The Comparative History and Theory of Corporate Criminal Liability

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This paper is an exercise in comparative legal history and legal theory.¹ It argues, first, that traditional views of the history of corporate criminal liability in German and Anglo-American law are interestingly mistaken, or at least incomplete, taken independently and comparatively, and, second, that histories and theories of corporate criminal liability engage in symbolic jurisprudence insofar as they treat their subject as a litmus test for other, more fundamental, phenomena, such as the relative influence of Roman and German law or the relative commitment of systems of criminal law to truth and justice.

At first glance, it might appear that corporate criminal liability in the common law and the civil law passed each other like ships in the night, sometime around the turn of the nineteenth century: While the common law had no corporate criminal liability before 1800, the civil law had no corporate criminal liability after 1800. Upon closer inspection, however, it turns out that corporate criminal liability was widely accepted in both common law and civil law countries at least since the Middle Ages, that rejection of corporate criminal liability was complete neither in England before 1800 nor in Germany after 1800. A comparative approach reveals common lines of conceptualization, rather than stark differences, between common law and civil law systems, which track the distinction between law and police as fundamental modes of governance that can be traced in common law and civil law systems alike.²

Let's start with the German and Anglo-American history independently, Germany first (I), then Anglo-American law (II), followed by a comparative analysis (III), and a concluding section (IV).

I. German Law: The Sudden Disappearance of Corporate Criminal Liability

The general take on corporate criminal liability in Germany is that it does not exist, could not exist, and—not surprisingly—did not exist, not necessarily in this order. Those who look a little more closely at German legal history notice, however, that the story is not quite so simple, because corporate criminal liability did exist in Germany at some point. The more sophisticated story then is that German corporate criminal liability, although it may have existed at some point, no longer does (ordinarily, one is content here to remark that the historical record is mixed, rather than exploring in any detail the extent, duration, and foundation of German corporate criminal liability). The story then becomes not that there never was or could have been corporate criminal liability in German law, but that there never was or could have been corporate criminal liability in *modern* German law.

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¹ More precisely, and awkwardly, comparative legal historio- and teoriography: rather than present an alternative history or theory of corporate criminal liability, this paper concerns itself with existing histories and theories of the subject.

² On the distinction between law and police, see Dubber, *The Police Power*; see also *infra* section IV.

In this telling, the enlightenment did away with corporate criminal liability, so that whatever traces of corporate criminal liability there might have been before, say, the turn of the nineteenth century, were erased from the face of the earth by the establishment of an enlightened system of German criminal law, which remains in place today, having reached ever higher degrees of perfection and refinement through the development of a German science of criminal law (as one branch of the general science of law, *Rechtswissenschaft*) over the past two centuries, give or take.³ Corporate criminal liability in a modern, enlightened, science of criminal law is illogical, impossible, unthinkable because it flies in the face of one of that science's greatest discoveries, if not its single greatest achievement: the "guilt principle" (*Schuldgrundsatz*, Latinized *ex post* as *nulla poena sine culpa*⁴). Corporations cannot commit crime because they are incapable of guilt (*societas delinquere non potest*).

The problem with this story, though it is less obviously ahistorical than the first (which fails to acknowledge the existence of German corporate criminal liability at any time), is that it is so simplistic and Whiggish as to be at least seriously misleading, and certainly woefully incomplete—and as a result much less interesting than it otherwise would be. It turns out, upon even slightly closer inspection, that the arguments against corporate criminal liability have changed almost not at all at least since the middle ages and certainly were not new, nor considered as new, when they were (once again) catalogued in a 1793 university lecture on "delicta universitatum" by an obscure and otherwise entirely inconsequential German professor of (Roman civil) law (by the name of Julius Friedrich Malblanc⁵), and then repeated (once more) by two Fathers of German Legal Science, Paul Johann Anselm Feuerbach (the Father of German Criminal Law Science) and Friedrich Carl von Savigny (another Roman civil lawyer, quite possibly the Father of German Legal Science, period), both of whom have been illuminated by the glow of the general enlightenment halo hovering above the foundation story of German legal science as a whole, and of German criminal law science in particular.⁶

Even a moderately close inspection would reveal not only the flimsy source of the supposed grand enlightenment attack on corporate criminal liability (the mentioned lecture by Malblanc), but also the casual *en passant* and shifting rationales actually cited by certified enlightenment Founding Fathers such as Feuerbach and Savigny, if not the total absence of any serious attempt to provide any rationale (as opposed to mere assertions about the supposed nature of corporations and of criminal liability), not to mention the most obvious indication of the absence of any connection between enlightenment ideas and the rejection of corporate criminal liability: the source of the asserted impossibility of corporate criminal liability in *Roman law*, not surprisingly

³ See generally Markus D. Dubber, "The Promise of German Criminal Law: A Science of Crime and Punishment," 6 German Law Journal 1049 (2005) (<http://www.germanlawjournal.com/article.php?id=613>).

⁴ Note that this Latin maxim of more recent vintage does not appear among those formulated by P.J.A. Feuerbach, which make no reference to guilt, *culpa* (*nulla poena sine lege, nulla poena sine crimine, Nullum crimen sine poena legali*). See generally B. Sharon Byrd & Joachim Hruschka, "The Rechtsstaat and its Criminal Law Implications for Kant and Feuerbach" (on file with author)

⁵ "Observationes quaedam ad delicta Universitatum spectantes" (Erlangen 1793). See generally August Ritter von Eisenhart, "Malblanc, Julius Friedrich von," in 20 Allgemeine Deutsche Biographie 129 (1884) (<http://www.deutsche-biographie.de/pnd104268891.html?anchor=adb>).

⁶ See also Allgemeine Literatur-Zeitung vom Jahre 1800 (Jan. 11, 1800), vol. 1 (Jena & Leipzig 1800), 106, 108 ("Man weiss, was überhaupt gegen die *delicta universitatum* eingewandt wird...").

asserted by Savigny, who was after all the leader of the Romanist school of legal thought, a movement devoted to grounding law in its entirety on Roman sources. (It's beside the point that the Roman law source of Savigny's claims here is at best unclear.)

Now, as anyone who has even a passing familiarity with German legal thought and history knows, the Romanists were not alone but were fought every step of the way by the Germanists, who favored a very different conception of law and of legal history, and of the relevance, or rather irrelevance, of Roman law in then contemporary German law. In fact, Otto von Gierke devoted his career, and his masterly (and excruciatingly detailed) study *Das deutsche Genossenschaftsrecht*—admired by, among many others, Frederic Maitland—to precisely the task of debunking the myth that there was no alternative—German—conception of law that was at least equal, if not superior, to the Romanists' Roman law-based one. Gierke argued that the concept of a corporation, as a *Genossenschaft*, lay at the heart of the Germanness of German law, for the very reason that it could not be found in Roman law, yet—according to Gierke and his Germanist colleagues—was of central legal sociological and legal doctrinal significance. Maitland, for one, was convinced by this argument, not only when it came to German law, but also to English law, which he thought had failed to appreciate the central role of the legal concept of the corporation, as *Genossenschaft*,⁷ largely because it had made such inventive use of what Maitland called the “great loose ‘trust concept’,” which in his view had obscured the substantive significance of corporate entities behind a veil of legal form.⁸

Gierke's significance, however, is not merely historical, but also theoretical. His study not only pointed out the deep historical roots of objections to corporate criminal liability, thereby drawing their supposed enlightenment origins into question. Its main objective was not negative, but positive. Gierke sought not to expose the canonical—and therefore ultimately, if indirectly, Roman law—roots of the concept of corporation, which since the Middle Ages (and not merely since Malblanc, or Feuerbach, never mind Savigny) had been said to preclude the criminal liability of corporations; he labored to document the long and, in his view, long-dominant and distinctly German history of the concept of corporation, not as a legal fiction with more or less limited, and arbitrarily definable, powers and obligations, but as an entity that, as a “right-and-duty-bearing unit” (in Maitland's rendering)—and in that sense as a legal person—was capable of, among other things, both criminal victimhood (i.e., of having its rights violated) and offenderhood (i.e., of violating others' rights or of violating its duties, depending on one's view of the nature of criminal law and the relationship between criminal and civil delicts).⁹

It is worth noting here that Gierke was not a criminal law scholar—nor, for that matter, were Savigny or Malblanc, or most other contributors to the literature on

⁷ *Genossenschaft* is much closer to *Gemeinschaft* (“community”) than to *Gesellschaft* (“society”), to use Tönnies's roughly contemporaneous distinction. “Genosse” is often translated as “comrade.” Ferdinand Tönnies, *Gemeinschaft und Gesellschaft: Grundbegriffe der reinen Soziologie* (1st ed. 1887). Tönnies himself classified *Genossenschaft* as a type of *Gemeinschaft*, in contrast to the less egalitarian *Herrschaft*. See generally Ferdinand Tönnies, *Einführung in die Soziologie* 34-47 (1931).

⁸ Frederic William Maitland, “Translator's Introduction,” in Otto Gierke, *Political Theories of the Middle Age* vii, xxx (1900).

⁹ Frederic William Maitland, “Moral and Personality and Legal Personality,” in *The Collected Papers of Frederic William Maitland*, vol. 3, 304, 307 (H.A.L. Fisher, ed. 1911).

corporate criminal liability.¹⁰ He was interested in the question of corporate criminal liability not for its own sake, but as evidence—the acceptance of corporate criminal liability, to him, was significant only insofar as it provided strong, even the strongest, evidence of the presence of the German, rather than the Roman, concept of corporation. Insofar as criminal liability, or rather the capacity for offenderhood, presumed personhood, the presence of criminal liability implied the presence of personhood; so if there was *corporate* criminal liability, then there was *corporate* personhood.

