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## FLETCHER ON OFFENCES AND DEFENCES

John Gardner\*

### I. FLETCHER'S PUZZLE

Sometimes criminal lawyers use the word “defence” in what Paul Robinson calls a “casual” sense to designate any part of the defendant’s case that, advanced successfully, would suffice to warrant an acquittal.<sup>1</sup> In this casual sense, imaginable defences to a criminal charge include such diverse lines of argument as alibi, denial of mens rea, denial of causation, *autrefois acquit*, self-defence, duress, and diplomatic or executive immunity. Private lawyers also use the word “defence” in this sense: a defence, for private lawyers, is simply the defendant’s reply to the plaintiff’s claim. But in criminal law, unlike private law, there is also a stricter use of the word “defence.” The word in its strict sense designates only those defences in the casual sense that are compatible with the defendant’s conceding that the offence charged was indeed committed. Alibi and denial of mens rea or causation do not count as defences in this strict sense, because to offer these arguments is simply to deny the commission of the offence. On the other hand, self-defence, duress, *autrefois acquit*, and immunity from prosecution do count as defences in the strict sense. To plead self-defence, duress, *autrefois acquit*, or immunity from prosecution is to argue like this: “Suppose I did commit the offence charged—I should still be acquitted.”

Using the word “defence” in this strict sense, as I will use it from now on, yields a neat contrast between offences and defences. Every issue relevant to criminal liability is relevant either under the heading of “offence” or under the heading of “defence.” Criminal lawyers are prone to thinking that the allocation of issues as between these two headings is inconsequential, or at most a matter of classificatory convenience for textbook writers.<sup>2</sup> Others think that the allocation of issues as between the two headings matters procedurally, when we come to discuss the shifting of probative or evidence-adducing burdens as between prosecutor and defendant.<sup>3</sup> In *Rethinking Criminal Law* (“*Rethinking*”),<sup>4</sup> George

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1. Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 Colum. L. Rev. 199, 203 (1982).

2. See e.g. Glanville Williams, *Offences and Defences*, 2 Leg. Stud. 233 (1982).

3. See e.g. Michael S. Moore, *Act and Crime: The Philosophy of Action and Its Implications for Criminal Law* 179 (Clarendon Press 1993).

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

Fletcher famously, and in my view rightly, rejects both of these views. The contrast between offences and defences has little to do with the shifting of any burdens, and nor should it have. On the other hand, the contrast between offences and defences is far from inconsequential, and its consequences extend not only to the organisation of textbooks but also to the moral quality of the criminal law. According to Fletcher,

[t]here are at least four areas of legal dispute where recognizing the distinction could have concrete consequences. First, it is of critical importance in deciding when external facts, standing alone, should have an exculpatory effect. Secondly, it might bear on the analysis of permissible vagueness in legal norms. Thirdly, it might bear on the allocation of power between the legislature and judiciary in the continuing development of the criminal law. And fourthly, it might be of importance in analyzing the exculpatory effect of mistakes.<sup>5</sup>

When he makes these brilliant and original suggestions in *Rethinking*, with which I broadly concur, Fletcher is focusing on just one class of defences, namely justificatory defences. But it seems to me that his suggestions can and should be extended beyond justifications to take in excuses as well. Indeed, his fourth suggestion, as I read it, introduces us to the distinctively excusatory role of reasonable mistakes. Unfortunately, Fletcher and I have different views about which defences count as excuses and why.<sup>6</sup> So while I will have something to say about excuses later on, to begin with I will follow Fletcher in focusing largely on justifications. For completeness I should stress that there are various defences known to the criminal law that are neither justifications nor excuses. There are what Robinson calls “non-exculpatory” defences (such as *autrefois acquit* and diplomatic and executive immunity), which bear on the standing of the court to try the case.<sup>7</sup> And there are some defences (infancy, insanity) that are genuinely exculpatory but which bear on the capacity and necessity to answer for what one did, whether by way of justification or excuse. I doubt whether any of Fletcher’s four suggestions applies these two types of defences. But be that as it may: moral consequences attach to the distinction between offences and defences so long as moral consequences *sometimes* attach to it. Among Fletcher’s finest triumphs in *Rethinking* is the case he makes for thinking that sometimes they do indeed attach (namely, when the defences in question are justificatory).

