the defendant” (28); the other of a more objectivistic-evaluative kind, founding responsibility on “whether the defendant had a fair opportunity to conform his or her behaviour to the criminal law standard” (29).

Now, what I find perplexing about this reconstruction is the fact that, once again, it puts together under the same conceptual umbrella things that are markedly different, not only in degree or in nuance, but in their very substance: while indeed “capacity as choice”—i.e., as a set of (more or less) subjective mental states—can sensibly be seen as an intentional object of responsibility and criminalization (the choice-based theory, in Duff’s account), so that it makes sense to argue that someone is punished *for* his/her culpable (intentional, reckless, indifferent, negligent) subjective attitude toward certain values, goods or norms; the same could not be sensibly argued with regard to “capacity as fair opportunity”: it would not make sense to say that someone should be punished *because* s/he had a fair opportunity not to do something; rather, it could be said that s/he should be punished *because* (intentional object of responsibility) s/he did something s/he should not do, though (just imputation condition) having the fair opportunity not to do it. Elements of fair opportunity are morally neutral conditions, which do not enshrine any (dis)value sensibly blameable on someone as a wrong:²⁸ the fact of having “human capacities of cognition” and “powers of self-control” (28) is not something for which people can be sensibly criminalized and punished; in this sense, they are not possible grounds for criminal responsibility.

If what I have been saying so far is correct, then not only Lacey’s category of “character responsibility,” but also her category of “capacity responsibility,” would end up being intrinsically inconsistent; what was previously said for “character responsibility” can now be extended, *mutatis mutandis*, to “capacity responsibility”: the things Lacey gathers

²⁸ At most, persons can sometimes be blamed for lacking capacity, as happens with cases of so-called *actio libera in causa*; but this is a completely different story.

under this latter category are too different from each other to justify their being assumed as instances of one and the same conception.

III. Concept and Conceptions of Criminal Responsibility

So far we have seen that, according to Lacey, in the last two hundred and fifty years various conceptions (character, capacity, outcome, risk) and sub-conceptions of criminal responsibility have been at work in British criminal law. But, what is the relationship between these shifting conceptions and (what should be seen as) their common conceptual substratum, i.e., the concept of “criminal responsibility”?²⁹ In what way do these two dimensions—concept and conceptions of criminal responsibility—relate to each other?

As I understand it, Lacey’s position is that there is no single concept of criminal responsibility, though frameable according to different conceptions and sub-conceptions depending on the corresponding historical-socio-institutional context, but that there are, instead, as many concepts of criminal responsibility as there are conceptions and sub-conceptions. The idea of “criminal responsibility,” in this view, does not seem to have one single underlying, basic meaning, which can be traced beyond its various concrete manifestations through history; it has, instead, as many meanings as there are concrete manifestations. In Lacey’s own terms, “Developments in the criminal process, in the penal system, and in the political and economic world, in short, affect the *meaning* as well as the *normative significance* of criminal responsibility” (185). And elsewhere:

My argument sets out from two very simple assumptions. First, I assume that responsibility is best thought of as a set of ideas that play two major roles in the development of modern criminal law: legitimation and coordination. . . . Second, I assume that three main aspects of its environment shape responsibility: ideas, interests, and institutions. These three contextual aspects affect its conceptual contours and its role or what is required of it (2).

Metaphorically, it seems as though Lacey sees the concept of “criminal responsibility” as being a sort of Stephen King’s *It*, which changes its shape depending on contingencies, but which is completely inconceivable in its ultimate core. More precisely, and leaving metaphor aside, it seems that for Lacey such an “ultimate core” of criminal responsibility does not exist at all as distinct from its—always shimmering, even contradictory—concrete historical manifestations. This can be seen as an extreme implication of her penal contextualism, consistent with the fact that she conceives her research on “criminal responsibility” as a follow-through “on the insight of modern linguistic philosophy that the analysis of words must be set in the context of their usage” (203); which seems to entail that words and linguistic expressions—and “criminal responsibility” among these—do

²⁹ I am here relying on a distinction—concept vs. conception—which, I know, is itself disputed. Since I cannot embark on a detailed analysis of this dispute, I will merely assume the two terms as respectively meaning the sum of the common and constant elements identifying criminal responsibility-attribution over time and space as a distinct, specific social practice (concept) and the philosophies, general views, *Weltanschauungen*, which can be seen at work beyond concrete rules of criminal responsibility-attribution and according to which the attribution of criminal responsibility can be justified (conceptions).

not have any meaning dissociated from their “environment”: to the extent that this environment changes, the concept itself changes accordingly.³⁰

But, does this mean that there is no single conceptual *fil rouge* horizontally crossing all the various conceptions of criminal responsibility? Does it mean that the concept of criminal responsibility *is* the same thing as (the sum—or better still, the juxtaposition—of) its different conceptions? Not *an* idea, but “a set of ideas”? If this is what Lacey means, then a problem arises: if the meaning of concepts changes according to variations in their context of usage, and thus according to their conceptions, on what basis can we argue that different conceptions of criminal responsibility are, nonetheless, inflections of the same concept, and not, instead, different concepts associated with the same linguistic expression? How can we say that what Lacey is in search of in her book is a unitary subject matter, and where does this unity come from if not from its referring to a unitary “thing” such as exactly the “concept” of criminal responsibility?

