Colonial Criminal Law and Other Modernities: European Criminal Law in the Nineteenth and Twentieth Century

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The idea of European legal history can be slippery. A handbook on European legal history presents the perfect opportunity to complicate the notion that there is such a thing as European legal history in the first place, and, if there is, to figure out what it might be. Luckily, others far more knowledgeable than I also have wondered aloud about these issues.¹

This chapter, also luckily, is not about European legal history as a whole. And yet, the more modest topic of this chapter, “criminal law in the nineteenth and twentieth century,” turns out nicely to illustrate some of the puzzling features of European legal history as an object of scholarly inquiry, not to mention as a phenomenon in its own right. Considering this chapter’s topic, then, may have the added bonus of documenting, if not necessarily illuminating, the endemic nebulousness of European legal history.

This chapter has two parts. The first part reflects on various approaches to our subject matter. We’ll do this by examining several ways of naming and framing the subject matter, along with ways of “covering” it along a set of by now fairly well established, and trodden, narrative paths, with its distinctive and familiar waystations and organizing teloi, “principles,” or “shared roots.” The paths may differ, along with their origins and destinations, but the trip is fairly standard, pushed along reassuringly by a quiet Whiggishness that keeps its eye firmly, or at any rate unerringly, on the prize (whatever it is).

The second part lays out a more promising, or at least less predictable, two-track, conception of European criminal legal history. It will do this by taking an upside-down, or more accurately, outside-in view of the subject, by focusing on an understudied, but fascinating, project of European criminal law (or, if you prefer, European project of criminal law): the invention, implementation, and evolution of colonial criminal law.

I. European Criminal Legal History: What Is It?

The difficulty of approaching this chapter’s topic becomes apparent as soon as one tries to name it, never mind to define it. It is a chapter on “criminal law in the nineteenth and twentieth century” in a handbook on “European legal history.” So, disregarding the temporal bracket for now, let’s streamline this into “European criminal legal history.” But what does that mean? The history of European criminal law? The history of criminal law in “Europe”? Or of “Europe”? The history of the criminal law of certain—all?—countries within, or associated with, a space or a region, an idea, a legal (political, cultural, social, etc.) project called “Europe”? Would getting a grip on the object of our historical analysis

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require a preliminary exercise in comparative law? Or in transnational law? In supranational law?

Supranational. In answering these questions (and the answer may well be: “all, or some, of the above”), it would help to get clear on the operative sense of Europe, from a list of separate entities, to a collection of parts, to a sum greater—or at least different—than its parts, an entity above the nations of Europe. In the case of criminal law, this is not simply a matter of clarifying one’s mode of analysis. If one adopts the latter, supranational, view of “Europe,” our chapter on criminal law may turn out to be, if not impossible, then at least extremely short. After all, the very existence, or possibility, and certainly the desirability or legitimacy of a European criminal law in the sense of a criminal law of the European Union (or some less prosaic label for a supranational conception of Europe) has long been contested.

Obviously, if there is no Europe, there can be no European law (or anything else distinctively European, for that matter). But even if there is a Europe, and European law becomes possible, the possibility of European criminal law is another matter. Criminal law has remained national law in Europe, just like criminal law has remained state law in the United States, by and large. The power to punish was too closely associated with the very idea of (national or state) sovereignty that it could be entrusted to a supranational (or suprastatal) entity: Europe in one case, the United States (i.e., the “federal government”) in the other. These supranational sites of oddly non-statal yet “governmental” power were not deprived of penal power altogether; but it was a different, carefully circumscribed, more instrumental than existential kind of penal power, in contrast to the essentially limitless discretionary, truly sovereign power to punish integral to the very idea of political power itself. That type of penal power was reserved for the sovereign members of the union—the nations and the states—which carefully policed the limits of supranational penal power (with limited success, as the evolution of U.S. federal criminal law indicates).

In Europe, more so than in the United States, this sovereignty-based narrative of necessarily national, rather than supranational, penal power has been joined by several others. There is a legitimacy-themed narrative, for instance, that stresses the heightened need for legitimation through local self-government in the case of the exercise of penal power as the most intrusive form of governmental power. This narrative may blend into an insistence on the protection of firmly held and deeply felt local cultural and social norms against “outside” influence in either direction, criminalization or decriminalization. More generally, these concerns about the very notion of European criminal law often arise in countries that regard themselves as having a criminal law system that is not only different than others, but superior in some way, perhaps in the advanced state of its criminal law “science” or—relatedly—its criminal law policy, including the principles of criminal liability or criminal procedure, constitutional and otherwise. To the extent that the resistance to European criminal law is motivated by a sense of national superiority, it presumably could be overcome if only the criminal law system of the “superior” nation were universalized into European criminal law.

Liberal. Perhaps the project of European criminal legal history, and therefore this chapter, is not about one mode of positivistic legal analysis or another, after all, but about a common essence, foundation, or model, to which we conveniently attach the abstract label of “Europe.” In other words, perhaps this foray into “European criminal legal
history” is less an exercise in legal history, in the sense of a history of positive law, than an exercise in legal theory (or sociology). In this conception of our topic, we might chart the evolution or, perhaps more accurately, the discovery of a theory of law—say liberalism, or Kantianism—the manifestations of which are then documented across space and time, in the domestic legal systems of various countries over the course of a certain period (say, “the nineteenth and twentieth century”). “Europe,” in this light, might appear as vaguely synonymous with “liberalism,” “European law” with “liberal law,” and “European criminal law” with “liberal criminal law.”

