

Tulsa Law Review

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

Volume 39 | Number 4

Summer 2004

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Recommended Citation

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

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CRIMES OUTSIDE THE CORE

Douglas Husak*

I am delighted to contribute to an issue commemorating the twenty-fifth anniversary of *Rethinking Criminal Law* (*Rethinking*).¹ I believe that *Rethinking* is the most important book in the English language about the philosophy of criminal law written in the past century. Some readers will suspect this statement to be hyperbole—the sort of inflated praise that is bestowed only on occasions in which the author himself is honored. If so, they are invited to propose their own candidate for this distinction, and to compare its impact with that of *Rethinking*. I am confident that no alternative will prove to be as influential.² I re-read significant portions of *Rethinking* in the course of preparing this essay, and I continue to be struck by the sheer number of brilliant and original insights. Fletcher's treatment of omissions, for example—to name just one of many topics on which I will have almost nothing to say here—is a major advance in the field of criminal law theory.

I say that *Rethinking* is central to the *philosophy* of criminal law because its central theme is that the criminal law contains an internal normative structure that is not simply imposed by the legislature. According to Fletcher, the task of criminal theory is “to explicate and refine the principles implicit in this structure.”³ If theoreticians are to perform this task proficiently, they have just as much need to draw from moral and political philosophy as from positive law. It is hard to say whether *Rethinking* is more valuable for law professors who specialize in criminal law or for philosophers who try to theorize about it.

On a personal note, no volume comes close to *Rethinking* in having altered the trajectory of my own research. After my introduction to the many issues I first confronted in *Rethinking*, I came to realize the possibility of an entire career exploring questions at the intersection of criminal law and moral philosophy.⁴ It is only a slight exaggeration to say that my actual scholarly career has conformed to this description. The following essay is not designed to criticize as much as to

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

2. In my view, there are three serious competitors: H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford U. Press 1968); R.A. Duff, *Criminal Attempts* (Clarendon Press 1996); and Michael Moore, *Placing Blame: A General Theory of the Criminal Law* (Clarendon Press 1997). All three books are required reading for serious theorists of the criminal law.

3. Fletcher, *supra* n. 1, at 406.

4. The book begins: “Criminal law is a species of political and moral philosophy.” *Id.* at xix.

extend some of the basic ideas in *Rethinking*. In the past twenty-five years, the criminal law that Fletcher rethought has changed dramatically—almost always for the worse—and the time has come to review the implications of Fletcher's general approach for some of the developments that most commentators (including myself) regard as unfortunate. My efforts will draw heavily from the work of contemporary scholars who also owe a tremendous intellectual debt to George Fletcher.

I. PATTERNS OF LIABILITY

George Fletcher, I believe, was the first to suggest that the criminal law contains a *core*. Unfortunately, he does not explicate this claim in detail, but allows it to remain intuitive. As metaphor, this supposition would lead us to believe that the criminal law also contains a periphery that surrounds its center. But how is this contrast between core and periphery to be drawn? Offenses in the core cannot simply be those that are amenable to whatever analyses Fletcher defends throughout *Rethinking*. This device to identify the core of the criminal law would be circular, ensuring the cogency of the subsequent analyses by definitional fiat. Potential counterexamples cannot be excluded from the scope of these analyses so easily. What independent criteria should be applied to decide which criminal offenses belong in the core and which should be relegated to the periphery?

The answer is not altogether clear, since core offenses might be identified in any number of ways. At least three devices to distinguish core from peripheral offenses are plausible. The first criterion is historical. Core offenses might be those that all Anglo-American jurisdictions have contained for centuries, and have come to be included in the prestigious Model Penal Code.⁵ Of course, the content of many such offenses has evolved over time. Few contemporary rape statutes, for example, still provide for marital immunity.⁶ Still, we easily recognize modern rape statutes as the product of evolution from offenses that have long existed at common law. Alternatively, core offenses might be identified as those that consume the bulk of the workload in our systems of criminal justice. Our theory of criminal law should not be detached from the actual business of police, prosecutors, and judges. By this criterion, drug offenses—and the offense of drug possession in particular—should be assigned to the core of criminal law. Under current federal law, more persons are arrested and punished for drug offenses than for any other category of crime.⁷ Finally, the criterion might be normative. Crimes in the core might be those that exhibit whatever features commentators take to be important. Criminal theorists, for example, attach enormous normative

5. Despite accolades from most others, it is noteworthy that no influential criminal theorist seems to be less enamored with the Model Penal Code than Fletcher. See George P. Fletcher, *Dogmas of the Model Penal Code*, 2 Buff. Crim. L. Rev. 3 (1998).

6. See Deborah W. Denno, *Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled and Replaced*, 1 Ohio St. J. Crim. L. 207, 213 (2003).

7. Bureau of J. Statistics, *Sourcebook of Criminal Justice Statistics—2001*, at tbl. 5.18, 415 (Ann L. Pastore & Kathleen Maguire eds., U.S. Dept. of J. 2002).

significance to the requirement of mens rea. Statutes that dispense with mens rea by imposing strict liability might be consigned to the periphery, even if they came to outnumber those that require culpability for each material element.

Fletcher's own method for identifying the core of the criminal law corresponds to none of these three possibilities. How, then, does he draw the distinction between offenses in the core and those outside it? This question is best answered by examining the *use* to which he puts the idea that the criminal law contains a core. In other words, we must try to understand the *point* of consigning some crimes to the core and others to the periphery. In fact, Fletcher puts this contrast to several distinct purposes. One such purpose, however, is especially important, and I propose to focus on it here. *Rethinking* provides a systematic defense of what Fletcher calls a *polycentric* (or pluralistic) theory of the nature of the criminal law.⁸ He argues, that is, that no single principle can hope to provide an adequate account of the content of the criminal law.⁹ Scholars are advised to "resist the temptation to reduce the criminal law to a single formula for determining when conduct ought to be treated as criminal."¹⁰ Instead, crimes in the core of the criminal law tend to conform to one of three distinct *patterns of liability*—among the most central insights in *Rethinking*. Although the suggestion that criminal law exhibits these patterns is fraught with ambiguity and confusion, I will argue that Fletcher's basic insight may be even more powerful than he appears to have realized.

A very brief summary of Fletcher's views about these three patterns of liability is necessary. The first such pattern is named *manifest criminality*. External acts occupy the focus in crimes of this class, and mental states are relegated to a secondary status. Neutral third-parties would be able to recognize the activity as dangerous and harmful without knowing the actor's intention. The act must manifest the actor's criminal purpose and typically constitutes an unnerving threat to the order of community life. The second such pattern is labeled *subjective criminality*. Intentions to violate a protected interest are the essence of these crimes. Acts serve merely to demonstrate the firmness of the actor's resolve and to provide evidence of his mental state. The third and final pattern is described as *harmful consequences*. Here, neither acts nor intentions have the same significance as in previous patterns. Instead, liability is based on the objective attribution to a responsible person of a harmful event that is conceptually independent of human action or state of mind.

According to Fletcher, no theory of criminal law is adequate if it disregards any of these three patterns. I do not know whether the majority of commentators concur, so that the indispensability of these three patterns should now be

8. Fletcher, *supra* n. 1, at xxii.

9. Curiously, Fletcher subsequently defends the view that *dominion* is common to virtually all crimes, thereby supporting his surprising conclusion that blackmail is a paradigmatic offense. This claim is difficult to reconcile with his commitment to the polycentrism that pervades *Rethinking*. Moreover, it has the odd consequence of categorizing homicide offenses as nonparadigmatic. See George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. Pa. L. Rev. 1617 (1993).

10. Fletcher, *supra* n. 1, at xxii.

described as orthodoxy among criminal theorists.¹¹ Since *Rethinking*, many scholars have succumbed to the very temptation against which Fletcher cautioned. In the philosophy of criminal law, as elsewhere in jurisprudence, “the itch for uniformity . . . is strong.”¹² Typically, theorists who depart from Fletcher’s polycentric model have sought to eliminate one pattern or another, usually by expanding the scope of those that remain. The pattern of harmful consequences has given rise to the greatest controversy. By my informal count, nearly half of all contemporary criminal theorists hold that actual results in the world ought to be irrelevant to whether or to what extent criminal liability should be imposed. Many commentators, including Andrew Ashworth, propose to shrink or eliminate the pattern of harmful consequences, generally by enlarging the pattern of subjective criminality.¹³ Less frequently, commentators advocate expanding rather than contracting the pattern of harmful consequences—usually at the expense of subjective criminality. Heidi Hurd, for example, defends “completed act deontology,” arguing that only completed actions, and not intentions or tryings, can be wrongs.¹⁴ Other theorists propose to enlarge the pattern of manifest criminality—again, at the expense of subjective criminality.¹⁵

I will not rehearse the pros and cons of these controversial views; the details of the positions and the arguments in their favor contain subtle variations and refinements that resist simple summaries. Suffice it to say that none of these positions has ever been implemented in any existing jurisdiction and generally would necessitate a radical rewriting of criminal codes. Of course, this statement hardly entails that any of these reforms must be deficient. No coherent normative theory—regardless of how simple or polycentric it may be—can hope to make sense of more than a fraction of the criminal law that actually exists. Arguably, the fact that a given theory identifies a huge chunk of the criminal law as deficient counts as an advantage rather than a disadvantage.¹⁶

Much subsequent commentary not only tries to eliminate or narrow a given pattern, but also endeavors to blur the contrasts between those patterns that remain. Consider, for example, the pattern of harmful consequences. As we have

11. The centrality of these three patterns figures prominently in other scholarly work on the criminal law. Only the names are changed. For example, the patterns replicate the tripartite account of the moral content of offenses defended by Stuart Green. See Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 Emory L.J. 1533 (1997).

