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From Rethinking to Internationalizing Criminal Law

George P. Fletcher

FROM *RETHINKING* TO *INTERNATIONALIZING CRIMINAL LAW*

George P. Fletcher*

Writing *Rethinking Criminal Law* ("*Rethinking*") was a gamble. No one had ever written a serious book on comparative criminal law—in English or in any other language. No one had ever addressed English-speaking readers with the argument that some other system of legal thought—espoused by a nation defeated in a major war just thirty years before—had a superior literature on criminal law and a more refined way of thinking about the structure of criminal offenses. No one had tried to present the system of criminal law as though it were a species of "political and moral philosophy."[1] If ever there was *chutzpah*, this was it.

The structure of *Rethinking* almost defied readers to find it interesting or useful. The conventional way to write textbooks in continental Europe is to distinguish between the general part and special part and devote a book to each. The general part always receives attention first because it is considered the foundation of the whole system. For all my devotion to philosophical and Continental thinking, my basic training was in the common law, and I still thought about law in the inductive style of the case method. This is why I took the highly unconventional approach of beginning the book with the special part, initially with a detailed analysis of the history of theft in the common law. I would have thought that this choice of topics and the detailed analysis of the cases would turn off most of my readers.

The approach was unfamiliar to almost everyone. The style of writing on the Continent is always deductive and authoritative and—though I did not notice it in the late 1970s—the Continental approach is almost always internal and parochial. The German literature cites only German authors; the French cite only the French. The Germans refer to their work on the general principles of criminal law as *Dogmatik*—a term borrowed from the Catholic Church to refer to the teachings offered by the priests to elaborate the tenets of the faith. This term aptly describes the system of thought that the Germans have developed. They have faith in a certain set of organizational distinctions, and their task is to elaborate and explain the system.

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

Common law lawyers have a similar set of dogmas. They are not aware of the extent to which they subscribe to their ideas as a matter of faith. They subscribe to certain formulae as though they were unquestionable truths—claims, for example, about the necessity of mens rea and actus reus. They believe in the indispensability of "policy" decisions and adhere to Holmesian realism ("general propositions do not decide concrete cases"[2]) as though there were no other way to think about law.[3] At the outset I was restrained, in *Rethinking*, by the assumption that I would not repeat these standard orthodoxies without subjecting them to a thoroughgoing critique.

At the level of style and substance, *Rethinking* was an iconoclastic book. It occurs to me now that it was also a conservative book. I will explain why.

I. THE BASICS OF *RETHINKING*

In late 1976 and 1977, when I was writing *Rethinking*, the greatest danger to criminal law was the likelihood that the Model Penal Code would soon dominate the entire field of discourse about the criminal law in the United States. Here is a sampling of the positions on which MPC threatened to become the hegemonic doctrine:

(1) There is no single rationale for punishment. Retributive and deterrent and other purposes must all be considered.[4]

(2) The principle of lesser evils, or necessity, is the model for understanding all claims of justification, including self-defense.[5]

(3) Insanity stands on its own: it need not be integrated into the theory of excuses.[6]

(4) There is no special category of defenses called "excuses."[7]

(5) On newly recognized defenses, such as mistake of law, it is permissible to shift the burden of persuasion to the defense.[8]

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2. *See Lochner v. N.Y.*, 198 U.S. 45, 74-76 (1905) (Holmes, J. dissenting).

3. The leading books at the time were Jerome Hall, *General Principles of Criminal Law* (2d ed., Bobbs-Merrill Co. 1960), and Glanville Williams, *Criminal Law: The General Part* (2d ed., Stevens & Sons Ltd. 1961).

4. Model Penal Code § 1.02(1) (ALI 1985).

5. *Id.* § 3.01 (declaring that the entire chapter is about "justification," an affirmative defense); *Id.* § 3.02 (defining lesser evils as though it were the paradigmatic justification).

6. There is no category of excuses in the Model Penal Code. Duress is regulated in Model Penal Code § 2.09; insanity is regulated separately in Article 4. The special status of insanity as a directive to punish, though by alternative means, was stressed in Herbert L. Packer, *The Limits of the Criminal Sanction* 131-35 (Stan. U. Press 1968).

7. My first systematic treatment of the issues was George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. Cal. L. Rev. 1269 (1974).

8. The burden is shifted on entrapment, Model Penal Code § 2.13(2), and mistake of law, Model Penal Code § 2.04(4).

(6) Whether attempted crimes result in harm should be irrelevant in assessing punishment.[9]

(7) Impossible attempts should be punished.[10]

(8) Inadvertent negligence is a suspect category of culpability. It should be punished only in exceptional cases.[11]

At the time it seemed to me that the debate about these basic issues was dying out—in the law reviews, in conferences where I encountered my colleagues in criminal law, and in the classroom, where the future of criminal law was being cast.

