

Grounding Criminal Law:
Foundational Texts in Comparative-Historical Perspective

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This book features essays in which contemporary scholars engage critically with foundational texts in modern criminal law: formative texts in criminal legal thought since Hobbes.¹ It aims to contribute to the emergence of a canon, along with a documentary intellectual and disciplinary history, of modern criminal law and, at the same time, to take a snapshot of contemporary work on criminal law within that historical context.

As a first, programmatic (not to say foundational), effort, this project does not attempt to assemble a comprehensive, never mind a definitive, set of certified “classic” texts. Instead it features a selection of texts reflecting significant aspects in the development of modern conceptions of crime, punishment, and law.

Criminal law discourse has become, and will continue to become, more international and comparative, and in this sense global: the long-standing parochialism of criminal law scholarship and doctrine is giving way to a broad exploration of the foundations of modern criminal law in the new *lingua franca* of legal scholarship, English. The present book seeks to advance this promising scholarly and doctrinal project by making available key texts, including several not previously available in English translation, from the common law and civil law traditions, accompanied by contributions from leading contemporary representatives of both traditions.

Global discourse on criminal law needs a common foundation of texts, if not of principles. Eventually, scholars from throughout the world will be able to draw on a shared *fundus* of materials, and of concepts, that define the discipline and shape academic discourse, while at the same time, as in any other discipline, being subjected to constant challenge and reconstruction. A canon of key texts, however contested, forms part of the scholarly infrastructure of a global discipline, along with common journals, monograph series, reference works, informal and formal networks, as well as compatible curricular programs grounded in a basic vision or visions, however general or abstract, of the field of study as a whole.

Eventually, contributors to the global discipline of criminal law, no matter what their institutional or national affiliation, would be expected to have grappled with a common *corpus* of texts and concepts. In a global environment, it makes no sense that a budding criminal law scholar at an English institution would be unfamiliar with the key texts that structure the intellectual worldview of her colleague at a German institution, *or vice versa*. (To see this point, substitute “political science” or “psychology” or “philosophy” or “chemistry” for “criminal law.”) The point is not that there cannot, or should not, be

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¹ Primary texts, notably those not readily available elsewhere, are accessible through the book’s companion website (<http://www.law-lib.utoronto.ca/bclc/crimweb/web1/foundational.html>).

scholarly traditions or “schools” (which may or may not be tied to a country, a city, an institution, a department, or even an individual or group, or coffee shop), but that they should operate within a shared discourse, a common discipline, however fluid and self-critical.

It must be said, of course, that the present book is preliminary in a still broader sense: it would be preliminary even if it managed to be comprehensive within its systemic scope. It is post-parochial and supranational, but it is not global, if global is taken literally to mean encompassing every country, and every system of law and governance, or even every system of *criminal* law, around the globe. The present early effort at canon construction has a hard enough time capturing at least some important, or at least interesting, aspects of one recent (“modern”) slice in the development of criminal law in (some) Western countries. It doesn’t even try to speculate about, never mind to make contact with, other traditions of law and governance. In this sense, even this project remains parochial, though its parochialism at least is no longer national, but systemic, and recognized as such.

In the end, then, this book makes no claims about universal, or even truly global, foundations, or principles, of criminal law. At best, it provides the resources for a better informed conversation—in the spirit of bilateral comparative analysis, rather than the unilateral dissemination of one’s domestic system to a receptive audience in other, presumably, in some sense less advanced system²—about just what might be these points of commonality that would make a shared discourse about criminal law possible, and even about whether they exist at all. Soon, we’ll take a closer look at some of the threads that can be seen running through the texts, and the essays, in this book. For now, one obvious candidate for a formal, if not a substantive, point of commonality suggests itself: it is tempting to see the various texts in this collection as contributions to the history of efforts to generate a conception of crime and punishment in the modern *liberal* state. The limited usefulness of this common denominator becomes apparent as soon as one reflects on the difficulty of defining with anything approaching fruitful specificity just what sort of conception of liberalism is at stake.

Nonetheless, at least as a convenient label, the notion of a shared “liberal” project may be worth keeping if only because several of the contributors to the volume make a point of emphasizing the liberal credentials of “their” primary text authors. The essays on Hobbes and Bentham come to mind (chapters 1 & 4), but even the relationship between Pashukanis’s Marxist account of criminal law and the object of its “bourgeois-liberal” critique turns out to be more complicated—and even interesting—than one might think, and not merely in the predictable dialectic sense (ch. 10). Much the same might be said about Foucault or Christie, *mutatis mutandis* (chapters 16 & 17). And so even those who railed against “liberalism,” or who ostensibly sought not to attack it, but merely to analyze it, arguably remained within its conceptual framework, which may not be saying much since “liberalism” may be inescapable precisely because it has become so indistinct and malleable a concept.

² See MD Dubber, ‘Comparative Criminal Law’ in M Reimann and R Zimmermann (eds), *Oxford Handbook of Comparative Law* (2006) 1287.

1. Toward a Comparative-Historical Analysis of Criminal Law

a. Comparative.

Whatever marker we use to draw a thin line around the supranational project for which the texts in this collection might count as “foundational,” for the moment the mode of discourse populated by these texts will be primarily *comparative*. It will be comparative both internally and externally. Internally (within the Western/liberal tradition), this book makes possible an intersystemic conversation between common law and civil law systems based on a shared familiarity with some important, or at least provocative or even surprisingly bland, texts. Most obviously, and mundanely, the translation into English of texts by Feuerbach, Birnbaum, Radbruch, and Jakobs for the first time brings Anglophone readers face-to-face with sources that until now had been accessible only to their civil law counterparts. In the case of Feuerbach, the translated text is an acknowledged “classic” (as Tatjana Hörnle confirms, in ch. 6), a certified foundational text in the history of German criminal law, and therefore also of civil criminal law which has been strongly influenced by German theory and doctrine over the past two centuries or so, in no small part thanks precisely to Feuerbach’s many and varied efforts, as a theorist, textbook author, and codifier (of the influential, even foundational, Bavarian criminal code of 1813). It is difficult to make sense of German criminal law without reference to Feuerbach; for that reason, it is difficult to have a meaningful conversation with someone steeped in German criminal law thought without knowing anything about Feuerbach’s views. This is not to say that Feuerbach, like many classic texts in any tradition, is in fact still read with any care even by those within that tradition, apart from a small class of self-professed historians, or antiquarians. In that case, making Feuerbach available for the first time to a new, external, audience may encourage those who claim his work as foundational to reassess the taken-for-granted cornerstones of their systemic worldview. The now possible comparative discourse may thus invigorate scholarly debate not only across, but also within, the systems in conversation.