12. H.L.A. Hart, *The Concept of Law* 32 (Clarendon Press 1961).

13. See Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm under the Code, and in the Common Law*, 19 Rutgers L.J. 725, 764 (1988); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. Pa. L. Rev. 1497 (1974).

14. Heidi M. Hurd, *What in the World Is Wrong?*, 5 J. Contemp. Leg. Issues 157 (1994).

15. See Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. Crim. L. & Criminology 1138 (1997).

16. My own efforts to construct a normative theory to limit the scope of the criminal law probably imply that a great many existing offenses are unjustified. See e.g. Douglas N. Husak, *Limitations on Criminalization and the General Part of Criminal Law*, in *Criminal Law Theory: Doctrines of the General Part* 13 (Stephen Shute & A.P. Simester eds., Oxford U. Press 2002); Douglas Husak, *Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction*, 23 L. & Phil. ____ (forthcoming Sept. 2004).

seen, crimes that fit this pattern seemingly presuppose the ability to identify a harmful result independently of human action or intention. The paradigm, of course, is the harm of death caused by homicide. As Duff has argued, however, we identify this harm quite differently depending on the type of wrongful action that causes it.¹⁷ The distinctive harm suffered by the victim of an intentional homicide is not just that he died—which might as well have been caused by a flood or hurricane—but that he was murdered. The fact that a given offense is a “result-crime” should not blind us to the significance of the kind of wrongful action that causes the result—even when characterizing the nature of the result itself. The contrast between these wrongful actions is central to Duff’s distinction between attacks and endangerments, which he argues have different conceptual structures.¹⁸ If Duff is correct—and I believe that he is—the boundaries between Fletcher’s patterns tend to blur.

Despite these complexities, I am persuaded that Fletcher was absolutely right to insist that each of his three patterns of liability is essential both descriptively and normatively—to explain the criminal law as it is, in addition to how it ought to be. In fact, his polycentric model may be even more powerful than Fletcher himself seemed to appreciate. The significance of these patterns becomes evident when we consider their possible implications for crimes that conform to none of them—for crimes outside the core. Before I offer my own thoughts on these implications, we need to turn to Fletcher’s own remarks about some of these offenses. Fletcher explicitly acknowledges that several existing crimes do not conform to any of the three patterns he describes. He cautions that “[n]ot even the three patterns account for more than many of the major offenses.”¹⁹ He lists perjury and kidnapping as crimes “it would be a mistake to squeeze . . . into one of the three patterns.”²⁰ In a later footnote, he mentions “[p]rohibited sexual behavior”²¹ such as adultery, incest, and statutory rape as examples of crimes that “fall in the gaps left by the three patterns of liability.”²² In light of these apparent counterexamples, he concludes “[t]he most we can claim for our theory of the three patterns of liability is that we may illuminate the core offenses of the criminal law.”²³

I confess that I am unsure what to make of these remarks. I fail to see why at least one of these crimes—statutory rape—does not conform to the pattern of harmful consequences. If the victim of statutory rape were not placed in a harmed condition simply by the act of sexual penetration, there would be no good reason to dispense with culpability or to deny the relevance of consent. I will return to

17. See R.A. Duff, *Harms and Wrongs*, 5 *Buff. Crim. L. Rev.* 13 (2001).

18. R.A. Duff, *Criminalising Endangerment*, in *Defining Crimes: Essays on the Criminal Law's Special Part* (R.A. Duff & Stuart Green eds., Oxford U. Press forthcoming 2005) (copy on file with *Tulsa Law Review*).

19. Fletcher, *supra* n. 1, at 389.

20. *Id.* at 233.

21. *Id.* at 389 n. 20.

22. *Id.*

23. *Id.* at 234.

some of the other alleged exceptions later.²⁴ At this time, I want to consider what their existence reveals about the patterns of liability. If we are able to grasp why the foregoing examples are thought to qualify as exceptions to the analysis Fletcher has provided, we may better understand the nature and significance of the analysis itself. We have seen that Fletcher alleges that his theory helps to “illuminate the core offenses of the criminal law” and that the alleged counterexamples fall outside this core, notwithstanding their status as “major offenses.” The challenge is to avoid the circularity to which I alluded earlier. If there is no basis for consigning offenses to the periphery other than the inconvenient fact that they are not amenable to Fletcher’s analysis, his claim that the patterns illuminate the core of the criminal law becomes an uninformative tautology.

Alternatively, I think that some of the examples to which Fletcher refers might be construed as *hybrids*—offenses that exhibit essential features of more than one pattern simultaneously. Consider perjury, for example. Like many crimes of deception, it is hard to say whether its most important feature is the act of deception or the intention to deceive.²⁵ But if particular offenses are to be banished from the core simply because they are hybrids, containing essential features of distinct patterns, a great many additional crimes must be relegated to the periphery as well. In fact, many and perhaps most crimes turn out to be hybrids, depending on how we solve the delicate problem of assigning a particular crime to a given pattern. Since the vast majority of core offenses require a union of prohibited act and mental state, the placement of a given offense into a pattern depends on which of their characteristics is taken to be the most basic or fundamental. Thus I remain puzzled about why some of the examples Fletcher identifies allegedly qualify as exceptions to his analysis. Because of this uncertainty, I admit to some confusion about the significance and nature of the analysis itself.

Notwithstanding these uncertainties, I return to my attempt to understand the claim that the core of criminal law can be analyzed in terms of three patterns of liability.²⁶ Fletcher is explicit that “[t]he value of these abstract patterns is their explanatory power,”²⁷ and that this explanatory power is both descriptive and normative.²⁸ For present purposes, the latter is more important than the former. Fletcher elaborates as follows: “The patterns . . . have normative implications, for they each state a plausible and coherent theory for prohibiting and punishing

24. See *infra* pt. II.

25. Or even the consequences of a deception for legal proceedings. Under the Model Penal Code, the deception must be material, even if it does not actually affect the outcome. See Model Penal Code § 241.1 (ALI 1962).

26. Fletcher makes a few remarks about what these patterns are *not*, although some of these disclaimers are unhelpful. See Fletcher, *supra* n. 1, at 117. For example, he assures us that “the pattern of manifest criminality . . . is not a theory of criminal types.” *Id.* But Fletcher does not elaborate on what a theory of criminal types would be.

27. *Id.* at 121.

28. *Id.* at 389.

conduct as criminal.”²⁹ I interpret this crucial remark to indicate that the patterns identify distinct objects of punishment—different things that punishment might be imposed *for*. In what I take to be a stipulation, Fletcher describes the various things for which punishment might be imposed as cases of *wrongdoing*. He characterizes “the element of wrongdoing [as] that aspect of criminal conduct for which punishment is imposed.”³⁰ Patterns of liability, then, provide (what I call) different *modes of wrongdoing* for which punishment might be imposed. In other words, I construe Fletcher to contend that the genus of wrongdoing contains at least three species; it is “plausible and coherent” to punish persons *for* their criminal acts, their states of mind, or the harmful consequences their actions cause.³¹ I explore the possible implications of my interpretation for a theory of criminalization in Part II.

At this point, I employ this interpretation to try to understand Fletcher’s apparent willingness to concede that additional patterns of liability may exist.³² This concession is almost completely undeveloped and probably is intended as an expression of caution. He can find no argument for concluding that his three patterns are exhaustive of the core of criminal law, and neither can I. All that can be done is to assess the merits of proposals to introduce new patterns of liability, and nothing in *Rethinking* should be construed to insist that no fourth pattern might be detected. What burden would an argument in favor of an additional pattern have to satisfy? On my interpretation, a new pattern would have to identify something other than an act, state of mind, or consequence for which it would be plausible and coherent to impose punishment.