Of course there were many other important issues raised in *Rethinking*, but I would like to concentrate on these eight in order to profile the way in which *Rethinking* had departed from the orthodoxy prevailing in the 1970s. Here are my responses to the eight challenges posed by the MPC:

(1) First as a student and then a colleague of Herbert Morris at UCLA, I was exposed to a way of thinking about justice in punishment that was radically different from the muddled views in the literature and in the cases.[12] The solution of the MPC was to adopt every conventional goal and urge judges to apply the proper mix of all of them.[13] This struck me as the nadir of intellectual sloppiness. The literature coming out of prestigious law schools on the East Coast was either unreflectingly utilitarian and thus hostile to retributive thinking or insufficiently rigorous to address the question of retribution properly.[14]

(2) The MPC made a strong case that all claims of justification were variations of the principle of balancing conflicting interests—thus self-defense was simply a subcategory of the defense of necessity defined at the outset of Article 3 in the MPC and labeled "Justification Generally." American scholars were silent on the question of whether all claims of justification were reducible to a single heading or not. By contrast, the German literature on point was abundant and thoughtful. Criminal lawyers were aware of the dubious grounding of necessity in social interest and the roots of self-defense in theories of personal autonomy. Any serious reader of Kant would know that the two defenses had totally different

9. Model Penal Code § 5.05(1) (the grade of attempt is the same as the grade for the offense attempted).

10. The rationale is that the offender's intention plus partial execution shows that he or she is dangerous. *See* Commentaries to the Model Penal Code § 5.01.

11. *See* Model Penal Code § 2.02(3) (unless otherwise provided, recklessness is the minimally required state of culpability).

12. Herbert Morris had just published his classic article. *See* Herbert Morris, *Persons and Punishment*, 52 Monist 475 (1968).

13. *See* Model Penal Code § 1.02.

14. The leading articles were: Jerome Michel & Herbert Wechsler, *A Rationale of the Law of Homicide: 1*, 37 Colum. L. Rev. 701 (1937), and Henry M. Hart, *The Aims of the Criminal Law*, 23 L. & Contemp. Probs. 401 (1958).

histories and rationales.[15] It seemed obvious to me that the drafters of the MPC had not even begun to think about the issues.

(3) and (4) With regard to the theory of excuses, I also benefited greatly from the study of German law, which treats insanity as a paradigmatic excuse[16] along with mistake of law[17] and personal necessity.[18] Many of my early articles focused on the failure of American and other common law systems, including the MPC, to approach the subject of excuses systematically.[19] The German approach seemed to me clearly superior. The challenge was to find sufficient traces of the same ideas to be able to plausibly argue that American law showed signs of evolving in the same direction.

(5) The same systematic approach led me, in my first major article,[20] to oppose the common law practice of shifting the burden of persuasion on defensive issues. I was convinced that historical trends opposed the common law on this point. The Rome Statute establishing the ICC (International Criminal Court) has validated my argument that the Continental tradition would prevail on this issue.[21]

(6), (7), and (8) My position on the last three of the eight issues mentioned above reflected an implicit philosophical commitment to thinking about human action in a different way from the prevailing view of criminal action. I think of the orthodox view as focusing on the isolated and atomistic will expressing itself in the external world. This view is expressed in (6) by the rejection of consequences as relevant to the appropriate punishment for attempts. Consequences are said to be irrelevant because they are not subject to the "control" of the actor's will. The same focus on the atomistic will, the intention to do wrong, supports in (7) the imposition of liability for impossible attempts that pose no manifest danger to anyone. Committed to the atomistic will as the core of criminal action, theorists have been led in (8) to argue that if there is no "choice" there can be no culpability. Thus, they conclude that inadvertent negligence (where there is no conscious choice) should not be a basis for criminal liability.[22]

The paradigmatic case of the atomistic theory of action is the lone individual who pulls the trigger of a gun with the intent to kill. The actor is abstracted from his or her context and setting. It does not matter whether the gun is loaded or even whether the intended target is actually a living person or a wax dummy. The

15. *See generally* Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor trans., Cambridge U. Press 1991).

16. StGB § 20 (1999).

17. StGB § 17.

18. StGB § 35.

19. *See e.g.* Fletcher, *supra* n. 7, at 1272; George P. Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. Rev. 293, 315 (1975) (discussing necessity as an excuse).

20. George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 Yale L.J. 880, 884 (1968).

21. *See* Rome Statute of the International Criminal Court art. 67(1)(i) (opposing the shift of the burden on any issue) (hereinafter Rome Statute).

22. *See* Alan Brudner, *The Unity of the Common Law* 221-38 (U. Cal. Press 1995); Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 Colum. L. Rev. 632 (1963).

important feature of the criminal action is the relationship between the choice to kill and the expression of this choice in external bodily movements.

