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FLETCHER'S *RETHINKING*: A MEMOIR

Kyron Huigens*

I.

My relationship to George Fletcher's *Rethinking Criminal Law* ("*Rethinking*")¹ has been a remarkably personal one. I encountered the book (and later George himself) at several key junctures, and despite the reservations about the book (but never George) that I developed in later years, it remains one of the most important that I have ever read, and re-read.

In 1979, I was a sophomore at Washington University in St. Louis, studying literature and philosophy but also, and more to the present point, working at the law library. My duties primarily consisted of shelving books, but at times I filled in behind the circulation desk, retrieving material on reserve for the law students. This position gave me an excellent perspective on the current "must reads" for the law students, from Karl Llewellyn's *Bramble Bush*² to the *BNA Tax Reporter*. Fletcher's *Rethinking*, then brand new, was among these books.

The "must reads" of a law student are defined by her teachers, so apparently George had an admirer on the Washington University law faculty. Of course, as an undergraduate who spent his time pushing around carts of books, I had no idea who this might be, or what intellectual debts or affinities might explain the recommendation. To some extent, however, I managed to figure out part of the story myself. If I was in the dark about criminal law, legal theory, and law professors, I gathered at least that George's book represented a sharp departure from prevailing thought.

In that place, in those days, the distinctive quality of the book was said to be that it was "normative." This description will sound odd to most readers today, but one occasionally comes across this use of the word "normative" even in current literature. Used to describe George's book, the term did not mean that it dealt with a normative subject matter—criminal law under any description is a system of norms—nor did it mean that George was an advocate for criminal law reform, making normative recommendations in his book. Instead, when applied to George's book, "normative" meant "non-consequentialist." *Rethinking Criminal Law* rethought, principally, the assumption that the point of criminal law

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

2. K.N. Llewellyn, *The Bramble Bush* (Oceana Publications 1960).

and the right perspective for understanding criminal law had to do with the promotion of social welfare. *Rethinking* rejected not only consequentialism, but also the legal academy's working understanding of value and normativity: the non-cognitivism that is not essential to consequentialism, but that has, historically, prompted and reinforced consequentialist thinking.

The notion that *Rethinking* was unusually "normative" was very confused, of course. The oddest thing about calling non-consequentialist arguments "normative" is that it suggests that consequentialism is not "normative"—an absurd idea, given that consequentialism is a theory about morality that, in some versions, offers moral prescriptions. But this usage of "normative" and its application to *Rethinking* in those days is just a measure of how dominant consequentialism and its attendant conceptions of value and normativity were. The thought, such as it was, was that value judgments are non-cognitive, and therefore they can only be expressions of emotion. According to philosophers such as A. J. Ayer, R. M. Hare, and Charles Stevenson, to say that honesty is good is to say nothing more than "yay honesty." The statement, "honesty is good," could not be true or false, it was thought, because it is not a genuine statement. Likewise, to say that theft is bad could mean no more than "boo theft."³ To this way of thinking, the criminal law's prohibitions on theft, murder, rape, and so on cannot be justified on their own terms. On their own terms, they merely express "value judgments" that are neither factual nor rational, and that can neither justify nor be justified. The justification for the prohibitions on murder, rape, theft, and so on must rest with their consequences—with the deterrence of those offenses, with the satisfaction of having fed our "retributive appetite," with the incapacitation of criminals. The criminal law was seen, on this view, as a means of minimizing future harms and maximizing social welfare, instead of as a rational response to past wrongdoing.⁴ And the prevention of harm by deterrence, social catharsis, and incapacitation was taken to be a matter of fact, not value. Consequentialist accounts of punishment—labeled, variously, as deterrence theories, utilitarian theories, and so on—were, in these terms, not thought of as "normative" at all.

Looking back, one can easily find the passage in the book that gave rise to the view that *Rethinking* was unusually "normative." In Chapter 6, Fletcher makes a distinction between two views of criminal culpability: the descriptive and the normative.⁵ During and after the drafting of the Model Penal Code, prominent theorists such as Glanville Williams⁶ and Jerome Hall⁷ insisted that

3. See Hilary Putnam, *The Empiricist Background*, in *The Collapse of the Fact/Value Dichotomy and Other Essays* 7, 20-21 (Harv. U. Press 2002); Hilary Putnam, *Sen's "Prescriptivist" Beginnings*, in *The Collapse of the Fact/Value Dichotomy and Other Essays* 67, 69-72 (Harv. U. Press 2002).

