

INTRODUCTION

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Before George Fletcher published *Rethinking Criminal Law*,¹ in 1978, Anglo-American punishment theory was parochial. H.L.A. Hart's essays in *Punishment and Responsibility*,² brilliant as they were, had a pure pedigree of English liberalism, Utilitarianism, and the analytic philosophy of Hart's contemporaries at Oxford. American experts had hardly raised their heads above the trenches of criminal law doctrine. The Model Penal Code had been the preoccupation of Herbert Wechsler, Jerome Hall, and others—and the Code, notwithstanding its several important innovations, is not notable for its theoretical sophistication.

Fletcher changed all that. *Rethinking* is above all a work of comparative legal theory. In the analysis of the doctrines of criminal law's special part, Fletcher brought German and Russian criminal law to bear. More important, he mined the extraordinarily rich theoretical tradition of German criminal law. Whereas Anglo-American theory tended to view criminal law in binary terms—actus reus and mens rea; ordinary and affirmative defenses—German theorists saw three dimensions: definition, wrongdoing, and excuse. One effect of this approach was to distinguish clearly between arguments of justification, which pertain to wrongdoing; and arguments of excuse, such as duress and insanity, which are independent of wrongdoing. As simple and obvious as this distinction might seem today, it was not reflected in American criminal law casebooks as late as the early 1980's.³ The Model Penal Code refers to “material elements” of justifications and excuses without distinguishing them, as if both were analogous to offenses;⁴ and lists both, without distinction, as affirmative defenses.⁵ The familiarity of the justification/excuse distinction to lawyers today is an indication of the level and scope of *Rethinking*'s influence.

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¹ GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* (1978).

² H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* (1968).

³ See, e.g., SANFORD KADISH & MONRAD PAULSON, *CRIMINAL LAW AND ITS PROCESSES* (3d ed. 1980).

⁴ MODEL PENAL CODE §1.13(10) (1962).

⁵ *Id.* §1.12(3)(c).

The intervening twenty-eight years have seen Fletcher's work extend outward, into the realm of tabloid-ready crime, as in his examination of the Bernard Goetz case;⁶ the realm of politics, as in his supportive writings on the victim's rights movement;⁷ and the realm of moral philosophy, as in his meditations on loyalty.⁸ And yet as disparate as these projects seem, Fletcher brought not only a distinctive theoretical sensibility, but distinctive theoretical tools to bear on them. Like the German theorists, he saw structure where his peers saw contingency, pragmatics, and strategic behavior. And the theoretical structures he brought to bear on such issues extended more and more deeply into human history and experience, embracing, most notably, the Jewish legal tradition.

The subject of this Symposium is the culmination of these decades of work. The essays below examine the first volume of George Fletcher's *The Grammar of Criminal Law: American, Comparative, International*.⁹ They touch on most of the important aspects of Fletcher's thinking, such as his insistence that punishment theory should be political, not moral, theory; his devotion to European legal theory and to the comparative perspective; his conviction that comparative insights illuminate international law; his contention that acts cannot be understood except as being socially meaningful; and, above all, that there is a universal grammar of criminal law to be discovered in comparative and international law.

These essays were delivered and discussed at a two-day symposium on Fletcher's *Grammar*, held at the Benjamin N. Cardozo School of Law, in November 2006. The rest of this Introduction is intended to give the reader not only a glimpse of the essays, but also some of the flavor of the discussion they engendered at the symposium.

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At the speakers' dinner the evening before the public conference began, Meir Dan-Cohen gave an address reprinted here as *Thinking Criminal Law*.¹⁰ Like many of the scholars at the conference, Dan-Cohen made an effort to bring Fletcher around to his way of thinking or

⁶ GEORGE P. FLETCHER, *A CASE OF SELF-DEFENSE: BERNARD GOETZ AND THE LAW ON TRIAL* (1988).

⁷ GEORGE P. FLETCHER, *WITH JUSTICE FOR SOME: PROTECTING VICTIMS' RIGHTS IN CRIMINAL TRIALS* (1994).

⁸ GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* (1993).

⁹ GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, INTERNATIONAL* (forthcoming 2007) (manuscript at 226-27, on file with the Cardozo Law Review).

¹⁰ Meir Dan-Cohen, *Thinking Criminal Law*, 28 CARDOZO L. REV. 2419 (2007).

to show that his approach to criminal law is consistent with Fletcher's. The particular argument at issue is Dan-Cohen's proposal to treat preserving dignity rather than preventing or recompensing harm as the defining aim of the criminal law. Dan-Cohen makes his arguments in terms of the boundaries of criminal law. A focus on harm, he argues, fails to keep other legal treatments of harm out of the criminal law. The term "paying the price," for example, is taken far too literally when criminal liability is made to turn on producing, in a torts-like way, optimal levels of conduct that would otherwise be absolutely prohibited. A focus on harm also fails to keep criminal law's features from leaking out. It might seem civilized to export criminal law's constraints on justified action to the law of war. But not only does this ignore the non-legal differences between crime and war and the importance of legal regulation's matching the nature of the conduct regulated, it also opens a path that runs the other way—inviting the less-constraining law of war into the criminal law.

