

Tulsa Law Review

Volume 39
Number 4 *Twenty-Five Years of George P.
Fletcher's Rethinking Criminal Law*

Volume 39 | Number 4

Summer 2004

Symposium Foreword

Russell L. Christopher
russell-christopher@utulsa.edu

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Russell L. Christopher, *Symposium Foreword*, 39 Tulsa L. Rev. 737 (2004).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol39/iss4/1>

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

SYMPOSIUM: TWENTY-FIVE YEARS OF GEORGE P. FLETCHER'S *RETHINKING CRIMINAL LAW*

SYMPOSIUM FOREWORD

Russell L. Christopher*

"Criminal law is a species of political and moral philosophy."¹ Thus begins George Fletcher's 1978 book, *Rethinking Criminal Law* ("Rethinking"), which is the subject of this symposium conceived to mark and honor the twenty-fifth anniversary of the book's initial publication.² While it has become fairly common for a symposium to honor the life work of a law scholar,³ symposia focusing on a single book are surprisingly rare. And the few existing symposia on single books typically occur contemporaneously with or shortly after the publication of the book.⁴ Such symposia, then, function, we might say, as collections of book reviews. This symposium affords an appreciably different focus. It allows, with the passage of time, for not merely the standard predictions that such-and-such a book "promises to shape the debate for years to come," but rather reflection on the *actual* significance and influence the book has enjoyed. And very few books have been as significant and influential in their field as *Rethinking*.

It is as difficult to overstate, as it is unnecessary to marshal evidence of, the importance of *Rethinking*. Too many commentators before me have already sung its praises. Bernard Jackson writes, "The integration of dogmatic, historical, comparative and philosophical approaches to law has often been regarded as an ideal of legal scholarship. Professor Fletcher's book comes closer than any other I

* Assistant Professor of Law, University of Tulsa College of Law.

1. George P. Fletcher, *Rethinking Criminal Law* xix (Little, Brown & Co. 1978).

2. Originally published by Little, Brown, and Co. in 1978, *Rethinking* was republished by Oxford University Press in 2000.

3. See e.g. Symposium, *Propter Honoris Respectum*, 78 Notre Dame L. Rev. 677 (2003) (honoring the scholarship of George Fletcher).

4. See e.g. Symposium, *John Rawls' A Theory of Justice*, 40 U. Chi. L. Rev. 486 (1973). For an example of a symposium on a single book convened substantially after the date of publication, see Symposium, *Symposium on Rawlsian Theory of Justice: Recent Developments*, 99 Ethics 695 (1989).

know to the attainment of this ideal”⁵ A. T. H. Smith describes *Rethinking* as “an almost indigestible supply of new ideas” and “so original in its conception that it is difficult to characterise.”⁶ Herbert Fingarette terms it a “uniquely important work.”⁷ Cole Durham, writing in 1979, hails *Rethinking* as the “most interesting Anglo-American work on criminal law to appear in this decade.”⁸ And in this symposium, Douglas Husak declares *Rethinking* to be “the most important book in the English language about the philosophy of criminal law written in the past century.”⁹

This admiration for *Rethinking* perhaps stems both from its uniqueness and its success on so many different levels. First, while its 898 pages have the length and comprehensiveness of a treatise or hornbook, *Rethinking* is more prescriptive than descriptive. It is not content to summarize criminal law doctrine, but rather seeks to explain, critique, challenge, and improve upon existing criminal law doctrine. Second, it melds a wide array of interdisciplinary sources and methodologies—history, moral philosophy, political philosophy, jurisprudence, and comparative law—and brings them to bear on problems in the criminal law, both theoretical and practical. Third, it may well be the first book ever written (at least in the English language) on comparative criminal law. Fourth, while not the first book on criminal theory, *Rethinking* cemented its viability as a legitimate and invaluable subfield of criminal law. Fifth, at a time when “American criminal lawyers [were] preoccupied with evidentiary and constitutional issues,”¹⁰ *Rethinking* sharpened interest in substantive criminal law. Sixth, in an era when criminal law was dominated by the grip of consequentialism and the Model Penal Code, *Rethinking* stemmed the prevailing tide by providing the necessary counterpoint of a nonconsequentialist framework for understanding criminal law.¹¹ And seventh, in a recent study of “Most-Cited Legal Books,” *Rethinking* was the most-cited book on criminal law.¹²

The contributions to this symposium are as varied as the diverse sources and methodologies utilized in *Rethinking*. They address a range of criminal law issues from the perspectives of moral philosophy, political philosophy, history, international law, and comparative law. The topics addressed include the theory of crime legislation, subjective versus objective perspectives on mens rea,

5. Bernard S. Jackson, *Towards an Integrated Approach to Criminal Law: Fletcher's Rethinking Criminal Law*, 1979 Crim. L. Rev. 621, 621 (book review).

6. A.T.H. Smith, *Book Reviews: Rethinking Criminal Law*, 39 Cambridge L.J. 382, 382 (1980).

7. Herbert Fingarette, *Rethinking Criminal Law Excuses*, 89 Yale L.J. 1002, 1002 (1980) (book review).

8. W. Cole Durham, Jr., *Book Review*, 1979 Utah L. Rev. 629, 629.

9. Douglas Husak, *Crimes Outside the Core*, 39 Tulsa L. Rev. 755, 755 (2004).

10. Smith, *supra* n. 6, at 382.

11. For further discussion, see George P. Fletcher, *From Rethinking to Internationalizing Criminal Law*, 39 Tulsa L. Rev. 979, 979-981, 986 (2004); Kyron Huigens, *Fletcher's Rethinking: A Memoir*, 39 Tulsa L. Rev. 803, 803-07 (2004); V.F. Nourse, *Rethinking Crime Legislation: History and Harshness*, 39 Tulsa L. Rev. 925, 928-29 (2004).