Without anticipating the discussion of Feuerbach’s text in the next section, the excerpt from Feuerbach’s textbook provides rich opportunities for comparative analysis, from the very conception of criminal law as a scientific discipline straddling the distinction between doctrine and theory and its accompanying scholarly apparatus of intricate conceptual structures (laid out in minutely detailed tables of contents) and ubiquitous footnotes covering domestic and foreign, historical, doctrinal, and theoretical sources (but not cases!) to the development of a concept of crime and punishment on the basis of a political theory of the state and law and, more specifically, to the still often-cited (if not -quoted) description of what has come to be known in the Anglo-American literature as the “principle of legality” (*nullum crimen sine lege*) and its various formulations.³

³ Not to be confused with the *Legalitätsprinzip* in German criminal law, which requires executive officials—police officers and prosecutors—to investigate and charge any provable violation of a criminal norm, subject, in the case of prosecutors but not police officers, to a countervailing principle, the opportunity principle (or *Opportunitätsprinzip*), that makes an exception for minor cases. For further

The translation of the Birnbaum article from 1834 (written as a critique of the then-orthodox Feuerbachian view) makes available to an Anglophone audience a text that, on its face, is as insignificant as its author, a fairly minor figure in nineteenth century German law.⁴ And yet this short paper is frequently cited as the source of one of the central concepts of German criminal law, the *Rechtsgut*, an idea that also has attracted comparative attention by Anglo-American scholars eager to explore alternatives to the ubiquitous yet elusive “harm principle” as a limitation on the scope of criminal law. Closer scrutiny—or, in fact, even a fairly cursory reading—of Birnbaum’s article, however, reveals that it says nothing about a *Rechtsgut*, but instead takes Feuerbach to task for setting out an account of criminal law based on the idea of violation of a personal right (*Recht*), which Birnbaum insists should be replaced by the idea of interference with a common good (*Gut*). Birnbaum’s article achieved foundational status only some decades later, particularly through Karl Binding, who placed the *Rechtsgut* at the heart of his—thoroughly positivistic—account of criminal law.⁵ In Birnbaum’s text, then, comparative analysis will not find a well-worked out alternative, deduced from fundamental principles of one form of another, to John Stuart Mill’s harm principle set out twenty-five years later across the Channel, and to much greater immediate acclaim, in *On Liberty* (1859) (ch. 8). Instead, the Anglophone reader (and perhaps also the occasional Germanophone reader not intimately familiar with the Birnbaum article) will find a somewhat meandering, pragmatic and positivistic attempt to come to grips with what the author felt was a troubling mismatch between Feuerbach’s dominant account of criminal law and its (far more sprawling and varied) reality.

The Radbruch text, too, opens up opportunities for comparative analysis, although one of a more historical, than theoretical or doctrinal kind (ch. 11). Radbruch’s account of the origins of criminal law has received very little attention in Anglo-American scholarship (with the notable exception of Thorsten Sellin, whose provocative claims about the connection between slavery and punishment, and imprisonment in particular, themselves did not gain much traction⁶). In fact, it has largely been ignored in Germany, and the civil law literature, as well, perhaps because Radbruch’s foray into early legal history did not fit easily into his broad and varied output in criminal law doctrine, theory, and reform, and of course of in legal philosophy, where the “Radbruch formula” played a central role in the post-WWII revival of natural law.⁷ From a comparative perspective, Radbruch’s essay is interesting for the same reason that drew Maitland to Heinrich Brunner’s and

discussion, see MD Dubber and T Hörnle, *Criminal Law: A Comparative Approach* (forthcoming 2014) ch 5.C.

⁴ And literature. Johann Michael Franz Birnbaum (1792-1877) taught at various Dutch and German universities. He studied law under Feuerbach in Landshut, where he also became friendly with Karl Joseph Anton Mittermaier, the (often critical) editor of later editions of Feuerbach’s textbook who went on to become a well-known scholar of criminal law, and notably comparative criminal law, in his own right.

⁵ See generally MD Dubber, ‘Theories of Crime and Punishment in German Criminal Law’ (2006) 53 *American Journal of Comparative Law* 679.

⁶ JT Sellin, *Slavery and the Penal System* (1976); see Mireille Hildebrandt’s essay in this book.

⁷ On Radbruch, see Mireille Hildebrandt’s essay in this book. His “formula” first appeared in a short 1946 paper, ‘Gesetzliches Unrecht und übergesetzliches Recht’ (1946) 1 *Süddeutsche Juristenzeitung* 105, 107 (English translation: ‘Statutory Lawlessness and Supra-Statutory Law’ (2006) 26 *OJLS* 1 (B Litschewski Paulson & SL Paulson trans.)).

Otto Gierke's legal historical work some decades before, in the late nineteenth century: it encourages an exercise in comparative legal history not only for its own sake but also—more ambitiously, and controversially—as historical analysis of law, i.e., with an eye toward a critical analysis of features of contemporary penalty.

The fourth, and final, text made available for the first time in English translation sets out Günther Jakobs's distinction between citizen and enemy criminal law, and once again packs a more immediately obvious comparative punch for contemporary critical analysis in criminal law doctrine and theory (ch. 18). The obvious question, from an internal comparative perspective, is whether the distinction between two contradictory yet mutually dependent paradigms of criminal law—whether or not it turns in the form of the distinction between citizen and enemy in particular—can inform the critical analysis of Anglo-American criminal law, descriptively, as a matter of analysis, or (also) normatively, as a matter of critique. More specifically, comparative analysis here might inquire into the connection between the citizen-enemy distinction and other, more familiar, ones, such as that between the “due process” and “crime control” models of criminal law (Herbert Packer), that between the punishment and treatment of (certain) offenders, or one between a “traditional” or “liberal” conception of criminal law, on one hand, and the “war” on crime (or drugs, or terror), on the other, or—in yet a different register—that between the experience of white and minority persons in the criminal justice system.

The potential for comparative analysis obviously is not limited to the mentioned texts that are being made available for the first time in English. The above discussion merely served to illustrate how these texts in particular can contribute to a transnational criminal law dialogue within the confines of Western political and legal systems. By assembling foundational texts from several “common law” and “civil law” countries, including those previously available in English, the present book invites comparative analysis as a mode of critical analysis of contemporary Western criminal law. Over time, this internal form of comparative analysis then may expand in scope to generate a transsystemic, and in that sense also a more global, discourse beyond the confines of the Western/liberal cluster.

b. Historical.

The important comparative dimension of this project, however, should not obscure its central historical aspect. If the ultimate object is scrutiny of the exercise of the state's penal power, both comparative and historical analysis appear as modes of critical analysis. As such they place a particular manifestation of that power, in a particular place and time, within an intra- or inter-temporal (i.e., a comparative and historical) context that creates the necessary space between subject and object of inquiry to make analysis and critique possible. Critical analysis, here, is taken simply to mean an attempt to capture the operation of an exercise of state power with an eye toward its critique, without prejudicing one mode of critique over another (say, Pashukanis's Marxist “ideological” critique or a “liberal” critique in terms of some notion of “justice”).

The present project is historical in several senses. Most immediately, the texts in the collection trace, if only in broad strokes, histories of criminal legal thought in Anglo-American and German criminal law (and therefore, by imperfect but familiar extension, in common and civil criminal law). They also, more opaquely, reflect histories of criminal law doctrine and, more clearly, of criminal law as a discipline that attempts to define itself, often in relation to other emerging scholarly enterprises, such as psychology, penology, and, in particular, criminology, whose continued struggle of self-discovery (and self-doubt) is documented in the chapters on Foucault and Christie (chapters 16 & 17).

More interesting, and controversial, is the attempt to see the texts in this book (primary and secondary alike) not only as mapping out parallel, or at least distinct, histories, but a common non-parochial history of, again, Western (or perhaps “liberal”) criminal legal thought, if nothing more. This attempt to construct a broader narrative, however, would require a careful exercise in comparative history, which in turn would presuppose the development of the domestic narratives subjected to comparative analysis.

In the end, the construction of a non-parochial (or more broadly parochial) historical account likely will involve the continuing contraction and expansion of analytic focus, oscillating between the domestic and the supra-domestic realm, with insights flowing in both directions. Comparative analysis, after all, aids not only the development of a overarching supra-domestic account (which may or may not emerge, in the end!) but also informs the construction of a domestic account, through the critical space created by any turn to comparative analysis.