Fletcher's concern about Dan-Cohen's proposal is that it makes criminal law too subjective, suggesting that the defendant's state of mind—his disrespect for the victim—is the ground of his liability, instead of what he did. This exacerbates a tendency, which Fletcher generally deplors, to shift the law's focus away from the victim and toward the defendant. Dan-Cohen allays this concern by an appeal to Fletcher's own communicative theory of action, according to which what the defendant has done is constituted in part by what it means. An infringement on dignity is part of the meaning of a criminal act, so that a focus on dignity does not necessarily remove the law's focus from the act to the defendant's intentions.

In the first paper presented at the public conference, Albin Eser, as one of Fletcher's oldest friends and colleagues, recalls that years ago Fletcher defended a purely retributive approach to punishment, including the justice of capital punishment.¹¹ Eser recognizes that Fletcher has moderated these views, and considers whether a "humane" view of criminal justice might play a role in this moderation. As Eser uses it, "humane" is a term of art, a rough translation from the German *menschengerechte*. In one view, the rights of individuals constrain the state. But the implied necessity of restraining the state suggests that it is pre-eminent; that it would otherwise be free to treat the individual as necessity demands. In the humane view, the individual is pre-eminent, and is served by the state. From this perspective, the individual recognizes limits on his own freedom and obligations toward his fellow human beings.

Eser construes the humane perspective on criminal justice in

¹¹ Albin Eser, *The Nature and Rationale of Punishment*, 28 CARDOZO L. REV. 2427 (2007).

consequentialist terms, seeing punishment as performing four functions. It awards indemnification to the victim (if only in fines and modes of incarceration that do not preclude restitution), re-establishes peace in the community, strengthens respect for the law, and influences individual choices. Retributive desert serves as a side constraint, but the humane rationale of punishment is sufficient to rule out the death penalty. As a means of re-establishing peace or influencing the individual, capital punishment is a confession of weakness—an extreme, desperate measure that could never be required in a well-functioning society. Behind the humane perspective on criminal justice lies the value of human dignity, and this is no less important a loss than the loss of life.

One of Fletcher's main contentions in the theory of punishment is that the political is prior to the moral. This principle has several applications, and Alon Harel and John Gardner each critically address one of them. Markus Dubber and Shlomit Wallerstein apply the principle. In *Why Only the State May Inflict Criminal Sanctions: The Argument from Moral Burden*,¹² Harel offers an elaboration and extension of Fletcher's argument that punishment must be inflicted by the state and cannot be inflicted by individuals. In *Prohibiting Immoralities*,¹³ Gardner criticizes Fletcher's claim that, as a conceptual matter, the state cannot enforce morality. In contrast to Gardner, Dubber takes the principle as a given, and inquires into the kind of punishment theory it produces, in *Legitimizing Penal Law*.¹⁴ In *Criminalising Remote Harm and the Case of Anti-Democratic Activity*,¹⁵ Wallerstein proceeds, in a manner most true to Fletcher's enterprise, to examine a pressing political issue bearing on criminal law—the campaign against terrorism—in terms of a political theory of punishment emphasizing the harm principle, the minimization principle, and the principle of attribution.

Harel's argument proceeds from alleged moral burdens imposed on individuals in privatized punishments. His example is shaming sanctions, in which the penalty is not imposed by an agent of the state, but instead by private individuals who are tasked with expressing the moral opprobrium that prompts shame in the offender. An individual who has been tasked by the state with inflicting punishment runs two moral risks: a burden on conscience that will result from either imposing a punishment one does not agree with or refusing to perform

¹² Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Argument From Moral Burdens*, 28 CARDOZO L. REV. 2629 (2007).

¹³ John Gardner, *Prohibiting Immoralities*, 28 CARDOZO L. REV. 2613 (2007).

¹⁴ Markus D. Dubber, *Legitimizing Penal Law*, 28 CARDOZO L. REV. 2597 (2007).

¹⁵ Shlomit Wallerstein, *Criminalising Remote Harm and the Case of Anti-Democratic Activity*, 28 CARDOZO L. REV. 2697 (2007).

one's social duty in this respect; and a burden of responsibility that might arise when one punishes too lightly or too severely. The imposition of these risks is unjustifiable, meaning that only the state can impose punishment.