Here it is fairly arbitrary which legal system we might use to illustrate the continuous unfolding of the liberal idea in European law, and European criminal law in particular, though some countries tend to appear more frequently in these accounts than others. Germany comes to mind. Measuring European criminal legal history against the yardstick of German criminal legal history may strike the casual observer as somewhat ironic—though perhaps not surprising, given the dominant position of German legal scholarship, including legal historiography, in Europe—in light of the radically illiberal episode in German criminal law between 1933 and 1945.

Narratives of continuous, if occasionally halting, progress are as uncritical as they are predictable, with no discernible motivation other than a need to record the development of something old into something newer into something current—and something yet to come, where the future generally is expected to continue closely to resemble the present, given the shared sense that things in criminal law, temporary hiccups and remaining imperfections aside, are pretty much what they should be, and have been for some time. These narratives may operate, explicitly or implicitly, against the backdrop of a contradistinction to another system or systems, where things are very much not what they should be. For decades, the image of U.S. criminal law has performed a particularly useful comparative function as the dystopia compared with which European criminal law, even at its worst, looks like a utopia of liberal criminal law, or at least well on its way there. In this context, English criminal law too may still appear occasionally as a more benign version of the premodern, unenlightened, irrational, codeless (!) (“common law”) other. German criminal law, again, tends to appear on the other end of the spectrum from norm/model to exception/dystopia, with the narrative of European criminal legal history then framed in terms of proximity to, or at least progression toward, German criminal law.

This state of affairs may not be unrelated to the fact that much of European legal history has long been written by German scholars. German dominance in European legal

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2 Germany, as we’ll see shortly, plays the role in the historiography of European criminal law that Rome plays in the historiography of European civil law.
3 We will return to the liberalist project of European criminal legal history in the second part of this chapter. For now, let’s continue our quick tour of European criminal legal history as it is being practiced (or not).
4 The point is not that U.S. criminal law is not dystopian, see Markus D. Dubber, Victims in the War on Crime: The Use and Abuse of Victims’ Rights (2005), but that it is used as a dystopian strawman. For a discussion of a similar, reverse, phenomenon, in U.S. criminal procedure, see David Alan Sklansky, ‘Anti-Inquisitorialism’, (2009) 122 Harv L Rev 1634ff. For a sophisticated work of comparative legal history that seeks to account for U.S. penal exceptionalism, rather than merely using it for rhetorical effect, see James Q. Whitman, Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe (2003).
history, however, doesn’t fully account for Germany’s central role in European criminal legal history; German dominance in criminal law, starting in the early twentieth century, has played a role as well. It didn’t much help the cause of European criminal legal history, or of domestic criminal legal history for that matter, that German criminal law scholarship emerged as an ahistorical “science” that had about as much use for historical context as modern physics—or, more relevant, botany—has for the history of science. German criminal law scholarship, in this respect, was even less interested in historical analysis than was its counterpart in common law countries, where the old was not dismissed as out-of-date but rather doctrinally venerated as precedential.6

This story does not apply to the law, or legal history, of (“European”) criminal procedure (as opposed to substantive criminal law), where German legal scholarship never achieved (or sought) quite the same model status.7 In the early 20th century, when a group of American scholars, including John Henry Wigmore and Ernst Freund, under the auspices of the Association of American Law Schools launched an ambitious translation and editorial project, The Continental Legal History Series, to enliven American legal discourse with “foreign” texts, the closest thing to a history of “continental” criminal law they could find was a history of German criminal law, which they then supplemented with asides about criminal law in other countries.8 A supplemented history of French criminal procedure served the analogous function of stand-in for a history of European criminal procedure.9

English criminal procedure (and the jury in particular) enjoyed a progressive, perhaps even (in some sense) enlightened reputation among continental observers, at least until continental legal systems (including Germany) determined that lay participation was a sign of ascientific premodern irrationality rather than enlightened self-government (and that the English jury system only worked—to the extent that it ever did—because of that elusive and distinctive English “common sense”).10 Unlike English law, U.S. law

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7 To this day, substantive criminal law (the law governing the principles of criminal liability and the definition of offenses) consumes the bulk of attention among German criminal law scholars, with criminal procedure largely relegated to the place of a necessary but secondary object of inquiry. (The exact opposite traditionally has been true of criminal law scholarship in common law countries.) At any rate, it is perhaps no surprise, then, that to the extent that German (or Germano-centric European) legal history showed an interest in criminal law, it tended toward histories of substantive criminal law, and, more specifically, histories of the general part of substantive criminal law (dealing with general principles of criminal liability, rather than with specific offenses), and yet more specifically, histories of (German) scholarship on the subject.
8 Carl Ludwig von Bar, A History of Continental Criminal Law (1916). Wigmore’s editorial preface is still worth reading today. Besides bemoaning the dearth of criminal legal historiography, Wigmore rejects a “simply antiquarian treatment” of the subject and sketches a remarkably comprehensive and (what we might now call) interdisciplinary outline of “an ideal history of the criminal law,” including “the history of criminal law in general,” “the history of specific crimes,” and “the history of crime itself.” Ibid. xxix ff., xxxi (emphasis in original).
continued to fulfill its function of contrasting dystopia even in criminal procedure, thanks to its association with the universally condemned practice of “plea bargaining,” even after Europeans, after decades of condemnatory “principled” rhetoric, could no longer ignore the use of arguably more nefarious bargaining practices involving the ultimate decision maker—rather than the parties, however unevenly matched—in European criminal procedure.11

Continental. One explanation for the difficulty in getting a handle on “European” legal history, including of criminal legal history, is the long-standing practice of using “continental” and “European” as synonyms. This practice has significant implications for the scope and ambition (and complexity) of the discipline. Neither Wigmore nor any of his colleagues would have dreamed of including English law alongside German or French law in their translations of texts on “continental” criminal law and procedure.