4. See e.g. Herbert L. Packer, *The Limits of the Criminal Sanction* 38-39 (Stan. U. Press 1968) ("This familiar version of the retributive position, which I shall call the affirmative version, has no useful place in a theory of justification for punishment, because what it expresses is nothing more than dogma, unverifiable and on its face implausible.").

5. Fletcher, *supra* n. 1, at 398-401.

6. Glanville Williams, *Criminal Law: The General Part* 102-03 (2d ed., Stevens & Sons Ltd. 1961).

criminal culpability consists entirely and exclusively of intentions toward the elements of an offense. In Model Penal Code terms, their view was that purpose, knowledge, and recklessness constitute culpability, whereas negligence and such discarded terms as implied malice and depraved mind are not kinds of culpability at all. Fletcher dubbed this the “descriptive” view because this term captured what he took to be the aspiration of these theorists: to confine the jury’s role as much as possible to the finding of facts.⁸ The problem with negligence, implied malice, and depraved mind, under the “descriptive” view, was that those terms are explicitly normative and that their use permits juries to make decisions that properly belong only to the legislature. Fletcher quite naturally dubbed the contrary view—that terms such as negligence could properly be used to frame the culpability question—the “normative” view.

Elsewhere in *Rethinking*, Fletcher made the positive case for the “normative” view of culpability over the “descriptive” view. He argued that the descriptive view could not accommodate criminal negligence, because the question whether one had violated a standard of reasonableness could not be reduced to the question whether a given state of mind was present. And he argued that in defenses such as duress, normative issues such as whether and for how long the defendant should have resisted the pressure to act inevitably involve the jury in normative decisionmaking.⁹

The importance of this analysis in breaking the stranglehold of consequentialism and non-cognitivism on criminal law theory cannot be overstated. The most important book on punishment theory prior to Fletcher’s *Rethinking* was H. L. A. Hart’s *Punishment and Responsibility*,¹⁰ which collected a series of essays that Hart had published in the 1950s and 1960s. In one of the most important of these essays, Hart acknowledged that the excuses were best explained not in consequentialist terms, but in their own terms.

[W]e do not dissociate ourselves from the principle that it is wrong to punish the hopelessly insane or those who act unintentionally, etc., by treating it as something merely embodied in popular *mores* to which concessions must be made sometimes. We condemn legal systems where they disregard this principle; whereas we try to educate people out of their preference for savage penalties even if we might in extreme cases of threatened disorder concede them.¹¹

Remarkably, Hart thought that such small concessions made his approach a “retributivist” theory of punishment.¹² This, too, is a measure of the dominance of

7. Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 Colum. L. Rev. 632 (1963).

8. See Fletcher, *supra* n. 1, at 400.

9. *Id.* at 492-95.

10. H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford U. Press 1968).

11. H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, in *Punishment and Responsibility: Essays in the Philosophy of Law* 1, 21 (Oxford U. Press 1968).

12. See H.L.A. Hart, *Postscript: Responsibility and Retribution*, in *Punishment and Responsibility: Essays in the Philosophy of Law* 210, 233 (Oxford U. Press 1968) (“*A fortiori*, the middle way, which I myself have attempted to tread, between a purely forward-looking scheme of social hygiene and

consequentialism and its attendant assumptions about value and normativity, because Hart's analysis was solidly lodged in the consequentialist mainstream. In the essay from which the quotation above is taken, he advanced the principal defense of consequentialist punishment theory against the classic scapegoating argument.¹³ Elsewhere in the volume collecting his essays, Hart explicitly refused to take the step that Fletcher would take over a decade later: to acknowledge that criminal culpability, or fault, was not "something merely embodied in popular *mores* to which concessions must be made sometimes." Hart insisted that "moral culpability" is not required for a criminal conviction and rather pugnaciously defended strict liability.¹⁴ Culpability in the retributivist's sense of a distinct, affirmative, justifying reason to punish for the sake of proportion between past and future, or in any sense that would connect fault to the justifying purposes of punishment, plays no role in Hart's analysis.¹⁵ Instead, culpability is, in Hart's view, merely a side-constraint on punishment, imposed only as a means of distributing punishment within a punishment system that is justified as a whole by its good consequences, and not at the level of individual cases by desert.¹⁶

II.