Gierke's argument, however, itself is based on a particular conception of criminal liability, and of the capacity for offenderhood. If it turns out, for instance, that personhood is not a prerequisite for criminal offenderhood—nor for that matter for criminal victimhood—then the presence of criminal liability does not imply the presence of personhood. Gierke's concept of crime as a violation of another person's rights may have been popular in his time (or today, for that matter), but it cannot simply be assumed that no other concept of crime existed either at the time or before. In fact, such a concept would not be hard to find: the concept of crime as the violation of sovereign *peace*, which does not turn on the conception of the offender as a person, collective or individual, fictional or real, juristic or natural, but merely as a threat to the sovereign's peace. The concept of threat, however, is not limited to persons (or humans, or even to animate beings, for that matter).¹¹

In fact, the bulk of the instances of corporate criminal liability Gierke cites involve acts of disturbance and disobedience and violations of the peace, rather than offenses against the rights of (other) persons. Gierke insists on classifying these offenses as crimes, and the sovereign's response as punishment¹²—rather than as an act of war (particularly against wayward cities, or what we might call “public” corporations today, which however were not distinguished categorically from other, “private,” corporations, a distinction that still is far more at home in American law than it is in English law) or as a “police action.”¹³ The question is whether these peace offenses are merely a particular form of crime subject to “ordinary” criminal law (with its presumptive requirement of personhood)—in which case Gierke must face the common argument that the denial of corporate criminal liability only applies to “true” crimes, but not to “peripheral” or “regulatory” ones (as we will see, a version of this argument has underlain German law on this point for many decades¹⁴)—or whether the concept of peace violation instead reflects an alternative, comprehensive view of crime that regards all crime as the violation of the sovereign's peace rather than of one person's right by another person.

What's at stake at this level of inquiry are not doctrinal distinctions, but different conceptions of crime, which in turn reflect different conceptions of sovereignty, the state,

¹⁰ Gierke does not always distinguish carefully between civil and criminal delicts, or (intentional) torts and crimes. The easy transition from the recognition of tort—and more generally civil—liability to criminal liability is common in the literature, and in the jurisprudence, both in civil law and common law systems. See, e.g., Franz von Liszt, *Lehrbuch des deutschen Strafrechts* § 27 n.1 (10th ed., 1900); *New York Central R. Co. v. United States*, 212 U.S. 481 (1909).

¹¹ See Markus D. Dubber, “‘The Power to Govern Men and Things’: Patriarchal Origins of the Police Power in American Law,” 52 *Buffalo Law Review* 1277 (2005).

¹² Otto v. Gierke, *Das deutsche Genossenschaftsrecht* ____.

¹³ See, e.g., Karl Engisch, “Referat,” in *Verhandlungen des Deutschen Juristentages*, 40. Juristentag 1953/54, vol. 1, at E7 (1954).

¹⁴ *Infra* ____.

power, and ultimately governance. For instance, the question would not be whether a corporation could satisfy the prerequisites for criminal offenderhood (or victimhood) under a given conception of crime—act, culpability, *actus reus*, *mens rea*—but whether the criminal liability of corporations is consistent with, and perhaps reflects, a different conception of crime altogether, one that does not turn on personhood at all, or on one, rather than another, conception of personhood. To put it differently, the question would not be whether corporate criminal liability indicates a German or Roman concept of the *corporation*, or even any particular concept of the corporation, but rather a concept of *crime* and its punishment (or other sanction) and its underlying conception of sovereignty and state power. Corporate criminal liability then would appear not as a deviation from some presupposed system of criminal law and its prerequisites, but as evidence of an alternative system of penal governance, revolving around the concept of the sovereign's peace and its keeping (call it *penal police*), a system that has stood in tension with another system of penal governance, framed in terms of rights and their violation (call it *penal law*), for at least as long as German and Roman elements have competed for influence on German law in Gierke's and Savigny's accounts, and as English and canonical elements have in Maitland's.¹⁵

Once more corporate criminal liability would have primarily evidentiary significance, rather than be of interest for its own sake; it would remain a litmus test, though for the presence of a different set of alternatives. The issue of corporate criminal liability, in other words, could profitably be placed within a yet wider conceptual framework, or within the context of a yet more fundamental tension, than that between Romanness and Germanness, which so exercised the minds of nineteenth-century Germans—and Gierke and Savigny in particular—but now itself appears parochial, limited in temporal and systemic scope. To be sure, the distinction between German and Roman elements in German legal history may turn out to be relevant to an understanding of English legal history insofar as this distinction parallels that between English and Roman (or canon law) elements in English legal history. But it is not this parallel, however tenuous at the start and growing increasingly tenuous over time, that makes comparative analysis of the treatment of corporate criminal liability in Anglo-American and German law worthwhile, and it is not what attracted Maitland to Gierke's work; rather Maitland and Gierke were ultimately concerned with the same questions about the nature and place of law within a system, and a conception, of governance, i.e., with political or constitutional questions about sovereignty and the state. And they used the issue of corporate personality, and more narrowly that of corporate criminal liability, to get at these more fundamental concerns.

We will revisit these questions, and this approach to the issue of corporate criminal liability in terms of the distinction between police and law, when we turn to comparative analysis, in section III. For now, let us return to the point of Gierke's contemporary, and not merely historical, significance, which goes beyond revealing the distinctly pre-enlightenment source for the supposedly enlightenment-triggered rejection of corporate criminal liability. Gierke's study, published in four volumes between 1868 and 1913, was no more a work of antiquarianism than Savigny's. Like Savigny, Gierke practiced *historical jurisprudence*, i.e., a history of the present, legal history with a point, a

¹⁵ For general discussion of the distinction between police and law, see Dubber, *Police Power*; New Police Science.

historically grounded account of law, rather than legal history for its own sake. The difference between Savigny and Gierke was not their approach to jurisprudence, and to legal history, lay not in methodology, but in the substance of their accounts, with Savigny regarding law historically through the lens of Roman law and Gierke through that of German law (the very existence of which Savigny and his fellow Romanists denied). Gierke, in other words, was not interested merely in documenting concepts of the corporation, and of corporate criminal liability as evidence of the prevalence, but certainly the existence, of these concepts at some point in history; he was concerned with documenting the continued role of these concepts, as historically grounded characteristics of German law, the significance of which might ebb and flow with time, in a continuing dance of influence with their opposite, and counterpart—the Romanist fiction theory of corporations (re)discovered (again) by Savigny. Much of Gierke’s work, in his magnum opus as well as in other works (notably his *Die Genossenschaftstheorie und die deutsche Rechtsprechung*, itself a 1000-page tome published in 1887) dealt with current law, i.e., German law in the late nineteenth (and even early twentieth) century, at a time in other words when the Malblanc/Savigny enlightenment-Romanist revival of fiction theory, according to the standard German account, had excised the barbaric practice of corporate criminal liability from the face of modern German law *a century before* (or certainly decades, depending on who’s counting).

It is worth nothing, given this paper’s comparative aim, that Maitland followed Gierke on this point as well. Maitland not only adopted Gierke’s historical account (as we will see shortly, when we turn our attention to the Anglo-American history of corporate criminal liability¹⁶), revising (and retitling) the chapter on corporations in the *History of English Law* in the wake of Gierke’s *Das Genossenschaftsrecht*,¹⁷ selections from which Maitland translated accompanied by a long introductory essay;¹⁸ Maitland also took to highlighting what he regarded as the long obscured, but nonetheless central, role of the concept of the corporation as a person in the sense of a “right-and-duty-bearing unit” in English law, in history and in the (again late nineteenth and early twentieth century) then-present.

In fact, in 1881, a few years before Gierke published his most expressly contemporary work on the theory of the corporation (*Die Genossenschaftstheorie*), Franz von Liszt published the first edition of his treatise on German criminal law, in which he endorsed the criminal liability of corporations.¹⁹ Liszt, however, sits next to, or at least very near, Feuerbach at the table of Great German Criminal Law Scientists, not only or even primarily because his criminal law treatise became the most influential work on the subject over the next half century, appearing in twenty-six editions through 1932, the last year of the Weimar Republic. By itself, the support for corporate criminal liability by two of the most celebrated German legal scholars, Gierke and Liszt, who dominated their respective fields, the law of corporations and criminal law—which just happen to be the very two fields at the intersection of which lies the subject of corporate criminal liability—suggests at the very least that reports of the death of German corporate criminal

¹⁶ *Infra* section II.

¹⁷ P & M 2d ed. vol. 1, at 486 n.1; see also “Preface to the Second Edition,” P & M 2d ed. vol. 1, at v.

¹⁸ Frederic William Maitland, “Translator’s Introduction,” in Otto Gierke, *Political Theories of the Middle Age* vii, xxx (1900).

¹⁹ Franz v. Liszt, *Das Deutsche Reichsstrafrecht* § 27 (1881).

liability (with the arrival of the enlightenment, at the turn of the nineteenth century!) are greatly exaggerated, no matter how many courts and commentators unthinkingly repeated the standard empty Latinism that *societas delinquere non potest*.

Instead, one finds that those who devoted thought to the subject, theoretically or historically, either ended up supporting the idea of corporate criminal liability, or at the very least conceding its *possibility*, if not its desirability. The orthodox Latinism, however, weighed heavily enough on even these commentators that they either spent a great deal of time hemming and hawing, and soul searching, before—begrudgingly, and hesitatingly—reaching the conclusion that corporate criminal liability was possible, or even desirable (if only in small doses, here and there) or changed their minds—in form, if not in substance—a fact that has often been noted as particularly strong evidence for the untenability of corporate criminal liability in German law, no matter how hard one might try, or wish, to endorse it.²⁰

Take the cases of Ernst Hafter, Richard Busch, and Eberhard Schmidt. Hafter and Busch produced the most careful German studies of corporate criminal liability, certainly of the early twentieth century, one published in 1903, the other in 1933.²¹ Both present quite detailed discussions of the arguments raised on both sides of the issue throughout legal history. And both end up concluding that corporate criminal liability is both possible and desirable. Yet Hafter changed his mind, decades later, in the two editions of his treatise on Swiss criminal law, published in 1926 and 1946, respectively.²²

Busch did not change his mind, as far as I know, but his book is at least as interesting as Hafter's for our purposes, not only because of its publication date, the first year of the National Socialist period, but also because it is more theoretically ambitious. Busch, like Hafter, landed on a qualified endorsement of corporate criminal liability, accusing both sides of the Gierke/Savigny debate of anthropomorphism, a common charge in the literature on this subject, not only in Germany, which usually is treated as definitive, often without much explanation of why this particular accusation would either be irrebuttable or, if so, dispositively devastating. His densely and carefully argued habilitation was largely ignored in substance if praised in form and erudition.²³

Busch's study deviates from the apparent orthodoxy of the impossibility of corporate criminal liability; it also spans the transition from the Weimar Republic to the Nationalist Socialist regime. Although Busch completed the research and writing of the book before 1933, in his 1933 preface he predicts, somewhat self-servingly, that the subject of corporate criminal liability will attain greater significance in the coming new era of German law: "A state that does not give itself the appearance of neutrality but instead

²⁰ See Hans-Heinrich Jescheck, "Die strafrechtliche Verantwortlichkeit der Personenverbände," 65 ZStW 210 (1953).