Harel's argument seems to suffer from two weaknesses, however. First, he does not explain why an ordinary citizen is differently situated, with respect to these moral burdens, from an individual employed by the state. The hangman faces stress on his conscience when he is asked to execute an offender whom he believes to be innocent, and it is hard to see how this could be less significant than the stress suffered by an individual. The hangman's contractual duties do not *detract from* the ordinary duties of citizenship (which he also has) that Harel identifies as a prong of the dilemma that burdens conscience, and his employment contract might assuage *or* exacerbate the burden on conscience. Second, Harel fails to explain why responsibility rests heavier on one who imposes punishment directly versus one who imposes punishment indirectly by means of his acquiescence in the current social order. I am not a hangman, but I do pay him with my taxes; and I have failed to abolish capital punishment in my state by means of civil disobedience or guerilla action, though I know capital punishment is always disproportionate. Why think I bear less a burden of responsibility for a disproportionate hanging than I do when I inflict a shaming punishment? Is it really a greater moral burden to risk imposing too much shame if I *both* honk my car horn *and* make rude gestures (when, really, either one would do) at the Driving Under the Influence offenders engaged in collecting trash alongside state highways? If there are no unique moral burdens suffered by the individuals who express the moral opprobrium of shaming punishments, then it is hard to see this as a reason for the state's monopoly on this or any other legal punishment.

One reason that Fletcher thinks the political is prior to the moral in legal punishment is that, as a conceptual matter, criminal law cannot enforce morality. He infers this from three premises: morality requires autonomy; the legal order requires coercion; coercion compromises autonomy. In *Prohibiting Immoralities*,¹⁶ Gardner picks Fletcher's argument apart in minute detail, but he does so in the service of a deeper point. Gardner concludes that the political considerations that support Fletcher's thesis really are moral considerations applicable equally to the state and individuals—thus casting doubt on Fletcher's claim that the political precedes the moral in legal punishment.

Gardner attacks Fletcher's second thesis by pointing out that law does not require coercion. Authority, not coercion, is the minimum

¹⁶ Gardner, *supra* note 13.

sufficient condition for law. To put the point in Hart's terms, if I create a contract because compliance with law in doing so gives rise to a sense of obligation from the internal point of view, then the coercion that might or might not eventually be required to enforce the contract is irrelevant to the existence of either the contract or the law that makes it possible. Fletcher might object, however, that he refers here to *Recht*—a just legal order as opposed to mere legal doctrine—and not to law, as requiring coercion. This is plausible, and if it is so then *Recht*, if not law, might necessarily infringe on autonomy.

However, Gardner has another argument that moots this issue. Even if *Recht* requires coercion, coercion does not deprive one of autonomy. Fletcher thinks that morality requires autonomy because one does not act morally unless one acts for the right reasons; and one cannot act for the right reasons if one acts because of coercion. But Gardner points out that a loss of personal autonomy as a result of coercion does not entail a loss of moral autonomy. To have an ulterior motive or a mixed motive does not necessarily detract from the morality of one's act because it does not detract from one's moral autonomy in also acting for the right reasons—even if a motive of avoiding coercion might reflect a loss of personal autonomy or make the act less admirable.

Gardner also argues that even if Fletcher were right about autonomy and coercion, he succeeds only in showing that law cannot regulate the reasons for which people act. Fletcher does not show that the state cannot regulate their actions, even if the state cannot enforce morality in the sense of virtue. Contrary to Fletcher's conclusion, the state can intelligibly enforce morality, and there is not reason to conclude that the political must precede the moral in legal punishment.

In a deliberate and welcome departure from the “tired push-me-pull-you of consequentialism and retributivism,”¹⁷ Dubber looks at criminal law in terms of the political value of autonomy. He breaks down the political justification for state punishment into two broad categories: the police power and penal law. Both have a long lineage and both are perceptible in current American criminal law and procedure. Ancient political organization of the public realm reflected the value of autonomy, with free citizens participating in decision-making on an equal basis. The private realm was heteronomous, exhibiting a top-down, authoritarian structure with the householder at its head. The heteronomous structure of the private realm was transmuted to the public in institutions such as serfdom, feudalism, and slavery from the Middle Ages to the Enlightenment, when autonomy came to the fore in democratic governance and the rule of law.

¹⁷ Dubber, *supra* note 14, at 2597.

Continental criminal law was intensely theorized in terms of autonomy by Bentham, Beccaria, Kant, and others. But American criminal law was neglected even in the golden age of American political theory stretching from the American Revolution to the adoption of the Constitution of 1789. As a result, the heteronomous, authoritarian police power model has persisted much longer and more powerfully than in Europe, giving us the present regime of plea bargaining, overcriminalization, disproportionate prosecutorial discretion, and mass incarceration. Principles of autonomy, as reflected in the act and mens rea requirements, and principles of legality—most notably the ban on status offenses—are present, but marginalized by practices such as our extensive criminalization of possession. Dubber might have added that the American founders did pay heed to autonomy in the criminal procedure provisions of the Bill of Rights, but that here, too, the police power model has intruded powerfully since the post-Warren era of the Supreme Court.