12. Fred R. Shapiro, *The Most-Cited Legal Books Published Since 1978*, 29 J. Leg. Stud. 397, 400 (2000) (ranking *Rethinking* twenty-second on the list of most-cited legal books (other than practitioner-oriented treatises and student texts)).

normative versus descriptive views of fault and culpability, the offense/defense distinction, the justification/excuse distinction, mistaken and unknowing justification, self-defense, the politics of crime legislation, the problem of moral luck, the possibility of a universal grammar or structure of criminal law, and universal jurisdiction in international criminal law. As befitting the interdisciplinary approach of *Rethinking*, the contributors are from the varied fields of philosophy, jurisprudence, legal history, and, of course, criminal law. And as befitting *Rethinking* as perhaps the first book on comparative criminal law, nearly half of the contributions are from leading scholars from abroad—England, Scotland, Argentina, Israel, Spain, and Germany.¹³

The contributions are organized into three main groupings. The first grouping—the first eight essays—focus on various aspects of *Rethinking*. These eight essays are arranged by topic in roughly the order in which *Rethinking* dealt with those same topics. The second grouping of four essays share an affinity—either methodological or topical—with Fletcher's forthcoming sequel to *Rethinking*, tentatively titled *Internationalizing Criminal Law*. And finally is Fletcher's own essay which takes a retrospective view of *Rethinking* as well as a prospective glimpse of *Internationalizing Criminal Law*.

While gratified that some aspects of *Rethinking* have received considerable attention, Fletcher laments the inattention paid to its taxonomy of patterns of criminal liability.¹⁴ These patterns represent different approaches to, and explanatory frameworks for, much of the doctrines, principles, and specific offenses of criminal law. If the criminal law is conventionally divided into the "Special Part," and the "General Part,"¹⁵ then this taxonomy of patterns of criminal liability might represent the "Middle Part" by being neither one category nor the other but falling somewhere in between.¹⁶ Presumably Fletcher will be pleased that this imbalance of critical attention to the "Middle Part" is redressed, in part, by two contributions to this symposium making it their primary focus—"Crimes Outside the Core"¹⁷ by Douglas Husak and "Views on Fletcher's 'Two Patterns of Criminality'"¹⁸ by Deborah Denno.

Fletcher's three patterns of criminal liability are manifest criminality, subjective criminality, and harmful consequences. Under the pattern of manifest criminality, "the commission of the crime [must] be objectively discernible at the time that it occurs. The assumption is that a neutral third-party observer could recognize the activity as criminal even if he had no special knowledge about the

13. Counting George Fletcher himself, who penned his contribution to this symposium while teaching in Egypt and who might best be described by the travel agents who know him well as a citizen of the world, exactly half of the contributions are from abroad.

14. Fletcher, *supra* n. 11, at 985.

15. The terminology may have originated with Glanville Williams, *Criminal Law: The General Part* (2d ed., Stevens & Sons Ltd. 1961).

16. Fletcher, *supra* n. 11, at 987 (citing Winfried Hassemer, formerly a Professor of Criminal Law at Frankfurt and now Vice President of the German Constitutional Court, for coining the term).

17. Husak, *supra* n. 9.

18. Deborah W. Denno, *Views on Fletcher's "Two Patterns of Criminality,"* 39 Tulsa L. Rev. 781 (2004).

offender's intention."¹⁹ Fletcher emphasizes two important features: (i) that a crime has been committed "crystallizes as the product of community experience, rather than being imposed on the community by an act of legislative will,"²⁰ and (ii) the importance of an actor's intent or mens rea is secondary to, and dependent on, establishing the manifest criminality of the actor's conduct.²¹ In contrast, under the pattern of subjective criminality, "the core of criminal conduct is the intention to violate a legally protected interest."²² Whether an actor's conduct is manifestly criminal to the community is primarily of significance only as evidence of, or to corroborate, the existence of the actor's criminal intention or mens rea.²³ And finally, in the harmful consequences pattern of criminality, "the starting point for analyzing liability is . . . the occurrence of the harm itself; once the harm is established, the inquiry centers on attributing that harm to particular actors and assessing whether they are accountable for bringing it about."²⁴ While each of these patterns is necessary for an adequate account of criminal law, the three patterns are neither individually nor even jointly sufficient to explain all of the significant criminal offenses. As such, they only "illuminate the core offenses of the criminal law."²⁵

Husak's essay explicates the significance of these three patterns of liability by examining what it means for a crime to be within or without the so-called core offenses encompassed by the three patterns of liability. Although Husak chides Fletcher for paying inadequate attention to "issues of criminalization—a set of principles that limit the scope of the criminal sanction,"²⁶ Husak construes the patterns as supplying the much-needed conceptual tools for a theory of criminalization—describing the sort of conduct that may justifiably be prohibited and punished as criminal. Husak employs Fletcher's patterns in an attempt to limit the justifiability of the explosive, ill-advised growth in the number of crimes which Husak classifies as coming in three types: (i) overlapping or redundant offenses, (ii) risk-prevention offenses, and (iii) ancillary offenses (those offenses which supply a means of convicting a defendant of a related crime when there is insufficient evidence to convict of a core crime).²⁷ By demonstrating that some offenses of risk-prevention and all of the ancillary offenses fall outside Fletcher's three patterns, Husak concludes that such offenses are without prima facie justification.²⁸ As a result, unless legislators can shoulder the burden of justifying their criminalization, these offenses should be eliminated.²⁹

19. Fletcher, *supra* n. 1, at 115-16.

20. *Id.* at 116.

21. *Id.* at 117.

22. *Id.* at 118.

23. *Id.* at 118-19.

24. Fletcher, *supra* n. 1, at 235.

25. *Id.* at 234.

26. Husak, *supra* n. 9, at 765.

27. *Id.* at 769-72.

28. *Id.* at 774-78.

29. *Id.* at 773.

Denno bolsters Fletcher's subjective criminality pattern by critiquing a more extreme view of the manifest criminality pattern espoused by recent commentators.³⁰ The premise of this more extreme view is that courts are ill-equipped to divine the actual content of the defendant's mental state.³¹ Instead, courts should merely infer the requisite mental state from the actor's conduct or presume it from doctrines such as an actor intends the natural and probable consequences of her actions.³² After demonstrating the difficulties with this extreme manifest criminality pattern, Denno buttresses the subjective criminality pattern by canvassing the new advances in psychological research on consciousness.³³ While this new research supports the premise of the extreme manifest criminality pattern concerning the near impossibility of divining an actor's mental state (even for the actor herself³⁴), it also reveals that mental states are even more subtle and convoluted than previously realized.³⁵ And it is this very subtlety that precludes the extreme manifest criminality pattern's ability to reliably infer and presume an actor's mental state. Thus, paradoxically, because the task of the subjective criminality pattern—discerning an actor's actual mental state—is even more difficult, it is also that much more important for our institutions of criminal justice to undertake. As a result, our increased understanding of consciousness affords a clarification and modernization of Fletcher's subjective criminality pattern.³⁶ Denno concludes that the preferable pattern is a combined "subjective + manifest"³⁷ pattern with the subjective criminality component predominating.³⁸