What makes this even more of a triumph is that Fletcher manages convincingly to attach his four moral consequences to the distinction without ever quite getting to the bottom of the distinction itself. To be sure, he finds many helpful ways of *restating* the distinction (“these are cases in which the inculpatory dimension is overridden by criteria of exculpation,”<sup>8</sup> “grounds of justification represent licenses or permissions to violate the prohibitory norm,”<sup>9</sup> etc.), but these

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5. *Id.* at 555.

6. *See infra* n. 26 and accompanying text.

7. Robinson, *supra* n. 1, at 229-32.

8. Fletcher, *supra* n. 4, at 562.

9. *Id.* at 563.

restatements do not yet explain exactly what is being distinguished and how. What makes the difference between an “offence” issue and a “defence” issue, or an “inculpation” issue and an “exculpation” issue? What determines which issues should be allocated to which category? Fletcher understandably resists the idea that the answer depends on accidents of statutory drafting or judicial whim. He naturally suspects that a distinction on which so much of moral moment turns must itself turn on something of moral moment. But what does it turn on? After much fine-grained deliberation, Fletcher’s answer still seems unsatisfying:

The minimal demand on the definition of an offense is that it reflect a morally coherent norm in a given society at a given time. It is only when the definition corresponds to a norm of this social force that satisfying the definition inculpates the actor. There is nothing inculpatory about driving. Nor is anything incriminating or inculpatory in carrying an object. Adding the element that the object belongs to another makes the act more incriminating; including the element of the owner’s nonconsent brings us closer to a prima facie case of wrongdoing.

This discussion . . . illustrates the general methodology for distinguishing between the prohibitory norm and the countervailing criteria of privilege. The norm must contain a sufficient number of elements to state a coherent moral imperative.<sup>10</sup>

The reference to the mores of a “given society at a given time” must surely be left on one side as a distraction. Social mores may bear on where the line ends up being drawn in a particular legal system, but the question remains: what line is it that social mores, and hence legal systems, are trying to draw? In what way is an inculpation issue really different from an exculpation issue, in social or legal life? In this passage, and throughout his discussion, Fletcher seems to get stuck at this answer: We have to ask when we have arrived at sufficient inculpation, and then the rest will be exculpation. But this helps little when our original question was: what does the distinction between inculpation and exculpation—also known as the distinction between offence and defence—turn on?

## II. RATIONAL CONFLICTS AND REMAINDERS

In an important but too-rarely-cited article, Kenneth Campbell argues that the distinction between offences and (justificatory) defences is ultimately based on the distinction between reasons against doing something and reasons in favour.<sup>11</sup> When someone pleads a justification, she is claiming that the reasons in favour of doing as she did stand undefeated by the reasons against. The reasons against are those that make what she did an offence. They have not gone away. They still make it an offence. But the reasons in favour prevail and make it a justified offence (and hence one of which she should be acquitted).

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10. *Id.* at 567-68.

11. See Kenneth Campbell, *Offence and Defence*, in *Criminal Law and Justice: Essays from the W.G. Hart Workshop, 1986*, at 73 (I.H. Dennis ed., Sweet & Maxwell 1987).