Shlomit Wallerstein's *Criminalising Remote Harm and the Case of Anti-Democratic Activity*¹⁸ considers the most compelling case for extending police power, and finds it wanting. Both England and the United States have in various ways begun to address "terrorism" by stretching the boundaries of criminal law as understood only a few years ago. Wallerstein attempts to make the best case for extending criminal law by taking anti-democratic activity instead of the ill-defined category of "terrorism" as the object of criminalization. She then considers what limitations there might be on imposing legal punishment on anti-democratic activity, beyond the longstanding limits of attempt, accomplice, and conspiracy liability. Even the best interpretation of the harm principle renders few answers. Two other principles more clearly define the permissible scope of criminalizing remote harm. The principle of fair imputation—that is, of the actions of one person to another—might allow for punishment beyond the direct underwriting of others' actions if the conduct is widespread or creates special urgency. The principle of minimization might allow for punishment of merely preparatory actions.

Anti-democratic activity short of creating organizational infrastructure—such as advocating violence or creating a climate of violence—has too tenuous a connection to harm, and if anti-democratic activity is widespread, intervention beyond punishment for existing attempts would be pointless. As for the creation of organizational infrastructure, the imputation of liability to those who do not carry out harmful acts is indistinguishable from advocacy and would be unjustifiable. Organization preparations might constitute the last

¹⁸ Wallerstein, *supra* note 15.

effective point of prevention, but not at a point beyond the reach of present conspiracy law. Wallerstein concludes that the principles of imputation and minimization, even as modified by eminent theorists such as Andrew von Hirsh and Joel Feinberg, impose strict limits on the criminalization of anti-democratic activity.

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European theory has had a pronounced influence on Fletcher's view of the act requirement in criminal law. Francisco Muñoz-Conde and Luis Ernesto Chiesa describe Fletcher's "communicative concept of action" in *The Act Requirement as a Basic Concept of Criminal Law*.¹⁹ A criminal act cannot be understood as a set of discrete motions—Fletcher has long resisted any mechanistic reduction of the act requirement—but must instead be understood in terms of social meaning. For example, if no one attacks a speaker during a lecture, one cannot say that the audience omitted to attack him; whereas if the audience refuses to applaud the lecture, they have omitted to applaud. As Spanish theorist Tomas Vives Anton puts it, "an action is the assessment of an underlying fact and not the fact underlying an assessment."²⁰ Muñoz-Conde and Chiesa see particular value in the potential of the communicative theory of action to facilitate the analysis of other components of criminal liability. One cannot pick out an intention or determine the reasonableness of self-defense without the scene's being set, so to speak, by an adequate description of the alleged criminal act in social terms.

Muñoz-Conde and Chiesa put the communicative account to use in critiquing Douglas Husak's longstanding view that the act requirement reduces almost completely to the concept of control. As Husak reiterates in *Rethinking the Act Requirement*,²¹ we do not know what we mean when we say an act is required for criminal liability. He borrows an example from Antony Duff: if a child moves my hand to knock a vase off a pedestal, and I do not resist, then there is apparently no act on my part. But what difference does this make to my responsibility for breaking the vase, given that I chose to break it? Even so, Husak denies that we can entirely separate the act requirement from the issue of control. If A bumps into B who then knocks C off a cliff, Husak does not see B as acting at all because mere bodily motion is not sufficient to constitute an act. Husak says instead that the act requirement for

¹⁹ Francisco Muñoz-Conde & Luis Ernesto Chiesa, *The Act Requirement as a Basic Concept of Criminal Law*, 28 CARDOZO L. REV. 2461 (2007).

²⁰ TOMÁS VIVES ANTÓN, FUNDAMENTOS DEL SISTEMA PENAL 205 (1996)

²¹ Douglas Husak, *Rethinking the Act Requirement*, 28 CARDOZO L. REV. 2437 (2007).

criminal liability just is a control requirement. In this he differs from Fletcher, who distinguishes act from control on the ground that the former concept is bivalent—one acts or one does not—whereas the latter is a matter of degree: I have more or less control over myself, my acts, and the consequences of my actions, depending on my condition and circumstances. Husak finds this distinction implausible. Which of any of these—to sneeze, cough, burp, yawn, habitually bite one's lip, or unconsciously probe a tooth with one's tongue—is an act? And could one answer that question without reference to the notion of control?