Ultimately, of course, the question whether punishment may be imposed for something—manifest criminality, subjective criminality, a harmful consequence, or anything else—cannot be resolved without providing a theory of punishment. Needless to say, philosophers have made countless attempts to defend such a theory. Few of these philosophers, however, have shown much interest in the substantive criminal law itself. Remarkably, they have tried to justify punishment

29. *Id.*

30. Fletcher, *supra* n. 1, at 467.

31. I admit to some apprehension about this interpretation. Fletcher is unclear and sometimes even inconsistent about his use of the term *wrongdoing*, which is introduced to contrast with *wrongful conduct*—another stipulative term. He writes: “[W]e should be explicit about the distinction between wrongful conduct and wrongdoing. The former is a purely formal concept, defined by the incompatibility of the act with the norms of the legal system. The concept of wrongdoing is material or substantive.” *Id.* at 458. Yet he goes on to say that “[e]very wrongful act is at least a nominal case of wrongdoing” and “[a]s a moral category, . . . wrongdoing is broader than the notion of wrongful conduct.” *Id.* This latter remark suggests that not every case of wrongdoing is a positive crime. For present purposes, however, the converse is more important; not every positive crime is a case of wrongdoing. Later, he claims that “punishment . . . is imposed only for a violation of norms directing people how to conform to the law. The violation of the norm establishes the element of wrongdoing.” *Id.* at 468. Are we to suppose that wrongdoing is involved even when the laws punish behavior that is not morally prohibited? No; Fletcher writes that “[i]f the norms are morally neutral . . . it might be plausible to use the more neutral term ‘unlawful’ behavior.” *Id.* I fail to see how “unlawful behavior” does not simply correspond to Fletcher’s definition of wrongful conduct—a purely formal concept.

32. Fletcher claims to have shown that “at least three patterns of liability” exist. Fletcher, *supra* n. 1, at 389 (emphasis added). He also concedes, as we have seen, that several “major” offenses appear not to conform to any of his three patterns. See *supra* nn. 20-23 and accompanying text.

as though they could afford to ignore the issue of what punishment is imposed *for*. In any event, little progress is made simply by noting that punishment is necessarily backward-looking and retributive.³³ The details of a retributive theory may further constrain what kinds of conduct are eligible for punishment. Any such theory will be complex, reflecting the polycentric model of the substantive criminal law embodied in the three patterns of liability Fletcher described.³⁴

In *Rethinking*, Fletcher devotes his most extended discussion to what might be called *benefits-and-burdens* theories.³⁵ According to these theories, a criminal gains an unfair benefit relative to law-abiding citizens when he breaks the law. Punishment is deserved because it somehow removes or negates the unfair advantage taken by the criminal; it restores an equilibrium of benefits and burdens. The implications of these retributive theories for the substantive criminal law depend mostly on the nature of the unfair benefit alleged to be gained by criminality. Many possible descriptions of this advantage have been provided.³⁶ On the most obvious but least plausible account, the unfair benefit is the material gain to the offender—the fruits of his crime. He benefits, relative to citizens who do not resort to theft, for example, by not having to pay for whatever he has stolen. This characterization of his benefit works reasonably well for property offenses, but it fails to explain why criminals deserve punishment when they commit crimes from which they derive no material gain. In particular, it is hard to see how this account can allow persons to be punished for crimes in the pattern of subjective criminality.³⁷ According to many philosophers, however, the unfair advantage to the criminal is not his material gain. Instead, he benefits simply by renouncing the burden of self-restraint, which law-abiding citizens have assumed.³⁸ This characterization solves the foregoing problem; *all* criminals gain an unfair advantage. Even those who merely attempt or conspire to commit crimes, for example, renounce a burden assumed by law-abiding citizens. For good reason, however, Fletcher rejects this alternative. His entire approach is at odds with positivists who hold that

a transgression of the rule in itself justifies criminal punishment. This thesis . . . ignores the content of [the] rules defining criminal conduct. If accepted, the

33. Fletcher's definition of retribution is minimalist, disqualifying few theories of punishment. "Retribution simply means that punishment is justified by virtue of its relationship to the offense that has been committed." Fletcher, *supra* n. 1, at 416-17. Even consequentialists with "forward-looking" accounts of punishment presumably adhere to the principle of legality and require that a crime be committed by the defendant before the state may punish him in order to attain future goods. Thus they differ only in the account of the relationship between punishment and offense that can justify punishment. Subsequently, Fletcher embellishes his account of retributivism by indicating that it seeks to impose punishment according to *desert*. *Id.* at 459-60.

34. "The ore of punishment is too rich to be sifted adequately in one light sweep." *Id.* at 419.

35. Not so long ago, such theories (which might also be called fairness theories) could be said to be the most influential versions of retributivism. See generally David Dolinko, *Some Thoughts about Retributivism*, 101 *Ethics* 537 (1991).

36. Various interpretations of the unfair advantage gained by criminality are distinguished in Richard W. Burgh, *Do the Guilty Deserve Punishment?*, 79 *J. Phil.* 193 (1982).

37. A few retributivists have tried to solve this problem. See e.g. Michael Davis, *Why Attempts Deserve Less Punishment Than Complete Crimes*, 5 *L. & Phil.* 1 (1986).

38. Herbert Morris, *Persons and Punishment*, 52 *The Monist* 475, 477 (1968).

positivist thesis explains the entire criminal law. . . . If we take the content, and not merely the form of the criminal law to be important, we should regard the positivist thesis not as a challenge, but as an alternative that stands outside our realm of discourse.³⁹

Thus we are left without a statement of the material gain of criminality that punishment could rectify. I conclude that benefits-and-burdens variants of retributivism face formidable obstacles in justifying the punishment of persons who commit crimes in each of Fletcher's three patterns. The ultimate problem of grounding Fletcher's polycentric model of criminal law in a theory of punishment remains unsolved.

In any event, several criminal theorists have tried to meet the challenge of defending a new pattern of liability. *Virtue* theory—or what I think is better described as *vice* theory—provides the most likely candidate for a fourth pattern. In the past few years, the literature on this topic has mushroomed; positions are too complex to be summarized easily. Suffice it to say that many commentators have argued that, in some instances, criminal liability is and ought to be imposed for a defect of character or vice.⁴⁰ Others are unpersuaded;⁴¹ some go to great lengths to explain how their views do not commit them to punishing defects of character.⁴² I am reluctant to admit that vice provides an additional pattern of liability, that is, something distinct for which punishment should be imposed. But surely there is nothing incoherent about the claim that liability may be imposed for vice; we cannot say that punishment *for* a defect of character is somehow unintelligible.

Although Fletcher himself does not explicitly entertain the possibility that vice may provide a distinct pattern of liability, he famously explores (and seemingly endorses) the view that judgments about character are central to an adequate theory of excuses. His statement of the argument is that “(1) punishing wrongful conduct is just only if punishment is measured by the desert of the offender, [and] (2) the desert of an offender is gauged by his character—i.e., the kind of person he is”⁴³ This *character theory of excuses* has been hotly debated.⁴⁴ At present, however, my narrow question is whether plausible grounds can be provided for confining the boundaries of this theory to the realm of excuses. As formulated above, the second premise seems applicable to the whole of the criminal law, and not merely to a subcategory of defenses. If the determination of whether persons deserve punishment is really a function of their character, it is only a short step to concluding that vice should be relevant to the

39. Fletcher, *supra* n. 1, at 234.

40. See e.g. Kyron Huigens, *Virtue and Inculpation*, 108 Harv. L. Rev. 1423, 1425 (1995).

41. See e.g. R.A. Duff, *Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law?*, 6 Buff. Crim. L. Rev. 147, 148 (2002).

42. See e.g. Kenneth W. Simons, *Does Punishment for “Culpable Indifference” Simply Punish for “Bad Character”? Examining the Requisite Connection between Mens Rea and Actus Reus*, 6 Buff. Crim. L. Rev. 219, 225 (2002).

43. Fletcher, *supra* n. 1, at 800.

44. See R.A. Duff, *Choice, Character, and Criminal Liability*, 12 L. & Phil. 345, 346 (1993).

content of criminal offenses—not simply to whether persons are excused for committing these offenses.⁴⁵ If this short step is taken, vice may emerge as yet a fourth pattern of liability—as something punishment should be imposed *for*.

Two familiar and related difficulties plague the view that punishment may be imposed for vice, in addition to two problems that have received relatively little attention. First, this view struggles to explain why each imposition of criminal liability requires conduct. If punishment (sometimes or always) were really inflicted *for* vice, why do statutes not proscribe vice directly, without the need for a particular criminal act?⁴⁶ Ideally, I suppose, vice theory recommends the radical redrafting of criminal codes to impose liability explicitly for defects of character, whether or not these traits are manifested in wrongful behavior. Second, why should we accept the minimal evidence of vice that is revealed by a single criminal act?⁴⁷ If persons are to be *punished* for their vices—a drastic state response that must satisfy a demanding standard of justification—we should require more persuasive evidence of vice than any single act could provide.⁴⁸ If so, what principled grounds can prevent the inquiry from expanding into an assessment of the whole agent?