Think about this example, adapted from Campbell's discussion. Consent is sometimes a defence in the criminal law. The offence of assault occasioning actual bodily harm, for example, is committed even when there is consent. Consent merely serves to justify its commission. But sometimes—for example, in the law of rape—absence of consent is instead an element of the offence. The offence of rape is not committed, and hence does not need to be justified, if the sexual intercourse is consented to. Why the difference? Because, says Campbell, there is no general reason not to have sexual intercourse, whereas there is a general reason not to occasion actual bodily harm. Actual bodily harm is per se an unwelcome turn of events, even when consensual; sexual intercourse is not per se an unwelcome turn of events, but becomes one by virtue of being non-consensual. This contrast is captured in the law's treatment of consent under the "defence" heading in assault occasioning actual bodily harm, but under the "offence" heading in rape.

Of course, it is possible for people to disagree about whether there is a general reason not to have sexual intercourse or a general reason not to occasion actual bodily harm. That is not denied. Campbell's only point is that if one has such a disagreement, one is apt also to disagree about whether the issue of consent should be handled under the "offence" or the "defence" heading. Those who think that, in the law of rape, sexual intercourse *tout court* should be regarded as the real offence and consent as a defence had best be able to identify a general reason not to have sexual intercourse, such that one needs a defeating reason in favour before one should engage in it. And likewise those who think that there is no reason not to occasion actual bodily harm, such that one needs no defeating reason to occasion it, had better stand up for the view that consent, in cases of assault occasioning actual bodily harm, belongs not under the "defence" heading but under the "offence" heading.<sup>12</sup>

Central to Campbell's modest proposal is the idea that cases of justified offending are not cases of innocuous action: the offence is still committed and is still, *qua* offence, unwelcome. Its commission, albeit justified, remains regrettable. It would have been better still had there been no occasion to commit it, and hence no need to ask whether its commission was justified or not. This we can call the "remainders thesis": justified action still leaves a remainder of conflicting reasons that were, regrettably, not conformed to. As Campbell spells the thesis out:

The reasons may have been overwhelmingly in favour of performing the action, but as long as the law takes the view that some harm has nevertheless been done it recognises the continuing existence, even in those circumstances, of a *prima facie* reason against. Suppose someone kills a terrorist who is about to detonate a bomb which will certainly kill dozens of people. His action is certainly permissible, and probably more than just that. So long, however, as the law takes the view that the life, even of that terrorist, was something of value then it recognises the existence of some reason against the action, albeit one which was clearly overridden.

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12. Which was indeed the line taken by the minority (Lords Mustill and Slynn) in the famous British sado-masochism case *Brown* [1994] AC 212 (HL).

[But] it can be different in a society with different values. Take the case of outlawry. Someone who kills an outlaw in those societies which recognise such an absence of status requires no defence in the sense in which that is opposed to an offence. His act is simply not within the defining terms of the relevant form of homicide, since these do not extend to victims who are beyond the protection of the law. From the legal point of view there was not even *prima facie* reason against this killing for, from that point of view, this life simply had no value.<sup>13</sup>

The remainder's thesis is captured in Campbell's claim that the law "recognises the *continuing* existence," in the terrorist case, of a *prima facie* reason against killing. To call the reason "*prima facie*" is not to claim that it appears to be there but is exposed as illusory when the terrorist's nefarious plot is exposed. Rather the reason not to kill the terrorist is really there and continues to be there and to exert its force throughout, such that killing the terrorist is regrettable—even though this is a case with a stronger conflicting reason such that killing him is justified.

To see whether Fletcher might help himself to Campbell's modest proposal as a way of explaining the distinction between offences and defences, we need to know—does Fletcher endorse the remainder's thesis? In *Rethinking* there is much to suggest that he does. I already quoted, for example, his reference to justified offences as "*prima facie* cases of wrongdoing." Maybe he uses the expression "*prima facie*" as Campbell does, to refer to a real and continuing reason that is regrettably defeated? I also already quoted Fletcher's remark that "grounds of justification represent licenses or permissions to violate the prohibitory norm." So the prohibitory norm *is* violated, and this, one may think, must surely be regrettable. And yet, continues Fletcher: "A justification is not a conflicting norm imposing a countervailing duty to act."<sup>14</sup> Does he mean only that there is no legal duty to perform justified actions, even to stop Campbell's terrorist? Or does he mean that there is no conflict to be resolved (and hence no remainder)? To add to our doubts: He goes on to label cases of justified action as falling under "exceptions to . . . norms,"<sup>15</sup> and he talks of justified offences as only "nominally" violations.<sup>16</sup> Both of these formulations suggest a rejection of the remainder's thesis. They suggest that when one is justified in committing an offence, one has no more cause for regret than when one commits no offence at all. There is no real reason against doing as one does. In which case, we must read Fletcher as rejecting the remainder's thesis and hence as having no use for Campbell's modest proposal.