Though also ultimately focusing on mental states and culpability, Kyron Huigens begins his contribution, "Fletcher's *Rethinking*: A Memoir,"³⁹ with a charmingly personal recollection of how *Rethinking* transformed both Huigens, as a budding academic, and the field of criminal law. Huigens sketches the state of criminal law scholarship prior to the publication of *Rethinking* as hopelessly dominated by consequentialism and non-cognitivism.⁴⁰ The "philosophical boldness"⁴¹ of *Rethinking*, according to Huigens, derived from its firm commitment to a "normative," or non-consequentialist perspective.⁴² The perception that *Rethinking* was distinctively "normative" Huigens traces to

30. Denno, *supra* n. 18, at 786 (citing Bruce Ledewitz, *Mr. Carroll's Mental State or What Is Meant by Intent*, 38 Am. Crim. L. Rev. 71, 99 (2001)).

31. *Id.* at 787-89.

32. *Id.* at 789-90.

33. *Id.* at 793-801.

34. *Id.* at 797.

35. See Denno, *supra* n. 18, at 793-98.

36. *Id.* at 800-01.

37. *Id.* at 783.

38. *Id.*

39. Huigens, *supra* n. 11.

40. *Id.* at 803-06.

41. *Id.* at 815.

42. *Id.* at 803-06.

Rethinking's dichotomizing descriptive and normative approaches to culpability.⁴³ The descriptive view of culpability, dominant at the time and influenced by the Model Penal Code, was that culpability consisted of an actual mental state, for example, an intent to commit a criminal act, residing in the mind of the defendant.⁴⁴ The role of the jury was then simply to determine as a matter of fact whether the defendant did or did not have this requisite mental state. As Fletcher pointed out, however, the descriptive view could not accommodate the culpability standard of negligence, which is not a mental state at all.⁴⁵ A finding of negligence required a jury to make a normative judgment as to whether the defendant violated a standard of reasonableness. While noting the historical importance of the distinction in both the development of the criminal law and his own scholarship, Huigens now views the distinction as flawed and inadequate.⁴⁶ After proposing a more central distinction—intentional versus non-intentional fault⁴⁷—Huigens illustrates the preferability of his distinction to Fletcher's by comparing each distinction's application to the infamous English rape case, *Regina v. Morgan*.⁴⁸

In "Fletcher on Offences and Defences,"⁴⁹ John Gardner defends and extends Fletcher's argument in *Rethinking* of the central substantive importance of the distinction between offenses and defenses. While some may maintain that the distinction is inconsequential, useful to textbook writers as a classificatory rubric, or of procedural significance in shifting burdens of persuasion between prosecutors and defendants, Fletcher argues that it has substantive, moral consequences in four areas.⁵⁰ In drawing the distinction between offenses and defenses, Fletcher posits that "[t]he minimal demand on the definition of an offense is that it reflects a morally coherent norm . . . [such] that its violation is incriminating."⁵¹ Fletcher cautions, however, that "this methodology may be insufficiently precise to resolve"⁵² borderline cases and that there is no "abstract,

43. *Id.* at 804-05.

44. Fletcher, *supra* n. 1, at 396-99.

45. *Id.* at 399-400, 493-94.

46. See Huigens, *supra* n. 11, at 807-08.

47. *Id.* at 809.

48. *Id.* at 809-15 (discussing *Regina v. Morgan*, 1976 App. Cas. 182).

49. John Gardner, *Fletcher on Offences and Defences*, 39 *Tulsa L. Rev.* 817 (2004).

50. Fletcher, *supra* n. 1, at 552-55. Fletcher explains the four areas as follows:

First, it is of critical importance in deciding when external facts, standing alone, should have an exculpatory effect. Secondly, it might bear on the analysis of permissible vagueness in legal norms. Thirdly, it might bear on the allocation of power between the legislature and judiciary in the continuing development of the criminal law. And fourthly, it might be of importance in analyzing the exculpatory effect of mistakes.

Id. at 555.

51. *Id.* at 567-68.

52. *Id.* at 568.

logical test.”⁵³ In a subsequent article, Fletcher notes that satisfactorily drawing the distinction is the most significant “unmet challenge in criminal theory.”⁵⁴

While paying tribute to *Rethinking* for establishing the importance of the offense/defense distinction,⁵⁵ Gardner attempts to more firmly establish what the distinction turns on and to determine more precisely the respective domains of offenses and defenses—that is, how do we determine what belongs in each category? Gardner bases his delineation of the distinction on conceptualizing an offense as the reasons that oppose committing the conduct (prohibited by the offense) and defenses as those reasons which are in favor of committing the conduct (prohibited by the offense). If the reasons against the conduct “stand undefeated”⁵⁶ by the reasons in favor, then the defendant is properly convicted. But if the reasons in favor outweigh the reasons against, the defendant’s defense succeeds. Gardner then goes on to examine whether this solution is compatible with Fletcher’s views.

Perhaps the single issue on which *Rethinking*, as well as Fletcher’s other work, enjoys the most influence is the justification/excuse distinction.⁵⁷ As we now well know, a “justification speaks to the rightness of the act; an excuse, to whether the actor is accountable for a concededly wrongful act.”⁵⁸ But prior to *Rethinking* and Fletcher’s earlier discussions dating back as far as 1972,⁵⁹ the distinction was considered archaic, irrelevant, and properly relegated to the dustbin of history.⁶⁰ But within ten years after the publication of *Rethinking*, the distinction had been the principle focus of two symposia,⁶¹ and in 1989 the distinction was hailed as “[p]erhaps the single most significant and controversial research program among

53. *Id.* at 566.

54. George P. Fletcher, *The Unmet Challenge of Criminal Theory*, 33 Wayne L. Rev. 1439, 1443 (1987) (“The unmet challenge of criminal theory consists in working out the basis of the incriminating dimension of crime and relating this incriminating dimension to the exculpatory dimension of justification and excuse.”).

55. Gardner, *supra* n. 49, at 817, 818.

56. *Id.* at 819.

57. While disappointed that some aspects of *Rethinking* have been neglected, Fletcher acknowledges that “[t]here has been a lot of attention paid to the theory of justification and excuse” Fletcher, *supra* n. 11, at 985.