The atomistic nature of criminal conduct is a dogma like any other. It is asserted and accepted without any evidence. The dogma is not hard to refute,[23] but whether right or wrong, it holds on. It still influences discussions of moral luck in assessing the relevance of consequences (6);[24] it inspires recurrent assertions that negligence is not a proper basis for liability (7);[25] and it reinforces the hegemonic doctrine that it is permissible to punish impossible attempts according to the actor's perception (8).[26]

The opposite position is a contextualized view of criminal wrongdoing, a view that was expressed more or less in different passages in *Rethinking*. The contextualized view treats criminal wrongdoing as a form of interaction between offender and victim. Consequences cannot be separated from the action as though they were purely contingent events. Shooting with the intent to kill and the actual killing are bound together in a single event, captured both in our language and in our conventional perceptions of the world.[27]

The contextualized view is anchored in our language and our social practices. We have verbs for murder and rape, which imply the occurrence of consequences, but we have no verbs in natural speech for "trying to kill" or "trying to rape." The Ten Commandments are a benchmark for thinking about law precisely because they are based on actions coupled with harmful consequences.[28]

The contextualized view of criminal wrongdoing recognizes that the critical point for understanding crime is not the relation of the will to the body but the relations of people to each other. Herb Morris had always stressed that a criminal act breaches the offender's relationship and therefore requires some form of repair. These views are closely associated with ordinary language philosophy, which requires the analyst to attend to what people actually say and do in particular real life contexts.

If we pay close attention to moral sentiments as they are actually expressed in human interaction, then there is little doubt about the right position to take on the conflict between the atomistic and contextualized theories of action. As to point (6), you will consider the consequences of action in assessing the gravity of wrongdoing; ordinary people would not even consider punishing their children in

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23. H.L.A. Hart and Herbert Morris both published definitive refutations of the will theory of action. *See* H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of the Law* 101 (Oxford U. Press 1968); Herbert Morris, *Dean Pound's* Jurisprudence, 13 Stan. L. Rev. 185 (1960) (reviewing Roscoe Pound's *Jurisprudence*).

24. *See* Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It*, 37 Ariz. L. Rev. 117, 121 (1995); Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. Crim. L. & Criminology 679, 684-86 (1994).

25. *See* Hall, *supra* n. 22.

26. In addition to the Model Penal Code, *see* Model Penal Code § 5.01, the leading proponent of this position was Glanville Williams. *See* Glanville Williams, *The Lords and Impossible Attempts, or* Quis Custodiet Ipsos Custodes?, 45 Cambridge L.J. 33, 34 (1986).

27. *See* Hart, *supra* n. 23.

28. The one possible exception is the Tenth Commandment, which prohibits "coveting" one's neighbor's house or wife. *See Exodus* 20:17 (King James).

the same way whether they try and fail to hit a neighbor's kid, or actually do hit her. Frankly, I have never understood the discourse about "moral luck" because the consequences of action are not simply a matter of bad luck.[29] They are an integral part of an action as perceived and evaluated in its social context.

As to point (7), it always seemed to me totally misconceived to punish an impossible attempt that, on the face of the action, threatens no one. The classic hypothetical case is putting sugar in the intended victim's coffee on the mistaken assumption that the sugar is arsenic. The rationale for punishing in this case is that acting on the basis of the malicious intent demonstrates the dangerousness of the offender. The remarkable feature of the English-language literature is that commentators appeal to dangerousness as though it were an unquestioned basis for criminal liability. By contrast, the post-war German literature has stressed the ideological significance of shifting from the dangerousness of acts to the dangerousness of actors. The German theorists insist that a liberal criminal law must be based on actions (*Tatstrafrecht*) rather than actors (*Täterstrafrecht*). This issue is not even on the radar screen of American scholarship. The Germans treat the focus on actors as an expression of Fascist thinking, yet the commentaries to the MPC take it for granted that actor-oriented thinking is a sensible way to justify criminal liability.

On the last point, the punishability of negligently causing harm, an approach sensitive to social content and the way people ordinarily behave, should leave little doubt about the right approach. We blame others for negligently imposing great risks on others. The criminal law should do the same. The only way one could come to the opposite result, I believe, is to adopt a totally artificial theory of action that stresses the elements of choice or will in external bodily movement.

In *Rethinking*, there is hardly a doctrine of the common law that escapes evaluation criticism. And yet, all things considered, my approach in *Rethinking* is conservative and traditional. That is, I fall back on social practice or on the arguments of the post-war Germans in order to mount a serious critique of common law trends. Paradoxically, Herb Wechsler and the MPC adopted a more radically critical point of view than my own. As utilitarians, they—like Bentham before them—could subject the common law to a systematic critique. They could test every provision to determine whether it efficiently furthers the aims of the criminal law.