“Continental” law meant “civil” law in the sense of not “common” law; in other words, continental law was defined in explicit contradistinction to English (and U.S.) law.

More recently, the casual practice of equating European with continental legal history has spawned a critical literature calling for an expansion of the traditionally narrow focus of European legal history, which excluded not only England (in one direction) but also the Scandinavian or “Nordic” countries (in another). One remedy appears to be the replacement of one rough synonym for “European” (“continental”) with another (“comparative”), or rather the conceptualization of European legal history as an exercise in comparative, or even transnational, legal history (with open, or at least, porous European borders) rather than in supranational history (of something called “Europe”), in an effort to sidestep distracting conceptual, perhaps merely taxonomic, questions.

Wigmore’s difficulty in finding a text on the history of European (“continental”) criminal law or procedure is noteworthy for three reasons. First, it reflected a dearth of literature on the subject of European (or continental) criminal legal history. There was simply nothing to translate, forcing Wigmore and his colleagues to supplement domestic histories (German in one case, French in another). Second, histories of domestic criminal law (or procedure) themselves were quite rare.

Third, and more interesting, Wigmore would have faced similar problems today. Even today, the literature on European criminal legal history is thin. And the literature on domestic criminal legal histories is not much thicker.

Consider the book that may well have been the choice for an early 21st century Wigmore: once again, a history of German criminal law (by Eberhard Schmidt), supplemented by summary accounts of developments in other countries. Schmidt’s book, though first published shortly after the end of World War II, and most recently revised in 1965, remains the leading work on the subject.12 In fact, the literature on German

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12 Eberhard Schmidt, Einführung in die Geschichte der deutschen Strafrechtspflege (1947). Recently, two additional introductory texts on German criminal law history have appeared. Thomas Vormbaum, Einführung in die moderne Strafrechtsgeschichte (3d ed. 2016); Hinrich Rüping, Günter Jerouscheck, Grundriss der Strafrechtsgeschichte (6th ed. 2011). The more ambitious of the two, by Thomas Vormbaum, is now available in English translation. Thomas Vormbaum, A Modern History of German Criminal Law (Michael Bohlander trans. 2014). Drawing on Vormbaum’s extensive pioneering work on primary sources of German criminal legal history, it traces an alternative historical narrative that advances past Schmidt’s endpoint, the collapse of the Nazi regime in 1945.
criminal legal history today is, in some respects, less rich than it was in Wigmore’s day, when an array of different historical accounts were on offer—including, besides von Bar’s, by writers with approaches and interests as diverse as Wilda, Brunner, and Binding (though all with a particular focus on early criminal law).13

German. Schmidt’s book, like von Bar’s, provides a helpful overview, in (rough) chronological order, of developments in (German) criminal law, or rather in (German) criminal law scholarship (which is to say in criminal law science—a subject that, by definition and design, resists serious engagement with historical context, other than to record the progression toward greater rationality and, in the end, truth). Schmidt’s book filled a gap in the literature (for decades!); it is not a particularly ambitious or revelatory historical account of German criminal law.

Uninspired domestic histories of criminal law make poor templates for histories of European (or continental) criminal law, even if one sets aside general reservations about a jurisdiction-centric project of generating European criminal legal history, no matter which jurisdiction one might pick and how one might try to justify that choice. Schmidt’s and Bar’s made available serviceable points of entry to anyone eager to learn about the standard account of the succession—and successive improvement—of German scholarship on criminal law and the theory of punishment.

Rather than as a history of criminal law, Schmidt’s book, in fact, might be better read as an exercise in self-justification or personal reckoning, particularly when it comes to the time period covered in our chapter. The main protagonist in Schmidt’s account is Franz von Liszt, the leading German contributor to the emergence of progressive “modern” criminology at the turn of the twentieth century, a movement that was consciously international—and European—in its ambition, as evidenced by the name of its central organization (“International Union of Criminal Law”), launched in 1889, and the multinational make-up of its founding trio (which also included Adolphe Prins (Brussels) and Gerardus Antonius van Hamel (Amsterdam)). Schmidt was Liszt’s student and edited Liszt’s popular criminal law textbook after Liszt’s death in 1919, until its 26th and final edition, in 1932. Schmidt’s narrative presents Liszt’s self-consciously modern consequentialist program (deterrence-rehabilitation-incapacitation), set against the atavistic barbaric unscientific orthodoxy of “classical” retributivism as the final stage in the pursuit of the enlightened legal-political project of criminal law: the “rule-of-law-social epoch” (rechtsstaatlich-soziale Epoche) personified by Liszt.