58. Fletcher, *supra* n. 1, at 759.

59. For perhaps Fletcher’s first discussion of the distinction, albeit as applied to tort theory, see George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537, 558-59 (1972). For Fletcher’s other pre-*Rethinking* work on justification and excuse, see generally George P. Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. Rev. 293 (1975) [hereinafter Fletcher, *Right Deed*]; George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. Cal. L. Rev. 1269 (1974); George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 Isr. L. Rev. 367 (1973) [hereinafter Fletcher, *Proportionality*].

60. See e.g. H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, in *Punishment and Responsibility: Essays in the Philosophy of Law* 1, 13 (rev. ed., Oxford U. Press 1988) (“English lawyers once distinguished between ‘excusable’ homicide (e.g. accidental non-negligent killing) and ‘justifiable’ homicide (e.g. killing in self-defence or in the arrest of a felon) and different legal consequences once attached to these two forms of homicide. To the modern lawyer this distinction has no longer any legal importance”).

61. See Symposium, *Justifications, Excuses, and Just Deserts*, 33 Wayne L. Rev. 1155 (1987); *Justification and Excuse: Comparative Perspectives* (Albin Eser & George P. Fletcher eds., Transnatl. Juris Publications 1987).

contemporary criminal theorists"⁶² Although there were some noteworthy predecessors,⁶³ Fletcher has been widely lauded for prophetically "[c]rying in the wilderness"⁶⁴ and resurrecting the distinction as a central concept in criminal theory.⁶⁵ While both defenses concede the definition of the offense has been satisfied and both defenses, if successful, generate an acquittal, Fletcher demonstrated the utility of the distinction by its ordering of legal rights and relationships: "A valid justification, then, affects a matrix of legal relationships. The victim [of justified force] has no right to resist, and other persons acquire a right to assist Excuses, in contrast, do not affect legal relationships with other persons [to resist or to assist the wrongful actor]."⁶⁶

Given the extraordinary influence Fletcher has enjoyed, it is not surprising that four of the contributions herein focus primarily on justifications and excuses,⁶⁷ and three others do so in part.⁶⁸ In "Rethinking Justifications,"⁶⁹ R. A. Duff argues that the categories of justification and excuse are insufficiently nuanced to account for the rich variety of exculpatory claims. Drawing on the epistemological meaning of justification, Duff discerns two separate strands of what justified

62. Douglas N. Husak, *Justifications and the Criminal Liability of Accessories*, 80 J. Crim. L. & Criminology 491, 491 (1989).

63. For examples of significant English-language discussions of the distinction prior to the publication of *Rethinking*, see generally John L. Austin, *A Plea for Excuses*, 57 Aristotelian Socy. Procs. 1 (1956-57); Albin Eser, *Justification and Excuse*, 24 Am. J. Comp. L. 621 (1976); Hart, *supra* n. 60; Jerome Hall, *Comment on Justification and Excuse*, 24 Am. J. Comp. L. 638 (1976) (commenting on Eser, *supra*); Peter D.W. Heberling, Student Author, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 Colum. L. Rev. 914 (1975); Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. Rev. 266 (1975).

For Fletcher's own pre-*Rethinking* work on justification and excuse, see *supra* note 59.

64. Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 Colum. L. Rev. 1897, 1897-98 (1984) ("Crying in the wilderness, however, are a few possibly prophetic voices, among which the loudest and most eloquent is George Fletcher's.").

65. E.g. Joshua Dressler, *Foreword: Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 Wayne L. Rev. 1155, 1159 (1987) ("George Fletcher is credited with 'crying in the wilderness' about the lack of academic attention to the concepts of justification and excuse. . . . Professor Fletcher's scholarship has borne fruit. The field is now fairly rich in literature. . . .") (quoting Greenawalt, *supra* n. 64, at 1897); Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. Rev. 61, 63 (1984) ("George Fletcher is largely responsible for this modern interest [in the distinction]."); Eser, *supra* n. 63, at 621 ("with the exception of George Fletcher, who seems to stand alone in fully recognizing the fundamental distinction"); Robert F. Schopp, *Justification Defenses and Just Convictions*, 24 P. L.J. 1233, 1238 (1993) ("Much of the contemporary discussion of justification defenses takes the form of a debate between George Fletcher and a series of critics. . . ."); A.T.H. Smith, *Rethinking the Defence of Mistake*, 2 Oxford J. Leg. Stud. 429, 430 (1982) ("[W]e can be grateful to Fletcher for helping us to see the point [of the distinction] more clearly."); Glanville Williams, *The Theory of Excuses*, 1982 Crim. L. Rev. 732, 732 ("We are indebted to Professor George Fletcher for reviving interest in the distinction between justification and excuse in the criminal law." (footnote omitted)).

66. Fletcher, *supra* n. 1, at 762.

67. See Larry Alexander, *Unknowingly Justified Actors and the Attempt/Success Distinction*, 39 Tulsa L. Rev. 851 (2004); R.A. Duff, *Rethinking Justifications*, 39 Tulsa L. Rev. 829 (2004); Mordechai Kremnitzer & Khalid Ghanayim, *Proportionality and the Aggressor's Culpability in Self-Defense*, 39 Tulsa L. Rev. 875 (2004); James Q. Whitman, *Between Self-Defense and Vengeance/Between Social Contract and Monopoly of Violence*, 39 Tulsa L. Rev. 901 (2004).

68. See Gardner, *supra* n. 49; Huigens, *supra* n. 11; Francisco Muñoz Conde, "Rethinking" the Universal Structure of Criminal Law, 39 Tulsa L. Rev. 941 (2004).

69. Duff, *supra* n. 67.

conduct encompasses: right conduct and warranted conduct.⁷⁰ Duff then applies this richer classificatory schema to two of the thorniest and most contested issues among approaches to justification.