There has long been tension in legal thought between the schools of Blackstone and Bentham. The Blackstonians invoke theories of rights, sometimes of natural or human rights. The Benthamites reject rights and argue in the language of social utility and group welfare—"efficiency" in the idiom of law and economics. When one of these schools is ascendant, the critics gravitate toward the alternative point of view. If efficiency is the reigning view, the natural tendency is the opposite—namely, to argue in the language of rights. If human

29. The leading works, often cited, are Bernard Williams, *Moral Luck*, in *Moral Luck* 35 (Daniel Statmen ed., SUNY Press 1993), and Thomas Nagel, *Mortal Questions* 24-38 (Cambridge U. Press 1979).

rights become entrenched as the orthodoxy—as they had in the infamous 1905 case of *Lochner v. New York*[30]—the critical method requires argument in the language of social welfare and efficiency.

The Benthamites have been ascendant in the common law, at least since the period of the New Deal. Wechsler and the MPC applied their methodology to the criminal law, but under the leadership of Ronald Dworkin, the rights theorists—the Blackstonians—were striking back. On this jurisprudential spectrum, I was clearly on the side of Dworkin and the Blackstonians.

Much to my surprise and gratification, European readers appreciated *Rethinking* as a presentation of the common law in a conceptual framework they could understand. This was, I gather, a novel event in comparative law. I learned much from the European reaction and have since consciously pursued the approach of explaining the common law in the conceptual framework of Continental legal thought.[31]

The reception of *Rethinking* in the United States was much more enthusiastic than I expected. It is gratifying to me that a whole generation of American scholars, well represented in this symposium, take the issues of criminal theory very seriously. It is not the case, however, that all the ideas I elaborated in *Rethinking* have found an audience. There has been a lot of attention paid to the theory of justification and excuse, but other important ideas have gone by the wayside. There has been almost no interest in my theory of manifest criminality and the application of the principle to the problem of impossible attempts. Nor did my conceptualization of three patterns of liability—manifest criminality, subjective criminality, and harmful consequences—attract much discussion.[32] If *Rethinking* is to be remembered, I would like it to be appreciated for its comparative effort to communicate an understanding of Continental thought to theorists in common law countries, reciprocally, to provide those outside the tradition with access to American thinking in criminal law.

II. INTELLECTUAL JOURNEYS

One of the consequences of writing *Rethinking* was my development of closer ties with scholars abroad. My links with German scholars date back to my period of study in Freiburg in 1964-1965 and even more significantly my first lecture tour in the summer of 1976 at the invitation of Klaus Lüderssen in Frankfurt. I also found the other criminal law specialists in Frankfurt to be a rich source of ideas—in particular, Winfried Hassemer and Wolfgang Naucke. I returned there as a visiting professor in the spring of 1980. My close working relationship with Albin Eser dates from the summer of 1976, and he provided me with considerable intellectual support when he came to UCLA for several months during the period I was writing *Rethinking*.

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30. *See Lochner*, 198 U.S. at 74-76 (Holmes, J. dissenting).

31. This approach is followed in George P. Fletcher & Steve Sheppard, *American Law in a Global Context: The Basics* (Oxford U. Press forthcoming 2005).

32. *See* text accopmanying *infra* n. 36.

Since the early 1970s, I have also had close working relationships with several scholars in Israel. Many were my students at the Hebrew University in Jerusalem, and several others came to Columbia in the 1980s and 1990s. Among them are Miriam Gur-Aryeh, Alon Harel, Mordechai Kremnitzer, Yoram Shachar, and Ron Shapira. They seem to have transplanted the style and many of the ideas from *Rethinking* to Israeli soil, though I remain bemused by the failure of Hebrew-speaking lawyers to develop precise analogues for the terms "justification" and "excuse."

My collegial bonds with Spanish and Italian criminal lawyers would await work that I did after *Rethinking*. There was little time was for outreach toward other countries when, in the mid-eighties, the United States started to become preoccupied by high-profile criminal trials. The *Goetz* case was the first of a series of prosecutions (ending, I believe, with the O.J. Simpson case in 1995) that dominated discussions of criminal law for a decade. In the summer of 1986 when I read that the New York Court of Appeals had ruled, correctly, that Goetz's shooting four blacks in the subway had to be judged against a reasonable person standard, I immediately sensed that the pending trial would be the ideal laboratory for testing the ability of criminal trials to domesticate complicated issues of theory and structure in criminal law. The trial of Bernard Goetz proved to be a microcosm of virtually all the questions that intrigued theoreticians of criminal law. Writing *A Crime of Self-Defense* was a thrilling project in which I sought to explain the ideas set forth in *Rethinking* to a general audience. With regard to the theory of criminal law there was not much new in the book. In a review in the *ABA Journal*, Paul Robinson insightfully and amusingly described the treatment of criminal law in the book as *Rethinking* in "short pants."[33]