This narrative might appear merely simplistically Whiggish, and perhaps a little self-serving, had Schmidt published his book in, say, 1932. But, in 1947, there was more at stake. For it turned out that the Nazis, especially—but not only—early on, drew heavily from Liszt’s progressive proposals, most famously and significantly, the radical reform of the German penal system the Nazis implemented within a year of assuming power, instituting the two-track system of guilt-based punitive “punishments” and diagnosis-based rehabilitative-incapacitative “measures” that remains in place to this day.14 Eight

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years later, in 1941, at the height of World War II, a reform of the murder provision in the German Criminal Code supported by none other than Roland Freisler, the later President of the notorious German People’s Court (Volksgerichtshof), replaced the traditional definition of “murder” (which resembled the common law definition in its focus on premeditation) with a definition of “murderer,” implementing a longstanding progressive proposal to shift emphasis from the offense to the offender, and from analysis of guilt to peno-correctional diagnosis.\footnote{Gesetz zur Änderung des Reichsstrafgesetzbuchs, Sept. 4, 1941, RGBl. I S. 549.}

The continuity between the ideology of Liszt’s “rule-of-law-social epoch” and Nazi penal policy is remarkable. At the very least, Liszt’s commitment to fundamental liberal principles of the rule of law (captured in slogans such as “The criminal code is the criminal’s magna carta.”\footnote{Franz v. Liszt, ‘Ueber den Einfluß der soziologischen und anthropologischen Forschungen auf die Grundbegriffe des Strafrechts’, in Strafrechtliche Aufsätze und Vorträge, vol. 2 (1905), 75ff, 80 (emphasis in original).}) did not stand in the way of the Nazis appropriating his general approach to penal governance along with his specific policy proposals. And, even leaving aside Liszt’s (and Schmidt’s) place in the history of German criminal law, the surprisingly smooth transition from the so-called “rule-of-law-social epoch” of Liszt and his fellow Weimar progressives to the Nazi era casts doubt on Schmidt’s attempt to trace that history as an ever-rising arc toward the realization of the modern ideal of liberal criminal law, suddenly interrupted in 1933 (or perhaps at some later point during the Nazi regime: 1939? 1941?\footnote{Also the year of the PolenStrVO, Dec. 4, 1941, RGBl. I S. 759 (§ 1(1): “Poles and Jews … are to refrain from doing anything that diminishes the sovereignty of the German empire and the reputation of the German people.”), also favored by Freisler, and promulgated three months after the revision of the murder provision.})

An alternative approach. But let’s suppose we eschewed a Whiggish approach and instead turned to a critical historical analysis of the liberal legal-political project in the penal realm. In that case, German criminal law might well serve as a focal point, and precisely for the same reason. In this historical account, the German penal regime of 1933-1945 would appear not as an inexplicable detour (if not an outright U-turn) on the road to the realization of the (European) project of liberal criminal law, but as a particularly stark illustration of the exact opposite, i.e., the failure to meet—if not the impossibility of meeting—the challenge of modern liberal criminal law, for any number of reasons, including the choice of inappropriate—and perhaps even counterproductive—means and the failure to appreciate the nature and significance of the legitimatory challenge in the first place.\footnote{Different countries may fall short in different ways, and in more ways than one. See, e.g., Markus D. Dubber, ‘The Legality Principle in American and German Criminal Law: An Essay in Comparative Legal History’, in Georges Martyn et al. (eds.), From the Judge’s Arbitrium to the Legality Principle: Legislation as a Source of Law in Criminal Trials (2013), 365 ff. (contrasting Germany and U.S.).}

This historical approach might even encourage critical reflection on the formulation of the challenge of liberal criminal law itself during the “emergence of modern law” at the turn of the nineteenth century. The launch of the project of modern liberal criminal law so far has been associated with a fairly standard list of “Fathers,” which ordinarily includes, at the European (or supranational) level Beccaria and Kant, perhaps Voltaire or even Bentham, supplemented with various national figures, notably P.J.A. Feuerbach in
Germany. These domestic founding figures translated the general ideal into the vernacular of domestic criminal law doctrine, through theoretical works of their own, textbooks, or codes, or—as in Feuerbach’s case—all three. “Punishment theory” has, for centuries, rediscovered and reanimated the debate between the consequentialist and deontological approaches to the justification of punishment that these authors are taken to exemplify. By contrast, the historiography of criminal law (domestic or European) generally has been content to mark a single, monochromatic, moment of the “emergence of modern law” and then chart a historical course from there.19 These foundational texts and figures, however, deserve closer attention than they have received, beyond their role as unidimensional stand-ins for one “theory of punishment” or another, if not simply for the start of the modern, enlightened, era of criminal law in their respective countries.

Slavery. One issue that might benefit from further historical analysis in this context is the role of slavery and enslavement in the foundational texts and during the formative period of the (European) liberal criminal law tradition. The latter issue has been explored, as part of the social history of slavery in liberal societies, by Orlando Patterson.20 The connection between penal slavery (and “social death”) and imprisonment in general, and a specific mode of incarceration in particular, permeates the foundational texts of liberal criminal law, across the familiar and supposedly fundamental ideological divide separating consequentialist from deontological approaches.21

To the extent the liberal criminal legal project revolves around a basic, and “modern,” commitment to personal autonomy, the frequent casual references to slavery (as the ultimate negation of autonomy through one human’s subjugation of another) in the foundational texts of liberal criminal law are striking. The dichotomy between master and slave, now, may frame—and significantly limit—the project of liberal criminal law from the very beginning, excluding certain objects of punishment from the realm of persons whose autonomy must be respected even in their punishment in order for that punishment to be legitimate. Alternatively, if this dichotomy is not meant to frame the project from the start by drawing a fundamental distinction among objects of punishment, then perhaps the commitment to autonomy (as the defining characteristic of a person and as the lynchpin of legitimacy) may turn out to be much less central to the project of liberal criminal law, and far less ironclad, than is generally supposed.