Munoz-Conde and Chiesa insist, however, that the notion of control is too thin to account for the act requirement. Relative to criminal liability, they say control proves both too much and too little. They say that if I promise to secure my neighbor's house against a hurricane, and then go to the movies instead, I cannot be held responsible for the hurricane's destroying the house just because I had control over whether I would secure it or not. Conversely, if a prison guard fails to act to prevent an escape because the prisoners have chained him to a steel beam, then, they say, it is a trivial feature of his non-liability to note that he has no control. But both points seem very questionable. Husak never suggests that having control over consequences is sufficient for responsibility (in the sense of liability); and it seems quite wrong to say that being unable to control whether the prisoners escape is a trivial feature of the guard's non-responsibility (in the sense of his being a fair candidate for punishment by virtue of his moral agency). On the contrary, this lack of voluntariness seems central to responsibility (in either sense).

Husak also seems to have the better of the argument with Fletcher over the distinction between act and control. Husak does not address the communicative theory of action, but it seems clear that Fletcher's view of acts undermines it. If action is communicative, then it is hard to see how it could be bivalent. As described by Munoz-Conde and Chiesa, the relevant social meanings are multi-valent. There is a good reason for this. Social meanings are multi-valent because they are act descriptions, and act descriptions are virtually infinite. Conundrums about the social meaning of actions are just variations in the aptness of the act descriptions. Omitting to applaud at the conclusion of a lecture is both true and apt. Omitting to attack during a lecture is a true but inapt description of the actions of the audience. "Sitting" would be a true but inapt description of the audience both during and after the lecture, as would be "molecular events."

The communicative theory of action, at least as presented by Munoz-Conde and Chiesa, does not add to or count against Husak's reading of the act requirement as a control requirement. If Fletcher means only to insist on the importance of act descriptions to the analysis

of action, then Husak seems unlikely to object. The question comes down to the aptness of the act descriptions we put to use in criminal law, and from this perspective Husak's point would seem to be only that control is a necessary feature of any apt description of a criminal act. Suppose it is a misdemeanor to disturb a public meeting, and I fall into a fit of coughing at a public meeting. To say I coughed will be insufficient to evaluate my action in criminal law terms, as Munoz-Conde and Chiesa say. A better act description is needed. It will add social resonance to my act to say that the meeting was a legislative hearing on tuberculosis policy, that I have tuberculosis, and that a regressive tuberculosis policy was under active consideration. But these are not apt descriptions where criminal liability is concerned. I will not have committed the offense if my tuberculosis caused me to cough uncontrollably, but I will have committed it if I faked or exaggerated the coughing fit. Control, not social significance, is the important feature of the act description.

The act requirement bears on responsibility in the sense of fair candidacy for legal punishment. Stephen Morse²² puts Fletcher's communicative theory of an act in the larger context of responsibility and free will. If the determinist is right, and there is no free will, then arguably all of our requirements for responsibility are meaningless because responsibility itself is absurd. The criminal law, however, is effectively compatibilist. That is, it is agnostic on the question of free will because the absence of free will does not imply non-responsibility. Our legal doctrines rest on concepts of capacity, intention, and action—none of which is dependent on our having free will. One might say that determinism underdetermines the normative evaluation of action. Morse posits dispatch from the science front to demonstrate the continuing strength of the compatibilist approach. Benjamin Libet has shown that brain activity associated with intentions precedes both actions and conscious awareness of intentions by a few hundred milliseconds. Some have speculated that this shows intentionality to be an illusion. Morse points out that if one rejects a dualistic view of the mind's being independent of the brain, then Libet's findings are exactly what one would expect of research into intentions. They certainly do not show that we are the kind of beings who cannot be held responsible for our intentions and actions pursuant to them.

Fletcher, in contrast, takes the much harder road of attempting to rebut determinism by demonstrating free will, and this forms the basis of his communicative theory of action. He relies on Chomsky's claim that a language contains an infinite number of sentences to argue that

²² Stephen J. Morse, *Criminal Responsibility and the Disappearing Person*, 28 CARDOZO L. REV. 2545 (2007).

determinism is false because actions are likewise infinite, and that the concept of responsibility is derived from freedom of speech. Morse points out that this is simply a non-sequitur. Chomsky's infinite number of sentences nevertheless has causes, and the ability of human beings to form an infinite number of sentences does not imply the freedom of speech or acts from causation.

Fletcher infers from his communicative account that there is no genuine distinction to be made between an actor's conduct and its consequences. However, as Morse points out, the consequences may show us something about the actor's intentions, and they may be part of the pertinent act description; but they do not tell us whether or not an act has occurred. The claim that conduct and consequences are indistinguishable depends on those marginal cases in which we have no more control over our conduct than we do over consequences, so that both are a matter of luck. But Morse sensibly asks why a marginal overlap in one respect should lead us to think that conduct and consequences are indistinguishable. The root of Fletcher's case against determinism is the claim that our ordinary understanding of action as being caused by mental events is flawed. Morse denies that this is our understanding of action and mental events at all. We say that people act for reasons. Whatever the mechanics of acting for reasons turns out to be, the fact that we act for reasons is sufficient for responsibility.