Initially, the present book may be useful in suggesting alternative histories, and raise questions about the boundaries, and the foundations, of the historical arc that is often taken for granted, to the extent historical curiosity arises in the first place. Take, for instance, the often drawn line connecting Beccaria (ch. 2), Bentham (ch. 4), Stephen (ch. 9), and Wechsler (ch. 12) (with any number of other links in between and beyond, including Livingston, Macaulay, Holmes, and even Posner and Becker (ch. 15)), which— notwithstanding the fact that Beccaria was Italian—tends to be associated with the common law tradition in criminal law and is often seen in contrast to another line, from Kant to Feuerbach to Hegel to Binding to Radbruch to contemporary German criminal law, which is ordinarily associated with the civil law tradition. A comparative historical analysis here may reveal—and perhaps to challenge—the tendency to match a given conceptual approach with a specific legal tradition. It might even go further and raise the question whether both traditions can be seen as struggling with some—and perhaps even the same—fundamental tension between two conceptions of state penal power, or at least with a similar contrast between basic approaches to questions of crime and punishment (see section 2.c. below).

Inquiries into the “foundations” of a given legal subject, or the “theory” or “philosophy” of that subject, occasionally start from the conclusion of this comparative historical enterprise. To the “theorist,” the questions worth asking may appear to be the same, as may the range of conceivable answers. Why punish? What is crime? What is

punishment? Intent? Justification? Insanity? And so on. From this ahistorical perspective, Beccaria and Kant, and Wechsler and Radbruch, are all trying to answer the same question, in various (if often similar, and even recurrent) ways. A text by Feuerbach and one by Becker, in this view, are sources of arguments that exist outside the realm of space and time. Certainly the “foundational” texts in the present collection can be—and have been—read in this way. In that case, one might wonder why anyone would bother studying texts written years, decades, even centuries ago. Aren’t they just early attempts that might have been remarkable at the time but have long since been supplanted by more nuanced, comprehensive, advanced, modern, even “correct” analyses? If law, and criminal law in particular, is a *science*—a theme that runs through this book—what’s the point of turning back the clock of scientific progress, other than as an exercise in the history of science?

There is another approach to the inquiry into legal “foundations,” and into foundations of criminal law as a practice (and a discipline), one that takes seriously the historical, or perhaps more helpfully the genealogical, nature of the enterprise. The search for foundations, from this perspective, is not merely a matter of uncovering foundational principles—either inductively from observed (doctrinal, or institutional) data, generally in the form of legal norms (and, less often, practices) or deductively from yet more foundational, or abstract, principles. It is instead an attempt to trace the development of norms and practices within a given system through the reading of texts that shaped, or even originated, this development in significant ways, and that are in this sense formative, or perhaps even foundational. This inquiry is not merely historical, but genealogical, in its attempt not to discover historical facts to reconstruct a past reality, or to record changes in that reality over time, but to capture development within a paradigm defined, and reflected, in part by certain texts. The comparative dimension of this genealogical project can be either internal, within a given paradigm, or external, across paradigms. In both cases, the recognition and conceptualization of that paradigm is a prerequisite for meaningful study.

Applied to the project of reflecting on the development of the *discipline* of criminal law mentioned at the outset, this approach suggests that the search for foundational texts of a discipline implies a historical consciousness, one that sees scholarship as a shared endeavor not only across space, but also across time. A discipline may reinvent itself, question its origins, limits, even its *raison d’être*, but it cannot regard itself as a sequence of moments of utter originality. Ideally, a discipline combines a recognition of its foundations with an urge to challenge and to critique, to combine tradition with innovation. The present book is offered in this spirit.

2. “Foundational Texts in Modern Criminal Law”

Having laid out the ambition and the approach driving the underlying project, it is high time we focus more closely on the essays collected in this volume. Rather than giving a chapter-by-chapter account, I will consider conceptions of “foundational texts in modern criminal law” running through the various contributions and, along the way, pull out touch on some of the many themes that one might see emerging from the book as a whole.

a. Foundational Texts

In the essays, and even more so at the two workshops, the question of what makes a text “foundational” attracted considerable attention. While this question was never settled, many contributors saw the need to consider whether “their” particular text met the standard of foundationalness or other. On one end of the spectrum, Guyora Binder argues that Bentham’s work in general, and the *Principles of Morals and Legislation* in particular was self-consciously and deliberately foundational. Bentham, according to Binder, set out to create a new mode, and field, and method of inquiry that was to replace everything that had gone before. Bentham, in other words, was a radical reformer, and saw his texts as laying the foundation for a new and all-encompassing enterprise. Invoking Bentham’s comparison between the “science of legislation” and the “science of architecture,” Binder draws attention to the architectural significance of the very notion of a foundational text.

Architectural imagery, incidentally, makes another appearance, in Simon Stern’s essay on Blackstone (ch. 3), in particular the understudied and –appreciated volume four of his *Commentaries on the Laws of England*. As has been pointed out often before, Blackstone was fond of using architectural images in the *Commentaries*. In contrast to Bentham, however, the parallel to architecture highlights the limits of Blackstone’s ambition, not its radical scope.

Blackstone was attacked as both too ambitious, and not ambitious enough. On one side were critics like Thomas Jefferson, who faulted Blackstone for lacking the humility of a Coke, whom they portrayed as content merely to let the common law speak for itself (despite considerable evidence of the unreliability of his reports of just what the “common law” spoke). In contrast to Coke, so the unflattering comparison went, Blackstone took it upon himself to remold the common law in the name of elegance in substance and in style. Bentham, by contrast, assailed Blackstone as a mere apologist for the common law, who showed no interest in subjecting it to critical analysis (preferably in utilitarian terms) and instead found sense in even the most senseless of doctrines.

As Stern points out, even Bentham grudgingly made an exception when it came to volume four of the *Commentaries*, in which he noticed an unusual number of critical remarks, with many of which he found himself agreeing, to his surprise. But as it turns out, Blackstone’s *Commentaries* were non-original—and in that sense non-foundational—even at their most original, in the volume on “public wrongs.” Blackstone’s discussion of criminal law is derivative not only in its uncritical reliance on other common law summarizers of the criminal law before him (e.g., Hawkins, Hale, but also Coke) but even in its flashes of originality. Whenever Blackstone ventured into the realm of critique, or even reform, something that he appears to have thought more appropriate in the case of the (statutory and supposedly haphazard and amateurish) criminal law than in the case of the common law’s other (private) realms, he did not go beyond relying uncritically on...Beccaria. (Ironically, Blackstone shared this deference to Beccaria as the supplier of critical perspective with both Jefferson and Bentham, two

of his fiercest critics, from opposite directions.⁸) Even in the criminal law, where even Bentham begrudgingly granted him a critical spirit that he found sorely lacking elsewhere in the *Commentaries*, Blackstone was not an architect, but an interior decorator.

On the other end of the spectrum, several contributors went out of their way to contest the foundational status of “their” primary text. The chapter on Wechsler not only points out the non-foundationalness of Wechsler’s Model Penal Code, but then goes on to argue that this very feature made it foundational after all. Obviously, two different notions of foundationalness are at play here. There is, on one hand, the notion of a foundational text as devoted to the exploration of fundamental issues, if not—unlike in Bentham’s case—necessarily providing the foundations itself. Wechsler’s text is not foundational in this sense; it is not concerned with foundational matters of principle, and the question of legitimacy in particular, or, at best, takes these matters to have been settled for too long, and too definitively, to warrant reconsideration. In fact, for the Model Penal Code—as a Legal Process document—this assumed consensus about, and consequent lack of interest in, basic questions of the legitimacy of the state’s exercise of its penal power is central. And yet, the Model Penal Code is foundational in another sense: it was in fact tremendously influential. It is the most foundational non-foundational text in American criminal law.