This historical inquiry might then be expanded in scope and in time. The dichotomy between slaves and other objects of punishment, and between enslavement and other modes of punishment, might be regarded as only one way of limiting (and thereby simplifying) the legitimatory task of liberal criminal law, by excluding certain objects of punishment and their punitive treatment from the scope of the inquiry. This would suggest a search for other distinctions that perform a similar function in European criminal legal history. Consider, for instance, a provocative example from the recent

19 But see now Arnd Koch et al. (eds.), Feuerbachs Bayerisches Strafgesetzbuch: Die Geburt liberalen, modernen und rationalen Strafrechts (2014); Vormbaum, Einführung (n. 12); see already Wolfgang Naucke, Kant und die psychologische Zwangstheorie Feuerbachs (1962).
20 Slavery and Social Death (1982).
literature, the distinction between citizen and enemy, often taken to be exemplified by “the terrorist.” More mundane examples might include familiar distinctions based on class, race, ethnicity, gender, national origin, residence, and so on.

**Colonial criminal law.** To pick a specific, and perhaps less obvious, example, that also expands the inquiry in time from the turn of the nineteenth to the turn of the twentieth century, take colonial criminal law, an entire penal regime based on the radical distinction between white and black, colonizer and “native,” civilized and uncivilized, ruler and ruled. Here, a focus on German colonial criminal law suggests itself for two reasons. First, it would nicely supplement the traditional focus on German (non-colonial) criminal law in European legal history, though it should not come as a surprise that there will be little if any institutional or personal overlap between the long-standing academic study of “real” criminal law in Germany and the exploration of colonial criminal law, which may not even have been regarded as criminal law, but rather as a form of public law. Second, Germany came late to the enterprise of colonial criminal law. As a result, when Germans turned their attention (however briefly) to the question of colonial criminal law at the turn of the twentieth century, they had before them a palette of approaches pursued by their fellow European colonial powers, including England, France, Italy, Holland, Spain, and Portugal. The result is a fascinating—and notably non-judgmental—literature providing comprehensive comparative analyses of “best practices” of European colonial criminal law.

Stepping back from our critical reflections up to this point, we can now see the basic contours of an alternative approach to our subject: European criminal legal history since the turn of the nineteenth century, i.e., “the emergence of modern law.” This approach would regard the European modern liberal political-legal project, rather than a single (model) jurisdiction or group of jurisdictions, as its object of inquiry. It would pursue historical analysis as a mode of critical analysis, beginning with the foundational moment of the project under investigation, and at every step challenge convenient assumptions about the cogency and desirability of that project, on one hand, and about progress toward its successful completion, on the other.

The second part of the chapter is devoted to fleshing out this alternative approach to European criminal legal history.

**II. European Criminal Legal History: What Could It Be?**

Associating the idea of Europe with the liberal project and, as a result, regarding European legal history in light of the basic commitments of that project need not be ahistorical, self-deluded, or self-congratulatory. “Liberalism,” in other words, may be the rug that ties European legal history together, as long as one doesn’t treat “liberalism” or, for that matter, “law” (or, of course, “Europe”) as prepackaged ideas delivered *ex*
machina, but rather as themselves historically situated.\textsuperscript{24} The problem with a liberalist approach to European legal history (as a form of intellectual history rather than of applied legal theory) is not a matter of conception but of execution. There is no reason why a liberalist history must be a happy history of progress, perhaps with occasional interruptions, and why it cannot instead—or also—be a history of failure, whether at the foundational level, as an ideal, or at the level of implementation, as a failure to live up to that ideal. And what better illustration of the significance of European legal history than the historical analysis of the most awesome manifestation of state power through law, criminal law, in which state officials intentionally threaten and inflict violence on the state’s constituents, thus violating the autonomy of the very persons upon whose autonomy the legitimacy of the liberal state rests?

A liberalist approach to European criminal legal history, however, would have to avoid not only the ever-present temptation of Whiggish self-congratulation (often combined with other-condemnation). It must, at the same time, take care to recognize its inherent limitations. Liberalist historiography is no more universalist than liberalism itself. Liberalism is often accused, rightly, as disregarding its historical and, more frequently, geographical, national, cultural, and social context. In fact, this criticism is often framed as an accusation of Euro-centrism. This is true enough, but beside the point when it comes to an explicitly European enterprise such as European criminal legal history. Liberalism is appropriate as a lens through which to regard European criminal legal history precisely because, and insofar as, it is Euro-centric, as Euro-centric as its object of analysis. Liberalism is one attempt to capture what is European about European criminal legal history, no less, but also no more.

Modern. The liberalist project may be regarded in connection with what we might call the modernist project, i.e., an approach to European legal history in general, and to European criminal legal history in particular, that associates the origins of modern legalism in Europe with the origins of liberal legalism: modern law is liberal law. Both approaches, modernist and liberalist legal historiography, face similar pitfalls; both can turn Whiggish fast, with one measuring continuous modernization and the other continuous liberalization across European (criminal) legal history since the turn of the nineteenth century. The modernist approach, in addition, suffers from a vagueness approaching vacuity that might be remedied by associating it with the liberalist approach; there is no reason why there can only be one modern moment, but it helps to get clear on what makes each modern moment, modern.\textsuperscript{25}

This handbook reflects a common conception of the relationship between legal modernism and liberalism. Start with our chapter’s temporal bracket: “Criminal Law in the Nineteenth and Twentieth Century”; then add the subtitle of the handbook section within which our chapter appears, “The Nineteenth Century and Beyond: The Emergence of Modern Law.” The subtitle suggests that what matters is the beginning of the period under investigation, not its end, the left side of the temporal bracket, not the right. That period, having begun with the “emergence of modern law” at the turn of the nineteenth century, is still underway.