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In *Tripartite Structures of Criminal Law in Germany and Other Civil Law Jurisdictions*,²³ Russell Christopher digs into the German origins of Fletcher's account of criminal liability in order to question the coherence of the tripartite structure of definition, wrongdoing, and culpability. He concludes that the simpler, bipartite structure of *actus reus* and *mens rea* prevalent in Anglo-American theorizing is preferable.

According to the tripartite structure of criminal liability favored by Fletcher, we inquire into three issues, in lexical order. The definition of the offense includes the elements of human action, norm violation, causation, and harm. If all of these are present, wrongdoing has occurred, but wrongdoing can be negated at this second stage by a showing of justification. If no justification is present, then the defendant is guilty, subject to his showing the absence of culpability, accountability, or responsibility. Specific criminal law doctrines such as self-defense and insanity are assigned places in this tripartite structure, sometimes straddling two of them.

²³ Russell L. Christopher, *Tripartite Structures of Criminal Law in Germany and Other Civil Law Jurisdictions*, 28 *CARDOZO L. REV.* 2675 (2007).

The assignment of doctrines to the structure is highly controversial among the adherents of the basic tripartite view, particularly with regard to the placement of mens rea. Using nicely delineated hypothetical cases, Christopher shows that all three of the leading placements of mens rea—at the first stage, the third stage, and divided between the first and third stages—fail to account for core cases of criminal liability. Placement at the first stage cannot plausibly explain cases of innocent aggressors, because it authorizes self-defense against the psychotic aggressor but denies it against the mistaken aggressor—an obvious contradiction. Splitting the placement of mens rea between those two stages fails to avoid the difficulties of its placement in the first stage because the basic problem at the first stage is its defining the psychotic aggressor's conduct as wrongful, but the mistaken aggressor's conduct as not wrongful. Placement of mens rea at the third stage avoids that difficulty, but cannot explain attempts because they have no elements of harm or causation. Without mens rea at the first stage, criminal wrongdoing for an attempt would consist of a voluntary act or omission, which Christopher finds implausible. He concludes that the simpler, bipartite structure of actus reus and mens rea avoids these problems. An honest and reasonable belief negates the mens rea implicit in an allegedly failed case of self-defense in both the psychotic aggressor and mistaken aggressor cases. Attempts are indistinguishable from complete offenses under the bipartite structure because there is no possibility that an act alone could constitute a crime.

The practical salience of Christopher's seemingly abstract discussion is demonstrated in *Towards a Universal System of Crime: Comments on George Fletcher's Grammar of Criminal Law* by Kai Ambos.²⁴ Fletcher describes the Rome Statute setting up the International Criminal Court as adopting the bipartite structure of criminal liability. Ambos agrees with this description, but he dissents from Fletcher's view that this represents a systematic consensus around the bipartite view in international criminal law. It reads too much theoretical sophistication into the highly political diplomatic negotiations (at which Ambos was present) that brought the treaty about.

Ambos suggests that there is also every reason to hope that Fletcher is wrong about this purported consensus. He makes the case, *contra* Christopher, that the tripartite structure of criminal liability represents the most coherent account of it, and the most promising basis for international criminal law. The tripartite system described by Ambos divides mens rea between the stages of definition and

²⁴ Kai Ambos, *Toward a Universal System of Crime: Comments on George Fletcher's Grammar of Criminal Law*, 28 CARDOZO L. REV. 2647 (2007).

culpability (these are Christopher's terms; Ambos uses the German terms *Tatbestandsmassigkeit* and *Schuld*), consigning subjective mens rea to definition and normative mens rea to culpability. He makes three arguments supporting in support of the tripartite structure.

First, Ambos implicitly replies to Christopher's argument from attempts against the tripartite structure, by saying that subjective culpability is part of definition, and noting that this is effectively to apply a bipartite, actus reus/mens rea structure on attempt. Second, Ambos notes that normative culpability is in the third stage of the inquiry into guilt, the point at which non-justified wrongdoing has been established. Were it not there, he points out, the defense of duress would not be available in the case of a soldier who is not only ordered but compelled to kill civilians—as it is in the Rome Statute, in spite of its over-all bipartite structure. Otherwise, the soldier would have only an implausible claim of justification. Finally, Ambos notes that to place subjective culpability in the first stage facilitates the analysis of mistakes regarding justification. Because justification is an issue of wrongdoing, placing subjective culpability here allows us to analyze mistake of fact and mistaken justification *in pari materia*; that is, with mens rea attaching to the negative elements of justification. Finally, under the same analysis the case of the unknowingly justified actor is more clearly seen as an attempt—contrary to Fletcher's often-expressed view that it results in liability for the completed offense.