In Malcolm Thorburn’s telling, H.L.A. Hart’s *Punishment and Responsibility* also was influential, and formative, yet oddly non-foundational at the same time (ch. 14). Of course, Hart, the philosopher-jurist, would have sought out the very foundational questions of criminal jurisprudence that Wechsler, the Legal Process codifier, made a point of ignoring as uninteresting. And yet Thorburn’s exercise in legal theoretical archaeology comes up empty; persistent attempts to push past the veneer of foundational theorizing reveal nothing: nothing foundational in the sense of “original,” since Rawls in particular had already covered much of the same ground, and nothing foundational in the structural, or architectural, sense, regardless of provenance, since Hart performs a “sleight of hand” precisely at the foundational moment, ironically by “cleverly disguis[ing]” his only innovation (the notion of limiting, or “negative” retributivism) as an incidental gloss on the familiar theory of retributivism.

The chapter on Foucault (by Pat O’Malley & Mariana Valverde) makes the case that *Discipline and Punish* not only was not meant to be foundational but, more disturbing, was *misinterpreted* as foundational. In making their case against foundationalness (in design, if not in fact), O’Malley and Valverde lay out a detailed *Wirkungsgeschichte* of the text, exemplifying another genre represented in the contributions to this book. The Foucault chapter, in fact, sketches the recent history of criminology as a discipline as a series of misreadings of a supposedly foundational text. In the end one may well be left

⁸ Jefferson’s schizophrenic Virginia criminal law reform bill consisted of a gloss on Coke and Anglo-Saxon dooms and a preface with frequent references to Beccaria. MD Dubber, “‘An Extraordinarily Beautiful Document’: Jefferson’s Bill for Proportioning Crimes and Punishments and the Challenge of Republican Punishment” in MD Dubber and L Farmer (eds), *Modern Histories of Crime and Punishment* (2007) 115. Beccaria’s influence on Bentham is well known. See, e.g., HLA Hart, ‘Bentham and Beccaria’ in *Essays on Bentham: Studies in Jurisprudence and Political Theory* (1982) 40; see also Guyora Binder’s essay on Bentham in this volume.

with the impression that *Discipline and Punish* turned out to be foundational after all, and in spite of itself (or its author's supposed intentions), in a discipline on the lookout for foundations after the collapse of the project of Marxist theorizing. The chapter thus raises the more general question of the foundational status of a text that is read, and perhaps misread, as foundational, not only in a one discipline but also in others, for instance criminal law. Does the tortured (and perhaps even damaging) *Wirkungsgeschichte* of this text in one discipline, even one that claims it as one of its own (criminology), affect the text's foundational significance in another (criminal law)?

A *Wirkungsgeschichte* of a radically different kind appears in Bernard Harcourt's essays on Beccaria's *Crimes and Punishments* and Mill's *On Liberty* (chapters 2 & 8). Harcourt does not focus on the question of whether a given text was intended to be "foundational," and whether later readings were true to its intended meaning, and yet in both cases, his account traces shifting interpretations and, more to point, uses or deployments of the texts in question. In the case of Beccaria, Harcourt—leaving aside the question of correctness—challenges the common practice among contemporary writers on criminal law from an economic perspective of claiming Beccaria as their foundational figure. As Alon Harel points out in greater detail in his essay in this collection, Gary Becker (ch. 15) was explicit about conceiving of—or at least portraying—his work as a mere updating of Beccaria's foundational text. Yet, as Harcourt argues, partly by expanding his analysis beyond *Crimes and Punishments* to Beccaria's other work (notably his short essay *On Smuggling*, which is well-known among economic historians but little-known among scholars of criminal law⁹), and by placing Beccaria within the intellectual context of late eighteenth century continental Europe, Beccaria was no proponent of a minimal state that left the free market to its own devices.

Instead, Beccaria should be seen as contributing to a by then long-standing intellectual, political and institutional project, *police science*, aimed at supplying (absolute) sovereigns with well-considered, rational, and eventually scientific advice on prudent or good governance ("gute Polizey"). Beccaria, in other words, was a practitioner of "political economy," in the traditional sense epitomized by Rousseau's *Discourse on Political Economy* (his entry on the topic in Diderot's *Encyclopédie*), published only nine years before *Crimes and Punishments*, in 1755:

THE word Economy, or OEconomy, is derived from oikos, a house, and nomos, law, and meant originally only the wise and legitimate government of the house for the common good of the whole family. The meaning of the term was then extended to the government of that great family, the State. To distinguish these two senses of the word, the latter is called general or political economy, and the former domestic or particular economy.

It should be noted that Adam Smith, another political economist claimed as a founding father by modern laissez-faire economists, also at least initially treated "police" in the traditional, oeconomic, sense in his roughly contemporaneous Glasgow lectures on

⁹ This essay is available on the Foundational Texts companion website (<http://www.law-lib.utoronto.ca/bclc/crimweb/web1/foundational.html>).

jurisprudence, preserved in student notes under the title “Juris Prudence or Notes from the Lectures on Justice, Police, Revenue, and Arms” (1763).¹⁰

In Harcourt’s telling, the story of Mill’s *On Liberty*, or rather of a short passage—if not a single sentence (“the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others”)—introducing the so-called “harm principle” at the beginning of that book (in ch. 1, entitled “Introductory”), is no less eventful and reflective of the evolution of criminal law since its publication, almost a century later, in 1859, than Beccaria’s short tract. Expanding on his celebrated article on the “collapse” of the harm principle, Harcourt demonstrates that by merely placing Mill’s initial statement of the “principle” within the context of the (not particularly long) book in which it appears—or, in other words, simply by *reading on*—it very quickly loses its libertarian sheen and instead emerges as a rather flexible standard, or consideration, concerning a state’s decision to exercise its power to govern, penal and otherwise. As a limit on state power—rather than as a guide to its exercise—the principle, it turns out, does not stand in the way of any number of robust regulatory interventions, including, for instance, the penal prohibition of marriage among the poor, idleness, drunkenness, and offenses against “good manners” and “decency.” Here Mill’s text recalls the long (yet oft-ignored) list of offenses against the “public police or oeconomy” in volume four of Blackstone’s *Commentaries*, published only five years after Beccaria’s *Crimes and Punishments*, in 1769. These “violation[s] of the public oeconomy and decency of a well ordered state,” drew on a definition of “public police and oeconomy” as

the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.

A closer reading, therefore, challenges *On Liberty*’s status as a foundational text in a particular and often self-consciously “liberal” conception of the state’s penal power that revolves around significant and hard limits on that power. What initially appears, and is frequently presented, as a manifesto on the limits on state penal power instead emerges as a more nuanced, and literally balanced, reflection on the exercise of that power in general and in a number of specific “applications.”

The connection to Beccaria here is clear enough. According to Harcourt, both Beccaria and Mill proceed from the premise of a sovereign state equipped with powers to implement policy. The fundamental challenge is not—certainly not only—to limit concededly comprehensive state power, but to properly guide its exercise. Neither Mill’s nor Beccaria’s text, in Harcourt’s reading of both the texts and of their subsequent readings—is obviously foundational to a conception of limited government, and of criminal law within it.

¹⁰ A Smith, ‘Juris Prudence or Notes from the Lectures on Justice, Police, Revenue, and Arms delivered in the University of Glasgow by Adam Smith Professor of Moral Philosophy’, in RL Meed et al, *Lectures on Jurisprudence* (1978) 396, 398.