### III. FROM REASONS TO NORMS

How are we to interpret Fletcher on the subject of remainders? One thing to notice is that, while Campbell is talking about conflicts of reasons (and rational

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13. Campbell, *supra* n. 11, at 83 (emphasis omitted).

14. Fletcher, *supra* n. 4, at 563-64.

15. *Id.* at 565.

16. *Id.* at 561.

remainders), Fletcher is talking about conflicts of norms (and normative remainders). A norm is not simply a reason. It is a reason with a special structure. The structure depends on what kind of norm it is. For simplicity's sake, I will focus on *mandatory* norms, the norms according to which a certain action is required or prohibited. In the helpful terminology devised by Joseph Raz, mandatory norms are "protected reasons."<sup>17</sup> They are reasons to perform the required act (or not to perform the prohibited act) that also serve as reasons not to act on some or all of the conflicting reasons. Thus, for example, the norm of Italian cooking that prohibits the use of metal implements to chop basil (assuming it is a sound norm) is a reason not to use metal implements to chop basil that is also a reason not to act for the reason that a metal implement is the one closest to hand. And the moral norm that prohibits promise-breaking (assuming it is a sound norm) is a reason not to break promises that is also a reason not to act for the reason that doing so would be cheap and convenient. The structure of the reason means that it punches above its weight. Of course, it still has weight as an ordinary reason for action, but it also has a second dimension of force, which Raz dubs its "exclusionary"<sup>18</sup> force. A mandatory norm is a reason that defeats some conflicting reasons by weight, but defeats others by exclusion. Irrespective of their weight, the excluded reasons are not to be relied upon as reasons for action (and in that sense no longer *count* as reasons).<sup>19</sup>

When the law requires or prohibits a certain action—for example, by creating a new criminal offence—it purports to exclude all conflicting reasons. Legally, upon the creation of a new criminal offence, one has reason not to act on any reason that militates against conformity with the norm (i.e., that militates in favour of committing the offence). It should be stressed that the law is perfectly happy for one to act on any reason at all *in favour of* conformity with the norm. One need not do so because of the legal norm. All the law cares about is conformity, never mind *why* one conforms. But, by the same token, the law is not interested in why one didn't conform. Any reason one gives for nonconformity with the norm falls on deaf ears. At least, this is the position if all the law does is create a criminal offence. Everything changes, however, if the law offers, in addition, a justificatory defence. When it does so, the law selectively opens its ears to some reasons that some defendants may have had for nonconformity with the law's norms. It allows the fact that one was provoked, or threatened, or attacked, for example, to count as a legally admissible reason in favour of nonconformity with the norm. In short, when the law grants a justificatory defence it *unexcludes* some otherwise excluded reasons and allows them once again to punch their weight in an ordinary rational conflict with the law's ordinary (now unprotected) reasons for not offending. At this point, everything depends on the comparative weight of the reasons.

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17. Joseph Raz, *Practical Reason and Norms* 191 (Oxford U. Press 1999).

18. *Id.*

19. Of course, exclusionary reasons may themselves sometimes be defeated in what Raz calls "second-order" conflicts. *Id.* at 47.