Lacey notices this risk of impasse, which she tries to neutralize by acknowledging the existence of “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.” However, as she herself admits, this is a rather limited acknowledgement, since “this core is a relatively small one, and the inflection which it is given by varying social institutional conditions and practical imperatives is so decisive that no theorist of criminal responsibility can afford to ignore it” (186-87).³¹

What makes this strategy an insufficient way out of the impasse, in my view, is the fact that it does not really provide us with specific information on “*criminal* responsibility,” but rather with a generic idea of “(human) responsibility,” which is not distinctive to criminal law, as it can also be found operating in other legal areas as well as in morality. The question remains unresolved whether there is anything specific to “criminal responsibility” *qua criminal*, which does not necessarily turn out to be the same thing as (a juxtaposition of) the various historical conceptions of the concept: is there anything distinctive to “*criminal* responsibility,” which can be said to be, at the same time, more specific than (i.e., a *species* of) the general “idea of human agency and accountability for conduct” and more general than (common to, not exhaustively identifiable with) the various historical conceptions and sub-conceptions which can be seen at work beyond the different rules and principles of criminal responsibility-attribution varying according to cultural, social and institutional environments?

A negative answer to this question again raises, substantially unaltered, the problem from which we started: on what basis can Lacey’s research be presented as research on *a subject matter that it makes sense to call unitedly and specifically* “*criminal responsibility*,” and

³⁰ See also Lacey, *supra* note 1, at 308, where she traces “[t]he idea that philosophical explanations of particular concepts should be located within the context of the social practices of which these concepts form a part” back to Ludwig Wittgenstein’s *Philosophical Investigations*: “For Wittgenstein, the meaning of concepts was inextricably linked with the practices of which they are part.”

³¹ See also Lacey, *supra* note 10, at 23-24.

not as one on, say, “human responsibility” in general or, at the other extreme, on “criminal responsibilities”?³² This is not to ask Lacey to pick and choose—on an aprioristic and ahistorical basis—one of the various conceptions of criminal responsibility she outlines so as to elect it as the *true* one, the conceptually authentic one, while discrediting the others as false or inaccurate. The relevant question is rather as follows: what do the various ideas Lacey analyzes in her book as conceptions of criminal responsibility have in common that justifies her treating them as articulations of one and the same subject (and not merely as different meanings of the same linguistic expression)? Which aspects of “criminal responsibility”—as this idea has been emerging through history—make it into a unitary theme, and not into a mere umbrella name referring to completely heterogeneous things?

One possible answer, in line with Lacey’s approach, might be that what the various conceptions of “criminal responsibility” have in common is the fact of being “responses to structural problems of coordination and legitimation faced by systems of criminal law”:³³ what makes them conceptions of the same “thing” is their referring to (their being functional—as a means of legitimation and coordination—to) one and the same social practice, which we call “criminal law.” Such an answer, however, while being perfectly sensible in itself, does not solve our problem; it only postpones it to a different step, that of the definition of “criminal law.” What we need now is a unitary definition of (the historical constants of) this social practice that we can use as a common ground for the different conceptions of criminal responsibility. The problem, however, is that Lacey is utterly skeptical about the possibility of such a definition,³⁴ at least insofar as what we are asking for is a thicker definition rather than a generic one according to which criminal law is “one way in which a society . . . both defines or constructs, and responds to, ‘deviance.’”³⁵ After having raised the question: “What, if anything, makes criminal law distinctive among . . . other forms of ‘social control’?”,³⁶ she concludes, indeed, that “[r]eflection on the complexity of actual criminal law must lead us to have reservations about the usefulness of general, unitary conceptions of criminal law.”³⁷

³² Interestingly, Lacey defends the opportunity to use the (singular) concept of “responsibility” even though it “works in different ways in different social practices and institutions, and . . . its meaning shifts over time,” and she declines the alternative to “speak rather of ‘responsibilities,’ and reject the pursuit of a general interpretive theory of responsibility as theoretically misplaced” (203).

³³ Lacey, *supra* note 10, at 16; see also Lacey, *supra* note 7, at 13.

³⁴ On the other hand, she seems to be sure that “criminal law” can be identified as such even without a previous definition. So, for instance,

the way in which eighteenth-century English criminal law constructed, addressed, and regulated its subjects was in an important sense quite different to the way in which early twenty-first-century English criminal law performs its analogous tasks. Both were, however, undoubtedly and in all senses, instances of criminal law (200).

³⁵ Nicola Lacey et al., *Reconstructing Criminal Law* 1 (1990).

³⁶ *Id.* at 2.

³⁷ *Id.* at 5.

If this means that a unitary—meaningful and not merely nominalistic—definition of criminal law (of its specific conceptual characters) is unattainable, then we are left with our problem unresolved: what is the common conceptual ground beyond the various conceptions of criminal responsibility, of which these conceptions can be sensibly said to be “variations,” “manifestations,” “versions”?

IV. Concluding Remarks

In this paper I have tried to make some critical observations concerning Nicola Lacey’s book *In Search of Criminal Responsibility*: a rather difficult task, the book being masterfully conceived and written. Notwithstanding this, I have identified two aspects which I find perplexing. The first one is of a “classificatory” kind and has to do with the way Lacey interprets the categories of “character responsibility” and of “capacity responsibility.” Both, I have argued, are given an over-inclusive account, which results from Lacey’s filling each of them with views that are not only disparate but also based, at least in part, on conflicting principles.

Secondly, I have raised the argument that Lacey’s spelling out various shifting conceptions of “criminal responsibility” necessarily entails an underlying unitary definition of its subject matter, that is, the concept of “criminal responsibility,” which seems to be conflicting with her (version of) penal contextualism. This, I have argued, has the effect of overlapping concept and conceptions of “criminal responsibility”—questions regarding what is distinctive to the social practice as such (what are the traits by which we can identify it as one and the same practice over time and space?) and questions regarding, instead, the shifting principles and rules according to which criminal responsibility is concretely attributed and justified in different times and places, depending on different social and institutional arrangements.