Comparative analysis reveals, however, that the similarities between Mill's and another text often cited as—or at least taken to be—foundational are even closer: the previously mentioned 1834 article by J.M.F. Birnbaum, entitled “Concerning the Need for a Right Violation in the Concept of a Crime, having particular Regard to the Concept of an Affront to Honour,” which is regularly cited as the supposed source of the analogue to the “harm principle” in German criminal law, the so-called *Rechtsgut* principle. The parallels between the careers of the harm principle in the common law world and of the *Rechtsgut* principle in the civil law world (originally and mainly in German criminal law, but also beyond, given German criminal law's long-standing influence in other civil law countries) are remarkable.¹¹ In fact, the German literature has produced accounts of the intellectual history of the *Rechtsgut* principle that mirror Harcourt's narrative of the harm principle's twists and turns. The *Rechtsgut* principle has been cited for decades as a cornerstone of German criminal law. Along with the so-called *ultima ratio* principle (according to which penal power may only be invoked as a “last resort”), the *Rechtsgut* principle is said, again and again, to be central to a modern, liberal, enlightened system of criminal law: the state may only invoke its penal power to protect a *Rechtsgut*, or “law good.” This is often treated as something akin to self-evident, as an analytical truth; to say that a *Rechtsstaat* (“law state”) may invoke its penal power only to safeguard a *Rechtsgut* (“law good”) under the rule of law (a *Rechtsstaat*) goes, literally, without saying. A law good just is precisely that good which a law state may seek to protect.

Without going into obvious problems of a *petitio principii* here, or related difficulties in distinguishing between descriptive and normative claims about what the (German) state in fact does or what it *may* do (not to mention whether or how violations of this prescription would be monitored and enforced), for our purposes it is enough to note that the cited Birnbaum article performs a function similar to Mill's *On Liberty*: it is routinely cited as the source of the limiting principle in question. As in the case of the Mill text, however, even a modestly attentive scrutiny, or mere perusal, of the Birnbaum essay raises serious doubts that it can bear the weight that has been placed on it. In fact, the Birnbaum text does not even attempt to set out an account of limits of state action through criminal law; on the contrary, it attacks such an attempt, by PJA Feuerbach, and *precisely for that reason*. Birnbaum, in this paper, criticizes Feuerbach for setting out a normative account of the nature and limits of the state's penal power instead of limiting himself to a positive account of the scope of the exercise of that power in fact. What's more, Birnbaum criticizes Feuerbach specifically for elevating to the level of actual legal principle a mere philosophical speculation about the proper limits of state power *based on the concept of a right violation*. Pointing out that Feuerbach's account of crime as a violation of personal *right* leaves no room for the very same offenses against the public police and economy we've encountered in Blackstone, Birnbaum calls for replacing *right* as the operative concept with *good*. In other words, Birnbaum does away with exactly that feature of the *Rechtsgut*—*Recht*—that makes the *Rechtsgut* principle self-evident in a *Rechtsstaat*. The object of state protection, the *good*, simply becomes any interest the state finds worthy of protection.

¹¹ For a more detailed discussion, see Dubber (n 5 above) pt 1.

It is this positivist impulse motivating Birnbaum's substitute of *right* with *good*, *Recht* with *Gut*, that recommended his essay to Karl Binding, a central figure in German criminal law at the turn of the twentieth century,¹² whose influential "norm theory" revolved around the generation of *Rechtsgüter* and the establishment of "protective norms" (*Schutznormen*) around them. Binding, like Birnbaum before him, insisted that morality (*Sittlichkeit*) was indeed a *Rechtsgut* (as indicated by its recognition as a protected interest in the Prussian Criminal Code at the time) even though it did not violate a personal right. In fact, the only limits on the state's recognition of *Rechtsgüter* were its "discretion and logic."¹³ *Rechtsgüter* were "interests of the law," which encompassed "anything that the legislature considers valuable and the undisturbed retention of which it therefore must ensure through norms." Binding, after all, held that "the right to punishment is nothing but the right to obedience of the law, which has been transformed by the offender's disobedience" and saw the purpose of punishment as "the inmate's subjugation under the power of law for the sake of maintaining the authority of the laws violated."

The *Rechtsgut* principle survived the Nazi period largely unscathed; after initial concerns that the principle was in some sense "liberal" and therefore incompatible with the conception of a National Socialist state, it found its place in Nazi criminal law. The principle could be retained simply by defining *Rechtsgut* to include such things as interests as "maintaining the purity of German blood."

After the collapse of the Nazi regime, however, the *Rechtsgut* principle increasingly came to be saddled with normative significance. The mere fact that German criminal law did not at any given time—after World War II—exceed the limits drawn by the principle was treated as confirmation of a wide and deep manifestation of the idea of the *law state*, rather than as evidence of the principle's lack of normative bite. The basis for the claim that the principle was, in fact, a principle, rather than a descriptive term or one that could prove useful in the application of existing norms (for instance, in the balance of evils defense or in exercises in statutory interpretation), remained unclear, however.

The tension between a descriptive and a normative view of the concept of *Rechtsgut* came to a head in the 2008 Incest Judgment of the German Constitutional Court. The Court there upheld the incest prohibition in the German Criminal Code in a case involving two adult siblings. In the face of a spirited dissent by Judge Winfried Hassemer, a former criminal law professor, the Court fatly rejected the constitutional significance of the *Rechtsgut* principle as a substantive constraint on the state's penal power.¹⁴

Returning to the other side of our comparative analysis, the harm principle, the Canadian Supreme Court, five years earlier, had rejected a constitutional attack on the criminal

¹² Binding will also make an appearance, as occasional historian of criminal law, in Mireille Hildebrandt's essay on Radbruch (ch. 11).

¹³ K Binding, *Die Normen und ihre Übertretung vol 1* (2nd ed 1890) 340.

¹⁴ BVerfG, 2 BvR 392/07 (2008).

prohibition of marijuana possession as a violation of the “harm principle.”¹⁵ According to the Court, the harm principle did not amount to a constitutional limitation on the state’s penal power as a “principle of fundamental justice.” Both the Canadian and the German courts, however, were happy to acknowledge that their respective “principles” may well function as prudential guidelines that might inform the legislative decision whether or not to invoke the state’s penal power in a particular instance. But the harm principle was only one consideration among many and its “violation” did not have constitutional significance by itself.

b. Foundational Texts

The texts that serve as springboards for the essays in this volume reflect a range of genres of legal writing, and therefore also varying conceptions of its producers and consumers, and, in the end, of the discipline of law. Initially, it is worth noticing that, among the first five authors and texts, only Blackstone could be considered a legal scholar and his *Commentaries* a work of legal scholarship.¹⁶ Under a suitably broad definition of a treatise (namely one that includes not only works devoted to a single legal subject), the *Commentaries* would count as a treatise, if a very broad, and ambitious, one: Blackstone set out not merely to record, but to present the entirety of English law in a systematic way (rather than, say, in alphabetical order, or in an order that follows a sequence of procedural steps).¹⁷ Blackstone’s immediate audience in the *Commentaries* was very specific, and limited: students who attended his Oxford lectures. Of course, it ended up reaching a far wider audience, particularly in the New World; in the early American Republic, it has been said, the significance of his *Commentaries* was only second to the Bible.

Hobbes and Beccaria before him, and Bentham and Kant after him, would not be considered—nor would they have considered themselves—legal scholars; they were interested in general questions of governance and state power, which led them to reflect

¹⁵ R v Malmö-Levine; R v Caine [2003] 3 SCR 571.

¹⁶ In the history of the study of law at English universities, Blackstone remained the exception for at least another century, if not for two; while Oxford and Cambridge returned their attention to the subject in the second half of the nineteenth century, law was still a backwater of university study when HLA Hart was appointed Professor of Jurisprudence at Oxford almost a century later. In the U.S., the first university professorship in law was the chair in “law and police” established by Thomas Jefferson at the College of William & Mary in 1779. T Jefferson, A Bill for Amending the Constitution of the College of William and Mary, and Substituting More Certain Revenues for Its Support (1779). Law was among the traditional founding faculties of German universities (generally alongside philosophy, theology, and medicine), as, for instance, at Humboldt-University Berlin where Hegel began lecturing (at the philosophical faculty) on “natural law and state science” in 1818.