On a visit to the United States, Francisco Muñoz Conde, professor of criminal law in Sevilla, Spain, noticed the Goetz book on sale in a bookstore. He picked it up, read it, and made a remarkable decision to introduce American thinking about criminal law into the Spanish legal culture. His translation, *En defensa propia*, was the beginning of a very productive collaboration and an enriching friendship. Eventually he translated three of my books and, after the appearance of each, accompanied me on a lecture tour around Spain. As a new kind of legal literature—an in-depth study of a particular case coupled with theoretical reflections on the criminal law—*A Crime of Self-Defense* also appealed to translators in several other countries.[34]

There were too many engaging developments in the late 1980s and early 1990s for me to think seriously about a second edition of *Rethinking*. My first major intellectual detour occurred after some personal experiences prompted me to explore loyalty, both personal and national, as a legitimate moral value. My book-length treatment of the subject appeared in 1992,[35] and though I did not

33. Paul H. Robinson, *Books for Lawyers: Revenge of the Nerd*, 74 ABA J. 112 (Sept. 1, 1988).

34. Translations have appeared in German, Japanese, and Italian.

35. George P. Fletcher, *Loyalty: An Essay on the Morality of Relationships* (Oxford U. Press 1993). The personal experiences that influenced me are discussed in the introduction at pages ix-xii.

think of the book as a revision of my theory of criminal law, it was clear that new lines of conceptualization were taking hold.

The centerpiece of the first half of *Rethinking* was a set of three patterns of liability: manifest criminality, subjective criminality, and harmful consequences. This was an entirely original way of grouping the offenses that constitute most systems of criminal law. Winfried Hassemer, one of the few readers ever engaged by this analysis, paid me a compliment by describing these three patterns as the "middle part" of the criminal law.[36] They were not the general part because they treated the subject matter of the special part, but nor were they the special part because they were not abstracted from the positive law of any particular jurisdiction. I discussed treason as one of many offenses rent by the dialectic between manifest and subjective criminality.[37] The specific point of tension was the requirement of an "overt act," which dates back to the first treason statute enacted in the reign of Edward III in 1351-1352. The problem is whether the overt act requirement is satisfied by an act in furtherance of the treason (subjective criminality) or only by an act that manifests the treasonous purpose (manifest criminality).

Beginning with the discussion of treason in *Loyalty*, I began to appreciate disloyalty and treason as a separate model of liability—a fourth pattern, as Cole Durham dubbed it.[38] The foundation of treason is the breach of a relationship. In virtually all countries of the world, only those owing a duty of allegiance can betray their countries—and this special duty of loyalty is typically limited to citizens, nationals, or permanent residents. Requiring this special relationship distinguishes treason from the standard crimes of murder, theft, and rape, which are committed against strangers as well as acquaintances. The implication is that treason is a parochial crime—that is, it is wrong only from the standpoint of the state that is betrayed. In contrast, the core violent offenses are universal in nature—they are wrong by whomever and against whoever committed. Working out the implications of this distinction is now one of my major concerns. It has particular relevance on the plane of international and regional criminal law.[39]

Thinking about loyalty in the criminal law also has repercussions in the theory of excuses. The problem is accounting for a range of third persons whose intervention on behalf of a person under threat will be excused as "involuntary." We are inclined to say that the intervention of a parent to save a child in danger is involuntary in this extended sense. Of course, there is a choice to intervene, but we could not reasonably expect a parent to stand by while his or her child is being

36. Winfried Hassemer, formerly professor of criminal law in Frankfurt, is now Vice President of the German Constitutional Court.

37. Fletcher, *supra* n. 1, at 202-13.

38. Cole Durham made this comment to me during a private conversation shortly after 1993.

39. *See* George P. Fletcher, *International vs. European Criminal Law*, __ J. Intl. Crim. J. __ (forthcoming 2005).

killed. The factor of loyalty from parent to child accounts for our intuitions of involuntariness in this context.[40]

With my work on loyalty, I had obviously undertaken a new approach toward the general principles elaborated in *Rethinking*. The next major shift in my sentiments occurred when I witnessed the Los Angeles riots in the wake of the verdict of not guilty in the 1993 trial of the four LAPD officers who had maliciously beaten up Rodney King. I realized for the first time that in *Rethinking* I had paid no attention to the victim's side of the criminal trial. I had always been skeptical about victimology because my impression was that this sociological school attempted to bring the victim into a causal account of the specific crime. Victims contribute, they say, to their own harm. Of course they do in some cases, but this causal analysis is irrelevant to the normative analysis. We should not punish a nighttime rapist in the park less because his victim decided foolishly to go running late at night in an isolated part of the park. The confusion between causal and normative analysis posed a serious danger to the moral foundations of the criminal law.