²¹ Ernst Hafter, *Die Delikts- und Straffähigkeit der Personenverbände* (1903); Richard Busch, *Grundfragen der strafrechtlichen Verantwortlichkeit der Verbände* (1933).

²² Jescheck 214 n. 14.

²³ Karl Engisch, "Referat: Empfiehlt es sich, die Strafbarkeit der juristischen Person gesetzlich vorzusehen?," in *Verhandlungen des Deutschen Juristentages*, 40. Juristentag 1953/54, vol. 1, at E7 (1954). Busch did not receive a university appointment, for whatever reason, and instead joined the judicial service, eventually serving on the German Supreme Court (Bundesgerichtshof) after the war; he did not produce further scholarship on the subject, though he continued to publish occasional pieces on other criminal law topics, and appears not to have played a significant role in the reconsideration of corporate criminal liability after 1945.

erects the supremacy of its own values, and sets itself the aim of educating all *Volksgenossen* [members of the *Volk* community (*Genossenschaft*)], cannot establish its political and social order in a corporative fashion without a disciplinary tool as socio-pedagogically effective as the punishment of corporations [*Verbände*].”²⁴

Yet, perhaps surprisingly, the National Socialist regime did not take up Busch’s proposals, nor did it show much interest in corporate criminal liability in general. Indeed, this very fact, the *failure* to institute corporate criminal liability and even the development of a new rationale for—or at least a more differentiated appreciation of—its utter impossibility (the vaunted “guilt principle” of German criminal law, or *Schuldgrundsatz*) was said to carry great significance after World War II. It was thought to reflect the iron commitment of German criminal law science to truth and principle even during the dark days of National Socialism, and—oddly, given the frequent post-war invocations of judges’ positivistic duty to apply the law, no matter how abhorrent²⁵—even in the face of the commands of positive law. The condemnation to practical insignificance during the Nazi period of a provision of tax criminal law (the obscure § 393 *Reichsabgabenordnung*) purportedly established that German criminal law science survived National Socialism fundamentally intact. In the face of such a provision, which contemplated corporate criminal sanctions for certain violations of tax laws in limited circumstances, the German judiciary and professoriate stood firm—so the post-war story went—and chose the path of truth and justice over slavish adherence to positive law.²⁶

It is important to see that the rejection of corporate criminal liability placed German criminal law on the side not only of justice, but of truth as well. Corporate criminal liability has been criticized for relying on a doctrinal fiction, if not an outright “white lie,”²⁷ insofar as it seeks to satisfy the act requirement with an imputed act, rather than the act itself. This criticism did not sit well with the simultaneous reliance on the “fiction theory” of the corporation, which accounted for the fictional nature of the imputation, from a natural to a fictional person (although it was occasionally suggested that fictions were acceptable in law, except in criminal law). It should also be noted that Nazi legal authors were fond of attacking “liberal” theorists, who were said to favor fictional, in the sense of artificial, and therefore manipulable, constructs over concrete realities (and even concepts) that had to be reckoned with, particularly if they coincided with Nazi ideology, the will of the Führer, or the sentiment of the German people (*konkretes Ordnungsdenken*).²⁸

Let’s take a look at our third, and final, case of endorsement of corporate criminal liability, that of Eberhard Schmidt. Schmidt’s case deserves attention because he joined Liszt as co-author of his treatise, which as we know favored corporate criminal liability as late as 1932. Schmidt, like Hafter before him, switched sides on the issue; unlike Hafter, however, he went further and successfully advocated, after the war—as chair of a

²⁴ Busch, *supra* n. ___, at vi.

²⁵ See generally, Markus D. Dubber, “Judicial Positivism and Hitler’s Injustice,” 93 *Columbia Law Review* 1807 (1993).

²⁶ See, e.g., Richard Lange, “Zur Strafbarkeit von Personenverbänden,” 1952 *JZ* 261; Hartung E45 (“Ich glaube, einen besseren Beweis für das Durchdringen des Schuldgrundsatzes im deutschen Strafrecht kann man kaum anführen.”)

²⁷ Water Seiler, *Strafrechtliche Maßnahmen gegen Personverbände* 60 (1967).

²⁸ See, e.g., Bernd Rüthers: *Entartetes Recht: Rechtslehren und Kronjuristen im Dritten Reich* (1988).

legislative commission to revise economic criminal law between 1947-49²⁹—not quite for corporate “criminal punishment” (*Kriminalstrafe*), but for corporate “order punishment” (*Ordnungsstrafe*), not monetary *penalties* (*Geldstrafe*), but monetary *finer* (*Geldbuße*). These corporate sanctions were possible, and permissible, precisely because they were not “criminal punishments.” Though labeled *Buße*,³⁰ it turned out these sanctions carried no ethical significance; since they did not express “ethical-moral” condemnation of a culpable act (or omission), they did not presuppose such an act (or omission), and therefore could attach to entities—like corporations—incapable of “free responsible ethical self-determination” (*freie verantwortliche sittliche Selbstbestimmung*).³¹ This approach eventually was expanded to an entire class of minor offenses labeled “order violations” (*Ordnungswidrigkeiten*) in the 1960s; these were removed from the criminal code and placed into a separate code of order violations, a sort of junior penal code with simplified general and special parts (and an attendant streamlined dispositional process), which also applies to corporations, subjecting them to a *Buße* (again, *not* a punishment) of up to € 1,000,000 for crimes or order violations committed by certain corporate agents on behalf of the corporation.³²

Monetary fines for order violations are *not* criminal punishments. Instead they are, to use a term commonly found in the literature, “sharpened administrative orders” (*verschärfte Verwaltungsbefehle*),³³ which is meant to communicate the prospective (as opposed to punitive or retrospective) orientation of the sanction, along with its administrative character. The monetary fine, it turns out, is simply a stern reminder to comply with one’s (public law) duties, as laid out in administrative law or criminal law. Put another way, a monetary penance imposed for the commission of an order violation, by definition, is whatever a criminal punishment imposed for the commission of a crime *is not*. (This symbolic-formalist move is not uncommon in German criminal law. The currently most favored rationale for punishment, positive general prevention, likewise is that rationale for punishment which is *not* retribution, general or specific prevention, incapacitation, or rehabilitation, yet combines the desirable qualities of all the above.³⁴)

Whether this shift from punishment to stern reminder, and from crime to order violation, reflects a substantive difference rather than merely drawing a formal distinction is at least open to question. Perhaps not surprisingly, opponents of corporate criminal liability at the time dismissed this move as *Etikettenschwindel*, literally “labeling fraud” (rather than the comparatively tame “false labeling”) that introduced corporate criminal liability by another name, while at the same time strenuously denying having done just that.³⁵ In this view, Schmidt had changed his position in form, but not in substance.

²⁹ On Schmidt, see Arnd Koch, “Schmidt, Ludwig Ferdinand Eberhard,” in 23 *Neue Deutsche Biographie* 181 (2007) (<http://www.deutsche-biographie.de/pnd118759590.html>).

³⁰ *Buße* is often translated as penance or atonement and is a central concept in Christian theology. In medieval law, *wergeld* referred to compensation for death, and *botgeld* to compensation for lesser injuries; “bootless” crimes were those so serious as to be beyond compensation. See, e.g., P & M vol. 2, p. 464 (2d ed.).

³¹ BGHSt 2, 194, 200.

³² § 30 OWiG.

³³ See, e.g., Jescheck, *supra* n. __, at 216-17.

³⁴ Markus D. Dubber, “Theories of Crime and Punishment in German Criminal Law,” 53 *American Journal of Comparative Law* 679 (2006).

³⁵ Hartung, *supra* n. __, at E44.

Then again, this distinction—between true criminal law and administrative criminal law—was not new, and goes back at least to the work of the brilliant, and unjustly neglected, James Goldschmidt who invented, and named, the field and study of administrative criminal law (*Verwaltungsstrafrecht*) at the beginning of the twentieth century.³⁶

Here it is ironic, and perhaps a testament to the power of formalism in German legal thought, that the very people who accused Schmidt of a sleight of hand through false labeling might turn around and propose an alternative that relied on the very same strategy, but using a different distinction, not between punishments and non-punitive fines, but between punishments and “measures of incapacitation and rehabilitation” (*Maßregeln der Sicherung und Besserung*): corporate “punishment” should be relabeled, but as “*Maßregel*” rather than as “*Buße*.”³⁷ The distinction between measures and punishments underlies the German two-track system of criminal sanction, often celebrated as one of the great achievements of German criminal law science. It should come as no surprise, yet adds to the irony, that the distinction between punishment and measure itself had been assailed as an *Etikettenschwindel* when it was first proposed.³⁸ What mattered, apparently, was less the *Schwindel* than the *Etikette*.