¹⁷ On the legal treatise as a genre, see generally, A Fernandez and MD Dubber (eds), *Law Books in Action: Essays on the Anglo-American Legal Treatise* (2012). On limiting the definition of the treatise to single-subject works, see AWB Simpson, ‘The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature’ (1981) 48 *University of Chicago Law Review* 632. Denying the *Commentaries* treatise status seems odd, given that its systematizing impetus is generally thought to be a, if not the central, distinguishing characteristic of a treatise. Their scope, then, would make the *Commentaries* too much of a treatise to qualify for treatisehood; in that event, one would of course be free to think of, say, its (fourth) volume on public wrongs as a separate treatise on criminal law instead, making the *Commentaries* a series of treatises, rather than a single one.

on the state's penal power, as the most acute manifestation of that power. Their texts were not intended narrowly as legal texts; their audience was the educated public and, more ambitiously, the state officials (and, later on, the emerging scholarly community). Kant did get around to addressing questions of law explicitly; Meir Dan-Cohen, however, largely ignores these late efforts (commonly referred to as the *Rechtslehre*) and instead constructs a Kantian account of criminal law based on his other, moral (not political), writings, a practice not uncommon among Kantian scholars of law in general and of criminal law in particular (ch. 5).

Feuerbach's *Lehrbuch* is the first text in our collection devoted exclusively, and expressly, to *criminal law* (or rather *peinliches Recht*, penal law, a then common term reflecting its not only etymological association with the infliction of pain (*Pein*)); it also nicely illustrates the genre of the German law textbook, and makes explicit that persistent genre's original motivating assumptions and aims.¹⁸ Unlike Blackstone's treatment of "public wrongs," which appears in the fourth, and last, volume of his comprehensive *Commentaries*, Feuerbach deals with criminal law exclusively, and in fact more narrowly still, with *substantive* criminal law. His textbook aims to set out a principled and systematic account of criminal law. As Feuerbach explains in the preface to the first edition of 1801, "[h]e wanted to present the penal law – purified in all its parts from positive as well as philosophical errors – in the strictest scientific context, in its highest logicity in accordance with all requirements of systematic unity."

Feuerbach then goes on to formulate, in a remarkable passage, "the maxims from which the author has worked and as to which he had to give an account to his readers":

When he had made his decision to examine penal law, he was very assiduous to call in question for the time being everything that existed before him, and also to forget what he thought he already knew. He spent a lot of time solely with the sources; he read and studied, particularly Roman law and German criminal statutes, and philosophised about the principles of science and their treatment; because here neither historical findings alone nor philosophising alone suffices. He thus laboriously created for himself the construct of his own science.... He went back to the scientific experts after he had collected enough to be able to learn from them without having to share their confusions with them. They were the touchstone for his own system, they smoothed off the sharp corners of his construct [Gebäude] and they filled many gaps that had remained hidden from him when left to himself. He thankfully acknowledges what they were to him; may he also be the same to them!

Here then we have a description of legal scientific method by "Professor Feuerbach" (as he is listed on the title page), oscillating between doctrinal study and theoretical reflection, and pursued within a community of scholars engaged in a common enterprise. In this textbook, Feuerbach addresses not only his students, but also his fellow criminal law scientists (to two of whom the first edition is dedicated). He is engaged in a conscious

¹⁸ Compare Feuerbach's pioneering textbook with Savigny's similarly foundational treatise on the law of possession, and its similarly extensive methodological exposition, published two years later. FC Savigny, *Der Begriff des Besitzes: Eine civilistische Abhandlung* (1803).

effort to “construct” a system; the preface is followed by ten pages of a “short overview of the system.” The first sections of the book contain methodological “Prolegomena to the concept, sources, ancillary disciplines and literature of penal law.” The scholarly apparatus includes many, and often lengthy, footnotes, with references to materials in German, Latin, Italian, and French (in later editions also in English, including one to “Blackstone’s well known Commentaries Book 4”), as well as a (still common) list of basic texts at the start of individual sections.

The other textbook—if we leave aside Blackstone’s *Commentaries*—among the primary texts in this project is Glanville Williams’s *Criminal Law: The General Part*, published a century and half later, in 1953. As Lindsay Farmer points out (in ch. 13), the book tends to be credited with the introduction of the concept of a “general part” into English criminal law (at the same time as Herbert Wechsler began work on the American Model Penal Code and its general part in the U.S.), but lacks the systematic and theoretical ambition that animated Feuerbach’s textbook. While Feuerbach pleads that “the evidence for his scientific endeavours should not be sought in the philosophical part alone,” where “the philosophical part” refers to what we would now call the general part, Williams insists that his interest is in the law alone, anxious to limit “the unwelcome attentions of certain criminologists and philosophers.” Feuerbach, by contrast, includes a long list of auxiliary disciplines, including

A) sciences in the true sense and amongst these ... principally: I) philosophy, namely 1) psychology; 2) practical philosophy in general, pre-eminently the philosophy of law (natural law) and... 3) criminal policy. II) Historical sciences, in particular 1) history of the states in which the statutes currently in force have arisen 2) history of the criminal statutes applicable in Germany and of the criminal law as a science itself. III) The science of criminal law and legislation of other states and peoples. IV) The forensic science of medicine.

Birnbaum’s 1834 critique of Feuerbach is the first of several *articles* among the foundational texts in the book. Here, too, even in this otherwise rather unexceptional paper, the scholarly apparatus already is quite extensive, including German and Roman law sources, along with primary and secondary literature from England, France, Italy, Portugal, and Switzerland, much of which is not only cited but also discussed in the text. Birnbaum’s paper appears as a text fully integrated into a well-entrenched and highly developed scholarly discourse on criminal law: published in a scholarly journal specifically devoted to criminal law (and edited by a group of four criminal law scholars, including Birnbaum himself), it targets another scholar’s work (Feuerbach’s), discusses and cites scholarly literature (along with primary sources), and appears primarily to address other scholars (rather than students or state officials¹⁹).

¹⁹ It is not surprising, but still worth noting, that judges initially were not among the primary audience of German scholarly literature on law, including on criminal law (though this changed over time with the development of the genre of critical “decision comments” (*Entscheidungsanmerkungen*)). By contrast, English legal literature was not only addressed to judges, but was often produced by them as well (e.g., Stephen, in this collection; Blackstone eventually managed to receive a judicial appointment, partly on the strength of his publication of the *Commentaries*).

Stephen published in a great many genres: in addition to his prodigious output as a leading Victorian essayist, there are of course his judicial opinions and other official documents, including his draft codes and his *General View of the Criminal Law of England* (1863) and *Digest of Criminal Law* (1878) (conceived as preparatory for his codification effort).²⁰ Marc DeGirolami (ch. 9) focuses primarily on Stephen's "magisterial and (at the time) unique three-volume *History of the Criminal Law of England*." While the *History* may well be Stephen's "major scholarly work," it is worth recalling that it was not produced by a professional academic with a university appointment (not unusual given the state—and status—of legal education in English universities at the time²¹), but rather was the work of a gentleman scholar shot through with extensive, and often entertaining, discussions of Stephen's views on any number of criminal law topics.

The other primarily historiographical text in the collection, by Gustav Radbruch, is also not the work of a professional legal historian (ch. 11). Radbruch, unlike Stephen, held a university appointment, although in the 1920s he also served as a Social Democratic member of German Parliament and even as Justice Minister (when he produced a draft German Criminal Code). By the time he published his provocative article on the "The Origin of Criminal Law in the Status of the Unfree," in a Swiss journal, the Nazis had removed him from his professorship, in 1933.