The Rodney King riots and the subsequent federal trial enabled me to appreciate the role of the criminal law in bringing justice to victims, particularly to minority victims. As a collective group, those who identify with the concrete victim have legitimate demands in the criminal process. If the state fails to prosecute or whitewashes the charges, those who identified with the victim feel like second-class citizens. It was not clear what kind of voice victims should have in the criminal process. I undertook a study of the problem, and the result was a passionate 1995 book called *With Justice for Some: Victims' Rights in Criminal Trials*.[41]

This study in victim's rights anticipated the dramatic recognition in the Rome Statute of "impunity" of offenders as a major concern of the international community. In the 1990s, the entire field of criminal law started to undergo a transformation from an exclusive concern with the rights of the accused toward greater recognition of the interests of victims.

About the time *With Justice for Some* was published, I applied for a grant from the Humboldt Foundation and identified a second edition of *Rethinking* as my primary project. I received the grant, which enabled me to spend some time at the Max Planck Institute in Freiburg. Oxford University Press offered me a contract for the second edition. The project was "off and running" but I was unsure of its direction.

My original plan was to make good on my assertion in the introduction to *Rethinking* that criminal law was a species of "political and moral philosophy." I needed to delve more deeply into philosophical issues in order to explicate the moral and political foundations of the criminal law. A detour into philosophical

40. Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in the Law*, 37 Ariz. L. Rev. 251 (1995).

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

questions enriched my thought. In 1996 Oxford brought out *Basic Concepts of Legal Thought*,[42] which was an expanded version of some lectures I had given in Italy in the early 1990s.[43] In this book—written for students, with few academic pretensions—I had a chance to explore my jurisprudential commitments on the nature of law, discretion, morality, efficiency, equality, and other basic themes.

In order to develop my ideas about a new version of *Rethinking*, I decided to write a short introduction to the basic theoretical questions of the field, expressing my current take on the foundational questions of the field. I adopted a mode of exposition that has proven to be effective. The thesis is that the entire general part of the criminal law inhabits twelve areas of discourse defined by an equal number of conceptual distinctions. The boundaries discussed among the twelve distinctions include, for example, the differences between substance and procedure, subjects and objects of action, offenses and defenses, and self-defense in contrast to necessity. The argument is that these distinctions are implicit in every system of criminal law, although the exact point of demarcation may vary from system to system.

My exposition in *Basic Concepts of Criminal Law*[44] includes several new positions—in particular, my skepticism about whether recklessness, defined as conscious risk-taking, is always worse than inadvertent risk-taking.[45] This grading is assumed in the MPC,[46] and it is widely shared in other legal cultures. Also, for the first time, I put to paper my theory of communicative human action.[47] This theory is related to the contextual theory of action expressed above, but with emphasis on the expressive nature of action. There were several other innovations as well. The treatment of mistake is more exhaustive than I had offered in *Rethinking*.[48] The overriding point was to stress the trans-national structure of the twelve basic distinctions. This was the beginning of my articulated universal theory of criminal law.

Oxford published this prelude to the revised version of *Rethinking* in 1998, and it quickly found translators around the world. Professor Muñoz Conde was able to get his successful Spanish edition on the market several months before the English version appeared.[49] Russian and Kazakh editions appeared shortly thereafter, and work is underway now to produce translations in Chinese and in Persian. The translation that most pleased me in particular has been the recent Italian version by Professor Michele Papa in Florence. Papa coined a new title for the book: *La Grammatica del diritto penale.* To translate is, of course, to interpret,

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42. George P. Fletcher, *Basic Concepts of Legal Thought* (Oxford U. Press 1996).

43. *See Introduzione Elementare alla Scienza Giuridica: II. Cardozo Lectures in Law* (George P. Fletcher, Pier G. Monateri & Ugo Mattei eds., Cedam Publications 1993).

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

45. *Id.* at 116.

46. Model Penal Code § 2.02(2).

47. Fletcher, *supra* n. 44, at 48.

48. *Id.* at 211-12.

49. George P. Fletcher, *Conceptos Básicos de Derecho Penal* (F. Muñoz Conde trans., Tirant lo Blanch 1997).

and Papa's interpretation captures the spirit of the book. My project was indeed to elaborate a universal grammar of criminal law.

As all this was going on at the end of the twentieth and the beginning of the twenty-first centuries, criminal law was undergoing radical change. With the advent of the ad hoc tribunals for the former Yugoslavia and Rwanda and the agreement on the Rome Statute in the summer of 1998, comparative criminal law was rapidly merging with international law. It turned out that it was impossible to proceed with international criminal prosecutions without seeking a synthesis of common law and Continental principles, both at the level of substance and of procedure. It took me a few years to realize this, but in the wake of September 11, 2001, and after the Rome Statute came into force on July 1, 2002, I was convinced that the theory of criminal law had an important role to play in the refinement and development of international criminal law.