First, in the so-called problem of “putative justification,”⁷¹ theorists have disagreed about whether an actor who reasonably believes in the existence of justificatory circumstances, but is mistaken, should be justified or merely excused. While Fletcher maintains that if an actor’s conduct is, in fact, wrong it cannot be justified and may only be excused, much of American law would treat the actor’s conduct as justified based on the reasonableness of the mistake.⁷² Duff contends both approaches are wrong. To treat such an actor—who we might say does the wrong deed for the right reason—as no less justified than an actor who does the right deed for the right reason is to ignore significant differences between the two types of actors.⁷³ And to treat the reasonably mistaken actor as excused implies that we would hope that she would do better the next time when presented with the same situation.⁷⁴ But this is false since she acted just as she should have—on the basis of what reasonably appeared to be the case.⁷⁵ Rather than try to awkwardly force the actor’s defense into categories which do not fit, the actor’s conduct should be considered neither justified nor excused but rather wrong but warranted.⁷⁶

Second, in the problem of “unknown justification,” theorists have disagreed about whether an actor’s conduct should be justified if the actor is unaware of existing justificatory circumstances. While Fletcher here concurs with American law by treating such an actor—who we might say did the right deed for the wrong reason—as unjustified,⁷⁷ other commentators argue that since the conduct is right it should be justified.⁷⁸ Duff again concludes that the labels justified and unjustified are inadequate and should be jettisoned in favor of the more nuanced and suitable category of treating the actor’s conduct as right, but unwarranted.⁷⁹ While many contest attaching the label of justified to the mistakenly justified and unknowingly justified actors above, few (if any) would dispute the labels “wrong but unwarranted” and “right but unwarranted,” respectively. As a result, Duff believes, this richer classificatory schema takes a significant step toward dissolving these two problems.

In “Unknowingly Justified Actors and the Attempt/Success Distinction,”⁸⁰ Larry Alexander also addresses the issue of unknowing justification by revisiting

70. *Id.* at 833-36.

71. Fletcher, *supra* n. 1, at 762.

72. *Id.* at 762-69.

73. Duff, *supra* n. 67, at 839-40.

74. *Id.* at 840.

75. *Id.* at 840-41.

76. *Id.*

77. Fletcher, *supra* n. 1, at 557.

78. See, for example, sources cited in Duff, *supra* n. 67, at 843 n. 42.

79. Duff, *supra* n. 67, at 843-44.

80. Alexander, *supra* n. 67.

its modern origin—a debate in 1975 between Fletcher and Paul Robinson, a former star student of Fletcher.⁸¹ Robinson's central argument is that the unknowingly justified actor who commits "an act found to be beneficial, or at least not harmful, should be of no concern to the criminal law."⁸² Fletcher disagrees, maintaining that unknowingly justified conduct should be unjustified.⁸³ Fletcher argues that Robinson's view conflates what must be considered as distinct: the definition of the crime and justification.⁸⁴ In *Rethinking*, Fletcher utilizes the offense/justification distinction to make two arguments against unknowing justification. First, unlike offense prohibitions which require abstaining from certain conduct, justificatory facts merely permit or privilege, but do not require, certain conduct.⁸⁵ Second, since justifications are exceptions to prohibitory norms, an actor must merit the privilege to invoke the exception. To deserve to invoke the exception one "must at least know of the circumstances supporting the claim of an exception."⁸⁶

Alexander argues that with respect to self-defense Fletcher is right, but with respect to the lesser evils justification Robinson is right. This is because in many self-defense cases the socially preferable course of action is unclear and self-defense functions somewhat like an excuse.⁸⁷ But where, as in lesser evils situations, the socially preferable course of action is clear, we wish the actor to perform the preferable course of action regardless of whether she is aware of the justificatory circumstances.⁸⁸

Alexander also notes that the unknowing justification issue bears on one of the most intractable debates in criminal theory—whether consummated offenses (for example, murder) deserve more punishment than inchoate offenses (for example, attempted murder). This is but one aspect of the larger philosophical problem of "moral luck."⁸⁹ That is, do actors deserve blame or praise for that which is outside their control and a product, at least in part, of luck? Alexander contends that careful consideration of the unknowing justification issue supports attempts deserving the same punishment as completed offenses.⁹⁰

Taking the opposite position than Alexander, Jaime Malamud Goti, in "Rethinking Punishment and Luck,"⁹¹ defends the position taken by Fletcher in

81. The debate took shape in an article by Paul Robinson and a reply article by Fletcher. See generally Fletcher, *Right Deed*, *supra* n. 59; Robinson, *supra* n. 63.

82. Robinson, *supra* n. 63, at 267-68.

83. Fletcher, *Right Deed*, *supra* n. 59, at 320-21.

84. *Id.* at 309-10.

85. Fletcher, *supra* n. 1, at 555-64.

86. *Id.* at 565.

87. Alexander, *supra* n. 67, at 855.

88. *Id.* at 856-57.

89. The term "moral luck" was perhaps first used by Thomas Nagel and Bernard Williams. See Thomas Nagel, *Moral Luck*, in *Mortal Questions* 24, 26 (Cambridge U. Press 1979); Bernard Williams, *Moral Luck*, in *Moral Luck: Philosophical Papers 1973-1980*, at 20 (Cambridge U. Press 1981). Nagel, however, credits Williams with coining the term. Thomas Nagel, *Other Minds* 167 (Oxford U. Press 1995).

90. Alexander, *supra* n. 67, at 857-58.

91. Jaime Malamud Goti, *Rethinking Punishment and Luck*, 39 *Tulsa L. Rev.* 861 (2004).

Rethinking that consummate offenses deserve greater punishment than inchoate offenses. Fletcher frames the issue as whether an “act of wrongdoing is aggravated by the occurrence of a harmful consequence.”⁹² After rejecting a number of arguments supporting greater deserved punishment for consummated offenses, Fletcher tentatively advances an argument based on an actor’s greater feelings of remorse and guilt for causing a harm than for merely risking or intending a harm. For example, “[i]f an assassin aims, shoots and hits her intended victim, she is likely to feel different about her act than she would if the bullet had gone astray.”⁹³ From this insight Fletcher reasons that if we were “to ask ourselves whether if we were to be punished the same for culpably causing harm and for having a ‘close call,’ we would regard ourselves as justly treated.”⁹⁴ Fletcher assumes not and thus, “we can hardly defend treating others in a way that we would not regard as acceptable.”⁹⁵

Malamud Goti argues that if the only component of deserved punishment is that which is outside the realm of luck, there would be virtually nothing left upon which to justify punishment at all. Not only are the outcomes of our actions beyond our control, but so also are our very acts themselves.⁹⁶ For example, “we cannot fully trust our muscles, for they may fail to obey us when we command them to stretch and contract.”⁹⁷ As a result, deserved punishment cannot be imposed based on our actions. Next Malamud Goti contends even our beliefs, thoughts, and mental processes are beyond our control and subject to the influence of luck. “The meaning and validity of a great deal of our mental activity depends on other people’s beliefs and attitudes which, in turn, these individuals cannot themselves control.”⁹⁸ With consequences of actions, actions themselves, and even thoughts outside of our control, there is nothing left upon which to base deserved punishment.⁹⁹ Thus, the stringent requirement that luck be morally irrelevant is simply too unrealistic to support any institution of punishment or practice of blaming. Building on this argument, Malamud Goti forges some interesting connections to the issues encompassing present group responsibility for the actions of past members of those groups.¹⁰⁰ With particular emphasis on the viability of reparations to African Americans to redress the continuing injustices of the vestiges of slavery, Malamud Goti argues for the centrality of a robust conception of blame and the admission of responsibility.¹⁰¹

Returning again to issues of justification and excuse, the next two contributions both address—albeit from different perspectives—perhaps the most

92. Fletcher, *supra* n. 1, at 475.

93. *Id.* at 482.