When I went to law school in 1981, Hart's was still the dominant theoretical account of the criminal law, and my criminal law professor was even more firmly locked into the consequentialist mindset than Hart had been. My professor might have been aware of Fletcher, but he was far more impressed with the equally novel innovations of law and economics. I learned precious little criminal law that year, a fact reflected in my grade, and I am inclined to think that the sheer uncongeniality of the consequentialist approach was foremost among the reasons for this. My recollections of those classes are not only few and dim, but also presumably select and largely fictional. But I will insist that I found most of what I was told about criminal law simply implausible. The rich moral terrain of crime and punishment was, day after day, reduced to a barren calculus of incentives. The criminal jury was treated as a fact-finder and rule-applier, a bureaucratic

theories which treat retribution as a general justifying aim, has itself been regarded as a form of retributive theory.").

13. Hart, *supra* n. 11, at 5-11.

14. Hart writes:

Strict liability is held in some considerable odium by most academic writers and by many judges. But why? What is so precious in the normal requirements of *mens rea* and how does this normal requirement fit together with our general aims in punishing? It is at this point that scepticism about the old idea that the primary measure of punishment is the wickedness of the criminal act leads to further scepticism about the importance of a responsible act as a condition of punishment. . . . [T]he case is altered if we no longer justify punishment [as retribution or denunciation]; if we think of it as justified by its social aims and effects in protecting society and reforming the criminal

H.L.A. Hart, *Punishment and the Elimination of Responsibility*, in *Punishment and Responsibility: Essays in the Philosophy of Law* 158, 176-77 (Oxford U. Press 1968).

15. H.L.A. Hart, *Legal Responsibility and Excuses*, in *Punishment and Responsibility: Essays in the Philosophy of Law* 28, 35-40 (Oxford U. Press 1968).

16. See Hart, *supra* n. 11, at 5-11.

agent of the legislature, which was in turn treated as an unwitting instrument of utility maximization. My resistance to these lessons was adamant, and I am convinced that, as little as I actually knew of its substance, Fletcher's *Rethinking* stiffened that resistance. I could not articulate what I disliked about my professor's teaching, but I knew it was not the only flavor available and that I did not have to swallow it.

I discovered my interest in criminal law seven or eight years later, during a relatively late-career clerkship on the Washington Supreme Court. In the clerkship and then on a county prosecutor's appellate team, I learned substantive criminal doctrine on the job. After publishing one purely doctrinal article, on lesser included offenses,¹⁷ I found myself one day with an inkling of a thesis that would require much more in the way of theoretical scaffolding. At that point, I read *Rethinking* from cover to cover for the first time.

In the article that eventually resulted from this work, I disagreed with Fletcher on a number of points, mostly having to do with the Rawlsian deontology in *Rethinking*. In addition to viewing the criminal law as a matter of rational duties and desert, Fletcher emphasized the value of equality and a concern over the fair terms of cooperation in society.¹⁸ I argued that this was simply the wrong perspective from which to theorize about the criminal law. It still retained too much of the dominant consequentialism of Hart and the legal economists in its assumption that the legislature and the drafting of criminal codes were the main points of interest and of reference in thinking about criminal law. To the contrary, I argued, our usual point of reference is the adjudication of the individual case. Furthermore, a Rawlsian emphasis on equality and fairness is misleading. A flat rejection of certain ends and life-plans as unworthy is inherent in the criminal law, and this is not a prominent theme, to say the least, in either Hart or Rawls. A more natural perspective on the subject, stressing the evaluation of actors' ends in the adjudication of criminal cases, is more accessible from an Aristotelian than from a Kantian or Rawlsian approach—or so I argued.¹⁹

Not long after the article was published, I received a friendly letter from George congratulating me on it and inviting me to give him a call. I was practicing law at that point, doing mostly criminal defense work in Tacoma, Washington, and people such as George were still, to me, names on spines of books. It was exciting, to say the least, to have someone whom I'd known about, read, and admired for years treat me as a peer. I did call George and we talked over my thesis and arguments, and then he asked if I intended to go into legal academics. I did, and he offered his assistance. As it turns out, his assistance proved invaluable. After a very disappointing callback interview at Cardozo Law School, I called George asking for help and advice. He invited me to come and meet him for lunch in San

17. Kyron Huigens, *The Doctrine of Lesser Included Offenses*, 16 U. Puget Sound L. Rev. 185 (1992).

18. See Fletcher, *supra* n. 1, at 774-98 (describing the relative influence of Kantian and utilitarian theory on the justification defense of lesser evils).