\textsuperscript{25} On various notions of the “modern” in criminal legal history, see Dubber, Foundational Texts (n. 22).
In this way, the subtitle gestures at a familiar narrative in legal history in general, and European legal history in particular. What happened at the turn of the nineteenth century (a long nineteenth century that actually started in the eighteenth and, in some cases—England?—even earlier) was modernity. Never mind that the turn of the twentieth century likewise tends to be marked by the arrival of modernity. But that modernity—associated with visions like the “modern man” in Kafka or Musil wondering aimlessly, anxiously, and alienatedly about the decaying classical world around him—was of a different kind, and oddly, despite its apparently existential significance, of a lesser kind, registering in legal history merely as an adjustment along the path that began with the “emergence of modern law” a hundred years (give or take a century) before.

The former (turn-of-the-nineteenth-century) modernity is the modernity of the enlightenment; “modern law” is the manifestation of the enlightenment project in the political-legal realm, built on the conception of the liberal individual, the person. The latter modernity is the modernity of the collapse—or, depending on one’s point of view, the fundamental reorientation—of the original enlightenment project, as science replaces justice, social interests drive out individual right, the “modern administrative state” encroaches on the Rechtsstaat, and—in the realm of penalty—a science of criminology built around a program of prevention, discipline, and incapacitation of the criminally dangerous challenges the orthodox doctrine of criminal law wedded to an atavistic, anachronistic, and irrational idea of punishment based on the notion of individual guilt.

Curiously, the modernity of progressive criminology in this light can be seen as recalling a notion of modernity that preceded the “emergence” of the modern liberal political-legal project at the turn of the nineteenth century. This pre-liberal modernity is not the modernity of the liberal Rechtsstaat (état de droit), but of the technocratic and self-consciously scientific and progressive Polizeistaat (état de police) and its Polizeiwissenschaft (science de la police). The police state, however, is the very manifestation of state power against which the “modern” enlightened liberal law state defined itself, based on the radical new idea of the universal capacity for self-government of all persons. In this telling, then, the history of European criminal law in the long nineteenth century is the history of an interlude of law in a centuries-long “modern” project of police (Policey), in the classic sense that still shines through, an ocean away, in the U.S. Supreme Court’s 1873 definition of the state’s police power as the “power to govern men and things within the limits of its dominion”26: the modern publicized manifestation of the householder’s discretionary, limitless and essentially sovereign “oeconomic” power over the human and non-human resources within his private household (oikos), familiar since the dawn of Western political history in ancient Athens.27

Two European criminal legal histories. Locating the idea of “modern law”—both its modernness and its lawness—in a broader historical context in this way suggests a two-track longue durée approach to European legal history in general, and European criminal legal history in particular, framed by the distinction, and tension, between two modes of governance that can be traced throughout the Western—and, more specifically, the European—political-legal project. The “modern law” that “emerged” at the turn of the

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nineteenth century is the enlightenment-based, autonomy-centered, conception of liberal law in contradistinction to the household-based, heteronomy-centered, conception of pre-liberal (yet already “modern”) police. Both, law and police, are “modern” manifestations of the long-standing tension between autonomy and heteronomy within the realm of public governance.

The object of this historical analysis of European criminal law is a political-legal project; its boundaries are defined by membership in this project. It is systemic rather than jurisdictional, and in that sense neither national nor supranational, but anational; it does not trace a discrete body of law at any level—local, national, international, or supranational. It uses historical analysis as critical analysis to regard a given norm, practice, or set of norms or practices against the backdrop of the normative commitments, if any, associated with law and police as the two basic “modern” modes of governance.

In the end, then, this historical analysis would generate a two-track narrative of European criminal legal history (using “legal history” in the broad sense): a European criminal legal history (in the narrow sense) and a European criminal policial history. From this perspective, the bulk of existing scholarship on European criminal legal history since the “emergence of modern law” falls into the first category. European criminal legal history since the turn of the nineteenth century has been a history of European criminal law in the narrow sense, as if the emergence of modern law marked an immediate and complete transition from one era (the era of police) to another (the era of law), with the era of the (modern) Rechtsstaat replacing everything (premodern) that went before it, and thus rendering historical analysis from a policial perspective irrelevant, if not outright anachronistic. At the same time, and perhaps relatedly, European criminal legal history has—as we noted previously—largely contented itself with retelling a criminal law version of the familiar story about the “emergence of modern law” at the turn of the nineteenth century as a march toward a more comprehensive manifestation of the idea of criminal law in the “modern,” liberal, sense.