94. *Id.* at 483.

95. *Id.*

96. Malamud Goti, *supra* n. 91, at 866.

97. *Id.*

98. *Id.* at 867.

99. *Id.* at 869.

100. *Id.* at 869-72.

101. Malamud Goti, *supra* n. 91, at 869-72.

discussed exculpatory claim—self-defense. While Mordechai Kremnitzer and Khalid Ghanayim explore self-defense in the methodological vein of *Rethinking*, James Whitman's essay considers self-defense within a framework of political theory—a perspective that Fletcher will increasingly draw on in his forthcoming sequel to *Rethinking*.¹⁰²

In "Proportionality and the Aggressor's Culpability in Self-Defense,"¹⁰³ Kremnitzer and Ghanayim dispute Fletcher's model of self-defense which excludes the requirements of proportional force and the aggressor's culpability. *Rethinking* canvasses three different models of self-defense: (i) as an excuse, (ii) as a variant on lesser evils or necessity in which the aggressor's culpability is included in the calculus of proportional harms, and (iii) protection of the victim's autonomy.¹⁰⁴ Fletcher adopts the latter model after considering the example of a man in an elevator who prevents an attack by a knife-wielding psychotic by killing him (which was the only means of escaping serious bodily harm).¹⁰⁵ Fletcher rejects the model of self-defense as excuse because that would allow the psychotic a right to defend against the defender's force.¹⁰⁶ The necessity model is also inapplicable because proportionality is not satisfied. The harm avoided is not (significantly) greater than that caused—it is taking one nonculpable (because psychotic) life to save one nonculpable (because nonaggressing) life.¹⁰⁷ The only remaining model that grants the defender a satisfactory right of self-defense is protection of autonomy. As Fletcher explains the protection of autonomy model, "the aggressor's culpability appears to be irrelevant; what counts is the objective nature of the aggressor's intrusion."¹⁰⁸ Proportionality is also irrelevant: "any person attacked by another should have the absolute right to counteract aggression against his vital interests."¹⁰⁹

Kremnitzer and Ghanayim argue that Fletcher is mistaken and that self-defense as modeled on necessity is the preferable approach. Under the necessity model, a wide variety of interests and considerations may be relevant to the balancing of harm avoided versus harm committed.¹¹⁰ One such interest is the autonomy of the defender which the psychotic has infringed.¹¹¹ Consideration of the defender's autonomy alters the balance in favor of the defender such that the defender's force avoids greater harm than it inflicts—loss of defender's life and violation of defender's autonomy is avoided at the cost of the psychotic aggressor's life.¹¹² Kremnitzer and Ghanayim conclude that the necessity-based

102. Fletcher, *supra* n. 11, at 992 ("[P]olitical analysis must precede any reference to moral issues. . . . Morality becomes relevant in the theory of law only because a political theory makes it relevant.").

103. Kremnitzer & Ghanayim, *supra* n. 67.

104. Fletcher, *supra* n. 1, at 855-64.

105. Fletcher, *Proportionality*, *supra* n. 59, at 371.

106. *Id.* at 376.

107. *Id.* at 374-76.

108. Fletcher, *supra* n. 1, at 862.

109. *Id.* at 860.

110. Kremnitzer & Ghanayim, *supra* n. 67, at 877-79.

111. *Id.* at 877-81.

112. *Id.* at 880-81.

model is preferable by providing a justification to the defender against the psychotic aggressor while still preserving the relevance of, as requirements for justified self-defense, proportional force and the culpability of an aggressor.

The next grouping of contributions marks a departure from the vein of *Rethinking*, but anticipates the perspectives and concerns of Fletcher's forthcoming *Internationalizing Criminal Law*. James Whitman's and Victoria Nourse's essays reflect Fletcher's increased emphasis on a broader political framework from which to view issues of criminal justice. Francisco Muñoz Conde's and Albin Eser's essays focus on substantive and procedural aspects, respectively, of the burgeoning field of international criminal law.

In "Between Self-Defense and Vengeance/Between Social Contract and Monopoly of Violence,"¹¹³ Whitman critiques the criminal law's inadequate treatment of justification and excuse claims, with particular respect to self-defense, through the lens of political theory. The inadequacy, Whitman argues, stems from the "tension between self-defense and vengeance."¹¹⁴ While our criminal law recognizes that citizens have a right of self-preservation, it formally disavows the legitimacy of vengeance. But too many defendants use force motivated by vengeance and then subsequently seek to cloak their conduct in the garb of a right to self-preservation.¹¹⁵ Perhaps sensing that vengeance is, in some respects, a greater part of justice than our criminal law is willing to acknowledge, the criminal justice system then either attempts to force impermissible vengeance-motivated conduct into an existing acceptable self-preservation category or awkwardly evolves new doctrines to exculpate such conduct.¹¹⁶ The natural results of this tension between official disavowal of vengeance and unofficial, tacit condonation are disingenuous and distorted theories of justification and excuse and "a criminal law that ties itself into ungainly doctrinal knots."¹¹⁷

And this tension in doctrinal criminal law is mirrored in political theory by the contrast between two leading theories of the state—social contract theory and monopoly of violence theory.¹¹⁸ While sometimes treated as the same, Whitman delineates an important difference. The social contract theory justifies state coercion from the premise that one's natural right to self-defense is surrendered to the state in return for the state supplying collective self-defense.¹¹⁹ In contrast, the monopoly of violence theory is premised on a citizen surrendering a natural right to seek vengeance in return for the state exacting vengeance on behalf of its aggrieved citizens.¹²⁰ After canvassing a number of historical and contemporary examples, including the present war in Iraq, Whitman conjectures that, unfortunately, human nature and political reality may reflect the primacy of the

113. Whitman, *supra* n. 67.

114. *Id.* at 902.