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Like Christopher, Stuart Green,²⁵ Vera Bergelson,²⁶ and Kimberly Kessler Ferzan²⁷ also call Fletcher's account of criminal wrongdoing into question. Green considers the widely held view, shared by Fletcher, that consent has a unique and profound capacity to transform wrongful conduct into innocent conduct. Bergelson considers the compatibility of wrongdoing and justification, and the nature of conflicting justifications. Ferzan argues that genuine mens rea is reducible to recklessness, and the fact that negligence is not so reducible calls its legitimacy into question. In contrast to Ferzan, Keren Shapira-Ettinger²⁸ defends and extends Fletcher's conception of culpability by means of a critical analysis of intentional action. All three topics—

²⁵ Stuart P. Green, *Consent and the Grammar of Theft Law*, 28 CARDOZO L. REV. 2505 (2007).

²⁶ Vera Bergelson, *Rights, Wrongs, and Comparative Justifications*, 28 CARDOZO L. REV. 2481 (2007).

²⁷ Kimberly Kessler Ferzan, *Holistic Culpability*, 28 CARDOZO L. REV. 2523 (2007).

²⁸ Keren Shapira-Ettinger, *The Conundrum of Mental States: Substantive Rules and Evidence Combined*, 28 CARDOZO L. REV. 2577 (2007).

consent, justification, and culpability, respectively—go to the heart of Fletcher’s grammar.

Fletcher views consent, along with aggression and self-defense, as one of the three basic components of criminal law (as opposed to the three elements of criminal liability considered by Christopher). Consent operates to define conduct as wrongful or not. To take money without consent is theft, but consent transforms the same act into an ordinary financial transaction. Sex is aggression unless it is accompanied by consent. Green pursues his ongoing inquiries into the special part of criminal law—the offenses and defenses, as opposed to the more general features of just punishment such as the act requirement and desert—in order to show that, with regard to theft, the idea of consent’s transformative effect is simplistic and potentially misleading.

The Model Penal Code effectively eliminated larceny, blackmail, extortion, and embezzlement as distinct offenses. Green notes that consent operates differently in each crime. Larceny is a taking without consent, but in extortion and blackmail the victim does consent to the transfer of property (the difference between these two offenses being that the means to obtain consent is illegal in extortion and legal in blackmail). Embezzlement involves putative consent that is involuntary and invalid because it is obtained by deception. It is difficult to maintain, at this level of specificity, that consent is the decisive feature distinguishing wrongful from innocent conduct—given that three of the four kinds of theft feature the victim’s consent to the transfer of property.

Bergelson questions Fletcher’s identification of justification with right action and its two corollaries: that wrongdoing and justification are mutually exclusive; and that only one party can be justified in a single conflict involving *prima facie* wrongdoing on each side. Whereas Fletcher views wrongdoing as the violation of legal norms, Bergelson separates the violation of legal norms from violations of other persons’ autonomy or dignity. This permits her to resolve some cases that are problematic on Fletcher’s view. Suppose, she writes, that the captors of a group of people threaten to kill them all unless captive Jack rapes captive Jill. Jack seems to have a justification of lesser evils, but Jill has a justification of self-defense. But from Fletcher’s point of view, both cannot be justified. Bergelson resolves the conflict by appeal to the “intrinsic wrongfulness” of Jack and Jill’s respective acts. Jack’s legally justified conduct is nevertheless wrongful because it infringes on Jill’s autonomy and dignity. Her resistance to Jack is justified but not wrongful because it does not impose such harms.

This analysis plays a key role in Bergelson’s account of conflicting justifications. She notes that some justified actors are under a duty to act as they do—an executioner, for example—whereas most are merely

permitted to act as they do—as in an ordinary case of self-defense. In a conflict between an actor under a duty and an actor with a privilege, the former prevails over the latter. In a conflict between two actors with a privilege, the conflict can be resolved by reference to the respective wrongs committed. Both Jack and Jill act under privileges only, but her justification of self-defense prevails over his of necessity because her act is not inherently wrongful. Jack cannot deprive Jill of her defense of self-defense by virtue of his acting under necessity; even though, as Jack the rapist, he is justified by necessity.

Fletcher's resolution of the conflict—to say that one of the actors cannot be justified, but is merely excused—seems less plausible, and not only because it is difficult, on his account, to tell which is which. To make a point that Bergelson doesn't note, Fletcher's "excuse" alternative for nominally justified actors is unsatisfactory under either common usage of that term. If he means excuse in the American sense of a denial of responsible agency, then Jack's excuse seems stipulative. Jack is not actually a non-responsible agent. If Fletcher means excuse in the British sense, then Jack would have no need for a justification in any case. An excused actor in this sense has done nothing that needs justification. He has, in John Gardner's terms, lived up to normative expectations and has done no wrong. Bergelson's analysis more plausibly recognizes that Jack has done wrong, and gives Jack a justification, though not a superior one.