19. See Kyron Huigens, *Virtue and Inculcation*, 108 Harv. L. Rev. 1423 (1995).

Francisco. Flights between Seattle-Tacoma and San Francisco are abundant, quick, and cheap, so I did. George and I met for the first time in the lobby of his hotel near the Berkeley campus. We walked around the university and talked for several hours, in spite of the fact that George was recovering from a ski injury and walking was slow and painful for him. Over lunch and coffee, we talked about criminal law, about teaching, about Aristotle, about politics, and about life outside the law. George made some calls after our meeting, and I am convinced they were decisive in my career.

III.

None of this help and advice, of course, was conditioned on my agreeing with Fletcher the scholar. I disagreed with Fletcher over substance from the start, and still disagree with him on many points. Indeed, I find that the point that I once took to be of central importance—Fletcher’s distinction between descriptive and normative conceptions of culpability—is wrong or inadequate in several respects.

There is, first, the fact that “culpability” is ambiguous. In one sense, it means fault as an aspect of wrongdoing—as when the Model Penal Code refers to purpose, knowledge, recklessness, and negligence as “kinds of culpability.” But if I crazily believe that *V* is Lee Harvey Oswald and that I am Jack Ruby, and if I kill *V* because I crazily believe he should die for killing President Kennedy, then we are also likely to hear that I should not be punished because I am not culpable—even though I have a purpose to kill an entity that I know to be a human being. So used, “culpable” refers to fair candidacy for punishment under the principles of responsibility. In Chapter 6 of *Rethinking*, Fletcher was (or should have been) concerned only with fault, and not with fair candidacy at all.

This highlights the second shortcoming of Fletcher’s account, which is that he gave too much credit to the Code drafters’ aspiration to a “descriptive” version of criminal fault. He failed to see or to say that this was always a thoroughly misconceived aspiration. Fault’s being an aspect of wrongdoing makes fault inherently normative.²⁰ Fletcher suggested that there is a difference between purpose, knowledge, and recklessness on one hand, and negligence on the other—the former being descriptive kinds of fault and the latter being normative. But the former fault criteria are just as normative as negligence. To have a purpose to keep an infant alive by nursing it is not to exhibit criminal fault. A purpose is only a kind of fault when the purpose is to do an act or to bring about a result that is

20. There are two senses in which fault inquiries are normative, only one of which is in dispute here. As a requirement of proof in criminal cases and a condition of legal liability, fault is normative in what is called a secondary sense. It is a limitation on courts and other legal decisionmakers. This dimension of fault’s normativity is not in dispute. What is in dispute is fault’s relationship to primary norms: the norms that govern all people in everyday life, such as the prohibitions on murder, rape, theft, and so on. Is a showing of fault only a side constraint on punishment, or is it, like the violation of the rest of the prohibition, an affirmative, justifying reason to punish such that not to punish would be unjust? See Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 Wm. & Mary L. Rev. 943, 974-80 (2000) (describing the primary normative dimension of fault). My arguments here concern the primary normative dimension of fault, and not the secondary normative dimension of fault.

part of some criminal wrongdoing.²¹ Similarly, one acts knowingly with respect to an element of an offense when one is not aware of it at all—if, that is, circumstances indicate that one is aware of a “high probability”²² that the element exists. The question of “how high is too high?” is left to the jury to determine. Knowledge as a kind of fault in these cases is, then, a normative inquiry. But this is true in most other cases of knowledge too, because the jury must determine whether a given result was “practically certain”²³ to occur. And one acts recklessly when one “disregards a substantial and unjustifiable risk.”²⁴ This is a normative determination for the jury to make, and not a question of fact about the defendant’s state of mind. Suppose I demonstrate my prowess at karate to my friends by aiming a kick at an infant’s head, intending to pull up just short of contact. If I wind up killing the child, I can hardly claim that I was not reckless on the ground that I personally did not consider the risk to be substantial or unjustifiable.

There is an important distinction to be drawn in the matter of criminal fault, but it is not a distinction between descriptive and normative fault criteria. The important distinction is one between intentional and non-intentional fault criteria. Purpose, knowledge, and recklessness are intentional states of mind, in that each consists of a kind of attention paid to an object: some bit of conduct, some result, some circumstance, or a risk that one of these will occur. Negligence is not an intentional state of mind; it is the absence of an intentional state of mind that one ought to have had—some consciousness of a risk of some conduct, result, or circumstance that a reasonable person would have had.