115. *Id.* at 903-09.

116. *Id.* at 904-08.

117. *Id.* at 908 (footnote omitted).

118. Whitman, *supra* n. 67, at 902.

119. *Id.* at 903.

120. *Id.*

desire for vengeance.¹²¹ As a result, to avoid the mismatch between doctrine and reality, both our criminal law and our political theory may well have to increasingly encompass a paradigm of social vengeance.¹²²

In "Rethinking Crime Legislation: History and Harshness,"¹²³ Victoria Nourse draws inspiration from *Rethinking* in two ways. First, it refused to abandon criminal law to the narrow, doctrinal, Model Penal Code-dominated zeitgeist of the 1950s through 1970s. Instead, *Rethinking* imbued new life into the field with its richly multi-disciplinary approach of comparative law, history, moral philosophy, and political philosophy. Second, and more specifically, while noting that *Rethinking* primarily focused on the moral philosophy component,¹²⁴ Nourse finds inspiration in *Rethinking*'s validation of the central importance of political theory to criminal law. As Nourse maintains, "[t]he criminal law . . . is about the nature of government itself."¹²⁵ But for Nourse this political dimension to criminal law should include not merely political theory but political practice as well.¹²⁶

As but a part of her larger project of "'rethinking' criminal law as it reflects the history of political theory,"¹²⁷ Nourse's essay takes a preliminary stab at "the politics of crime legislation."¹²⁸ With particular emphasis on the recidivist statutes, or "three strikes laws," Nourse subverts the prevailing assumption of legal historians that the "get tough on crime" attitudes and rhetoric began and were continued only in the Nixon, Reagan, and Bush administrations.¹²⁹ Rather, wars on crime have been waged throughout the twentieth century and have cut across partisan lines. After canvassing the interactions of popular perceptions of crime and their concomitant legislative responses (and most interestingly, vice versa¹³⁰), Nourse demonstrates that the much-debated, recent harshness of our criminal justice system has been endemic throughout, at least, the twentieth century.¹³¹ As a result, Nourse suggests, the harshness may be integral to, and exacerbated by, the very political structures which we, as Americans, both cherish and use to define us.¹³² If so, Nourse concludes, understanding the failures of the last century in dealing with the seemingly insoluble problems of criminal justice should galvanize us to rethink our assumptions and begin anew in the criminal law in a framework in which the criminal law is truly a species of not only political theory but political practice as well.¹³³

121. *Id.* at 915-19.

122. *Id.* at 921-23.

123. Nourse, *supra* n. 11.

124. *Id.* at 928 n. 13.

125. *Id.* at 934 (emphasis omitted).

126. *Id.* at 928.

127. *Id.*

128. Nourse, *supra* n. 11, at 928.

129. *Id.* at 928-30.

130. *Id.* at 926.

131. *Id.* at 928-34.

132. *Id.* at 934-36.

133. Nourse, *supra* n. 11, at 935-37.

In “‘Rethinking’ The Universal Structure of Criminal Law,”¹³⁴ Francisco Muñoz Conde investigates the possibility of identifying a shared conceptual framework of criminal law that would meet the growing need for an internationalized, globalized, and universalized criminal law. Muñoz Conde attempts to find the basic concepts for such a shared framework in *Rethinking* which, as Muñoz Conde notes, is itself an attempt to mediate between common law and continental approaches to criminal law. In finding the deep grammar and structures of criminal law common to all the disparate national and parochial systems of criminal law, Muñoz Conde uses *Rethinking* not only as a source for such deep structures but also as a counterpoint to the current trends in criminal law. The basic concepts Muñoz Conde discusses, which any universalized criminal law must address, include whether an actor’s wrongdoing and harmful consequences should take primacy over an actor’s intention;¹³⁵ the interplay of inchoate offenses such as possession of illicit substances and reckless endangerment and mistakes of fact and law, and the challenge this interplay poses to the operation of a strict legality principle;¹³⁶ and the distinction between justification and excuse.¹³⁷

While Muñoz Conde’s contribution stresses the importance of a universalized substantive criminal law, Albin Eser, in “For Universal Jurisdiction: Against Fletcher’s Antagonism,”¹³⁸ defends perhaps the most crucial procedural aspect of a universalized criminal law—universal jurisdiction. Eser offers a point-by-point rebuttal of Fletcher’s withering critique of universal jurisdiction. Fletcher attacks the increasing trend of many countries, including Belgium, Canada, and Germany, to assert universal jurisdiction over the adjudication of crimes committed anywhere in the world even if neither the accused nor the victim has any tie to that country.¹³⁹ Though Fletcher characterizes those favoring universal jurisdiction as “compassionate, ‘right-thinking’ lawyers,”¹⁴⁰ Fletcher concludes that “universal jurisdiction is both unwise and unjust.”¹⁴¹ Eser replies that the concept of universal jurisdiction has been recognized since 1927 and has afforded the prosecution of many infamous criminals—the Nuremberg trials of Nazi war criminals and the Israeli prosecution of Adolf Eichmann.¹⁴² Against Fletcher’s concern that universal jurisdiction promotes interjurisdictional conflicts, Eser explains that even under territorial jurisdiction concurrent national and international jurisdiction may result if a crime occurred across a number of

134. Muñoz Conde, *supra* n. 68.

135. *Id.* at 944-46.

136. *Id.* at 946-51.

137. *Id.* at 951-53.

138. Albin Eser, *For Universal Jurisdiction: Against Fletcher’s Antagonism*, 39 *Tulsa L. Rev.* 955 (2004).

139. George P. Fletcher, *Against Universal Jurisdiction*, 1 *J. Intl. Crim. J.* 580 (2003).

140. *Id.* at 580.