Noteworthy about the Radbruch text is not its genre, but its methodology (or perhaps not its formal, but its substantive genre), or more precisely its approach to the study of legal history. As Mireille Hildebrandt points out, Radbruch's essay fits into a by then over a century old scholarly project, *historical jurisprudence*, which originated as the study of law from a historical point of view, as opposed to the study of legal history for its own sake, as a variety of applied history. Launched by Savigny with the publication of his treatise on the law of possession in 1803, the *historische Rechtsschule* was a "historical school of law," rather than a school of legal historiography. The point of historical inquiry was to produce a legal theory, or more broadly a critical vantage point for the analysis of contemporary law. In Savigny's mind this meant recovery of original Roman law texts, out of which Roman law scholars—like himself—would construct a system of (private) law. The more general idea, however, was the pursuit of legal history as *historical analysis of law*. In Radbruch's hands, historical inquiry sheds light on features of contemporary criminal law: "To the present day criminal law bears the features of its derivation from serf punishments. Punishment since that time signifies a *capitis deminutio* [degraded status] because it assumes the *capitis deminutio* of the one for whom it was originally intended." Half a century earlier, Stephen's *History*, too, can be seen as a project in the spirit of historical jurisprudence in England, as practiced by Henry Sumner Maine and, to the greatest effect, by Frederic William Maitland (and to a lesser extent, Frederick Pollock) and, later, Paul Vinogradoff.

²⁰ See B Wright, 'Renovate or Rebuild? Treatises, Digests, and Criminal Law Codification' in A Fernandez and MD Dubber (eds), *Law Books in Action: Essays on the Anglo American Legal Treatise* (2011) 181.

²¹ See, e.g., JP Dawson, *The Oracles of the Law* (1968) 95.

Another formal genre of legal text to which both Stephen and Radbruch made significant contributions deserves our attention: the *code*. While Herbert Wechsler's Model Penal Code is the only example of this genre in the present collection of foundational texts, the list of primary text authors who tried their hand at codification also includes Bentham (the codifier—*manqué*—*par excellence*, who never got a chance to work out his ideas for penal codification in detail, despite his best efforts), Feuerbach (who drafted the influential Bavarian Criminal Code of 1813), Williams (who was active in England criminal codification efforts and kept close ties with Wechsler during the drafting of the Model Penal Code in the 1950s), and, interestingly, Pashukanis (who, Peter Ramsay tells us, produced draft penal codes that were not only used for training purposes but even were adopted in some Soviet republics).

Tracing the conceptions of codification, along with structural, stylistic, and substantive features, of the codes envisioned, and drafted, by these writers would be a fascinating exercise—which will have to await another opportunity. For now, a general observation will have to do. As the essay on the Model Penal Code points out in some detail, Wechsler saw himself very much as working within the tradition he saw as including Beccaria, Bentham, and Stephen (among the writers represent in our collection), without however drawing any specific connections between Bentham's and Stephen's codification efforts and his own. He had in mind not codificatory technique but a general approach to codification, and to criminal law in general, that proceeded from the conviction that consequentialism was the only possible rationale for punishment (or, peno-correctional treatment, as he and his contemporaries preferred to call it), while retributivism was at best irrational, and at worst simply barbaric and pointlessly cruel.

It is worth reflecting for a moment on the fact that every primary text author in this collection who turned his attention to codification shared this, consequentialist rather than deontological, view of the purpose of punishment, in one form or another. Although Feuerbach and Radbruch held broadly Kantian views on general matters of moral theory, they both rejected Kant's retributivist position on the subject of punishment (leaving aside interpretations of Kant's writings as endorsing a mixed theory of punishment²²). Feuerbach, in fact, made his name as a proponent of a thoroughly consequentialist theory of general, rather than special, prevention, and drafted the Bavarian criminal code accordingly. Stephen saw himself as a utilitarian in the tradition of Bentham, even though—as DeGirolami points out—his views on Bentham (and utilitarianism) were no less fluid and self-contradictory than on many other subjects. His insistence that punishment mirror public feelings of hatred for offenders did not reflect a retributivist theory of punishment, in his mind, but an unflinching commitment to an objective assessment for purposes of the utilitarian calculus of pain and pleasure actually experienced (in contrast to Mill, who in his mind abandoned clear-eyed, social scientific, utilitarianism when he postulated the harm principle as *deus ex machina*). Wechsler's position already has been mentioned, and Williams in this context does not differ significantly from Wechsler (although, as we saw, he appears to have been less enamored

²² See S Byrd, 'Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution' (1989) 8 *Law and Philosophy* 151. Radbruch's "neo-Kantian" views on legal philosophy are discussed in Hildebrandt's essay in this book (ch 11).

of advances in penological science than his American colleague). Pashukanis is the most noteworthy member of the group. As Ramsay shows, he was committed to a radically consequentialist vision of criminal law, and of criminal codification, which abandoned detailed offense definitions in favor of broad prohibitions of violations of “Soviet policy” for the sake of the “technical regulation of persons.”

In the end, then, the shared consequentialism of all the codifiers represented among the primary text authors in this book raises the question about the conception of codification at play in their codification efforts. More pointedly, it suggests that this conception is compatible with a wide range of positions on the idea of the state, and of law.

Wechsler’s and Pashukanis’s approaches to codification in different ways draw into question the relationship between codification and law, as well as codification’s possible contribution to the legitimation of state power, and state penal power in particular. The potential for codification as anything other than a coordinated and efficient mechanism for the exercise of sovereign power, no matter to what end, remains oddly unrealized (in both senses of the word).²³

c. Modern Criminal Law

Considering the question of what *really* counts as “modern” could take up at least as much time, and space, as pondering *the* meaning of “foundational.”²⁴ While we’ll spend some time on this point, the bulk of what remains of this introduction will be devoted to some reflections on the conceptions of criminal law, and modern criminal law in particular, circulating in this book.

It may be useful to approach the concept of law at play in these pages in the context of contrasts to other concepts. There is first the law that is distinguished from religion and from morality, where religion and morality are often treated as synonyms, or at least as functional equivalents, i.e., as sufficiently similar vis-à-vis their common point of contrast, law. This distinction is often associated with the idea of “modern” law in particular, with Hobbes, for instance, or Beccaria, qualifying as “modern” or as ushering in a “modern” era of law insofar as they rescue law from the dark, literally, medieval realm of religious dogma and irrationality, if not outright barbarity. Morality, in this view of law, may play the role as the modern remnant of religion, as modern law’s counterpoint at a time when religion has lost much of its institutional and discursive force, or threat. Note here DeGirolami’s perceptive discussion of Stephen’s meandering remarks on the distinction between law and morality and/or religion (ch. 9).

The conception of law in contradistinction to religion and morality, then, has an important temporal dimension. Law coexisted with religion for a very long time, but then turned modern at the moment its fundamental incompatibility with religion was discovered (by Hobbes, perhaps). As the power of the church, and of religion, faded

²³ Alternative conceptions of criminal codification are explored in MD Dubber, ‘Penal Panopticon: The Idea of a Modern Model Penal Code’ (2000) 4 Buffalo Criminal Law Review 53.

²⁴ On self-consciously “modern” approaches to criminal law, and criminal codification, see the essays on Wechsler and Williams (chs 12 & 13).

away, morality took religion's place as the contrasting non-legal normative system, with even organized religion redefining its mission in moral terms. The criminal law played an important role in this evolution since it was located, and placed, at the supposed fault line between law and morality.

This is a familiar story about the relationship between law and morality (religion having become so irrelevant as to have completely dropped out of the analysis, even as a convenient counterpoint), and between criminal law and morality in particular. And it is one that is played out in many of the primary texts, and the essays, in this project. The animating irony of this story is, of course, the obvious difficulty of categorically separating "law" from "morality," when the language of criminal law overflows with moral terms, arguments, considerations, and meanings, in doctrine, theory, policy, and everyday conversation. The history of criminal law thought, in this sense, can be seen as the constant struggle to both deny and insist on the connection between criminal law and morality, at the same time. As modern, modern criminal law must keep an anxious distance from morality while its legitimacy depends on its moral foundation.