When applied to the fault criteria of a criminal code, the intentional versus non-intentional distinction is no more absolute than the descriptive versus normative distinction. When used as fault criteria, purpose, knowledge, and recklessness have non-intentional aspects. Furthermore, the non-intentional aspects of these fault criteria are roughly the same aspects that I have already picked out as “normative” when I argued above that the descriptive versus normative distinction was not airtight when applied to our familiar fault criteria. What, then, is the advantage to drawing my distinction instead of the one that Fletcher drew? My distinction allows us to place the various fault criteria along a continuum, and to treat them all as valid when properly deployed—instead of seeing them, as Fletcher’s distinction suggests, as different in kind from one another, and as mostly misconceived.

As an illustration of this difference, consider our respective treatments of the notorious *Regina v. Morgan*²⁵ case. Morgan, an officer in the British Army, invited a group of his junior officers to have sex with his wife. He told them to

21. Model Penal Code § 2.02(2)(a) (ALI 1985) (defining purpose “with respect to a material element of an offense”).

22. *Id.* § 2.02(7).

23. *Id.* § 2.02(2)(b)(ii).

24. *Id.* § 2.02(2)(c).

25. 1976 App. Cas. 182.

ignore any objections from her, because his wife enjoyed rape fantasies and wanted to have sex with a number of men at one time. Mrs. Morgan did object when the officers raped her, and the officers duly ignored her. On trial for rape, they requested an instruction to the effect that their good faith belief in Mrs. Morgan's consent was a ground for acquittal. If the offense of rape requires an intentional state of mind regarding non-consent, then their genuine good faith belief in her consent precluded their having any such state of mind. The trial court refused to give this instruction, the *Morgan* defendants were convicted, and the Law Lords affirmed the conviction. But the appellate court affirmed the conviction only under a harmless error rule. The trial court did err in refusing to give the instruction, the Lords said, because rape requires an awareness of at least the risk of non-consent. In American terms, the *Morgan* defendants were entitled to their instruction because the law requires at least recklessness regarding non-consent to sexual intercourse, in accordance with the principle of Model Penal Code section 2.02(3).

Clearly, something has gone wrong here. If the *Morgan* defendants raped Mrs. Morgan out of callousness, immaturity, self-absorption, and stupidity, then the law grants them an acquittal *because* they were callous, immature, self-absorbed, and stupid.²⁶ The Law Lords in *Morgan* confronted an apparently insoluble dilemma. They were simultaneously committed to the principle of intentional states (or "descriptive") fault and to the notion that such morally bad men should not escape criminal liability. However, the former commitment made it impossible to keep the latter. The Law Lords jumped between the horns of the dilemma by disposing of the case under a harmless error rule. As I will explain below, I think the dilemma should have been resolved by grabbing one of the horns—by rejecting the intentional states conception of criminal fault. Fletcher solved the *Morgan* problem in *Rethinking* by defining it out of existence. Of the three solutions, it seems to me, his is the least plausible.

Fletcher's solution to the problem presented by the *Morgan* case has three elements. First, he contends that neither justification, proof of justification, nor mistake about justification pertains to the prohibitory norms of the criminal law. Second, he contends that a mistake about a justification results in an excuse. Third, he contends that the matter of non-consent in rape is a matter of justification independent of the offense of rape. With these premises in place, Fletcher can argue that the unreasonable mistake of the *Morgan* defendants does not negate the required recklessness, knowledge, or purpose regarding non-consent. Because non-consent is not an element of the offense, no such proof of fault regarding non-consent is required. The unreasonableness of the *Morgan*

26. Now, this could be denied: on one interpretation, the intentional states approach to fault grants an acquittal for mistake because of the erroneous belief as such, and not because of the reasons for the belief. But that view takes intentional states of mind and fault to be identical, which is an extreme and implausible position. Intentionality and criminal fault are two different things, and some kind of argument is needed to link them. More plausibly, mistake doctrine grants an acquittal, not because of the erroneous belief as such, but because of the reasons behind the erroneous belief.

defendants' mistake regarding non-consent is enough to deny them an acquittal, because an unreasonable mistake cannot excuse.