If one takes a still broader historical, and theoretical, view, the distinction between punishment and fine (as well as, incidentally, that between punishment and measure) appears to have deeper roots: in the distinction between police and law as fundamental modes of governance, one mode—since the enlightenment—centered around the protection of sovereign welfare, and the other around the manifestation of personal rights, with the supposed dominance of the latter over the former signaled by the appearance, ascendance, and invocation, of such terms as “rule of law” or “*Rechtsstaat*” in the nineteenth century. In this light, Goldschmidt’s administrative criminal law would fit into the more general effort to “legalize” the sovereign power to police, i.e., to subject that power to law constraints derived from the supposed centrality of the notion of autonomous personhood, the enlightenment’s great discovery, or invention.³⁹ This effort found its most obvious, and explicit, manifestation in the creation of a new, and jarringly oxymoronic, field of law called “police law” (*Polizeirecht*), which through labeling ostensibly and simultaneously both formulates and addresses the formidable challenge of constraining an apparently illimitable discretionary sovereign power, ultimately derived from the householder’s patriarchic and absolute power over the resources that constitute his household, animate and inanimate, human and nonhuman.⁴⁰

Rather than seeing the history of German corporate criminal liability as falling into two periods, radically separated by the advent of the enlightenment, it is worth trying to read it instead as the history of a continuous struggle, and permanent tension, between competing views on the matter, which themselves reflect broader tensions about the

³⁶ James Goldschmidt, *Das Verwaltungsstrafrecht* (1902). On Goldschmidt, see Dubber, *Police Power*, supra, at __; Mireille Hildebrandt, “Justice and Police: Regulatory Offenses and the Criminal Law,” 12 *New Criminal Law Review* 43 (2009); Daniel Ohana, “Administrative Penalties in the *Rechtsstaat*: On the Emergence of the *Ordnungswidrigkeit* Sanctioning System in Post-War Germany” (on file with author).

³⁷ Hartung, supra n. __, at E50.

³⁸ Eduard Kohlrausch, “*Sicherungshaft: Eine Besinnung auf den Streitstand*,” 44 *Zeitschrift für die gesamte Strafrechtswissenschaft* 21, 33 (1924).

³⁹ See Dubber, *Police Power*, supra; Hildebrandt, supra; Ohana, supra.

⁴⁰ Dubber, *Preventive Justice*

nature of the state, law, and criminal law. Seen in this light, the historiography and theoriography of corporate criminal liability becomes a subject worth studying, domestically and comparatively, not for its own sake, but for the sake of the basic tensions it reflects. We will return to this analysis in parts III & IV. First, we need to shift our attention to the Anglo-American side of the story.

II. Anglo-American Law: The Sudden Appearance of Corporate Criminal Liability

In Germany, so the traditional story goes, the history of corporate criminal liability falls into two distinct periods. Before the enlightenment, there was plenty of corporate criminal liability. After the enlightenment, there was, and could be, none.

In England, so the traditional story goes, the history of corporate criminal liability falls into two distinct periods. After the nineteenth century, there was plenty of corporate criminal liability. Before the nineteenth century, there was none.

The German story turned out to be more interesting than that. And so will the English story, though its twists and turns are less violent.

Blackstone is, as so often, both a terrific and a terrible place to start. Terrific because he authoritatively addresses the question of corporate criminal liability, pouring hundreds if not thousands of years of English legal history into simple declarative statements that have been cited, and quoted, slavishly ever since. Terrible because the simple declarative statements cited ad nauseam by anyone with the slightest curiosity about English legal history turn out to be at best misleading.

For our purposes, the statement in question is: “A corporation cannot commit treason, or felony, or other crime, in it’s corporate capacity [citation: 10 Rep. 32]: though it’s members may, in their distinct individual capacities.”⁴¹

The citation is to Coke’s report of the *Case of Sutton’s Hospital*,⁴² an important early case on the legal nature of corporations. That report, however, says something quite different: that corporations cannot “commit treason, nor be outlawed nor excommunicate, for they have no souls.” For starters, the case was not about corporate criminal liability so that the report’s musings on this point, even in their original short form, qualify as dicta, made very much in passing, as part of a laundry list of characteristics of a corporation. (The case was about a trespass committed by two men on the grounds of the hospital, who defended by challenging the proper establishment of the corporation; if anything, then, the corporation’s victimhood, rather than its offenderhood was at stake, though even this way of putting it is uncomfortably anachronistic.⁴³) What’s more the report is from 1612, which tells us nothing about the law preceding it, nor much about the law following it, if only because Coke says he intended it—and it appears to have been used in fact—as a checklist for the creation of a corporation, and certainly not as a considered judgment on its criminal liability, once properly created.⁴⁴ In fact, it is now clear, thanks to the pioneering work of Gierke and Maitland, that corporate criminal

⁴¹ Blackstone I 476.

⁴² 10 Co. 23a, 32b, 77 Eng. Rep. 960, 973 (1612).

⁴³ On corporate victimhood, as opposed to offenderhood, see *infra* _____. In the sentence immediately preceding the passage under consideration, Blackstone remarks that “a corporation can neither beat, nor be beaten, in its body politic,” though for purposes of civil, not criminal, liability. Blackstone I 476.

⁴⁴ 10 Co. at 34b, 77 Eng. Rep. at 976.

liability was a common feature of English (and German) law since at least the 13th century, occasional statements to the contrary notwithstanding.

But even if we disregard these caveats and look closely at the passage miscited by Blackstone, it turns out to say nothing about the capacity of corporations for criminal offenderhood. Here it is useful to consider the passage from Coke's report in context:

They [corporations aggregate, as opposed to sole] cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney 33 H. 8. Br. Fealty. A corporation aggregate of many cannot do fealty, for an invisible body can neither be in person, nor swear, Plow. Com. 213, and The Lord Berkley's case 245, it is not subject to imbecilities, death of the natural body, and divers other cases.

The report does not say that corporations cannot commit felony or misdemeanor. It speaks only of treason. As Pollock and Maitland have suggestively argued, however, the distinction between treason and felony has deep roots in English legal history, with treason being the quintessential offense of disloyalty.⁴⁵ Disloyalty, however, has the very specific meaning of violation of the obligation of loyalty, which itself springs from the oath of fealty.⁴⁶ As the next sentence points out, corporations "cannot do fealty, for an invisible body can neither be in person, nor swear." If they cannot swear, or do fealty, they cannot violate the oath of fealty, i.e., they cannot commit treason.

This reading would be enough to suggest that this passage, dictum or not, says nothing about the criminal liability of corporations, except for treason. But it is worth pressing on to the remaining clauses of the sentence misquoted by Blackstone, along with the sentence that follows it, as they confirm the suggested reading. Corporations cannot be "outlawed" for the simple reason that outlawry is a procedural device to force the attendance of a party at court; corporations, however, cannot "be in person," and therefore cannot be compelled to appear, as that would compel them to do the impossible: the accused initially was required to be physically present at trial; appearance by attorney was insufficient.⁴⁷

Finally, and most straightforwardly, corporations cannot be "excommunicate[d], for they have no souls." But their soullessness, and their excommunicability, has nothing to do with their qualification for criminal liability; it prevents only their excommunication, a sanction from canon law, which is very much concerned with the presence or absence of souls, and the possibility or impossibility of sin.⁴⁸

The reference to canon law in this context is interesting. Recall that canon law also featured prominently in Gierke's account of the development of the fiction theory of

⁴⁵ P & M II 2d ed. 502-04.

⁴⁶ According to Pollock and Maitland, felony too originally referred to a breach of loyalty, though over time this significance became obscured, perhaps as a result of the evolution of a distinction between felony and misdemeanor in terms of severity of offense, and perhaps baseness of character, while treason's connection to the breach of obligations of fealty remained more visible. *Id.*

⁴⁷ See, e.g., *Birmingham and Gloucester Railway Co* (1842) 3 QB 223, 114 ER 492; cf. *Evans & Co Ltd v London County Council* [1914] 3 KB 315 (corporation's appearance in summary jurisdiction—i.e., police—courts).

⁴⁸ Cf. Blackstone I 477 (corporation's soullessness means that "also it is not liable to be summoned into the ecclesiastical courts").

corporations that reappeared in Malblanc's and Savigny's dismissal of corporate criminal liability as a conceptual impossibility. Central to this story, again followed by Maitland, was the Catholic Church's interest in shielding itself from criminal, or rather delictual,⁴⁹ liability, by insisting at least since Pope Innocence IV., Bracton's thirteenth-century contemporary (and, according to Maitland, "the father of the modern theory of corporations"⁵⁰) that the church as corporation (*universitas*) was both distinct from the individual persons constituting it—who might commit wrongs, and sins—and, at the same time, was itself a merely fictional entity, a *persona ficta*—incapable of wrong and sin. Originally, according to Gierke's and—therefore Maitland's—account, the canonists argued that the church was *sui generis* not only in being distinct from the collection of churchmen, but also from all other groups, a line that over time became increasingly difficult to hold and eventually faded away to make room for a general theory of the corporation in general as fictional entity. As Maitland puts it, channeling Gierke:

The *ecclesia* is an *universitas*, and the *universitas* is a *persona*. That they [the canonists] should go on to add (as Innocent IV. did [in the thirteenth century]) that it is *persona ficta* was not unnatural. The organized group ["of bishop and canons, or abbot and monks"] was distinct from the "church"; its will might not be the church's will. To this we must add that the canonist's law aspired to deal not only with wrong and crime, reparation and punishment, but also with sin and damnation. In his eyes a person who cannot sin and cannot be damned can only be *persona ficta*. So the *universitas* is not the organized group, but a feigned substratum for rights. This theory will easily lead to a denial that a corporation can commit either crime or wrong, and Innocent went this length; but both practice and theory rejected his doctrine.⁵¹

In this rich passage, one finds precisely the link between the supposed non-punishability of corporations and their non-excommunicability mentioned, in passing, in *Sutton's Hospital*: the connection between punishment and damnation, between crime and sin, and more precisely between mens rea and wickedness. The denial of corporate criminal liability makes sense, as Maitland points out, from the perspective of canon law, which draws no categorical distinction between sin and crime and, in fact, prioritizes sin over crime, and damnation (or salvation, as the case may be) over punishment. To the extent, then, that the English concept of crime is at bottom a canonical one, with mens rea a marker for sin, then the denial of corporate criminal liability makes perfect sense. The roots of the so-called mens rea requirement in English criminal law, which comes in its own Latin version (*actus non facit reum, nisi mens sit rea*), have often been traced back to canonical origins.⁵² And so the history of corporate criminal liability turns out also to be the history of mens rea in English criminal law—not merely the history of various conceptions of the corporation, which tends to get all the attention (from *Sutton's Hospital* to Savigny and Gierke and the roughly contemporaneous American debates in

⁴⁹ On the distinction between criminal and delictual responsibility, see *infra* ____.