In addition, vice theory encounters two difficulties that are discussed less frequently but seem no less damaging. First, no existing jurisdiction comes close to incorporating a theory of vice into the content of its substantive criminal law. On any plausible theory of virtue and vice, remarkably few instances of the latter—or actions that manifest or provide evidence of vice—are subject to criminal liability. Commentators who defend vice theories have the formidable challenge of explaining why some but not all defects of character are or ought to be punished.⁴⁹ Finally, vice theory seemingly presupposes the existence of relatively robust and stable traits of character. To be sure, the empirical commitments made by particular versions of vice theory are debatable. Empirical research indicates, however, that robust and stable traits of character may be far less common than folk psychology suggests.⁵⁰

45. John Gardner contends that the standards by which we judge actions to be dishonest, for example, are exactly those by which we judge persons to be dishonest. See John Gardner, *The Gist of Excuses*, 1 Buff. Crim. L. Rev. 575, 575 (1998).

46. Many commentators have pressed this objection. See e.g. Michael S. Moore, *Choice, Character, and Excuse*, in *Crime, Culpability, and Remedy* 29 (Ellen Frankel Paul et al. eds., Basil Blackwell 1990).

47. My formulation of this question presupposes that the relation between criminal acts and vice must be evidential. Although other accounts of this relation have been given, I am dubious of their success.

48. Fletcher suggests that the principle of legality precludes us from obtaining more reliable evidence of character than a single act could provide. Fletcher, *supra* n. 1, at 800-01. I suspect, however, that those who really believe that punishment is imposed for vice would simply reject whatever conception of the principle of legality prevents the inquiry from expanding into an assessment of the whole agent.

49. For many nice examples, see Leo Katz, *Villainy and Felony: A Problem Concerning Criminalization*, 6 Buff. Crim. L. Rev. 451 (2002).

50. See John M. Doris, *Lack of Character: Personality and Moral Behavior* 111 (Cambridge U. Press 2002).

Perhaps these several difficulties can be evaded or solved, and vice will assume its place alongside manifest criminality, subjective criminality, and harmful consequences as a fourth pattern of liability.⁵¹ No one can predict that additional patterns will not emerge as viable candidates for modes of wrongdoing for which punishment may be imposed.⁵² Again, I do not insist that the criminal law cannot be even more polycentric than Fletcher acknowledged. However many patterns of liability should ultimately be countenanced, it is time to explore the normative implications of these patterns for the content of the substantive criminal law.

II. HOW THE PATTERNS LIMIT THE CRIMINAL LAW

Whenever I see Fletcher, I chide him for his failure to address issues of criminalization—a set of principles that limit the scope of the criminal sanction. How can an 898-page opus devote so little attention to the topic of when the criminal law is used legitimately or illegitimately—or how this distinction should be drawn? This neglect is puzzling, since Fletcher begins *Rethinking* by contending that the “central question” of criminal law is “justifying the use of the state’s coercive power against free and autonomous persons.”⁵³ If this question is really central—and difficult—there must be countless situations in which the use of the state’s coercive power against free and autonomous persons is *not* justified. What are they?

We should not be surprised that positivists have little to say about this topic. If the criminal law has whatever shape and form the legislature chooses to give it, its content is subject to no constraints at all—except, I suppose, to those that can be derived from the Constitution. We all know, however, that the Constitution imposes very few such constraints.⁵⁴ Still, this failure is peculiar in *Rethinking*. As I have indicated, the unifying theme in virtually all of Fletcher’s work—which makes it relevant to philosophers—is that the criminal law has an internal structure that is not simply created by the legislators.⁵⁵ Positivists have no choice

51. I am aware that some commentators have far more ambitious aspirations. They contend that vice theory should replace, rather than supplement, many or all of Fletcher’s patterns. I remain convinced, however, that Fletcher’s polycentric model is correct. The question, then, is not whether, but to what extent, the criminal law is polycentric.

52. Arguably, the use of criminal liability to punish persons for future dangerousness rather than for past conduct represents a fifth distinct pattern. I have no doubt that such impositions of the criminal sanction are objectionable on many grounds. I disagree, however, that their use is somehow precluded by the logic of punishment. Paul Robinson cites Webster’s Dictionary to support his contention that “one cannot logically ‘punish’ dangerousness.” Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, 114 Harv. L. Rev. 1429, 1432 (2001). Contrary to the thrust of Robinson’s argument, however, one *can* punish persons for *being* dangerous, or for having the characteristics that make one dangerous. On this interpretation, preventive detention punishes persons for properties that probably qualify as vices. If so, this alleged fifth pattern of liability can be subsumed under vice theory.

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

54. See Stephen Shute, *With and Without Constitutional Restraints: A Comparison between the Criminal Law of England and America*, 1 Buff. Crim. L. Rev. 329 (1998). Shute contends that “[t]here are in fact only five constitutional provisions which are directly on point” in limiting “the permissible content of the substantive criminal law.” *Id.* at 333. Curiously, Shute omits the Second Amendment.

55. See text accompanying *supra* n. 3.

but to trust the good sense of prosecutors to rectify whatever injustice results from the nearly unlimited power they bestow upon the legislative branch. Fletcher, however, is unwilling to “retreat to prosecutorial discretion as a surrogate for the principled solution of human conflict.”⁵⁶ Instead, principled solutions are to be found within the internal structure of criminal law itself.

For the most part, I continue to believe that my criticism of Fletcher is accurate; *Rethinking* suffers from insufficient explicit attention to the principled limits of the criminal sanction. Even the harm requirement—perhaps the most familiar attempt to narrow the boundaries of the criminal law—is treated unsympathetically. Fletcher apparently regards the concept of harm as “infinitely expandable,”⁵⁷ and wonders whether the harm requirement is “subject to falsification.”⁵⁸ His skepticism *may* be warranted,⁵⁹ but I suspect he abandons the search for a substantive, non-vacuous account of harm too quickly.⁶⁰ If Fletcher had surrendered with so little resistance elsewhere, *Rethinking* would not be the subject of an issue commemorating its impact today.⁶¹ Indeed, many of the most important claims and distinctions defended throughout *Rethinking* become problematic if the concept of harm were irreparably vague and elastic. Even Fletcher’s characterizations of at least two of his three patterns of liability assume that a substantive account of harm must be available. Obviously, we cannot make sense of a pattern of harmful consequences unless we are able to recognize some consequences as harms. Less obviously, paradigm cases of subjective criminality—like the inchoate crime of attempt—also presuppose an analysis of harm. As Fletcher is aware, “[w]ithout a general theory of harms that ought to be prevented, one can hardly develop a ranking of offenses as complete and inchoate.”⁶² Although this statement is true, I would go further: without a general theory of harms that ought to be prevented, one can hardly develop a theory of the criminal law. More precisely, one can hardly develop a theory of the criminal law that is responsive to Fletcher’s “central question” of specifying the conditions under which coercive power may be employed against free and autonomous persons.

56. Fletcher, *supra* n. 1, at 769.

57. *Id.* at 404.

58. *Id.*

59. See Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. Crim. L. & Criminology 109, 113 (1999).

60. Since the publication of *Rethinking*, the most important interpretations and defenses of the harm requirement are provided by Joel Feinberg, *Harm to Others* (Oxford U. Press 1984), and Joseph Raz, *Autonomy, Toleration, and the Harm Principle*, in *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart* 313 (Ruth Gavison ed., Clarendon Press 1987).

61. Consider, for example, the concept of a legal interest—which seems no less vague or immune to falsification than harm. As Fletcher indicates,

The place to search for a scale of wrongdoing is the range of legal interests that are either violated or threatened by wrongful acts. . . . Thus evaluating wrongdoing requires both a ranking of legal interests and a technique for estimating degrees of proximity and remoteness from the violation of the interest.

Fletcher, *supra* n. 1, at 472-73.

62. *Id.* at 133.

Nonetheless, I have come to believe that the resources for a substantial part of a theory of criminalization might be found in *Rethinking*. In what follows, I propose to examine the normative significance of his three patterns of liability in the hope of drawing a few implications about the limits of the criminal sanction. I do not know whether Fletcher himself would be amenable to my suggestions. But many important insights have even more explanatory power than their authors realize, and I suspect this to be the case with Fletcher's thesis that the criminal law can be analyzed in terms of his three patterns of liability.