Elsewhere I have tried to capture this complex structure by describing justificatory defences in the criminal law as “cancelling permissions.”<sup>20</sup> Some permissions (sometimes known as “strong permissions”) are norms in their own right.<sup>21</sup> But a cancelling permission is not. When the law grants a cancelling permission by creating a justification defence it does not set up a second (permissive) norm that conflicts with the (mandatory) norm created by the law’s specification of the offence. Rather, it creates a gap in the mandatory force of the mandatory norm, a gap through which certain conflicting reasons are readmitted as legally acceptable reasons for acting. Across a certain range of cases the mandatory force of the norm is cancelled. And yet it would be misleading to say that the norm itself is cancelled. For it still exerts its ordinary rational pull as a reason not to commit the offence. All it loses is its secondary protective layer. In this sense, the case of a justification defence in criminal law falls somewhere between the case of an ordinary justification and an exception to the norm. It is like an ordinary justification in that there is still a rational conflict exactly as Campbell describes, with a rational remainder. There is still something to regret in the fact that one commits the offence; the violation is not just nominal. On the other hand, a justification defence in criminal law is like an exception to the norm in that the mandatory force of the norm is, strictly speaking, in abeyance where the defence applies. So there is a normative remainder in one sense, and not in another. The law does not simply cancel the norm (create an exception to it). But the law does cancel (create an exception to) the mandatory part of the norm’s normative force.

Here we have a possible explanation for Fletcher’s apparent equivocations about the remainders thesis. Fletcher is half-right to call justification defences “exceptions,” but also half-right to think that actions falling under them “violate the prohibitory norm.” The truth, as we have seen, is somewhere between the two. And Fletcher is certainly right to think that “[a] justification is not a conflicting norm imposing a countervailing duty to act.” Not only is there no countervailing duty to act, there is no conflicting norm full stop. A justification defence is conferred not by another norm but by the carving out (from the original norm that creates the offence) of permissive space for people to act on certain conflicting reasons. So while there is no conflict of norms, there is a conflict of reasons. If Fletcher agrees, then he can after all help himself to Campbell’s modest proposal for the explanation of the offence/defence contrast: if there is no conflict of reasons, and hence no rational remainder, then what we are looking at is not a defence but a denial of the offence.

In sketching the “cancelling permissions” view of justificatory defences, I tried to bring out not only how it harmonizes with Campbell’s proposal, but also what it has to recommend itself to Fletcher. Recall Fletcher’s first suggested

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20. John Gardner, *Justifications and Reasons*, in *Harm and Culpability* 103, 117 (A.P. Simester & A.T.H. Smith eds., Clarendon Press 1996).

21. See e.g. Georg Henrik von Wright, *Norm and Action: A Logical Enquiry* 85-89 (Routledge & Kegan Paul 1963).

consequence of the offence/defence contrast: “it is of critical importance in deciding when external facts, standing alone, should have an exculpatory effect.” What Fletcher means is that the state of the world alone, quite apart from the defendant’s responsiveness to it, can suffice to negate an offence. But a justificatory defence is available only where the defendant is responsive to the state of the world.<sup>22</sup> The “cancelling permissions” view of justificatory defences explains why this should be so. As I mentioned, when it comes to the legal norm that creates an offence, all the law cares about is conformity, never mind *why* one conforms. It is no skin off the law’s nose whether one acts for legal, moral, or prudential reasons, or indeed no reasons at all, so long as one does not break the law. But when it comes to the conferring of a justificatory defence, things are different. What the conferring of the defence does is unexclude certain conflicting reasons for action, such that these reasons (unlike others) are now available to be relied upon as reasons in favour of violating the norm. To avail oneself of the defence, one relies upon the reasons. It is no good merely to act in the way that someone relying upon the reason would act. Excluding a reason makes it a defeated reason, i.e., a reason for which one should not act. Unexcluding it merely reverses the process. It changes what one should do, on balance, only by changing what reasons one has available to act on. If one does not act on them, then one has no justification.<sup>23</sup>

#### IV. WRONGS AND FAULTS

Fletcher offers one further reflection on the possible import of the offence/defence contrast, which I have not yet mentioned:

[L]et us think of inculpatory conduct as the violation of a prohibitory norm. For examples we need only think of the basic commandments of Western society. Thou shalt not kill, thou shalt not steal – these are the basic prohibitions on which there is consensus even in morally relativistic, post-religious societies. Yet these simple imperatives that we invoke in blaming others point merely to paradigmatic instances of wrongdoing. In order to make out a complete case of responsible wrongdoing, whether in law or in moral discourse, the simple imperatives must be supplemented in exceptional cases. The supplementary criteria are grounds of justification and excuse.<sup>24</sup>

There is more than one way to interpret this passage. On the interpretation I will favour and discuss, Fletcher is saying that *prima facie* wrongs are by default “strict” wrongs, i.e., they do not include a requirement of fault. It is only when we come to assess justifications and excuses that we are assessing fault. In suggesting this interpretation, I don’t mean to attribute to Fletcher the view that *prima facie* wrongs are by default wrongs without *mens rea*. Clearly that is not his view. One of Fletcher’s examples (“thou shalt not kill”) is of a prohibitory norm that can be

22. To see the difference at work in English law, compare *Regina v. Dadson*, 4 Cox C.C. 358 (Crim. App. 1850), with *Regina v. Deller*, 36 Crim. App. R. 184 (1952).

23. I have explored the point in much greater detail in Gardner, *supra* n. 20.

24. Fletcher, *supra* n. 4, at 562.

violated entirely accidentally, but the other (“thou shalt not steal”) is of a prohibitory norm that can only be violated intentionally (i.e., with *mens rea*). That, however, is irrelevant to the interpretation of Fletcher’s passage that I am advancing. The point I am emphasising is that either of these prohibitory norms can be violated without fault on the part of the violator. That is because neither norm makes space, as it stands, for any assessment of the violator’s reasons for doing as she does. And that, Fletcher may be interpreted as saying, is where justifications and excuses come into play: they invite us to assess the violator’s reasons for violating the norm, to see whether she is at fault.

If this is Fletcher’s view, I agree with it completely. I have argued at length elsewhere that the ordinary or basic kind of wrongdoing is “strict” wrongdoing, e.g., hurting people, upsetting people (for whatever reason).<sup>25</sup> I have also argued that excuses, like justifications, are defences to wrongdoing that call for an assessment of the wrongdoer’s reasons.<sup>26</sup> And I also believe, although I have never argued, that someone is at fault in committing a wrong if and only if he commits it without justification or excuse. But all of this adds up to yield a puzzle, which is also a puzzle for Fletcher as I have just interpreted him.

Fletcher has it that only “paradigmatic” wrongs are captured in such “simple imperatives” as “thou shalt not kill.” I say similarly that such simple wrongs are just the “ordinary” or “basic” type of wrongs. On both views, however, there can be more complex and less ordinary wrongs that are partly constituted by the fault of the wrongdoer. Classic examples in the law include wrongs partly constituted by the recklessness or negligence of the wrongdoer. These can be called “fault-anticipating” wrongs. The fault of the wrongdoer—that she lacks (certain) justifications and excuses—is a necessary condition of her violating the prohibitory norm. At least some justifications and excuses are anticipated in the prohibitory norm. But how can this be? For surely the whole point about justifications and excuses, the point that Fletcher emphasises time and again and I have endorsed from the outset of this discussion, is that justifications and excuses are defences in the strict sense. To offer one is not to deny that one violated the norm. It is to say: “I may have committed the wrong but . . . .” With fault-anticipating wrongs, however, this logic seems to be defied. Where these wrongs are concerned, a justification or excuse seems also to be a denial of the wrong; a defence seems also to be denial of the offence. How is this possible? How can there possibly be any fault-anticipating wrongs?