All three of Fletcher's premises are wrong. First, a justification is not independent of the prohibitory norms expressed in offense definitions. Offense definitions are necessarily incomplete in many instances, and the justification defense is the rest of the story, so to speak, about the prohibition. It is not wrong to purposely kill a human being; it is wrong to purposely kill a human being without a sufficiently good reason to do so. It is in the nature of a justification, as Fletcher well knows, to show us that an apparent wrong is not a wrong at all, but a right action. We might express the entire prohibition in the offense definition, but for a particular practical concern: it is impossible to prove a negative unless it is very narrowly framed. Even if I had access to the world's intelligence capabilities, I could not prove that there never were any weapons of mass destruction in Iraq; but I can prove that I am not now wearing a hat. If we asked the prosecution to prove beyond a reasonable doubt that the defendant purposely killed a human being without a sufficiently good reason to do so, then the prosecution would face the practically impossible task of excluding every conceivable reason the defendant might have had to kill the victim. But if we require the defendant to raise an argument of justification with sufficient evidence, then the question is narrowed to manageable proportions, even if we put the ultimate burden to prove non-justification on the prosecution—as we should and usually do, precisely because justification is as much a part of the prohibition as the offense definition.

This point goes a long way toward explaining why Fletcher is wrong about his second premise: the idea that mistaken justification results in an excuse. If a justification is part of the prohibition, and if the prosecution has the burden of persuasion on that part of the prohibition, then the prosecution has a burden to show that at least one element of the justification is absent. That is, in a case of self-defense, it must persuade the jury that there was no imminent threat, *or* no necessity for the use of deadly force, *or* no inability to retreat, and so on. But if an absent justifying circumstance (“AJC”) is part of the prosecution's proof, then so is fault regarding AJC. Just as the prosecution must prove fault with regard to each and every material element of the offense definition, it must prove fault with regard to the rest of the prohibition, when the defendant has adequately raised that question. I will have more to say below about the logic of this kind of defense, but notice for now that the requirement that the prosecution prove fault regarding AJC turns a claim of mistaken justification into an ordinary mistake of fact claim. Just as my good faith mistake about whether the victim is a human being might negate my fault regarding that element of the offense of murder, so might my mistake about whether the victim is about to kill me negate my fault regarding the absence of imminent threat or the absence of necessity. And this is hardly surprising. If the justification is part of the prohibition, then the mistake of fact analysis should be the same whether my mistake of fact is one about an element of the offense or a mistake about an absent element of the defense.

It is also worth noting how Fletcher's terminology leads him astray on his second point. Because he does not distinguish between fault and fair candidacy as two different kinds of "culpability," he tends to elide the difference between the absence of fault and genuine excuses. To the extent Fletcher recognizes that it is fault that is missing in cases of mistaken justification, he can nevertheless persist in calling the resulting defense an "excuse." If both the absence of fault and non-excuse count as "culpability," then the lack of "culpability" of one who makes a mistake about a justification can be called an excuse in spite of its having nothing in common, conceptually, with such defenses as insanity and duress. The former kind of defense pertains to the wrongdoing of which the defendant is accused, whereas the latter kind of defense can concede wrongdoing in all its aspects because it claims instead that the defendant is not a fair candidate for the application of the criminal law at all. In one or more respects, the conditions of responsibility do not attach to him or his circumstances.

These two points are sufficient to undermine Fletcher's analysis of *Morgan*. Even if the *Morgan* defendants were raising a claim of mistaken justification when they claimed mistake regarding non-consent, their unreasonable mistake would still acquit them—leaving the dilemma of the case intact. If as a general rule we require proof of an intentional state of mind—at least recklessness—regarding every material element of an offense, then we must require proof of at least recklessness regarding the absence of one element of the justification. If belief in consent is a justification, then that justification holds regardless of whether the belief is reasonable or not, because it logically rules out recklessness. If it never occurred to the *Morgan* defendants that they were not justified by the victim's consent, then they were innocent—not because they were actually justified, but because they were not at fault in being unjustified, i.e., in violating the prohibition on rape.²⁷

Fletcher's third point is simply wrong on its face: non-consent is part of the definition of rape, not a justification for violent sexual intercourse. It is difficult, because it is very artificial, to say what the "principal rationale for rape" is at any given time. But to speak in that vein, the principal rationale of rape law has changed over the centuries, from the protection of property, to the protection of chastity, to the present understanding of the prohibition on rape as a protection of personal and sexual autonomy. The only current competitor for the title, other than the protection of autonomy, would be the protection of the victim from violence. Rape is sometimes said to be a crime of violence, not a crime of sex, and the use or threatened use of force is, historically, an essential element of rape. There is a sense in which these two modern rationales really do compete, because the element of use of force is often at odds with the element of non-consent. A woman can be coerced into having sex by any number of means short of the use or

27. This is in fact the position of the Model Penal Code, because it is the only position that is consistent with its commitment to intentional states fault criteria. Cf. Model Penal Code § 3.04(2) (authorizing the justification of self defense based only on a "belief" without reference to the reasonableness of the belief).

threatened use of force—by a threat to fire her from a good job, by other economic or social blackmail, by trickery, and so on—but if force is a necessary element of rape, then the non-consent reflected in these tactics is a moot point. So we might take the tension between non-consent and the use or threatened use of force as a proxy for the contest for “principal rationale of rape,” between protection of autonomy and protection from violence, respectively. And from this perspective, the protection of autonomy is clearly foremost in modern legislatures’ and courts’ drafting and interpretation of rape law.