Before proceeding further, it is important to appreciate the urgent need for limitations on the scope of the criminal sanction. The criminal law has undergone enormous transformation in the twenty-five years since the publication of *Rethinking*. Remarkably, few criminal theorists—or philosophers of criminal law—have tended to pay much attention to these developments.⁶³ Criminal codes are rarely read, even by those who purport to theorize about them.⁶⁴ Commentators remain obsessed with the so-called general part, and typically write as though the criminal law still contains only those core offenses discussed by Fletcher. According to William Stuntz, however, the criminal law has now become “not one field but two. The first consists of a few core crimes The second consists of everything else. Criminal law courses, criminal law literature, and popular conversation about crime focus heavily on the first. The second dominates criminal codes.”⁶⁵ Since the influence of *Rethinking* has been so pervasive, I doubt that so little attention to questions of criminalization would have been paid had Fletcher confronted the issue more directly.

In any event, changes in the criminal law have been dramatic—so dramatic, in fact, that a theorist might conclude that the whole model Fletcher advanced has become obsolete, applicable to an earlier era when the criminal law was simpler and more manageable.⁶⁶ I reject this pessimistic view, although I think its plausibility should not be dismissed out of hand. After all, criminal theorists purport to be theorizing about the criminal law. At some point, their efforts are no longer recognizable as theories about the criminal law we actually have, but rather as theories about the criminal law we would prefer to have. Arguably, this point has already been reached.⁶⁷ Despite these reservations, I propose to examine whether Fletcher has given us the resources to oppose any of the recent changes I will discuss. Even if this exercise is unlikely to stimulate reform in the

63. “Most criminal law scholars . . . pay surprisingly little attention to the actual state of the law” Gerard E. Lynch, *Revising the Model Penal Code: Keeping It Real*, 1 Ohio St. J. Crim. L. 219, 224 (2003).

64. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 512 (2001).

65. *Id.*

66. Or perhaps the “good old days” when the model was applicable are myths that never really existed. See generally Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 Mich. L. Rev. 1269 (1998).

67. Few theorists are ready to throw in the towel, but many seem resigned to the possibility that we will never return to the era in which the criminal law tended to show greater respect for the general principles of justice these commentators hold dear. See Andrew Ashworth, *Is the Criminal Law a Lost Cause?*, 116 L.Q. Rev. 225 (2000).

real world,⁶⁸ I hope it is not utterly without value. At the very least, my project may help to identify some of the characteristics of a criminal law to which our reforms should aspire.

To begin, I will try to briefly summarize some of the most significant developments in criminal law. Douglas Berman lists five important changes that have taken place in the field of criminal justice since the completion of the Model Penal Code.⁶⁹ He notes:

First, the... criminal law has become highly politicized.... Second, the investigation and prosecution of criminal offenses has been "constitutionalized" by judicial decisions.... Third, the sentencing of criminal offenders has been "legalized" by legislatures and commissions through the enactment of mandatory sentencing statutes and sentencing guidelines.... Fourth, the treatment of wrongdoing has been "civilized" by the broad use of sanctions like forfeiture and involuntary civil commitment.... Fifth, the scale of punishments, prison populations and the economic costs of our justice systems have been "super-sized"....⁷⁰

I have no doubt that Berman's list captures the most important trends in criminal justice in the past three decades. Yet only the first directly affects the content of the substantive criminal law itself—the law Fletcher rethought twenty-five years ago.⁷¹

The single most visible development in the substantive criminal law is that the sheer number of criminal offenses has grown exponentially. Perhaps theorists have paid relatively little attention to this explosive growth because its true dimensions are difficult to quantify. Since much of this expansion consists of amendments to existing statutes, we cannot meaningfully say that the number of crimes has doubled, tripled, or multiplied tenfold. Still, we can count the words or pages in criminal codes to demonstrate the trend. Paul Robinson and Michael Cahill employ this method to illustrate the expansion of the criminal code of Illinois⁷²—even though commentators (including Robinson himself) tend to rank the overall quality of this particular state code as well above average.⁷³ In 1961, the Illinois code contained less than 24,000 words; by 2003, that number had

68. The standard complaint among those theorists who are aware of the trends I will recount is that legislatures and courts ignore us. Fletcher recommends that "[p]olicy makers in the field of criminal justice should pay more attention to academic criticism." George P. Fletcher, *The Fall and Rise of Criminal Theory*, 1 Buff. Crim. L. Rev. 275, 281 (1998).

69. Douglas A. Berman, *The Model Penal Code Second: Might "Film Schools" Be in Need of a Remake?*, 1 Ohio St. J. Crim. L. 163, 164-65 (2003).

70. *Id.*

71. I say that only the first of these developments directly affects the content of the substantive criminal law because others—most notably the second—have done so indirectly. The impact of criminal procedure on the content of the substantive criminal law is explored in a series of articles by William Stuntz. See e.g. William J. Stuntz, *The Uneasy Relationship between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1 (1997).

72. Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 Ohio St. J. Crim. L. 169, 172 n. 16 (2003).

73. See Paul H. Robinson et al., *The Five Worst (and Five Best) American Criminal Codes*, 95 Nw. U. L. Rev. 1 (2000).

swelled to more than 136,000—a six-fold increase.⁷⁴ This figure tends to understate the expansion of criminal offenses, since many crimes now are contained outside criminal codes themselves—a phenomenon that threatens to undermine the principle of legality, as Fletcher recognized in *Rethinking*.⁷⁵

In my judgment, no commentator has done more both to describe as well as to explain the growth of the substantive criminal law than William Stuntz.⁷⁶ I concur with his observation that “anyone who studies contemporary state or federal criminal codes is likely to be struck by their scope, by the sheer amount of conduct they render punishable.”⁷⁷ As a result, we are steadily moving “closer to a world in which the law on the books makes everyone a felon.”⁷⁸ Nothing that should be dignified with the name of a *theory* drives this expansion; “American criminal law’s historical development has borne no relation to any plausible normative theory—unless ‘more’ counts as a normative theory.”⁷⁹ Because of this phenomenal growth, enforcement is necessarily selective, leading Stuntz to identify prosecutors rather than legislators as “the criminal justice system’s real lawmakers.”⁸⁰ Commentators like Fletcher—who attach great importance to preserving the principle of legality and are suspicious of the discretion that inevitably accompanies increases in prosecutorial power—should vehemently oppose these developments.

Statistics and large-scale trends aside, how might we generalize about the *content* of these new crimes? This task is daunting. It is easy to provide numerous examples of crimes that seem to have no place in modern criminal codes. Many laws—like Maine’s prohibition of catching crustaceans with anything but conventional lobster traps, or the federal government’s ban on using the “Give a hoot, don’t pollute” slogan without authorization—fail what Erik Luna calls the “laugh test.”⁸¹ The challenge for theorists, however, is not simply to list these new crimes, but to place them into meaningful categories for analysis. The project is to decide what general kinds of crimes represent unjustifiable impositions of the penal sanction. Once we move outside the core to the periphery of criminal law, we lack a familiar conceptual apparatus to classify many of the new kinds of offenses that have been enacted. In what follows, I will describe what I regard as three kinds of recent innovations: overlapping offenses, crimes of risk prevention, and ancillary offenses. I make no pretense that my categories are precise or

74. Robinson & Cahill, *supra* n. 72, at 172 n. 16.

75. Fletcher’s worries are discussed in the context of his discussion of liability for omissions. See Fletcher, *supra* n. 1, at 628-31. According to some commentators, these concerns about legality are even more pronounced in the context of possessory offenses. See Markus Dirk Dubber, *The Possession Paradigm: The Special Part and the Police Model of the Criminal Process*, in *Defining Crimes: Essays on the Criminal Law’s Special Part* (R.A. Duff & Stuart Green eds., Oxford U. Press forthcoming 2005).

76. See e.g. Stuntz, *supra* n. 64.

77. *Id.* at 515.

78. *Id.* at 511.

79. *Id.* at 508.

80. *Id.* at 506.

81. See Erik Luna, *Overextending the Criminal Law*, 25 Cato Policy Rpt. 1, 1 (Nov./Dec. 2003) (available at <http://www.cato.org/pubs/policy_report/v25n6/luna.pdf>).

exhaustive. Admittedly, many crimes of risk prevention overlap, and some ancillary offenses may be designed to prevent risk. Still, I contend that my crude categories are somewhat helpful in allowing us to begin the task of distinguishing legitimate from illegitimate uses of the criminal law.

I call the first category *overlapping crimes*. According to Stuntz, "federal and state codes alike are filled with overlapping crimes, such that a single criminal incident typically violates a half dozen or more prohibitions."⁸² We understand the social dynamic that spawns many of these offenses; several commentators have complained about the extent to which our legislative process has become politicized.⁸³ A sensationalistic tragedy attracts extraordinary media attention, and officials pledge to "do something" to prevent similar events in the future. All too often, this "something" consists of the enactment of a new statute. When these statutes proscribe harmful and culpable conduct that was previously noncriminal, the additions are welcome and necessary. Such cases, however, are unusual. More typically, the original conduct was already criminalized, and the new offense simply describes the proscribed behavior more specifically. As a result, codes have come to contain several overlapping offenses, with newer, more specific statutes supplementing older, more generic offenses.