⁵⁰ P & M I 2d ed, 520.

⁵¹ P & M 2d ed, 529; see also at n. 520 ("We now [in the thirteenth century] begin to hear the dogma (of which all English lawyers know a vulgar version) that the *universitas* can be punished neither in this world nor in the next, for that it has nor soul nor body.").

⁵² See Francis Bowes Sayre, "Mens Rea," 45 Harv. L. Rev. 974 (1932); see also Albert Levitt, "The Origin of the Doctrine of Mens Rea," 17 Ill. L. Rev. 117 (1922-1923).

the wake of *Santa Clara County v. Southern Pacific Railroad Company*,⁵³ chronicled by Morton Horwitz⁵⁴).

Ultimately then, as in the German case, the various accounts of, and positions on, corporate criminal liability in English law reflect a fundamental tension between two modes of governance in the penal realm, one grounded in the maintenance of the sovereign's (*some* sovereign's) peace and the other in the protection of persons as, to once again borrow Maitland's phrase, "right-and-duty-bearing units"⁵⁵: penal police and penal law, for short. While we can trace the basic contours of these conceptions in contemporary English and German penality, as well as throughout their history, important differences remain in the specifics. The first and clearest enunciation of the distinction appears in the enlightenment critique of state power, as the distinctive characteristic of the person capable of self-government, or autonomy, independent of social status, is discovered, or at least asserted (and assumed). Criminal law, as law, pursues the new ideal of resolving the apparent contradiction between an exercise of state power that is both legitimated, and can only be legitimated, insofar as it manifests the autonomy of persons and, at the same time, radically interferes with that autonomy through criminal punishment.

English political and legal history does not pose the contrast between police and law in such stark and historically specific terms. The relation between enlightenment thought, and critique, and English political and legal history is as complex, and contested, as the relation between the ideals of the *Rechtsstaat* and of the rule of law. It may well be argued that English political and legal discourse never developed an alternative right-based, rather than-peace based, account of penality, insofar as even today, crime is conceptualized as a violation of the sovereign's peace.⁵⁶ However this may be, the seeds of such an account—both in England and elsewhere—can be seen in the canon law's concern with individual sin and salvation, which does not amount to a different, individualized, conception of crime as the violation of another's rights, or even interests, but nonetheless may open the door to a consideration of personal guilt, rather than merely the offender's status as a threat to the sovereign's peace, and therefore ultimately as an offense against the sovereign itself.⁵⁷

We will return to this point when we pursue a comparative analysis of the history of corporate criminal liability German and Anglo-American law (section III). But first we must pick up the thread of the English story. Besides the mentioned dictum from *Sutton's Hospital*, the other evidence of the absence of corporate criminal liability in English law before the advent of industrialization—and the railroads—in the nineteenth century is an unexplained one-sentence anonymous case note attributed to Holt from 1701, which—as has been pointed out by several others—may well have been a reporting

⁵³ 118 U.S. 394 (1886).

⁵⁴ Morton J. Horwitz, "Santa Clara Revisited: The Development of Corporate Theory," 88 W. Va. L. Rev. 173 (1986).

⁵⁵ Maitland, *Collected Papers* 307.

⁵⁶ Dubber, *Preventive Justice*.

⁵⁷ It may, but need not, open the door to a conception of guilt as personal, depending on the meaning ascribed to the notoriously "loose"—to invoke Maitland once more—concept of mens rea in English legal history. For well-known attempts to develop a historically-informed account of mens rea, see J.W.C. Turner, "The Mental Element in Crimes at Common Law," 6 Cambridge L.J. 32 (1936); Jeremy Horder, "Two Histories and Four Hidden Principles of Mens Rea," *Law Quarterly Review* 113 (1997).

error and, if it wasn't, would have flown in the face of the ubiquitous practice of criminal prosecutions of corporations at the time.⁵⁸

Nonetheless, the traditional story—relying on Blackstone's misrepresentation of the wide centuries-long practice of corporate criminal liability, despite occasional remarks on the incapacity of corporations for treason or sin in the context of canonical reflections on the nature of the church as corporation—does not register the arrival of corporate criminal liability until the familiar nineteenth-century paradigm shift associated with the industrial revolution, driven by corporate locomotives barreling across the English (and American) countryside and ever more powerful corporate steam engines filling crowded factory floors, leaving death and destruction and dismemberment in their wake. In the crucible of exploding corporate might, the long-standing categorical rejection of the very possibility of corporate criminal liability gives way, so the story goes, to the pragmatic acceptance of the impossible as the inevitable. Principle gives way to reality, right to need, and logic to policy. From then on, all that is left are doctrinal details; the question of *whether* having suddenly been resolved, and once apparently categorical objections removed, only the *how* remains.

There is an interesting parallel here to the story of *mens rea* in English criminal law—interesting, but not surprising given the historical connection between the very notion of *mens rea* and corporate criminal liability reflected in the passage from *Sutton's Hospital* discussed earlier. (As we've seen,⁵⁹ the history of the German guilt principle, *Schuldgrundsatz*, is similarly bound up with that of corporate criminal liability, particularly in the immediate post-World War II period.⁶⁰) The principle of *actus non facit reum, nisi mens sit rea* too is said to have melted in the heat of the industrial revolution. Corporately created or not, the new and greater dangers of modern economic and social life in big cities bursting at the seams, a far cry from quaint—and presumably much safer—familial life in the premodern countryside, required greater vigilance from the agents of progress. To encourage this vigilance, the threat of criminal sanction for noncompliance with duties of care was thought prudent; given the scary enormity of the potential harm and the sheer scope of the affected activity, however, this new regulatory system could not be effective (or at least not be as effective) if one were to cling to outmoded principles such as the *mens rea* requirement. And so the *mens rea* requirement was abandoned, along with the once categorical, centuries-old, rejection of corporate criminal liability, or so the story goes.

There is something to be said for this story. Note, however, that it takes for granted the one-time existence, if not the universal acceptance, of the principle said to have been jettisoned. And yet, as with our apparently categorical declaration of the unthinkability of corporate criminal liability, so too the principle of *actus non facit reum, nisi mens sit rea* turns out to rest on less sure footing than the orthodox account might lead one to believe. Even a quick look at English legal history reveals that criminal liability without proof of *mens rea* was no more unthinkable than, say, corporate criminal liability. So-called “statutory” crimes, for instance, were not subject to the *mens rea* requirement,

⁵⁸ 12 Mod. 559 (1701) (reading in its entirety: “A corporation is not indictable, but the particular members of its are.”). For discussion, see, e.g., Frederic P. Lee, “Corporate Criminal Liability,” 28 Colum. L. Rev. 1, 4 (1928).

⁵⁹ Supra text accompanying notes ____-____.

⁶⁰ See supra text accompanying notes 18-20.

which applied only to common law—that is judicially, rather than legislatively, created—crimes. Parliament was free to define crimes without mens rea if it wished, with courts limited to plumbing legislative intent, and the mens rea requirement reduced to a tool of statutory interpretation, a presumption rather than a principle.⁶¹)

Take bigamy, a classic “strict liability” (i.e., mens rea-less) crime, which was made a capital felony as early as 1603. (Blackstone lists bigamy among his grab bag of “Offences Against the Public Health, and the Public Police Or Economy,” explaining that “the legislature has thought it just to make it felony, by reason of it's being so great a violation of the public oeconomy and decency of a well ordered state”⁶²—and thereby highlighting the character of police governance as public household governance (oikonomia).) More remarkably, as late as 1889, in the well-known case of *R v Tolson*, the offense triggered a lengthy judicial inquiry into the significance and origin of the supposedly categorical mens rea requirement asserted by Blackstone over a century before.⁶³ To quote from James Fitzjames Stephen’s opinion (other parts of which are often cited, and quoted):

Like most legal Latin maxims, the maxim of *mens rea* appears to me to be too short and antithetical to be of much practical value. It is, indeed, more like the title of a treatise than a practical rule. I have tried to ascertain its origin, but have not succeeded in doing so.⁶⁴

In the case of statutory crimes, the vaunted mens rea requirement thus is reduced from principle to presumption, to a maxim of statutory interpretation that at best establishes a rebuttable presumption of legislative intent to require proof of mens rea for conviction. Parliament can ignore the mens rea requirement, as long as it makes its intention plain.

There is of course also the matter of just what “the maxim of *mens rea*” means, assuming we can get clear on its scope. Stephen’s opinion in *Tolson*, in fact, is mainly about what the maxim doesn’t mean, or no longer means, or could not possibly mean, but certainly did mean at some point, as illustrated by the many examples of what he considers inconsistent and ultimately confused usage. The only thing mens rea did mean—in Stephen’s view—was a general defect of character, a malice, wickedness, meanness that marked the offender as fit for punishment. This connection between moral and criminal fault, however, lay at the very origin of the concept of mens rea in canon law, which—as Maitland points out—“aspired to deal not only with wrong and crime,

⁶¹ The same qualification applied to the other ironclad principle of English criminal law: the act requirement; for instance, possession offenses, it turned out, did not violate the requirement of an *actus reus* or not—insofar as they were statutory crimes, not common law crimes. See Markus D. Dubber, ““Policing Possession: The War on Crime and the End of Criminal Law,” 91 *Journal of Criminal Law & Criminology* 829, 915-16 (2002).

⁶² Blackstone IV 163.

⁶³ For some reason, rather than quoting the Latin version, Blackstone was content to put this principle in English: “to constitute a crime against human laws, there must be first, a vitious will; and, secondly, an unlawful act consequent upon such vitious will.” Blackstone vol. 4, at 21.