To answer this question, it is not enough to draw attention to the complications that I added to Campbell’s story in Part III above. True, mandatory norms often take the shape they do in order to reflect not only the reasons in favour of doing what they make mandatory, but also at least some of the reasons

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25. See John Gardner, *Obligations and Outcomes in the Law of Torts*, in *Relating to Responsibility: Essays for Tony Honoré on His Eightieth Birthday* 111 (Peter Cane & John Gardner eds., Hart Publ. 2001).

26. See John Gardner, *The Gist of Excuses*, 1 *Buff. Crim. L. Rev.* 575 (1998). This is where Fletcher and I disagree about excuses. My explanation of excuses excludes insanity whereas his (hesitantly) includes it. See Fletcher, *supra* n. 4, at 835-46.

against. That is the most obvious explanation of why some or all of the reasons against doing what the norm makes mandatory are excluded from consideration by the norm. They have already been taken into account and given their full weight in the original specification of the norm, and to let them in again as defences would mean counting them twice. Sometimes, of course, they are given their full weight in the specification of the norm without showing up in the norm's final shape (e.g., because they were not weighty enough). On other occasions they show up in the norm's final shape as simple exceptions. At common law, for example, murder can be committed only under "the Queen's peace." Those who kill enemy combatants in wartime need not argue that they did so for the defence of the realm (or for other lawful reasons) because the offence of murder does not extend to their actions in the first place. Their argument has already been anticipated in the shape of the prohibitory norm, by way of ordinary exception. There being no violation, no defence is needed. There is no logical puzzle about this.

Fault-anticipating wrongs are different. They are logically puzzling. This is because they do not merely obviate the need for a defence, or otherwise take account of its force, in the shape they give to the offence. Rather they make the commission of the offence depend on whether the defendant actually has, or lacks, the relevant defence. To deny having committed the offence, one must assert the acceptability of one's reasons for having done as one did, either by justifying it or excusing it. The logical puzzle can be brought out more vividly, perhaps, by putting it in the following terms. If the prohibitory norm has not been violated, what is there to justify or excuse? But if there is nothing to justify or excuse, how can the absence of a justification or excuse bear on whether the norm has been violated?

The correct way to dissolve the puzzle is to recognise that these fault-anticipating wrongs are in a way parasitic or secondary wrongs. One commits them only if one lacks a justification or excuse for something *else* one does as part and parcel of committing them. In some cases the "something else" is not the violation of a mandatory norm at all, but merely the failure to conform to an ordinary reason. One has a weighty reason not to take one's children mountaineering, for instance, but one's only duty is not to do so recklessly, or not to do so negligently. What is prohibited by the prohibitory norm is not conforming to the reason without (certain) justifications or excuses. In other cases the "something else" is the commission of another, simpler wrong. One commits a wrong by, say, spreading gossip, but a different and further wrong by spreading gossip maliciously or dishonestly. What is prohibited by the prohibitory norm is violation of another prohibitory norm for which one lacks (certain) justifications or excuses.

In cases of both of these types—which frequently arise in the law as well as in morality—one can agree that a certain argument is a defence while insisting that it is also a denial of the offence. That is because it is a defence to a *different* offence from the one that is denied. The offence that is denied is the one that is

constituted by an indefensible or inadequately defended commission of the offence that is not denied. This shows why it is natural to think (as I think, and I like to think Fletcher thinks) that wrongs of the ordinary or basic type are “strict” wrongs, wrongs of the type captured in “thou shalt not kill.” Wrongs that are committed only by those who are at fault are parasitic on such simple wrongs as these. They are further wrongs that one commits by committing simpler “strict” wrongs without (certain) justifications or excuses.

Those who think that wrongs committed with fault are the ordinary or basic type, and that “strict” wrongs are special or odd, need to think again. They need to learn from *Rethinking Criminal Law*. They need to grasp, in particular, the full significance of the distinction between offence and defence. For that distinction, technical and legalistic though it may sound, turns out to be the key to understanding the relationship between wrongdoing and fault—not only in law, but in morality as well.