But most overlapping crimes have not originated from sensationalistic media coverage. Robinson and Cahill provide several mundane examples of this phenomenon from the criminal code of Illinois. Although the Illinois code has long contained a general offense of damaging property, recent statutes proscribe damaging library materials, damaging an animal facility, defacing delivery containers, and (their personal favorite) damaging anhydrous ammonia equipment.⁸⁴ Presumably, similar overlapping offenses can be found in nearly every state code throughout the United States, and probably are even more common in federal law. Although the federal criminal code has a generic false statement statute that prohibits lies in matters under federal jurisdiction, it also contains a bewildering maze of statutes banning lies in specified settings. According to one commentator, there are exactly 325 separate federal statutes proscribing fraud or misrepresentation.⁸⁵

As long as these overlapping offenses contain distinct elements, current interpretations of double jeopardy doctrine do not preclude the state from bringing several charges simultaneously, even though, from the intuitive perspective of a layperson, the defendant has committed a single crime.⁸⁶ Thus the main effect of these overlapping offenses is to allow "charge-stacking" and

82. Stuntz, *supra* n. 64, at 507.

83. See e.g. Sara Sun Beale, *What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 Buff. Crim. L. Rev. 23 (1997).

84. Robinson & Cahill, *supra* n. 72, at 170.

85. Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 Buff. Crim. L. Rev. 249, 289 (1998).

86. To be sure, some criminal theorists have tried to block this result by arguing for reforms in double jeopardy doctrine. See e.g. Michael S. Moore, *Act and Crime: The Philosophy of Action and Its Implications for Criminal Law* 305-90 (Clarendon Press 1993).

thereby subject defendants to more severe punishments.⁸⁷ As a consequence, defendants have greater incentives to plead guilty.⁸⁸

A second category of relatively new crimes might be called offenses of *risk-prevention*. The proliferation of these offenses has contributed to the phenomenal growth of the criminal law. After all, the state has long proscribed just about every possible means of causing direct harm. But there is virtually no limit to how far the state might go in protecting persons from novel ways that harm might be risked. Offenses of risk prevention are examples of inchoate offenses. Roughly, an offense is inchoate when some but not all of its instances cause harm. More precisely, tokens of the criminal act-type need not bring about the harm or evil the law is designed to prevent.⁸⁹ These offenses do not proscribe harm itself, but rather the *possibility* of harm—a possibility that need not (and typically does not) materialize when the offense is committed.⁹⁰

R.A. Duff has provided the most detailed taxonomy of offenses of risk-prevention.⁹¹ According to Duff, these crimes may be general or specific, basic or aggravated, primary or secondary, direct or indirect, explicit or implicit. For present purposes, I will focus on the last distinction. An offense of risk-prevention is explicit

when the definition of the offense makes explicit reference to the relevant risk, so that their commission requires the actual creation of that risk; they are implicit when their definition makes no such explicit reference, so that they can be committed without the relevant risk (the risk that justified their creation) actually being created.⁹²

Duff lists reckless driving as an example of an offense of explicit risk-prevention, although I doubt that this is literally correct. Presumably, the risk to be prevented by this offense is the personal injury and property damage caused by a crash, even though the definition of the offense does identify this risk explicitly. Perhaps he regards reckless driving as an example of an explicit offense of risk-prevention because the nature of the risk is obvious, and not because it is expressly mentioned. In any event, Duff's example of an offense of implicit risk creation—illicit drug possession—is better. Presumably, this crime is designed to prevent some risk(s) or another, although the nature of that risk is not identified in the statute itself.

A third category of recent crimes might be called *ancillary* offenses. This term, I believe, was introduced by Norman Abrams—who immediately

87. See Stuntz, *supra* n. 64, at 520.

88. In federal courts, 64,558 of 68,156 convictions were obtained by guilty pleas in 2000. See Bureau of J. Statistics, *supra* n. 7, at 414 tbl. 5.17.

89. For further discussion, see Douglas N. Husak, *The Nature and Justifiability of Nonconsummate Offenses*, 37 Ariz. L. Rev. 151 (1995).

90. In some (but not all) cases, the occurrence of the harm that is risked actually precludes liability for the inchoate offense. For example, liability for an attempt merges with the completed offense, and thus cannot be imposed if the attempt is successful.

91. See Duff, *supra* n. 18.

92. *Id.* at (m.s. 11) (footnote omitted).

apologized for its imprecision—and I draw heavily from his insights here.⁹³ Roughly, ancillary offenses are those that bear an indirect relation to core offenses. They are used when a defendant is believed to have committed a core offense, but prosecution is unlikely to be successful or is otherwise deemed to be undesirable. On some occasions, the state cannot prove the commission of the core offense, or its evidence of the core offense is inadmissible because it has been obtained illegally. These occasions have led to the enactment of growing numbers of ancillary offenses that surround core offenses.

Abrams divides ancillary offenses into several kinds.⁹⁴ The first are *derivative crimes*, which typically proscribe “aidlike” conduct that occurs after the commission of a core offense. Money laundering statutes provide an example.⁹⁵ Prior to the enactment of federal money-laundering statutes, a defendant committed a single crime by robbing a bank and depositing the funds in his own account. Subsequently, he may be guilty of at least two crimes. The activity resembles an ordinary commercial transaction; what transforms it into a crime is the mental state of the defendant and the fact that the money has been derived from specified kinds of criminal conduct. His second category is *enforcement and information-gathering offenses*. These crimes are committed in the course of a law enforcement investigation directed toward a core offense, or involve a failure to provide required information that might have lead to an investigation of such an offense. Abrams’s example is the Bank Secrecy Act,⁹⁶ which makes it a crime for a financial institution to omit to file a report on any bank transaction exceeding a given amount. Again, bank employees may be processing a fairly routine transaction, but the statute criminalizes their failure to report it to the proper authorities.

I repeat that my efforts to categorize the massive numbers of new criminal offenses do not demonstrate much sophistication or ingenuity. The distinctions between overlapping crimes, offenses of risk-prevention, and ancillary offenses are at least as vague and imprecise as those between Fletcher’s three patterns of liability. My objective is to explore whether and to what extent the normative significance of these patterns can be used to generate a substantial part of a theory of criminalization that can be brought to bear in resisting some of the foregoing developments. In the remainder of this essay, I will defend the hypothesis that Fletcher’s patterns can be used for this very purpose.

The argument proceeds as follows. The most important difference between the criminal law and other bodies of law, or systems of social control that are not modes of law at all, is that the former subjects offenders to punishment. Unless punishment is a possible sanction that can be imposed on individuals who violate

93. See Norman Abrams, *The New Ancillary Offenses*, 1 Crim. L. Forum 1 (1989).

94. In addition to the two categories of ancillary offenses I describe here, Abrams includes a third, which he names *catchall crimes*. *Id.* at 24. The fact that this label is so unhelpful underscores the need for a better taxonomy of ancillary crimes.

95. See 18 U.S.C. §§ 1956-1957 (2000).

96. Pub. L. No. 91-508, 84 Stat. 1114 (1970).

given rules, we would not describe those rules as belonging to the criminal law.⁹⁷ Of course, it is notoriously difficult to decide when state responses to rule violations are modes of punishment, and the expanded use of innovative sanctions—such as asset forfeiture—compound the problem of trying to identify offenses as criminal.⁹⁸ Although the exact nature of punishment is controversial, all commentators agree that inflictions of punishment require justification.⁹⁹ If the foregoing claims are correct, our justification of punishment provides limits on the kinds of conduct that may be criminalized. These limitations arise because the criminal law is never wholly effective. Criminalized conduct that subjects offenders to punishment is *proscribed*, but not always *prevented*. Some persons will engage in the proscribed conduct, whatever the law might say.¹⁰⁰ But if the law in question is really a criminal law, these offenders will become subject to punishment. Is the punishment of such persons justified? Notice that this question would lack urgency if the mere act of proscribing conduct could effectively prevent it. In a world of perfect compliance, no one would have to be punished. In our world of imperfect compliance, however, the implications for criminalization are apparent. Before legislators enact a criminal law, they had better be confident that the state would be justified in punishing persons who violate it. In other words, the state should not create crimes that will subject offenders to punishment unless it has good reason to believe that the punishment to which such persons will become subject would be justified. If we cannot justify the punishment of those who commit a given offense, we should not enact that offense in the first place. Enactment of such an offense will require the state to impose punishments we have not or cannot justify, or to renege on its classification of that law as criminal.

I suggest, then, that the most basic question that must be answered by our theory of criminalization is: *For what conduct may persons be punished?*¹⁰¹ Whenever the justifiability of a particular offense is called into question, it is crucial to ask: may punishment be imposed for it? When construed normatively, Fletcher's patterns of liability are designed to answer this very question. Although we have no "single formula for determining when conduct ought to be treated as

97. "[T]he institution of punishment provides the distinguishing features of criminal law." George P. Fletcher, *Basic Concepts of Criminal Law* 25 (Oxford U. Press 1998).