⁶⁴ *R v Tolson* (1889) 23 QBD 168, 185 (Stephen, J.) [please confirm the page cite for this passage, as well as for the first page of Stephen’s opinion in this case].

reparation and punishment, but also with sin and damnation,” i.e., with guilt religious and earthly.⁶⁵

Without going into the fascinating, yet also much belabored, details of the historiography and teoriography of *mens rea* in English law, it is enough for our purposes to point out that it is difficult to understand precisely what is meant by the supposed abandonment of the principle of *mens rea* in the crucible of industrial revolution; the principle, after all, was neither firmly grounded, nor comprehensive in scope, nor capable of definition, characteristics it shared with the supposed principle of the impossibility of corporate criminal liability (which, arguably, was easier to define only insofar as it amounted to a simple denial, rather than a positive requirement). “The maxim of *mens rea*” (which Stephen does not accord the status of a “principle”) and the denial of corporate criminal liability share two other features: all contrary evidence notwithstanding, they are at the beginning of the nineteenth century accepted, and repeated unthinkingly, as dogma and, as all proper dogmas, have been rendered in “scraps of Latin,” to quote the always quotable Stephen once more: *actus non facit reum, nisi mens sit rea* and *societas delinquere non potest*. (Perhaps the most significant change since the nineteenth century is that only the former maxim has survived in English law—notwithstanding an explosion of (statutory) strict liability offenses. Comparatively, rather than historically, speaking, the latter maxim is still very much alive in *German* law, and continues to coexist happily with the German version of “the maxim of *mens rea*,” the *Schuldprinzip*, or rather its properly Latin formulation, *nulla poena sine culpa*.⁶⁶)

In the end, nineteenth-century developments—perhaps triggered by the industrial revolution, perhaps not—may usefully be seen as a continuation of a long-standing approach to the exercise of penal power, rather than as a radical departure from long-cherished principle. In this light, the “new” regulatory offenses of the nineteenth century appear in the tradition of the myriad “Offences Against the Public Health, and the Public Police Or Economy,” including bigamy, some of which Blackstone catalogued in the *Commentaries*, and none of which paid much, if any, attention to the “*mens rea*” of offenders, or to their acts, for that matter, some felonies, some misdemeanors (from bigamy to nuisances, “clandestine marriages,” to idleness in general, and “idle soldiers and mariners wandering about the realm” in particular, “outlandish persons calling themselves Egyptians or gypsies,” sumptuary laws, gaming laws, poaching, and so on⁶⁷). The point here is not that these police offenses do not, or could not, require proof of “*mens rea*,” however defined, but instead that it did not matter whether they did or not.

From the perspective of police, which seeks the preservation of the sovereign’s peace, and ultimately sovereignty itself, with its attendant authority and dignity, it matters little whether the offense takes the form of an act, an act combined with a “*mens rea*,” only “*mens rea*” without an accompanying act—as in the classic case of treason through merely “compassing or imagining” the sovereign’s death (Treason Act 1351, incidentally,

⁶⁵ P & M 2d ed. II 502.

⁶⁶ See, e.g., Klaus Günther, “Nulla poena sine culpa and corporate personhood” (in this issue).

⁶⁷ Blackstone IV, ch. XIII; for discussion, see Dubber, Police Power, *supra*, at ____.

another statute),⁶⁸ or no act whatsoever (through a failure to act (as in the case of idleness), a status (vagrants, Gypsies, and so on), or a non-act (possession)).⁶⁹

From the same perspective, it also makes no difference whether the offender is a natural person, or a fictional one, an individual or a group, or simply a multitude, any more than it matters whether the threat to the sovereign's peace, and thus to the sovereign himself (and eventually "itself"), emanates from an oncoming flood, a rabid dog, or contumacy manifesting itself in human form (to use the term still found in contempt definitions⁷⁰). There is nothing in the peace-police model of English penalty, then, that would interfere with the sovereign's power to discipline, i.e., to eliminate a threat to its peace, based merely on its nature. Individual threats, from the perspective of police, may be as much (or as little) of a threat as corporate ones. On the one hand this means that there are no objections to corporate criminal liability (assuming the penal power is used to identify and eliminate threats); on the other hand, there is nothing distinctive or qualitatively different about threats in the form of natural persons. The offender's dangerousness (contumacy, meanness, disloyalty, malice) is what matters, not her rights, or duties, or her capacity for autonomy. The corporation is not regarded as a "right-and-duty bearing unit,"⁷¹ nor is the individual; personhood, corporate or individual, is simply beside the point.

There may be reasons of prudence or efficiency for policing the corporation, rather than—or in addition to—the individual (perhaps as a convenient shortcut, as a more localized site of intermediary discipline, or because corporations, according to the familiar rationale for the punishment of conspiracies, can represent a greater collective threat than their members taken individually), but these reasons have nothing to do with the corporation's status as a person. As sites of delegated disciplinary power, corporations in turn would be subject to disciplinary review of their exercise of this power, much as the state sovereign, as macro householder, would police—if only at the extreme margins of ("ultra vires") incompetence—the exercise of the micro householder's patriarchal authority, which was once original but has, in the process of the centralization of power, been redefined as delegated.⁷²

Before we turn to a comparative analysis of the German and English histories of corporate criminal liability, in the next section, one that emphasizes the similarities across two apparently disparate, if not precisely inverted, developments and the continuities—rather than the sudden around the long turn of the 19th century—within each one, we must take note of an interesting feature of the expansion of corporate criminal liability in English law. Once the dogma of the impossibility of corporate criminal liability was broken, corporate criminal liability entered Anglo-American law sliding backwards

⁶⁸ 25 Edw. 3 stat. 5 c. 2.

⁶⁹ MD Dubber, 'Policing Possession: The War on Crime and the End of Criminal Law' (2002) 91 *Journal of Criminal Law & Criminology* 829; A Ashworth, 'The Unfairness of Risk-Based Possession Offences' (2011) 5 *Criminal Law and Philosophy* 237.

⁷⁰ See, e.g., N.Y. Penal Law § 251.50.

⁷¹ Maitland *Collected Papers* 307.

⁷² Cf. Joshua Getzler, "Disciplining the Corporation Through Tort Liability and Disability," http://www.law.tau.ac.il/Eng/_Uploads/dbsAttachedFiles/Getzler-paper.pdf ("disciplining" corporations through tort law).

upside down, from the exception to the rule, from the periphery to the core, and from the present to the past.

The paradigmatic offense in traditional criminal law is often thought to be the intentional commission of a violation of another's right or interest; the historiographical version of this view is that crime began with this paradigm, at its core, and over time has expanded into the periphery, shedding defining characteristics in all dimensions along the way, from commission to omission, from intent to strict liability, and from person offenses to public welfare offenses. The paradigmatic offense of corporate criminal liability, by contrast, is a strict liability public welfare offense by omission, with the attendant reverse historical development, from strict liability public welfare omission (such as the failure to submit required documentation) to intentional commission of a person offense (including homicide). In the upside down, and backwards, *sui generis* world of corporate criminal liability, an omission was not a liability (an exception to the rule of commission), but an asset (by avoiding the need to develop an account of corporate action); the absence of mens rea was not a liability (an exception to the mens rea requirement), but an asset (by avoiding the need to develop an account of corporate intention); and the criminalization of offenses that did not cause, or even threaten, harm to specific persons was not a liability (the troubling extension of the special part of the criminal law), but an asset (a marker of modernity, of progress into a time when the protection of public interests no longer played second fiddle to the selfish safeguarding of individual rights).

Corporate criminal liability made the exception the rule, and in the views of some proponents, signaled a fresh start, the rise of a new paradigm. Antiquated maxims no longer stood in the way of progress, which meant the state pursuing the public interest unfettered by constraints that had no foundation except tradition, and that derived their relevance from their very antiquatedness, with no apparent connection to modern theories of legitimacy. Modern society was a society of groups, of corporations, not of individuals, was measured in affirmative duties, rather than in mere prohibitions, and in the pursuit of the great aim of public welfare had no room for rigid adherence to undermotivated metaphysical niceties like "vitious will."⁷³

Whether this paradigm is in fact new, or the perpetuation of a basic, and familiar, mode of governance, having replaced one sovereign (the father, the king) with another ("the people") is a notoriously tricky question. It's a question fact that we could pose about many, perhaps all, political and legal paradigm shifts, including that of the American Revolution, which very explicitly saw itself as creating a New World, conceptually and geographically, yet fairly quickly gave way to a system of penal governance that in fact, if not in ideology, came to resemble the one it had sought to replace.⁷⁴

III. The Comparative Ubiquity of Corporate Criminal Liability

⁷³ Sayre, Public Welfare Offenses.

⁷⁴ On this issue in the context of the exercise of penal power, see Markus D. Dubber, "'An Extraordinarily Beautiful Document': Jefferson's Bill for Proportioning Crimes and Punishments and the Challenge of Republican Punishment," in *Modern Histories of Crime and Punishment* 115 (Markus D. Dubber & Lindsay Farmer eds., Stanford University Press 2007).

Much more could be—and perhaps should be—said about the histories of corporate criminal liability in German and Anglo-American law, but the time has come to take a step back and draw out, and together, some of the comparative reflections that have cropped up in the discussion so far.

Taking a comparative approach is particularly promising, and natural, when it comes to corporate criminal liability because its history and theory is already remarkably, and distinctly, comparative, in at least two ways. First, there is a very tight connection between Maitland's and Gierke's work on the history of the corporation, which underlies the history of corporate criminal liability and uses it as an important litmus test for the presence of what Gierke, and with him Maitland, saw as the central tension driving the history of the corporation: between Roman(ist)/canonical fiction theory and German(ist)/English entity theory. Maitland's history of the corporation in English law is applied comparative history; his considered account of that history in English law follows Gierke's account in German law so closely that only incidental, or formal, distinctions remain. The most significant of these distinctions is the English concept of a trust, which in Maitland's view rendered a concept of the corporation unnecessary since English lawyers could do with the concept of trust anything that German lawyers might want to do with the concept of corporation.⁷⁵ While superficially useful, the concept of trust however obscured the substantive concept of the corporation—as the separate “right-and-duty-bearing unit” the origin and development of which Gierke could trace in German law, and Maitland sought to document throughout the history of English law. Once revealed, the substance, the significance, and the development of that concept, however, in English law mirrored German law, as chronicled by Gierke.⁷⁶

Second, the question of corporate criminal liability figured prominently during the occupation of Germany after World War II, when criminal law, for a brief moment, was comparative criminal law in action, as occupation law and German law, and in particular Anglo-American and German criminal law interacted in fascinating ways. During this period of applied comparative criminal law, German courts and commentators had to grapple with Anglo-American legal concepts, and Anglo-American courts with German legal concepts.⁷⁷ Adolf Schönke's short, but informative, 1948 summary of Anglo-American criminal law singles out corporate criminal liability as a “particularity” of Anglo-American law.⁷⁸ Interestingly and not surprisingly, Schönke also cites the orthodox view, by now well familiar to us, that English law originally was less particular in this regard, because like Germany it did not recognize corporate criminal liability, but then became increasingly more particular with the advent of the industrial revolution.