141. *Id.*

142. Eser, *supra* n. 138, at 957.

countries.¹⁴³ Against Fletcher's criticism that the circumstances under which a prosecution under universal jurisdiction takes place will be unjust and unfair by tending to favor the victims at the expense of the accused, Eser argues that fairness is owed not only to the accused but to victims as well.¹⁴⁴

Eser also disputes that the rights of the accused will be weaker under universal jurisdiction prosecutions than in American prosecutions. According to Fletcher, the possibility of multiple prosecutions under universal jurisdiction would violate the American constitutional right against double jeopardy.¹⁴⁵ Though Eser concedes this prospect as potentially troubling, he argues that even without universal jurisdiction this difficulty may arise.¹⁴⁶ And furthermore, Eser notes, the vaunted American protection against double jeopardy is not without its exceptions—the dual sovereignty doctrine, minor variations in different offenses allow for multiple prosecutions of essentially the same conduct, and successive prosecutions after a mistrial or if an acquittal resulted from fraud or collusion.¹⁴⁷

And finally, in "From *Rethinking* to *Internationalizing Criminal Law*,"¹⁴⁸ George Fletcher treats us to a fascinating intellectual memoir tracing the evolution of his thinking and rethinking about criminal law from the advent of *Rethinking* through a number of other stages and progressing to the forthcoming stage of his sequel to *Rethinking*—a synthesis of criminal theory, comparative criminal law, and international criminal law. After recounting the origins of, and the influences on, the unconventional approach taken in *Rethinking*, Fletcher summarizes the core of *Rethinking* by explaining its opposition to eight positions taken by the Model Penal Code.¹⁴⁹ Though at the time of writing *Rethinking* Fletcher reveals that he was aware that the project was a "gamble" and exhibited considerable "chutzpah,"¹⁵⁰ viewing it retrospectively Fletcher now intriguingly characterizes it as "conservative and traditional."¹⁵¹ In mounting his normative or nonconsequentialist critique of the criminal law of the common law, Fletcher employed a combination of analytic and ordinary language philosophy as well as post-WWII German criminal theory.¹⁵² In contrast, the Bentham-influenced utilitarian approach of the Model Penal Code "could subject the common law to a [comparatively more] systematic critique."¹⁵³ Fletcher now sees that

143. *Id.* at 957-58.

144. *Id.* at 959-60.

145. Fletcher, *supra* n. 139, at 580-83.

146. Eser provides the following example:

If . . . a German terrorist bombed an American tour bus in Madrid and fled to Paris, why should not each of the countries concerned attempt to get the perpetrator extradited: to Spain based on the territory of commission, to Germany based on the nationality of the defendant, or to the United States based on the nationality of the victims?

Eser, *supra* n. 138, at 965.

147. *Id.* at 966-68.

148. Fletcher, *supra* n. 11.

149. *Id.* at 979-85.

150. *Id.* at 979.

151. *Id.* at 984.

152. *Id.*

153. Fletcher, *supra* n. 11, at 984.

“[p]aradoxically, Herb Wechsler and the MPC adopted a more radically critical point of view than [his] own.”¹⁵⁴

As perhaps the first book on comparative criminal theory, *Rethinking* found an appreciative audience both at home and abroad. Europeans read it as an explanation of the common law in a conceptual framework they could understand—Continental legal thought. American readers saw, perhaps for the first time, that criminal theory (treating the criminal law as “a species of political and moral philosophy”¹⁵⁵) was a valuable enterprise and that our understanding of criminal law could be enhanced by a comparative perspective.

After *Rethinking*, Fletcher published a number of books concerning related themes. In *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial*,¹⁵⁶ on the trial of infamous subway vigilante Bernhard Goetz, Fletcher “sought to describe the ideas set forth in *Rethinking* to a general audience.”¹⁵⁷ As Paul Robinson quipped, it was “*Rethinking* in short pants.”¹⁵⁸ From the discussion of the crime of treason in his next book, *Loyalty: An Essay on the Morality of Relationships*,¹⁵⁹ Fletcher realized that treason might be a separate, and fourth, pattern of liability supplementing the three identified in *Rethinking*.¹⁶⁰ While the wrong of other core crimes is “universal in nature,” treason is parochial—“wrong only from the standpoint of the state that is betrayed.”¹⁶¹ *With Justice for Some: Victims’ Rights in Criminal Trials*,¹⁶² focusing on recent, high-profile criminal trials, addressed the side of the criminal trial ignored by *Rethinking*—victims and victims’ rights. This anticipated the Rome Statute’s stunning conceptual shift of emphasizing the rights of victims perhaps above those of defendants.¹⁶³ Around 1995, Fletcher began to take tentative steps toward a second edition of *Rethinking*. A prelude was the publication of *Basic Concepts of Criminal Law*,¹⁶⁴ offering an account of the criminal law in twelve basic distinctions. This was the beginning of Fletcher’s attempt at a “universal theory” or “universal grammar” of criminal law.¹⁶⁵

As Fletcher began to work on drafts of a sequel to *Rethinking*, tentatively titled “Universalizing Criminal Law,” explicating the set of philosophical premises of universal application that underpin the criminal law, transformative world

154. *Id.*

155. Fletcher, *supra* n. 1, at xix.

156. George P. Fletcher, *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* (Free Press 1988).

157. Fletcher, *supra* n. 11, at 986.

158. *Id.* (citing Paul H. Robinson, *Books for Lawyers: Revenge of the Nerd*, 74 ABA J. 112 (Sept. 1, 1988) (reviewing Fletcher, *supra* n. 156)).

159. George P. Fletcher, *Loyalty: An Essay on the Morality of Relationships* (Oxford U. Press 1993).

160. For discussion of Fletcher’s three patterns of criminality, see *supra* notes 14-25 and accompanying text.

161. Fletcher, *supra* n. 11, at 987.

162. George P. Fletcher, *With Justice for Some: Victims’ Rights in Criminal Trials* (Addison Wesley Publg. 1995).

163. Fletcher, *supra* n. 11, at 988.

164. George P. Fletcher, *Basic Concepts of Criminal Law* (Oxford U. Press 1998).

165. Fletcher, *supra* n. 11, at 989.

events were causing the criminal law to undergo radical change.¹⁶⁶ The ad hoc tribunals of the former Yugoslavia and Rwanda, the terrorist attacks of September 11, and the Rome Statute coming into force in July of 2002 also crystallized the focus and scope of a sequel to *Rethinking*.¹⁶⁷ In the wake of these events, Fletcher realized that while international criminal law prosecutions needed a fusion of common law and continental principles, the field of international criminal law required an infusion of comparative and theoretical criminal law scholarship. With the mission of the book clarified—a synthesis of theoretical, comparative, and international criminal law—Fletcher is finally writing the long-awaited sequel to *Rethinking*. While the dizzying pace of change in the world makes difficult to predict what our criminal law will look like twenty-five years hence, undoubtedly this brave new world of criminal law will still be studying, arguing over, and honoring both *Rethinking* and its new sibling, *Internationalizing Criminal Law*.

166. *Id.*

167. *Id.* at 990.