98. Innovative sanctions include expatriation, deportation, denaturalization, citizenship revocation, the detention and adjudication of juvenile delinquents, "civil" commitment of the dangerous mentally ill, the pretrial detention of criminal defendants, civil contempt orders, and the like. For a discussion, see Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 Geo. L.J. 775 (1997).

99. When the hardships are severe, the standard of justification is high. See Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. Rev. 781 (1994).

100. This claim is empirical, not logical. Conceivably, compliance with a proscription could be universal.

101. Legal moralism is perhaps the main rival to my approach. According to legal moralists, the most basic question that must be answered by our theory of criminalization is: *What conduct is immoral?* For the most sophisticated defense of legal moralism, see Moore, *supra* n. 2.

criminal,”¹⁰² the patterns represent distinct modes of wrongdoing for which punishment is plausibly and coherently inflicted. As the existence of hybrids demonstrates, we need not answer this question by identifying a single pattern of liability to which a given offense conforms. Punishment might be imposed for some complex combination of act, mental state, and harmful consequence. But we should be skeptical of attempts to locate wrongfulness anywhere outside of these patterns. What else besides act, mental state, or consequence might punishments be inflicted for? The burden is on legislators to explain why crimes that deviate from these patterns—crimes outside the core—justifiably subject offenders to punishment.

If I am correct, offenses are not part of the core of the criminal law simply because they conform to one or more of Fletcher’s patterns of liability. Instead, offenses are part of the core because they conform to patterns that state a plausible and coherent basis for punishment. This device for identifying core offenses is not circular or tautological. It provides a basis for claiming that some of Fletcher’s patterns should be deleted (as those who oppose the pattern of harmful consequences recommend) or that others should be added (as vice theorists propose) to our normative theory of criminal law. The consequences of my interpretation are far-reaching. Crimes outside the core—on what I have called the periphery—are not of a kind for which a coherent and plausible basis for punishment has been given. As far as I can see, this is no different from saying that crimes outside the core should not be crimes at all. Of course, we should not infer that no justification for these crimes *can* be given from the premise that none *has* been given. But we should have a justification before we resort to punishment; the mere hope that a justification will someday be found is insufficient.

Does Fletcher himself use his patterns for this purpose? I am unsure. Consider, however, his (admittedly cursory) remarks about strict liability offenses—those that dispense with mens rea for at least one material element. Theorists who reserve punishment for wrongdoing typically oppose these offenses. Fletcher’s own position is more subtle. He does not argue that wrongdoing is irrelevant, but that wrongdoing may be present despite the absence of mens rea.¹⁰³ When strict liability offenses are justifiable, the defendant’s fault “is presumed from the violation of the norm.”¹⁰⁴ He mentions statutes proscribing the distribution of adulterated drugs to illustrate this phenomenon. My own interpretation of his strategy is that impositions of strict liability, when justified, conform to the pattern of manifest criminality. We must be able to infer

102. Fletcher, *supra* n. 1, at xxii.

103. Many subsequent commentators have contended that wrongdoing may be present despite the absence of culpability for each material element by distinguishing *formal* from *substantive* impositions of strict liability. See e.g. Douglas Husak, *Strict Liability, Justice, and Proportionality*, in *Appraising Strict Liability* (A.P. Simester ed., Oxford U. Press forthcoming 2005); Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. Crim. L. & Criminology 1075 (1997).

104. Fletcher, *supra* n. 1, at 469.

wrongdoing from the proscribed act itself.¹⁰⁵ But in cases in which the inference to fault from the violation of the norm should not be presumed—surely a very realistic possibility—I am confident that Fletcher would join the chorus of those commentators who oppose the imposition of strict liability.¹⁰⁶

Consider also the reservation I have mentioned about some of the “major crimes” that Fletcher alleges fall outside the core of the criminal law. Incest and adultery are among his examples. Some commentators would not shrink from consigning these crimes to the pattern of manifest criminality. Surely (they would say) sex within biological families or with a person other than one’s spouse is wrongful on its face. Fletcher’s ambivalence, I assume, reflects his unwillingness to subscribe to the substantive morality that would condemn these behaviors as cases of wrongdoing. The problem, then, is not that these crimes are perfectly legitimate uses of the criminal sanction, even though they conform to none of Fletcher’s three patterns of liability. Instead, I would conclude that if these crimes conform to no discernable pattern—if they are not genuine cases of wrongdoing according to our best account of what wrongdoing may be—the better response is to call for their repeal.¹⁰⁷

The case of justifiable strict liability, which must be assigned into an existing pattern, and the examples of incest and adultery, which I believe cannot be squeezed into any pattern, reveal once again the formidable problems in deciding how to place particular offenses in given categories. I do not intend to minimize these problems. At the same time, I do not believe they should be exaggerated; some crimes cannot plausibly be thought to conform to any pattern. Consider, for example, a statute that proscribes the possession of something intended to be used for the purpose of creating a mental state. In California, for example, “[a]ny person who possesses nitrous oxide . . . with the intent to breathe, inhale, or ingest for the purpose of causing a condition of intoxication, elation, euphoria, dizziness, stupefaction, or dulling of the senses . . . is guilty of a misdemeanor.”¹⁰⁸ What mode of wrongdoing could possibly be described here? I cannot imagine how an argument to assign this offense to a pattern of liability would proceed.

In what follows, I will put aside strict liability, crimes of dubious wrongfulness, and statutes that probably fail the laugh test. We must address the more general issue of how a theory of criminalization derived from the patterns of liability would apply to the three categories of new offenses I have described. First, consider overlapping offenses. Admittedly, I cannot see how Fletcher’s

105. Perhaps this inference from proscribed act to wrongdoing must only be sufficiently compelling to shift the burden onto defendants to show that their particular act does not involve wrongdoing. See Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 Cornell L. Rev. 401 (1993).

106. When is this inference *unwarranted*? For a possible answer, see Alan C. Michaels, *Constitutional Innocence*, 112 Harv. L. Rev. 828 (1999).

107. As a matter of political reality, of course, offenses are hard to repeal, and demands to do so may galvanize remaining support in their favor. The politically feasible alternative, then—however uncomfortable to the theorist—is to allow these statutes to fall into disuse. See Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. Fam. L. 45 (1991-1992).

108. Cal. Penal Code Ann. § 381b (West 1999).

views are especially helpful in retarding the proliferation of these kinds of crimes. Suppose the generic offense falls squarely within the core of the criminal law, conforming to one pattern or another. Any more specific offense that is enacted would presumably conform to the very same pattern as its generic predecessor. I have no doubt that Fletcher himself is unhappy about the perversion of criminal justice that often results from the charge-stacking made possible by these overlapping offenses. But I can find little in *Rethinking*—and nothing in his patterns of liability—to oppose this development.¹⁰⁹ To be sure, massive confusion surrounds the issue of how severely defendants should be punished when they are convicted of multiple offenses derived from the same underlying conduct.¹¹⁰ But a theory of proportionality in punishment rather than a theory of the limits of the substantive criminal law seems more likely to offer a solution to this difficult problem.

The prospects for retarding the growth of the criminal law in my second category—crimes of risk-prevention—are a good deal more promising. Many of these crimes fall outside any of Fletcher's three patterns. By definition, no harm need be caused. In some instances—as when a culpability term is used to define the prohibited conduct—the act may manifest dangerousness on its face. No one can pretend, for example, that dangerous driving is not dangerous. But in many cases of what Duff calls crimes of implicit risk-prevention, the conduct cannot be said to manifest dangerousness. When no specific risk is identified, defendants can be (and often are) liable notwithstanding their complete absence of culpability with respect to whatever risk the statute is designed to prevent. The problem, as I would express it, is that such statutes are *overinclusive*.¹¹¹ They are designed to prevent persons from creating a risk, even though a given individual may satisfy the definition of the offense without creating that risk at all. In such cases, it is equally clear that the crimes do not conform to the pattern of subjective criminality.

To illustrate this problem, consider crimes involving drug paraphernalia. Presumably, these statutes are enacted to reduce a given risk, even though that risk is not mentioned in the statute itself. We should resist the temptation to suppose that the risk to be prevented is the possession and eventual use of illicit drugs. In the first place, drug use itself is best conceptualized as an offense of risk-prevention; it is proscribed because it creates a subsequent risk.¹¹² Moreover, many states include among their drug offenses the proscription of substances that cannot be used to create these risks because they are not really drugs; the substances are merely possessed “[u]nder circumstances which would lead a

109. I do not mean to suggest that Fletcher has nothing instructive to say about disproportionate punishments.

110. For some helpful suggestions, see Michael T. Cahill, *Offense Grading and Multiple Liability: New Challenges for a Model Penal Code Second*, 1 Ohio St. J. Crim. L. 599 (2004).