⁷⁵ Maitland, intro to Gierke, *Political Theories* xxx.

⁷⁶ Maitland's account of the history of the corporation, and therefore of corporate criminal liability, grew to resemble Gierke's to the point where he renamed, and substantially revised, the chapter in *History of English Law* on “Corporations and Churches,” one of the very few differences between the second edition and the first: “A repeated perusal of Dr. Gierke's great book, *Das deutsche Genossenschaftsrecht*, Berlin, 1868–81, has occasioned many changes in this section, which in the first edition bore the title *Fictitious Persons*.” P & M 2d ed. vol. 1, at 486 n.1; see also “Preface to the Second Edition,” P & M 2d ed. vol. 1, at v.

⁷⁷ See, e.g., Adolf Schönke, *Materialien zum englisch-amerikanischen Strafrecht* (4. Beiheft, *Deutsche Rechtszeitung*) (1948) (“The occupation of Germany demands a thorough study and consideration of foreign law.”).

⁷⁸ *Id.* at 8.

The same view is repeated in an explicitly comparative article on corporate criminal liability, published by Hans-Heinrich Jescheck (Schönke's successor as head of the Seminar—later Max-Planck-Institute—for Foreign and International Criminal Law in Freiburg) in 1952, shortly before the broad reconsideration of corporate criminal liability at the influential biannual German Lawyers' Meeting's (*Deutscher Juristentag*) in 1953.⁷⁹ The presentations at that *Juristentag*, much cited to this day, still reflected the comparative (and occupational) context of the issue, which was framed—as we've not previously⁸⁰—as a matter that cut to the core of German criminal law, and represented a welcome opportunity to use comparative analysis to highlight the comparative superiority of German criminal law vis-à-vis the law of the occupiers, while simultaneously noting the principled steadfastness of German criminal law, and German criminal law science, during the Nazi period. Corporate criminal liability thus once again became a litmus test: its absence indicated the presence of principle, science, truth, its presence their absence.

The comparative analysis attempted in this paper is not rooted in a particular domestic perspective, to be expanded by a peek over the fence. It instead suggests a way of considering two domestic histories in light of each other, thereby illuminating aspects of each that otherwise would remain obscure. In the case of the history of corporate criminal liability, German and Anglo-American law appear to have gone radically divergent paths, or rather to have gone the same path, but in opposite directions, crisscrossing one another somewhere around the turn of nineteenth century. According to the now familiar traditional story, there was plenty of corporate criminal liability in Germany before the enlightenment, and none since then (if we ignore the radically ahistorical view that corporate criminal liability never existed in Germany); by contrast, there was no corporate criminal liability in England until the early nineteenth century, yet plenty of it since then.

A comparative, broader, perspective, however, suggests parallelism, rather than radical divergence, or inversion. Schönke and Jescheck, without professing a particular interest in legal history, also noted similarities, relying on standard Anglo-American texts for the proposition that English and German law both rejected corporate criminal liability before the nineteenth century, until the onset of the industrial revolution. The difficulty with this account, however, is that it ignores the widespread acceptance of corporate criminal liability, occasionally in the face of dogma to the contrary, in both English and German law since at least the 13th century, as documented by Gierke (and Maitland). It is also a convenient account, from a German perspective, as it raises the question of why English law (and, presumably in its wake, U.S. law) would have abandoned this principled position, while German law held firm, even in the face of the industrial revolution and, it turns out, two World Wars and the Nazi regime.

Maitland, of course, also saw similarities between English and German laws, strong enough to justify applying Gierke's account of the German legal history of corporate criminal liability (as a litmus test for competing theories of the corporation) to English law. As a matter of professional legal history, this method may be problematic. From a more general perspective, however, Maitland's approach is attractive not only because it is comparative without being judgmental, or self-serving, and does not feature a sudden moment of radical and never mitigated divergence after a prolonged period of similarity,

⁷⁹ Jescheck, *supra*, 221 (fiction theory).

⁸⁰ *Supra*

but also because it characteristically pushes the historical and comparative inquiry to a higher level of abstraction, or—if you prefer—a more fundamental level of significance. The parallel that interested Maitland in the end was the parallel role played by corporations, under whatever name, in political and legal history, i.e., ultimately in the history of “public law”; ultimately he was after exposing the importance of the theory of corporations in a theory of the state,⁸¹ rather than highlighting the superiority, or even the prevalence, of one concept of the corporation over another (a concern that was much closer to Gierke’s Germanist heart).

Gierke saw the theory of the corporation within the context of the conflict between Romanist and Germanist conceptions of law. The concept of the corporation as a real entity, rather than a fictional one, was significant because it was perhaps the most distinctive, and important, indigenous German, rather than alien Roman, contribution to German law. To Gierke, the issue of corporate criminal liability in turn mattered because it indicated the presence of Roman or German elements: the presence of corporation criminal liability indicated Germanness, its absence Romanness.

Both Gierke and Maitland, in the end were interested in the nature of the corporation, and only incidentally in the nature of its liability. Criminal liability was evidence of corporate personhood; it may even be particularly strong evidence of “real” corporate personhood, but it was not the only evidence. In Gierke’s view, depending on one’s theory of a delict, acknowledging tortious capacity (*Deliktsfähigkeit* in the narrow sense), even while denying its criminal capacity (*Strafffähigkeit* or *Verbrechensfähigkeit*), could also be taken to indicate a Germanist conception of the corporation.⁸²

If one leaves aside the tension between Germanist and Romanist influences and shifts focus to corporate criminal liability as a question of criminal law, rather than of corporate law, another underlying tension comes into view: that between police and law in general, and between penal police and penal law in particular. After noting this tension several times in passing, it is now time to bring it to the fore in the next, concluding, section.

IV. Conclusion: Corporate Criminal Liability and the Rule of Law

Like the distinction between Germanist and Romanist elements, that between police and law as modes governance marks a longstanding fundamental tension, though not between sociological or national characteristics, but between conceptions of power reaching back to the origins of Western governmental thought and practice.⁸³ The basic idea is that there is a fundamental distinction between self-government (autonomy) and other-government (heteronomy), which manifested itself originally in the distinction between household governance and public governance. The (“private”) household realm (*oikos*, *familia*) was characterized by radical heteronomy, a categorical distinction between ruler (householder) and ruled (household), or between the subject and the object of government. The (“public”) realm of the city (the *agora*, the *forum*), by contrast, was

⁸¹ Maitland, Intro to Gierke, Political Theories xxx: “Then we shall understand how vitally important to a nation—socially, politically, religiously important—its Theory of Corporations might be.”

⁸² Otto Gierke, *Die Genossenschaftstheorie und die deutsche Rechtsprechung* 743ff. (1887).

⁸³ On the concept of police in various systems and spheres of governance, see generally The New Police Science: The Police Power in Domestic and International Governance 107 (Markus D. Dubber & Mariana Valverde eds., Stanford University Press, 2006); see also Martin Loughlin, *Foundations of Public Law* pt V (2010); Marc Neocleous, *The Fabrication of Social Order: A Critical Theory of Police Power* (2000).

marked by autonomy, the identity of ruler and ruled. Participation in the public realm of autonomy was limited to those holding the status of householder in the private realm of heteronomy; self-government presumed other-government. The householder was capable of self-government because he was capable of other-government. The constituents of the household were capable only of being governed, not of governing, themselves or others.

This distinction between autonomy and heteronomy, between public government and household governance, remained unchallenged for millennia, until the enlightenment, with its discovery (or invention) of autonomy as a capacity of all persons as such, rather than as a distinct (rare, elevated) social status. Once all persons were capable of autonomy, their objectification at the hands of the sole subject of power, the householder, came under critique, legitimacy now both being demanded of the exercise of power by some over others and being measured in the new coin of the realm, autonomy.

In the political sphere, the new demand for legitimation through autonomy was more or less formalized in a more or less comprehensive new ideal, the *Rechtsstaat* in Germany and the rule of law in England and America. This ideal itself cut its teeth on the final and most ambitious version of the heteronomous mode of patriarchal governance, the *Polizeistaat* of the benevolent prince who radically recast himself as the servant of the very human household resource he ruled with an absolute discretion at best guided by counsels of prudence, having extended his household to encompass the entire state, and having established himself as the father of his people.

Penal police and penal law are manifestations of the police and law model in the penal realm. From the perspective of penal police, a crime is an offense against the sovereign—the king in a monarchy, the people in a republic. The sovereign enjoys wide discretionary power to protect his (or its) peace, the peace of his (or its) household.

In penal law, a crime is one person's violation of another's personhood. The person is both the paradigmatic offender and the paradigmatic victim. Personhood is defined by the capacity for autonomy; crime is the exercise of that capacity by one person in a matter that is inconsistent with the personhood of another.

Even this brief sketch of the distinction shows that penal police easily accommodates corporate criminal liability. The offender's personhood is no prerequisite for punishability, so the corporation's status as a person is beside the point. The question from the penal police perspective is not whether the exercise of penal power against a corporation is legitimate, but—at best—whether it is prudent, or perhaps efficient (keeping in mind that the very recognition of limits on the power to police, here as elsewhere, is inconsistent with the sovereign nature of the power, so that whatever limits exist are self-generated and self-monitored). It may be prudent to police a corporation, rather than—or in addition to—individual members of the state household, because corporate liability obviates the need to differentiate between the respective quality and quantity of liability of individual group members, or because individuals may pose a significant threat to the peace only as a group, but not individually, or for any number of other reasons, none of which has anything to do with the corporation's personhood.⁸⁴ More generally, the central state could simply delegate its peacekeeping function to corporations and then police the corporation for failure to police its constituents. (See the use of communal peace bonds in medieval English law.⁸⁵)

⁸⁴ Supra text accompanying notes __-__.