III. THE INTERNATIONALIZATION OF CRIMINAL LAW

My original conception of a second edition of *Rethinking* was undergoing change as well. I was never capable of the deceptive task of updating the footnotes to the 1978 edition and calling it a new book. For several years the draft I worked on consisted of virtually all-new material. Thus I thought I would publish a new "version" of *Rethinking* under a clever title like "Rethinking *Rethinking*." But after Oxford published a reprint edition in 2000 and the book continued to have an audience, my editor at Oxford, Cynthia Read, and I decided against publishing another book under the same title. The new book would be a sequel to *Rethinking* but catalogued under a different title. My thoughts turned to *Universalizing Criminal Law* as a title that would capture my hypothesis that criminal law rests on certain philosophical premises of universal validity.

But my interest in international criminal law has continued to grow, largely due to a very fruitful association with Antonio Cassese of Florence. His work, both as former president of the International Criminal Tribunal for the Former Yugoslavia, and as a professor of International Law in Florence, is a model of clear-headed and thorough scholarship,[50] but he has also supported me in my conviction that international criminal law requires a substantial infusion of theoretical and comparative scholarship in criminal law. Those who drafted and negotiated the Rome Statute were primarily international lawyers with little knowledge or interest in the basic principles of criminal liability. Their interest in moral and political philosophy was even less serious than their mastery of the literature of criminal law.

It is striking that the philosophical literature on the theory of just war and the commentaries on the Rome Statute seem to have nothing to do with each other. Michael Walzer's book *Just and Unjust Wars*[51] is properly influential

50. *See* Antonio Cassese, *International Criminal Law* (Oxford U. Press 2003). Cassese is also the founder and editor of the new and important *Journal of International Criminal Justice*.

51. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (3d ed., Basic Bks. 2000).

among philosophers and political scientists, but it is never cited in the literature on international criminal law. Even more seriously, the philosophical doctrine of double effect, important in Walzer's work and critical for understanding the law of war, is totally ignored in the legal commentaries. The results are extremely unfortunate. Allow me to explain.

The moral premise of the Geneva Conventions of 1949 and of the Rome Statute is the absolute prohibition against intentionally killing civilians and other protected persons. This is an application of the basic idea, anchored in the book of Genesis and developed both in the Christian and secular moral traditions, that it is wrong—indeed absolutely wrong—intentionally to kill the innocent.[52] In international law, the word "civilian" has taken the place of the word "innocent." The problems are what it means to kill "intentionally" and whether the prohibition is truly absolute or whether it may yield to considerations of military necessity.

The Catholic doctrine of double effect leads us to the conclusion that "intentionally" should be narrowly construed to mean, in effect, what the Model Penal Code means by "purposely." The death of civilians must be the actor's "conscious object," not the side effect of his action. Under the MPC, expecting some civilians to die as a side effect of a bombing mission is not enough to make the deaths purposeful and it should not be sufficient under the Rome Statute for an intentional killing. This narrow construction is the only way to maintain an absolute prohibition against intentional killing. If the interpretation of intentional killing encompasses side effects—collateral damage, as it is now called—then the temptation is to introduce a corrective under the principle of necessity to restrict liability to those cases of serious wrongdoing.

Unfortunately, both the drafters and the commentators to the Rome Statute have taken a broad view of intentionality, so that intentional killing seems to include any action undertaken in the knowledge that the death of civilians is a foreseeable side effect.[53] Without any authority to support their conclusions, many international legal commentators venture the opinion that "intentional" in the Rome Statute includes "reckless" killing.[54] This proposed expansion of liability far exceeds the moral foundations of the law of war and necessitates a corrective under the defense of necessity.[55]

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52. Elsewhere I have traced this prohibition to the principles expressed in Genesis 9:6 that human beings are created in God's image. *See* George P. Fletcher, *In God's Image: The Religious Imperative of Equality under Law*, 99 Colum. L. Rev. 1608, 1618 (1999).

53. Rome Statute art. 30(2)(b) (includes within the ambit of intentional conduct any consequence that the actor "is aware . . . will occur in the ordinary course of events"). This appears to be functionally equivalent to a foreseeability standard.

54. *Commentary on the Rome Statute of the International Criminal Court* 527-35 (Otto Triffterer ed., Nomos Verlagsgesellschaft 1999); *The Rome Statute of the International Criminal Court: A Commentary* 898-902 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., Oxford U. Press 2002).

55. Rome Statute art. 31(1)(d) recognizes a claim of necessity that is compromised by the requirement of duress. In order to generate the necessary corrective under a principle of necessity, the court would have to develop a new defense under Article 31(3) comparable to Model Penal Code § 3.02.

The international lawyers who make these claims have an ingrained bias in favor of victims and of the prosecution. The Preamble to the Rome Statute stresses the importance of punishing the guilty but never mentions the traditional value of protecting the innocent.[56] This bias toward victims makes the ICC different from other systems of criminal law that typically begin with a commitment to the rights of the accused and then struggle to accommodate the interests of victim.[57] This victim-orientation of the ICC makes it imperative that criminal lawyers intervene, both in theory and in practice, to correct the imbalance and to protect the rights of the accused.