The notion of legitimacy, however, points toward another distinction, or rather a cluster of distinctions. I mean the distinction, in primary texts and essays in this collection, between law and justice, on the one hand, and peace (and war!), economy (including political economy), politics and policy (and regulation) and, in the particular case of criminal law, medicine (or public health), on the other.²⁵ The basic idea animating this distinction is that modern law radically redefined and sharpened a long-standing distinction between two fundamental modes, or genres, of governance that had remained submerged throughout the Middle Ages. At bottom, this is the distinction between autonomy and heteronomy, self- and other-government, which is at least as old as that between the Athenian householder's governance of his household, the *oikos*, and his governance *qua* citizen of himself and other citizens in the agora.

With the collapse of Roman republicanism, and the emergence of the imperial sovereign as *pater patriae*, began a long period during which heteronomy was the dominant mode of governance in all realms of government, and a collapse of the distinction between the private and public realm. The householder's essentially patriarchal *mode* of governance became the *model* of governance, from the family to the manor to the monastery to the church to the prison to the military and eventually, and most importantly, to the state. The creation of the central sovereign state was achieved not through the replacement of (local) autonomy with (central) heteronomy, but through the extension of one heteronomy throughout the land. More specifically, the creation of the pre-modern state was the expansion of one householder's peace at the expense of another's. At the end of a development (already well under way in the days of Hobbes's peacemaking *Leviathan* and long completed by the time of Blackstone's *Commentaries*), the king's land peace had incorporated the lord's manorial peace or, to put it in terms of law, the king's common law had swallowed the lord's particular law, and the king's jurisdiction had

²⁵ See generally MD Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (2005).

transformed the lord's jurisdiction into a juris-audition, and the lord from a lawgiver into a lawrecipient.

This process of pacification is not separated from that of legalization. The latter is a tool for the accomplishment of the former: the spread of the king's peace is accomplished by, among other things, the spread of the king's common law, the law that is common throughout his realm precisely insofar as it is *his* law. The pacification of the land (through "land peaces") gives an answer to the age-old question: whose peace? And the answer is the same as that to the question: whose law? It is the king's peace and the king's law, with all other peaces and laws, or jurisdictions, being mere delegations of the king's.

The criminal law, now, serves to protect the king's peace. Just as the householder's power had encompassed the protection of the householder's peace, no matter how modest or wide in scope, as defined by the boundaries of his house or *mund*, by any means he deemed necessary, so now the king—as *pater familias* of the nation, in Blackstone's phrase—wields his penal power to protect the king's peace, or the peace of the realm, and, eventually, the public peace.

In this account, the shift to modernity arrives with the rise of the state as an institution separate from the king's household, when the sovereign draws a distinction between the peace of his (personal) household and the public household of the state. At that point, once the dismantling, degradation, and incorporation of the (now) micro households of (now) lower lords and men—who can be the victims only of "petit" treason as opposed to the high, or grand, treason that can apply only to the sovereign—into the king's household is so complete that the notion of the king as a *primus inter pares* has long been forgotten, and the king's power is synonymous with governmental power itself, the king can transcend his royal household and even (bizarrely) assumes the role of "first servant" (as in the case of Frederick II. of Prussia) of the newly apersonal and distinct state.

The rise of the modern state is marked by, among other things, the rise of the science of state administration, i.e., the science of *police* (*Polizeiwissenschaft*). This science is produced by experts, police scientists, who advise the enlightened sovereign on the prudent government of the state. The study of "political economy," at this point, pursues the same goal, while nicely capturing the combination of private and public governance through the expansion of economy (*oikonomia*, or household government) into the public sphere, or *polis* (as pointed out by Rousseau in his *Discourse on Political Economy*).

The modern conception of law now arises in reaction to, and as a critique of, this attempt to rationalize, scienticize, and objectivize the traditional radically arational, discretionary, and subjective mode of household governance transferred onto the government of the state. Driven by the discovery, or "declaration," of the capacity for autonomy as the defining, sufficient, and "universal" characteristic of personhood, "law" places against the radical and all-encompassing heteronomy of "police" a similarly radical and all-encompassing autonomy of law. The law state (*Rechtsstaat*) must displace the police state (*Polizeistaat*); autonomy must not only end, but reverse, the millennia-long

hegemony of heteronomy. Autonomy replaces heteronomy as the universal model of governance, as law replaces police, and justice replaces peace as the measure of political power.

Now the notion of legitimacy is crucial to this originary moment of tension between modern police and modern law (or modern heteronomy and modern autonomy as genres of governance). Law and justice are no longer compatible, if not synonymous, with police and peace, as benefits dispensed by the householder-sovereign, much as the lord once did to “his man” in exchange for the latter’s obeisance. They instead frame a new critical analysis of state power that demands justification of every exercise of that power as a potential violation of the autonomy of the person-citizen. The legitimacy of the state turns on its compliance with “the rule of law” (which is explicitly distinguished from “the rule of men,” and the rule of the sovereign in particular) and with “principles of justice.” At bottom, however, consistency with, and respect for, the capacity for self-government of every subject-object of state power is the touchstone of the new critical discourse of legitimacy.

In this changed landscape, the state’s penal power attracts considerable critical attention as a *prima facie* illegitimate and severe interference with the autonomy of its object. At the same time, criminal law—*qua* law—no longer merely describes a set of norms, institutions, and practices but faces the burden not only of applying, but at the same that of legitimating, the state’s penal power, as consistent with the autonomy of all affected person-citizens, including notably the “victim” and the “offender.” Kant, Feuerbach, and Hegel (and perhaps Mill, and later Hart, though less clearly) all can be seen as framing this legitimacy challenge, and addressing it, in different ways.

Birnbaum’s public good-based critique of Feuerbach’s personal right-based account of criminal law, however, is symptomatic of the dualistic condition of modern criminal law, or penalty, which continues to reflect the long-standing (and in this sense foundational!) tension between heteronomy and autonomy, recovered in the conflict between modern police and law. The critical moment of modern law might have interrupted the hegemony of heteronomy, but it has not replaced it with the hegemony of autonomy. The police state persists alongside the law state, as an uneasy complement in continuous tension. All “modern” accounts of criminal law reflect this tension, some placing different emphases on one conception of penalty or another, and some drawing the distinction more explicitly than others. Wechsler and Becker, for instance, are content to approach criminal law as a tool for the administration of measures to maximize public welfare, in Wechsler’s case through a fairly elaborate administrative apparatus designed to identify and deter, or if necessary to neutralize (through peno-correctional treatment), abnormally dangerous people, without giving much thought to an alternative conception of criminal law. Jakobs, by contrast, expends considerable effort to differentiate between criminal law for citizens (or criminal law properly speaking) and criminal law for enemies (or criminal police), and has drawn intense criticism for his refusal to privilege the former over the latter in all cases.

This introduction can only give a poor sense of the opportunities for further thought and study presented by the essays in this collection, along with the foundational texts themselves. This project—from the selection of “foundational texts” and the solicitation of an international and interdisciplinary group of contemporary scholars, the translation of key German texts now available for the first time to an international Anglophone audience, the two intensive workshops where the contributors shared their work, and eventually to the completion of the manuscript (and even the writing of this introduction)—has been a tremendously stimulating and rewarding experience. Hopefully this introduction managed to capture some of that excitement, in the hope that others will take up this invitation to engage with, and to discover or rediscover, the foundational texts that inspired the provocative reflections collected in this volume.