The outlined two-track approach leaves two opportunities for further development. First, and most obvious, the pursuit of European criminal legal history in the narrow sense should avoid the rut of Whiggishness to pursue a historical analysis that challenges accepted narratives and critically analyzes norms and practices in light of the conception of “modern” liberal law that should not be assumed to animate them simply because its “emergence” preceded them. Take, for instance, a familiar narrative that identifies criminal codification with modernism, liberalism, rationalism, scientism, and virtually every imaginable innovation generally associated with the emergence of modern criminal law. The association between codification and modernity, liberalism, science, etc. is somewhat surprising for several reasons, including that codification long predates the “emergence of modern law” at the turn of the nineteenth century, remained controversial long after that moment of emergence, and in England—which at least according to more recent, inclusive, conceptions of the project of “European legal history” is no longer seen

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28 Yes, this two-track narrative would, among other things, track the German two-track (punishment-treatment/law-police) system discussed above.

as quintessentially non-European—was regarded as fundamentally inconsistent with, rather than as a necessary condition for—the political-legal project.

The role of codification, and of criminal codification specifically, in European criminal legal history is ripe for a more nuanced reassessment, even within the realm of European criminal legal history in the narrow sense. It may turn out, upon closer inspection, that criminal codification isn’t all that it’s been cracked up to be (Bavaria: Feuerbach), that liberal criminal law can do without codification (England & Scotland), that transformative effects of codification are overrated (Spain), and that there is nothing inevitable about criminal codification preceding civil codification (Switzerland).

Second, and more significant, the outlined legal-political approach opens up (and airs out) historical legal analysis by expanding its systemic and temporal context: broader systemically because the European political-legal project, even—and especially—the “modern” variety, is broader and more complex (and interesting!) because it encompasses not one but two foundational modes of governance that are in tension (and have been since the very beginning of that project), as well as broader historically because it places the emergence of “modern law” into a longue durée context that illuminates both the distinctiveness of the “modern” conception of law and its deep historical, and systemic, roots. The suggested approach also promises to enliven the project of European criminal legal history by placing it in a broader disciplinary, institutional, and international context, by providing a common framework for traditional “legal history” practiced primarily by professors of law working primarily with legal texts (and, often, texts produced by previous generations of law professors, i.e., “legal scientists”) and historical analysis of law and governance pursued by scholars in other fields, including, e.g., history, criminology, criminal justice, police studies, and political and social theory, many of whom are long accustomed to participating in European and international research networks and projects.

Once one adopts the perspective of a two-track historical analysis, previously submerged moments—however sporadic—of a parallel European criminal policial history become visible. Take, for instance, Theodor Mommsen’s oddly neglected, yet still definitive and stimulating, tome on Roman criminal law. Recall that the history of European civil law is often pursued as an exercise in Roman law. One reason why a Roman-centric approach to European criminal legal history has not gained similar traction (leaving room for a German-centric approach, at least to modern European

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criminal legal history) is simply that the Romans themselves expended comparatively little effort on criminal law. Roman law was first and foremost civil law; and Roman legal history has been civil legal history.

As Mommsen made clear, however, there was plenty of what we might call Roman criminal police. (Similarly, there was plenty of what we might call Roman public police—as opposed to public law—in the sense of norms governing the administration of Rome, and eventually, the Roman empire.) Mommsen stressed repeatedly that the origin of “Roman criminal law” lay in the patria potestas, the practically limitless disciplinary power of the pater familias over his household (familia): “The householder’s limitless power over household members is essentially identical to the state’s power over community members.”

Instead of busying ourselves with searching for the supposed Roman law origins of purportedly age-old criminal law principles such as actus reus non facit reum nisi mens sit rea (on the common law side)33 or, more dubious yet, Latinate neologisms such as Feuerbach’s three nulla poena/nullum crimen maxims or, most dubious, more recent Latinisms they inspired (e.g., nulla poena sine culpa),34 we might try our hand at tracing the long history of penal power as an exercise of patriarchal power unconcerned with such “legal” niceties.35

Gustav Radbruch did just that, in the longue durée, in his wonderful and still too-little noticed essay on the origins of (European, and not merely German) criminal law in household discipline, particularly against serfs, or the unfree.36 To Radbruch, the story of modern public criminal law is the story of the publicization of once private discipline into state punishment, achieved through the expansion of disciplinary measures (notably physical chastisement) once reserved for the unfree (i.e., the members of the private household) to the free, now reconceived as members of the public household under the quasi-patriarchal power of “the state.” Note that, in Radbruch’s telling, this is not on its face a troubling story. To Radbruch, the radical distinction between subject and object of penal power is an essential feature of that power. The modernization of penal power is not its reconception from an (and, in fact, the most extreme) instance of utter heteronomy.

32 Theodor Mommsen, Römisches Strafrecht (1899) 16-17; ibid. 17 (“As to see the river one must keep in mind the spring, so Roman criminal law can only be understood on the basis of house discipline.”).
33 Queen v. Tolson, 16 Cox C.C. 629, 644 (1889) (Stephen J.) (“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.”). James Fitzjames Stephen, the author of this judgment, also published A History of the Criminal Law of England (3 vols. 1883).
35 Exploring the Roman foundations of European criminal policial history may not be what proponents of excavating the (proto-liberal) Roman roots of European (private) legal history had in mind. Surely this would be no reason not to supplement the latter track of historical analysis with the former, if only to avoid the impression of historiographical cherrypicking, one way or another.
to an instance of autonomy, but its rationalization. In other words, in terms of the autonomy-based conception of modern law, the problem of modern penal power to Radbruch remains a matter of good governance, i.e., of “good police” (gute Policey).