⁸⁵ Dubber Preventive Justice.

The question of the legitimacy, as opposed to the prudence, of corporate criminal liability only arises, or could only be asked, from the perspective of penal law. In a penal law model, both corporate criminal offenderhood and corporate criminal victimhood—given the abstract identity of offender and victim—must pass the test of personhood. It is worth noting, in this context, that the connection between corporate offenderhood and victimhood is rarely made in discussions of corporate criminal liability. Instead, the focus is almost exclusively on a corporation’s capacity for offenderhood. By contrast, another candidate for personhood, animals, enters criminal law discourse almost exclusively as a potential victim; the question is whether animals are capable of criminal victimhood (directly, and independently of other right-holders, notably their owner), not criminal offenderhood.⁸⁶ There is much discussion, especially in American constitutional law, of corporate rights, including the right to equal protection and to freedom of speech, but the question of the possibility of criminal violation of these rights, whether narrowly under criminal civil rights statutes like 18 U.S.C. § 242 or more generally as a general account of crime, has not received much attention. In other contexts, particularly in the area of economic offenses such as fraud, the capacity for victimhood of corporations tends to be assumed without discussion. Consider, for instance, an employee’s criminal fraud perpetrated on a corporate employer, straightforwardly through the infliction of economic harm or, more interestingly for our purposes, through acts of disloyalty (most notoriously under the U.S. federal “honest services” fraud statute).⁸⁷

The distinction between police and law is more easily visible in German and American (and, for that matter, French⁸⁸) law than it is in English law. German legal and political history evolved around the distinction between *Polizei* and *Recht*, and between *Polizeistaat* and *Rechtsstaat*, with the concept of *Polizeistaat* having acquired a negative connotation over time precisely as a result of the critique under the *Rechtsstaat* banner, morphing into the *Wohlfahrtsstaat* (welfare state). From the other end of the spectrum, the concept of *sozialer Rechtsstaat* attempts to resolve the tension between *Polizei* and *Recht* by definition, or at least by label, with a parallel attempt in the realm of legal doctrine, rather than political ideology, taking the form of the facially oxymoronic project of *Polizeirecht* (which itself evolved into *Verwaltungsrecht*, or administrative law, with its subspecies of *Verwaltungsstrafrecht*).⁸⁹

The American legal and political project can also profitably be seen in light of the distinction between police and law, insofar as revolutionary rhetoric was couched (also) in terms of the establishment of a regime of laws, rather than men, or more specifically the king—oddly enough, by insisting that, from now on, as Thomas Paine put it in *Common Sense* (1776), “in America the law is king. For as in absolute governments the King is law, so in free countries the law ought to be king....”⁹⁰ Nonetheless, the police power—defined by Blackstone just seven years earlier as the king’s power, as *pater patriae*, over “the due regulation and domestic order of the kingdom: whereby the

⁸⁶ But see Jen Girgen, “The Historical and Contemporary Prosecution and Punishment of Animals,” 9 *Animal L.* 97 (2003); Dubber, *Victims in the War on crime* ____ (dog criminal law); see also Liszt, *Lehrbuch*, supra Franz von Liszt, *Lehrbuch des deutschen Strafrechts* § 27 (10th ed., 1900)

⁸⁷ 18 U.S.C. § 1346 (limited, on other grounds, *Skilling v. United States*, 561 U.S. ____ (2010)).

⁸⁸ See, e.g., Paoli Napoli, *Naissance de la police moderne: Pouvoirs, normes, société* (2003).

⁸⁹ Dubber, *Preventive Justice*

⁹⁰ Thomas Paine, *Common Sense* (1776).

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”⁹¹—remained alive and well in the New World, and was soon celebrated for its marvelous indefinability, flexibility, and scope, as the most direct manifestation of sovereignty, both the greatest and least limitable power of the state, which included, among other things, the penal power.⁹²

Despite Blackstone’s treatment of the police power, and of the various “Offences Against the Public Health, and the Public Police Or Economy,” i.e., “violation[s] of the public oeconomy and decency of a well ordered state,”⁹³ in the *Commentaries*, English legal and political discourse in general resisted the concept of police, which was associated with French law and government, as was any reference to the state or public law, the existence of which was strenuously denied until well into the twentieth century, stymying the development of an English history, never mind a theory, of the state and public law.⁹⁴ Here there is an obvious connection to Maitland’s attempt to excavate the concept of a corporation for the same purpose: to come to terms, literally, with what he regarded as the facts of the English state, by developing a vocabulary to describe, rather than to obfuscate, forms of government, even if that meant drawing on “alien” concepts, or entire theories and histories, like Gierke’s *Genossenschaft*, or, in Blackstone’s (and less surprisingly, Adam Smith’s and Bentham’s) case, the supposedly French concept of police.⁹⁵

The English reluctance to use the term “police” notwithstanding, the concept of household governance runs through all of English legal and political history, and the history of English penalty in particular, even if it tends to be framed not in terms of police, but in terms of peace: from medieval peace bonds, sureties “to keep the peace and good behavior,” to justices of the (royal) peace, to comprehensive colonial constitutional phrases such as “peace, order, and good government”⁹⁶ (an odd string of synonyms for police), to the form of criminal indictments as violations of the king’s peace.⁹⁷ Peace, however, was always *someone’s*, and more precisely some *householder’s*, peace.⁹⁸ In this light, then, English legal and political history appears as the expansion of the king’s household peace to encompass the entire realm, along the way reducing other once great, and not-so-great, households to micro households, i.e., to sites of delegated royal power (subject, at least theoretically, to ultra vires review).

⁹¹ Blackstone IV 162.

⁹² See, e.g., Dubber, *Police Power*, esp. ____ - ____; William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (1996); Christopher Tomlins, *Law Labor, and Ideology in the Early American Republic* (1993).

⁹³ Blackstone IV 163

⁹⁴ See generally Martin Loughlin, “Why the History of English Administrative Law Is not Written,” in *A Simple Common Lawyer: Essays in Honour of Michael Taggart* 151 (David Dyzenhaus, Murray Hunt, & Grant Huscroft, eds., 2009).

⁹⁵ On the concept of police in Smith and Bentham, see Dubber, *Police Power* ch. 3.

⁹⁶ See Mariana Valverde, “Peace, Order, and Good Government: Policelike Powers in Postcolonial Perspective,” in *The New Police Science* 73; see also Loughlin, *Foundations of Public Law* pt V.

⁹⁷ Dubber, *Preventive Justice*

⁹⁸ F Pollock and FW Maitland, *The History of English Law Before the Time of Edward I* (2nd edn, 1898) vol 1, 454.

The relation between law and police reflects the relationship between autonomy and heteronomy, which was thrown into question by the enlightenment's assertion of the capacity for autonomy of all persons as such, jettisoning the long-familiar distinction between governor and governed. The modern, post-enlightenment, relation between law and police is marked by tension, by a conflict of paradigms, which manifests itself also, and particularly sharply, in the realm of penalty, where penal law and penal police coexist uneasily, if inevitably.

This basic tension, now, can be seen manifesting itself in the comparative historiography and theoriography of corporate criminal liability. One version of this comparative account draws a sharp contrast between Germany and Anglo-American law. In Germany, so the story would go, the enlightenment not only formulated a critique of penal police (and police in general) from the perspective of law, but also turned to addressing it, and resolve the tension between police and law by definitional fiat, by asserting the legitimacy of the latter over the illegitimacy of the former. Since the enlightenment, the *Rechtsstaat* is king, and German criminal law science is devoted to working out the details of the rule of law (over police) in the penal realm. A penal law regime, however, has no place for corporate criminal liability, because corporations are declared to lack the capacity for autonomy in the relevant sense of a capacity for "free responsible ethical self-determination"⁹⁹ (or "personal-ethical guilt"¹⁰⁰). By contrast, the story continues, Anglo-American criminal law never had an enlightenment moment, therefore never experienced the tension between penal law and penal police, and therefore had no—and could have no—objection to corporate criminal liability as a matter of the rule of law.

There is some truth in this sketch, particularly insofar as it captures the absence of a revolutionary moment—enlightened or not—in the history of American penalty, which survived the Revolution and its law-soaked rhetoric essentially untouched.¹⁰¹ Nonetheless, the descriptions are unsatisfyingly simplistic on both sides of the supposed comparative divide: neither is Anglo-American penalty not devoid of law, nor is German penalty devoid of police.¹⁰² The enlightenment is significant as the origin of the modern notion of law as grounded in the capacity for autonomy of all persons as such, and captured in the ideal of the *Rechtsstaat* and the rule of law, but it is not the decisive moment at which the paths of German and Anglo-American penalty suddenly and radically diverge, in general or on the specific question of corporate criminal liability, with one system representing the rule of law, and the other the rule of police.

⁹⁹ BGHSt 2, 194, 200.

¹⁰⁰ Hans-Heinrich Jescheck, "Die strafrechtliche Verantwortlichkeit der Personenverbände," 65 ZStW 210, 210 (1953).

¹⁰¹ See Markus D. Dubber, "'An Extraordinarily Beautiful Document': Jefferson's Bill for Proportioning Crimes and Punishments and the Challenge of Republican Punishment," in *Modern Histories of Crime and Punishment* 115 (Markus D. Dubber & Lindsay Farmer eds., Stanford University Press 2007).

¹⁰² See, e.g., W. Naucke, 'Vom Vordringen des Polizeigedankens im Recht, d.i.: vom Ende der Metaphysik im Recht', in G. Dilcher and B. Diestelkamp (eds.), *Recht, Gericht, Genossenschaft und Policey: Studien zu Grundbegriffen der germanistischen Rechtshistorie* (1986), 177; B. Zabel, 'Die ordnungspolitische Funktion des Strafrechts', (2008) 120 ZStW 68.