EXPLAINING TORT AND CRIME

Tracing almost 200 years of history, *Explaining Tort and Crime* explains the development of tort law and criminal law in England compared with other legal systems. Referencing legal systems from around the globe, it uses innovative comparative and historical methods to identify patterns of legal development, to investigate the English law of fault doctrine across tort and crime, and to chart and explain three procedural interfaces: criminal powers to compensate, timing rules to control parallel actions, and convictions as evidence in later civil cases. Matthew Dyson draws on decades of research to offer an analysis of the field, examining patterns of legal development, visible as motifs in the law of many legal systems.

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EXPLAINING TORT AND CRIME

Legal Development across Laws and Legal Systems, 1850–2020

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FOREWORD

A little over fifteen years ago, Matthew Dyson decided to embark on a long intellectual journey to explore and compare the structures of tort and crime and their interactions. When turned towards publications, this endeavour has produced two connected books, in 2014 and 2015, resulting from collaborative endeavours, and the present volume, the last in the series, bringing together all the different parts of the story for the benefit of the reader. The total number of pages dedicated to the subject is now well over a thousand. Clearly, the intent was to leave no stone unturned.

The centre of gravity of the research carried out over a decade is English law in its present state but the approach followed by the author is historical and comparative. The period considered goes from the beginning of the nineteenth century to the present day. French law, Spanish law, German law, Swedish law and to a lesser extent the laws of other jurisdictions as well, such as the USA, have been chosen as comparators. English law on tort and crime, both substantive and procedural, is therefore analysed and discussed in a wider context, showing which alternative avenues have not been taken, but also how certain general trends have been at work across different legal systems.

This great comparative effort over legal developments spanning two centuries may be considered, at first blush, simply as a splendid academic exercise. The reality is that the book covers matters of utmost practical interest. Tort litigation takes place in entirely different settings depending on a number of variables. Whether or not a civil claim for damages is the immediate, regular consequence of the violation of a criminal law norm sanctioning the omission of certain precautions, or forbidding harmful conduct, is one of them. The possibility for the claimant to take part in criminal proceedings to obtain full compensation for damage suffered is another. Transnational tort litigation raises an incredible number of questions arising from the interaction of tort and crime. On the other hand, where the power to compensate the victims of what is both a crime and a civil wrong is allocated to criminal courts on
a generous scale, this deeply influences how criminal law works on an everyday basis. Many criminal convictions in these systems have no other purpose, or practical end, than to allocate that compensation as effectively as possible. As a matter of fact, the burden of proof relating to the civil wrong under these systems is only in part on the claimant, when the case is handled by a criminal court. The evidence that is needed to establish the claimant’s case will usually be brought to the attention of the court by the public prosecutor, while the victim of the crime will be able to rely on it to obtain compensation, of course. What are the theoretical and practical problems that arise under this approach? No leap of imagination is sufficient to answer the question; this comes only after a patient investigation of the applicable law, in all its dimensions, and hence the purpose of this volume.

The distinction between criminal and civil liability is taken to be fundamental in all modern legal systems. In 1775 Lord Mansfield gave voice to this opinion, when he said that ‘[t]here is no distinction better known, than the distinction between civil and criminal law’.¹ In modern terms, the distinction is often drawn between a subfield of private law that shares its general purpose, namely to protect personal autonomy, and a field of law that works instead to secure the protection of society’s general interests. But these very broad ideas are deceptively simple: what lies beyond them is what makes the difference. Tort law is one of the areas of the law that has been massively investigated in the last century by both legal historians and comparative law scholars. Criminal law has also been the subject of many excellent historical and comparative studies. But nothing as systematic and profound has so far been produced on the interrelationship between tort and crime in the last two centuries and how it has been handled through criminal and civil proceedings. In the following pages the reader will discover much about the inner structure of these two fields, and the complex patterns of their interaction across several key jurisdictions. The author proceeds carefully to unpack the various levels of analysis, so that each twist and turn of the story comes into focus. One of the most remarkable aspects of this work is the discussion of how legal doctrine strives to make sense of emerging solutions. Legal doctrine is thus itself historicised and put under a comparative lens, showing how its achievements are partial, and its rationality incomplete. This is best illustrated by the way legal doctrine is often a prisoner of the key terms of the language in which the law is

¹ Atcheson v. Everitt (1776) 1 Cowp. 382, 391, 98 ER 1142, 1147.
framed – for example intent, fault, recklessness, guilt. One of the great merits of this book, perhaps its finest intellectual achievement, is to lay bare before the eyes of the reader the iron cage in which much law is still ensnared.

 Turning the last pages of this volume, T. S. Eliot’s lines thus come to mind: ‘We shall not cease from exploration. And the end of all our exploring. Will be to arrive where we started. And know the place for the first time.’

 Michele Graziadei

2 ‘Little Gidding' in *Four Quartets* (main ed.) (London: Faber and Faber, 1944).
This volume is the third outcome of a project to promote scholarship on
tort and crime. The first, *Unravelling Tort and Crime*, a collection of
essays on English law, was published by Cambridge University Press in
July 2014. *Comparing Tort and Crime* was then published, also by
Cambridge University Press, in 2015. It was the first volume dedicated
to understanding both areas of law from a comparative perspective, both
nationally and across jurisdictions. This book, *Explaining Tort and
Crime*, pushes back in time, out in legal systems and threads through
questions of legal development.

The book has been many days and nights in the making. It still barely
scratches the surface of the immense complexity of how legal systems
change, and in particular, the relationship between tort and crime. These
topics merit much more work, and much more attention.

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