111. For a seminal discussion of overinclusive and underinclusive rules, see Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press 1991).

112. See Douglas N. Husak, *Drugs and Rights* (Cambridge U. Press 1992).

reasonable person to believe”¹¹³ they are drugs. In any event, it is clear that one can commit a drug paraphernalia offense even though he does not create whatever risk(s) the law is designed to prevent. Federal law proscribes the *sale* of given items when they are primarily for use or “designed for use”¹¹⁴ with controlled substances. This statute is construed to apply to items that sellers are aware their customers in general are likely to use with drugs, even though particular customers never actually use, and never intended to use, the items for this purpose.¹¹⁵ The law of many states also prohibits the (knowing) possession of drug paraphernalia.¹¹⁶ Many individuals who commit this offense will not use the paraphernalia in a subsequent drug offense. Suppose a person acquired a proscribed item when he was actively using drugs, but his “drug career” has long ended. If he did not dispose of the paraphernalia (for whatever reason), it is hard to see how his possession creates a risk. Yet (unless he is saved by the exercise of discretion) he is subject to punishment. In the absence of a harmful consequence, manifest criminality, or subjective criminality, I fail to understand what punishment in such a case is imposed for.¹¹⁷ In other words, I fail to understand how punishment is justified.

How might we modify offenses of risk-prevention to avoid the problem of overinclusion? The most obvious but least practical solution is to ensure that the very individuals who are banned from the risky activity are those who pose the risk in question. Although the individualized tests required to implement this solution would often be cumbersome, the resulting scheme would not be overinclusive. A more manageable way to achieve this result would be to enact offenses that require defendants to act with a high degree of culpability with respect to the harm to be prevented. The criminal law employs this device when imposing liability for the most well-known inchoate offenses. A person should not be guilty of attempting to commit a crime, for example, unless he *intends* to commit that crime.¹¹⁸ Even though many of these persons would not actually succeed in causing harm, there is good reason to think that all of them pose a risk and are guilty of wrongdoing.¹¹⁹ This solution, of course, would transform offenses of risk-prevention into cases of subjective criminality. When the conduct is not

113. N.J. Stat. Ann. § 2C:35-11(a)(3) (1995).

114. 21 U.S.C. § 863(d) (2000).

115. See *Posters 'N' Things, Ltd. v. U.S.*, 511 U.S. 513 (1994). This case also involves an excellent example of how overlapping offenses result in charge-stacking: In addition to selling drug paraphernalia, the defendant was convicted of conspiring to sell drug paraphernalia, aiding and abetting the manufacturing and distribution of controlled substances, investing income derived from a drug offense, money laundering, and engaging in monetary transactions with the proceeds of unlawful activity. *Id.* at 515.

116. See e.g. N.Y. Penal Law § 220.50 (McKinney 1999).

117. I explore many of these issues further in Douglas N. Husak, *Reasonable Risk Creation and Overinclusive Legislation*, 1 Buff. Crim. L. Rev. 599 (1998).

118. See Duff, *supra* n. 2, at 5.

119. Impossible attempts are probably an exception. A defendant who intends to commit a crime and performs acts beyond mere preparation does not create a risk of harm when he cannot possibly succeed in completing that crime. See *id.* at 76-115. As Fletcher notes, commentators disagree about whether liability should be imposed in cases of impossible attempts.

sufficiently risky on its face, wrongfulness must be located in the defendant's state of mind. Although neither of the alternatives I have described is wholly unproblematic, they succeed in allowing the state to use the criminal law to prevent risk while minimizing the likelihood that unjustified punishments will be imposed.

But the third category of crime I have identified—ancillary offenses—is perhaps the most vulnerable of all. Many of these offenses conform to no pattern that could reasonably provide the basis for deserved punishment. Return to two of the examples Abrams mentioned—the Federal Money Laundering and Bank Secrecy Acts. Can these ancillary offenses possibly be categorized within the pattern of manifest criminality, subjective criminality, or harmful consequences? Do they await the defense of new patterns of liability? Presumably, they do not represent modes of wrongdoing at all, and are enacted simply to ease the burdens on prosecutors. Ronald Gainer expresses his dissatisfaction with these offenses as follows:

Sometimes the operating philosophy seems to be that, if government cannot prosecute what it wishes to penalize, it will penalize what it can prosecute. . . . [M]oving beyond penalization of collateral misconduct to the penalization of collateral, seemingly innocent conduct, that causes no real independent harm but that may be associated with either lawful or unlawful actions, raises jurisprudential questions that lawmakers have not frequently chosen to face.¹²⁰

Despite the cogency of his analysis, I do not think that Gainer accurately identifies the precise nature of the “jurisprudential questions” raised by the ancillary crimes to which he refers. He seems to be worried that punishing relatively innocuous conduct contributes to the trivialization of criminalization and thereby erodes respect for law, undermining its general efficacy as a deterrent.¹²¹ A number of commentators have voiced similar concerns,¹²² although good empirical evidence for this conjecture is not easy to find. In any event, I do not believe that empirical speculation is needed in order to understand what is objectionable about these ancillary offenses. My own conclusion is not simply that these crimes erode respect for law, but that they should not be crimes at all. At the very least, the case for justifiably punishing persons who commit these crimes has not been demonstrated.

Perhaps my position may be expressed in different terms. The ancillary crimes in question (and some offenses of risk-prevention as well) are sometimes described as *malum prohibitum* rather than as *malum in se* offenses. This ancient contrast might be invoked in the present context, despite the notorious difficulties in drawing it. Roughly, an offense is an instance of *malum prohibitum* when it proscribes conduct that is not a case of wrongdoing prior to or independent of the

120. Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 Buff. Crim. L. Rev. 45, 63 n. 19 (1998).

121. *Id.* at 78.

122. See e.g. Paul H. Robinson & John M. Darley, *Justice, Liability, and Blame* (Westview Press 1995).

law that defined it as criminal.¹²³ It is hard to see how *malum prohibitum* offenses conform to any of Fletcher's patterns and could be assigned to the core of the criminal law. How, then, can we justify punishing persons who commit these crimes? Could *malum prohibitum* possibly represent a new pattern of liability? Admittedly, it is radical to suggest that these offenses cannot be justified, and deserved punishment may only be imposed for *mala in se*.¹²⁴ *Rethinking* is a ground-breaking book, but I am uncomfortable in attributing this radical position to Fletcher. Regrettably, the terms *malum in se*, *malum prohibitum* (or even *regulatory offense*) do not so much as appear in the index to *Rethinking*. My conclusion, then, is best expressed more cautiously, as a challenge: If no defense of punishment for these *malum prohibitum* offenses can be provided—if we cannot give a plausible and coherent account of what punishment is applied for—it is hard to see how these offenses are legitimate uses of the criminal sanction. I invite those philosophers of criminal law who share Fletcher's nonpositivist orientation to try to meet this challenge.¹²⁵

CONCLUSION

I tentatively conclude that crimes outside the core are best understood to be those offenses that have not been justified as legitimate exercises of state power over free and autonomous individuals. A peripheral offense does not conform to a pattern of liability that provides a coherent and plausible basis for punishing those who commit it. In the absence of a basis for believing otherwise, it is reasonable to infer that we cannot justify the punishment of persons who commit these crimes. Again, I do not insist that only the three patterns of liability described by Fletcher should be included in our theory of criminalization. But if I am correct to suppose that each of the patterns that should ultimately be countenanced represents a different mode of wrongdoing—something punishment may be imposed for—it seems clear that these patterns, when construed normatively, rule out some possible conduct as meriting justified punishment. All overlapping offenses, some offenses of risk-prevention, but no ancillary offenses belong in the core.¹²⁶ The burden suggested by *Rethinking*—or, more precisely, by my interpretation of it—is that the justification for punishing persons who commit crimes outside the core has yet to be found.

123. I hope that this rough characterization captures how most theorists understand the nature of *malum prohibitum*. Still, I am aware of several problems with this definition. One problem is that even *mala in se* offenses may include a *malum prohibitum* component. The application of homicide offenses, for example, must specify when a victim is dead. The definition of death may be partly stipulative.

124. For further thoughts, see Douglas N. Husak, *Malum Prohibitum and Retributivism*, in *Defining Crimes: Essays on the Criminal Law's Special Part* (R.A. Duff & Stuart Green eds., Oxford U. Press forthcoming 2005).

125. A few criminal theorists have tried to meet this challenge. See e.g. R.A. Duff, *Crime, Prohibition, and Punishment*, 19 J. Applied Phil. 97, 102 (2002); Green, *supra* n. 11.

126. More precisely, overlapping offenses belong in the core if the generic offense with which they overlap belongs in the core.