More recently, Wolfgang Naucke in a provocative essay has traced what he regards as the creeping “policification” (Verpolizeilichung) of German criminal law since the nineteenth century. According to Naucke, the supposed legalization of German criminal law during the nineteenth century in the wake of what we have called “the emergence of modern law” at the turn of that century in fact produced the opposite result: the dominance of police over law as modes of penal governance, and the replacement of justice and right with policial aims of “security, order, and welfare.” Finally, Günther Jakobs’s much-debated distinction between citizen and enemy criminal law draws partly on a less-noticed sketch of an intellectual history that traces enemy criminal law as a manifestation of the policification of criminal law to venerable enlightenment texts by Rousseau and Fichte, Hobbes and Kant.

The point is not that the exploration of a European criminal policial history alongside a European criminal legal history (in the narrow sense) would emerge fully formed from an attempt to stitch together these apparently disparate historiographical essays, from Mommsen and Radbruch to Naucke and Jakobs. Instead, these interventions serve to highlight both the absence and the potential of an alternative European criminal legal history (in the broad sense).

Conclusion: European Colonial Criminal Legal History

The history of colonial criminal law highlights the critical-analytical potential of a two-track approach to European criminal legal history. Colonial criminal law makes for a promising case study for two-track historical analysis of criminal law (in the broad sense) not only because of the essential—and explicitly drawn—fault lines (between whites and natives, colonizers and colonized, etc.) that structure the substance of colonial criminal law but also because the entire enterprise of colonial criminal law was designed to run on a separate track from the enterprise of criminal law unmodified. None of this is to suggest a simplistic mapping of the distinction between law and police onto that between (German) criminal law and (German) colonial criminal law or, within colonial criminal law, between criminal law for whites and criminal law for “natives.” After all, this would suggest, among other things, that “ordinary” criminal law would somehow be free of policial aspects and therefore beyond analysis from a policial perspective.

37 Radbruch’s foray into European criminal legal history is noteworthy for another reason: like Schmidt, he was a committed follower of Liszt (who was his Doktorvater). During the early 1930s, Radbruch also made the case for affinities between Liszt’s views (e.g., on the need to incapacitate “incorrigibles” and to retain corporal punishment), which he argued had been misrepresented as soft on crime (or rather on criminals), and the then-emerging Nazi penal ideology pushed by scholars like Georg Dahm and Friedrich Schaffstein. Gustav Radbruch, ‘Autoritäres oder soziales Strafrecht’, in Der Mensch im Recht: Ausgewählte Vorträge und Aufsätze über Grundfragen des Rechts (1957) (1933), 63 ff.


To locate German efforts to assemble a well-ordered regime of colonial criminal law within a yet broader context, consider that, in 1904, at the very moment a major two-part article on colonial criminal law, complete with a draft criminal code, appeared in a leading German law journal (though, significantly, one dedicated to public law, not criminal law), a German military expeditionary force was in the midst of a protracted “military penal action” against “the blacks for having cowardly and insidiously murdered” German farmers in the colony of German South West Africa (now Namibia).

Colonial criminal law, however, is fascinating not only because it may serve as a convenient, and non-obvious, focal point for two-track historical analysis from the perspectives of criminal law and criminal police. It also illustrates European criminal law in action. The German literature on colonial criminal law of the time includes careful comparative analysis of what Naucke called “a new form of common European criminal law,” i.e., the collective governmental experience of other European colonial powers that the new (imperial) German colonizer might wish to consult in his prudential wisdom as he joins the pan-European project of radically heteronomous, quasi-patriarchal governance of non-Europeans that is colonial criminal law. At the top of his list, one commentator suggests, he might wish to put a criminal code, designed “to create, as quickly and effectively as possible, all generally applicable norms and to leave untouched only that which appears to be compatible with our moral and ethical views or which political prudence irrefutably requires.” The criminal code the English had imposed on their Indian subjects, he suggested, might serve as a model.

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41 Paul Bauer, ‘Die Strafrechtspflege über die Eingeborenen der deutschen Schutzgebiete’, (1904) 19 Archiv für öffentliches Recht 32 ff., 34 (Part I); ibid. 433 ff. (Part II). Interesting for further comparative analysis, at the same time (1905-08), the leaders of the German criminal law professoriate (including Liszt) published a massive comparative analysis of “German and foreign criminal law” in preparation for an anticipated reform of the German criminal code (which did not occur until some sixty years later). Karl Birkmeyer et al. (eds.), Vergleichende Darstellung des deutschen und ausländischen Strafrechts: Vorarbeiten zur deutschen Strafrechtsreform (1905-09) (16 volumes).

42 See Gustav Frenssen, Peter Moors Fahrt nach Südwest: Ein Feldzugsbericht (1910) 6 (a bestselling novel of the time, styled as an “expedition report” by participant German soldier); cf. Medardus Brehl, ‘Ich denke, die haben Ihnen zum Tode verholfen.’: Koloniale Gewalt in kollektiver Rede’, in Mihran Dabag et al. (eds.), Kolonialismus: Kolonialdiskurs und Genozid (2004), 185 ff., 189. This massive exercise of penal-military power is now recognized as one of the first genocides of the twentieth century.


44 For material on corporal punishment and discipline in the German colonies, see Martin Schröder, Prügelstrafe und Züchtigungsrecht in den deutschen Schutzgebieten Schwarzafrikas (1997).

45 Bauer (Part I) (n. 41), 34.

46 See Bauer II (n. 43) 448, 454. On Macaulay’s Indian Penal Code, see Wright (n. 41).