Regarding culpability or *mens rea*, Fletcher long ago distinguished between descriptive and normative criteria. The Model Penal Code and many commentators insist on the primacy of descriptive kinds of culpability, such as the Code's purpose, knowledge, and recklessness; and have, correspondingly, insisted on minimizing resort to negligence and other kinds of culpability that leave a normative determination—such as the reasonableness of the defendant's conduct—for the jury to make. Fletcher has argued for the primacy of normative kinds of culpability and for the legitimacy of criminal liability for negligence.

In response to this longstanding contention, Kimberly Kessler Ferzan argues in *Holistic Culpability*²⁹ that the line of division does not run between descriptive and normative, but instead between a holistic culpability criterion and an outlier. These correspond, respectively, to recklessness and negligence. She follows Larry Alexander in arguing that purpose and knowledge reduce to recklessness. If recklessness is an instance in which one's reasons for an act do not outweigh the risk run in that act, then purpose is just an instance in which the reason is presumptively unjustifying, and knowledge is an extreme case of risk (as reflected in the Model Penal Code's "practical certainty" of results

²⁹ Ferzan, *supra* note 27.

formulation³⁰). Only negligence cannot be brought within this holistic conception of culpability, which Ferzan sees as placing a heavy burden of proof on Fletcher to show the centrality of negligence as a kind of culpability.

It should be noted, though, that Fletcher argues for the primacy of normative formulations of culpability, not for the primacy of negligence per se. Ferzan makes two mistakes in this regard. First, purpose, knowledge, and so on are not kinds of culpability; they are criteria of culpability. The controversy surrounding descriptive versus normative culpability is a controversy about the formulation of these criteria, and not about natural kinds. The objection to descriptive culpability criteria is that, as criteria, they leave too much out of the description of wrongdoing. Normative criteria are preferable because they are more fine-grained in this respect. Second, Ferzan's case against negligence turns on the impossibility of redefining it in terms of recklessness. But negligence is a particular normative culpability criterion—not the only one, and not a representative one. A culpability criterion's definition, as such, and its compatibility with other definitions, tells us little about the nature of culpability itself. And to the extent such a definitional argument is successful, it would not tell against other normative culpability criteria, or against Fletcher's preference for normative culpability criteria generally.

Fletcher's approach to culpability is preferable because it ties culpability into the wrongful act instead of separating and reifying it as a discrete mental event. In other words, a normative approach to culpability minimizes the effects of the dualism and realism about mental states that is implicit in the concept of culpability. These are some of the concerns of Keren Shapira-Ettinger in *The Conundrum of Mental States—Substantive Rules and Evidence Combined*.³¹ She helpfully portrays Fletcher's normative account of culpability as an extension of Antony Duff's case against treating culpable intentions as mental states.

Relying on a long line of action theory that begins with Gilbert Ryle, Duff argues that intentions are best seen as act descriptions. He rejects the argument from analogy—under which we infer others' mental states from their actions by analogizing to our own mental states and actions—because the empirical inference is necessarily unfalsifiable and unsupported by sufficient numbers. Duff rejects the dualism implicit in the mental states approach because it implausibly treats actions as “colorless movements” given content and meaning by mental events—whereas our experience of action is utterly unlike this. And

³⁰ MODEL PENAL CODE § 2.02(b)(ii) (1962).

³¹ Shapira-Ettinger, *supra* note 28.

Duff rejects the similar and equally implausible claim of dualism that a discrete mental event can be identified as an intention in the absence of a fairly complete description of the act intended.

For Shapira-Ettinger, part of the value of the Duff/Fletcher account of culpable intentions lies in its exposing the normative dimensions hidden beneath purportedly factual determinations of mental states—the point of Fletcher’s original argument as well. But Shapira-Ettinger extends the point to show how legal institutions reinforce the criminal law in this deception. The move from factual to normative takes place in the black box of the jury room, concealed by the doctrine of general verdicts. Evidence is taught in isolation in law schools, so that the substantive dimension of the rules as they play out in criminal cases is obscured. With a few exceptions, such as Fletcher, Duff, and Douglas Husak, legal scholars have neglected the philosophical issues surrounding intentions—to a noteworthy extent, given their central role in criminal law. Shapira-Ettinger’s essay is a welcome antidote to that neglect.

* * *

Fletcher’s *Grammar*, to judge from this Symposium, promises to be as fertile a field for other scholars as *Rethinking* has been. All of us who care as deeply as he does about the theoretical, political, and moral issues addressed by his work are deeply in his debt.