For example, in California’s rape statute, the force element is completely subservient to the concept of non-consent: force is treated as a non-necessary part of the definition of non-consent, and the absence of force cannot render the victim’s non-consent a moot point.²⁸ If the protection of autonomy is the principal rationale for the rape prohibition, non-consent can hardly be said to be exogenous to the definition of rape. Consent is not a justification for rape; where there is consent there is no rape at all. Two people might consent to engage in violent sex. This will not be rape if non-consent is an element of the offense, regardless of whether force is also an element. A powerful man might trick or intimidate a woman into having sex without using force. This will be rape if non-consent is an element of the offense, provided that force is not an element. Given that the inclusion of non-consent as an element of rape and the exclusion of force simultaneously respects and protects personal and sexual autonomy, it seems that autonomy, rather than protection from violence, meets the apparent current understanding of the offense of rape. It is hard to see, from this perspective, why we should consider consent a justification for rape instead of viewing non-consent as an element of the crime.

Furthermore, a defense of consent does not place an impossible burden of proving a negative on the prosecution. The supposed impossibility of proving a negative is not a logical problem, but a practical problem. Proving a negative is

28. See Cal. Penal Code Ann. § 261 (West 1999). In California, consent is defined as “positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily . . .” *Id.* § 261.6. The extent to which this definition of consent is dependent on the notion of force becomes clear when one reads the related provisions that give meaning to the terms “free will” and “freely and voluntarily” in this context. Sexual intercourse is rape in California if, *inter alia*, “it is accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury . . .” *Id.* § 261(a)(2). Duress, in turn, is defined as:

[A] direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress.

Id. § 261(b). An alternative definition of rape further provides that sexual intercourse is rape:

Where the act is accomplished against the victim’s will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this paragraph, “threatening to retaliate” means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.

Id. § 261(a)(6). Note that under these definitions the difficult cases cited in the text can indeed be prosecuted and punished as rape.

more or less difficult depending on the question and its context. I can prove that I am not an elderly Finnish woman; I cannot prove that I have never unwittingly eaten something disgusting. Unlike the absence of all possible warrants for taking the life of another human being, the question of non-consent to sex is *not* practically impossible for the prosecution to prove. There will be disputes of fact between defendant and victim, and the manifestations of non-consent are numerous, but the prosecution must produce only one plausible manifestation of non-consent in order to make its case. There is no practical reason, then, to treat consent as a justification defense.

Fletcher's attempt to define away the *Morgan* dilemma fails, because none of his three premises withstands scrutiny. For present purposes, it is the failure of the first two that is most important. Fletcher's arguments about justification's relationship to offense definition and his claim that mistaken justification results in an excuse represent a larger failure to understand the nature of criminal fault. This mistake can be seen as a result of Fletcher's failure to dig deeper into the nature of "normative culpability." If "culpability" is "normative," it is normative in two distinct ways: fault as an aspect of wrongdoing is an entirely different question from whether one is a fair candidate for the application of the criminal law at all. Fault is an aspect of wrongdoing and, as such, it is always normative: "descriptive" fault criteria do not—because they cannot—exist. Unless one understands the nature of fault in ways that Fletcher's categories obscure, it is impossible to explain the relevance of mistaken beliefs to the commission of crime. Our difficulties in defining the fault of rape are particularly acute, and the categories of "descriptive culpability" and "normative culpability" are positively counterproductive in any attempt to overcome those difficulties.