The drafters of the Rome Statute had the foresight to understand that they could not do a perfect job. They recognized the necessity of ongoing legal development. Further, in the tradition of both international law and Continental legal thought, they acknowledged the role of scholars as well as judges in elaborating "general principles of law derived by the Court from national laws of legal systems of the world."[58] There may be some imperfections in the Rome Statute as drafted, but the field of international criminal law is still in its infancy, and in time we should expect the scholarly literature and the case law to bring the necessary refinements to the system.

The importance of addressing these issues convinced me that the sequel to *Rethinking* should bring to bear my philosophical and comparative work to the task of *Internationalizing Criminal Law.* This is the apt title for a sequel to *Rethinking Criminal Law.* My aim in the book is to bring together current developments in the theory of criminal law, in comparative criminal law, and in international criminal law itself.

The present manuscript is divided into four parts. Part One addresses general foundational questions of criminal law, all considered from a comparative point of view, with frequent reference to the Rome Statute. The centerpiece of this part will be two chapters on the philosophical dimensions of criminal law—one on political theory and the other on moral theory. The thesis bridging these chapters is that political analysis must precede any reference to moral issues. The justification of punishment is ultimately a political and not a moral issue. Someone might deserve punishment but it does not follow that the state is justified in imposing it. The latter question depends on the theory of legitimate political power and whether it includes the authority to impose criminal sanctions. Morality becomes relevant in the theory of criminal law only because a political theory makes it relevant. This is a critical point. It turns contrary to the views of many retributivists who think that their stand on moral desert resolves the question of just punishment.

The second part focuses on the foundations of international criminal justice, with particular attention devoted to the problems of universal jurisdiction and the

56. *See* Rome Statute preamble.

57. For example, Model Penal Code § 1.02(1) expresses a commitment to protect the accused against false convictions and says nothing about the interests of victims.

58. Rome Statute art. 21(1)(c); *see* Statute of the International Court of Justice art. 38.

theoretical foundations of jurisdiction in the International Criminal Court. I expose the weakness of the conventional arguments in favor of universal jurisdiction and strongly endorse the ICC. Yet the premises of the ICC raise profound problems of political theory that have not been adequately addressed.

The ICC merges three totally distinct ideas—the tradition of international law based on the liability of states, the principle of individual criminal liability, and the ability of the United Nations Security Council to institute courts for the purpose of maintaining international peace and security.[59] How these strands are to be reconciled requires a serious "rethinking" of democratic principles. The major problem is whether a state can determine where its citizens should be tried for their crimes. A proper analysis of this question takes us back to the problem of when and where particular institutions enjoy "the right to punish." Addressing these problems adequately remains a great academic challenge. The second part also includes an extended analysis of the law of war and the problems faced in American law in the aftermath of the attacks of September 11, 2001.

The third part of the book addresses the problem of finding a synthesis of systems of criminal law. Two distinct methods of synthesis are considered, both with elements that might be considered universal when extrapolated across existing systems of criminal law. The first begins with the idea of punishment and the other with the idea of human action. The first approaches criminal law from the top down, that is, beginning with the state's response to crime. The other begins from the bottom up, that is, with the theory of human action as a basic constituent of criminal liability. These efforts at synthesizing—and thus universalizing—criminal law provide a possible contribution to the effort to supplement the Rome Statute with "general principles of law derived by the Court from national laws of legal systems of the world."[60]

The fourth part of the book turns to the tensions between universalization and internationalization. I elaborate three distinct types of universal law. International law—particularly its core principles—has pretensions of universality. It is applicable to all states at all times. The ICC is based on a claim to be the court of last resort for all countries in the world, even for those who have not ratified the Rome Statute. The second type of universality is represented by the comparative synthesis developed in Part Two. The third type derives from my system of twelve distinctions developed in *Basic Concepts*. Here I apply those twelve distinctions as a framework for reviewing the doctrinal features of the Rome Statute. The criminal law advanced by the statute is treated like any other system of positive law. The universality implicit in this analysis is not that of the Rome Statute, but rather the meta-structure incorporated in the twelve distinctions.

The ultimate tension between universality and internationalization recurs in all legal systems. The positive law invariably domesticates the impulse toward

59. U. N. Charter art. 52-54.
60. Rome Statute art. 21(1)(c).

generating abstract principles that apply everywhere. All law eventually becomes the law of a particular system. Americans would like to think of due process as a universal standard of justice, but the concept of due process is invariably compromised by the authority of American courts. Blackstone thought that the common law was the embodiment of pure reason, but reason is invariably subject to interpretation and bound by precedent. The same will happen with the Rome Statute. The law of the ICC will be its own law—not the universal conceptual and moral truths to which we aspire. Yet we must keep the dialectic alive. By pressing for universal principles of criminal law, we enable international law to be more than the conventional law governing relations among states. International criminal law, in particular, must maintain its mission of being the single law that should govern all humans everywhere.