My solution to the problem of the *Morgan* case takes it to reflect the choices we make between intentional and non-intentional fault criteria in the definition of offenses. The paradox of *Morgan* arises only because the Law Lords (and the Model Penal Code) insisted on proof of an intentional state of mind—consciousness of a risk—with regard to the element of non-consent. There are at least three alternatives to this intentional states approach to proof of fault regarding non-consent in rape. One is not to require any formal proof of fault at all: to make rape a crime of strict liability where non-consent is concerned. We can achieve this rule if we refuse to accept even a reasonable mistake about non-consent as a defense, as some courts have done.²⁹ The second possibility is to require proof only of negligence, a non-intentional kind of fault, regarding non-consent. Most jurisdictions have adopted this approach under the guise of requiring a mistake about non-consent to be reasonable.³⁰ The third possibility is to use a different kind of non-intentional fault criterion, such as extreme indifference, that turns not on the reasonableness of the mistake, but instead on

29. See e.g. *State v. Reed*, 479 A.2d 1291, 1295-96 (Me. 1984); *Cmmw. v. Ascolillo*, 541 N.E.2d 570, 575 (Mass. 1989).

30. See e.g. *People v. Mayberry*, 542 P.2d 1337, 1345 (Cal. 1975) (en banc); *State v. Oliver*, 627 A.2d 144, 152 (N.J. 1993).

the defendant's attitude toward non-consent.³¹ This set of alternatives can be seen as stretching along a continuum of fault conceptions: from no formal proof of fault; to proof of an attitude indicative of fault; to a flawed course of practical reasoning indicative of fault; to proof of an intentional state of mind that is indicative of fault. Only the last option is an intentional state of mind fault criterion; the others are different versions of non-intentional fault.

What point along this continuum is the "right" point? As always, the question is more interesting than the answer. If one is concerned that wide jury discretion threatens the rule of law, then a rule about intentional states will be preferred. But the implausibility of an intentional states fault criterion for non-consent in rape, and the abundance of plausible non-intentional criteria, tells us that the question has more dimensions than this. The choice of the appropriate point on the continuum in the definition of each fault element of a criminal offense is determined with an eye toward a value in the criminal law that is in tension with the value of legality. This competing value is fine-grainedness, defined as a low level of under- and over-inclusiveness in our rules of criminal liability, relative to a background justification of moral desert; or, as a high degree of congruence between our legal judgments of fault and our moral judgments of fault. If legality is the rule of law as a law of rules, then the pursuit of fine-grainedness requires a relaxation of legality. The pursuit of legality, on the other hand, entails a loss in fine-grainedness and at least the risk of a loss in the credibility and prestige of the criminal justice system. The predominance of non-intentional fault criteria in the definition of rape tells us that we value fine-grainedness in this context. This is hardly surprising. Where the stakes for both the victim and the defendant are so high, the legal system needs to produce morally palatable outcomes and to avoid over- and under-inclusion relative to our background moral judgments about autonomy, sex, and punishment. Mrs. Morgan was raped, because the defendants were at fault regarding her non-consent, and they were at fault for rape because they were callous, immature, self-absorbed, and stupid. We resort to non-intentional fault criteria in rape because unless the law captures compelling moral judgments, such as the one we make in cases such as *Morgan*, the law would lose essential credibility and public support.

The foregoing analysis differs substantially from Fletcher's analysis of mistake regarding non-consent in rape. But, in closing, I want to insist that this analysis would not have been possible without Fletcher's. The larger significance of *Rethinking Criminal Law* rests not with its analysis of such individual issues, but with its philosophical boldness. By 1979, the emotivism and prescriptivism of Ayer and Stevenson had long since ceased to be serious contenders in the field of philosophical ethics. Their demise dates at least to Peter Geach's papers in the 1960s³² in which he pointed out that emotivism doesn't capture some important

31. Cf. Model Penal Code § 210.2(1)(b) (defining murder committed recklessly "under circumstances manifesting extreme indifference to the value of human life").

32. See Peter Geach, *Assertion*, 74 Phil. Rev. 449 (1965); Peter Geach, *Ascriptivism*, 69 Phil. Rev. 221 (1960).

and eminently plausible ethical claims. However, despite their best interdisciplinary efforts, legal academics really are not much better than other people at keeping up with new philosophical arguments or at thinking through philosophical questions for themselves. I know that I am not, and what I recall of the reaction to George's book—to the effect that it was “normative” in a revolutionary way—makes me think that this was true of most legal academics then too. American legal scholars working in the 1970s seem to have just about absorbed the ideas that Ayer, Stephenson, and Hare had advanced in the 1940s; and by the 1990s they might, just possibly, have caught up to the idea that ethical realism actually cannot be dismissed out of hand in the way that they had claimed. In *Rethinking Criminal Law*, George Fletcher was several decades ahead of his contemporaries in this respect. At least one younger criminal law scholar has drawn essential encouragement and support from Fletcher's insight, as well as from his friendship.