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“RETHINKING” THE UNIVERSAL STRUCTURE OF CRIMINAL LAW

Francisco Muñoz Conde*

I. BACKGROUND REMARKS

The common law system, applied in the countries formerly or still associated with the British crown, is virtually unknown in the jurisprudential world of the Continental or civil law. This is due, no doubt, to the particularities of the common law system and the distinguishing features of the continental European legal culture, and also to the common law method of thinking. The particularities of civil law derived, in the nineteenth century, from adoption of the Code Napoleon and, in the twentieth, from the influence of the German doctrinal system—an abstract set of categories that lends itself to application to any system of criminal law regardless of its legislative foundations. Nonetheless, the system of the common law has exercised much influence in other continental European legal cultures that are likewise based on different premises and methods.

There is no doubt that knowledge of the common law system is progressively becoming more important. The influence of this system—particularly as developed in the United States—is felt widely in the fields of procedure as well as commercial and constitutional law. The same influence will eventually reach the field of criminal law. Yet it is obvious that the common law is a system that is little inclined to theoretical speculation. Its primary focus is on the solution of particular cases (case law). But rather than seeing this attribute as a defect, we should consider it, for certain purposes, as an advantage. Once decided, the cases live on in the thinking and in the opinions of judges, thus establishing themselves as “precedents.” A system of this sort is not likely to be formulated in abstract principles; but paradoxically, it has enormous influence on judicial thinking and on students who learn the law by studying these precedents.

At the same time, the common law should become more amenable to the structural theories and conceptual categories of Continental thinking—at least so far as these are more refined and sophisticated than the concepts used in the common law. A minimum of systematic elaboration is necessary in any modern legal system in order to reduce the complexity and facilitate its mastery. This task could be rendered possible only by identifying basic concepts of criminal law that

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would enable the development of a universally applicable system of thinking. The merit of the doctrinal system developed in Germany and applied in other countries is that it in fact exhibits a set of categories that might apply in any legal system.

The question of immediate practical importance is to what extent must universal categories and principles accommodate the local details of legislation and case law. The answer to this question must be contextualized in our present situation—one which emphasizes internationalization and globalization of legal thinking. One way to proceed is to develop a structure of basic distinctions and concepts that would accommodate the tensions felt in all democratic legal systems. A tentative list of these distinctions would include those between substantive law and procedural norms, between acts and omissions, between caused and fortuitous events, between act and actor, between justification and excuse, between attempts and consummated offenses, and between perpetration and complicity. These distinctions represent a set of polar contrasts. Attraction and repulsion between these poles is arguably common to all legal systems that engage in debate about the basic questions of criminal responsibility.

Another way to proceed would be to take the basic international treaties on human rights as the foundation of a set of recognized universal principles. The Universal Declaration of Human Rights of 1948, the International Covenant of Political and Civil Rights, and other more localized instruments such as the European Convention of Human Rights could serve as the backdrop for the refinement of principles binding and applicable on all states participating in the international community. The task of correcting and conforming the jurisprudence of individual states to international standards is well underway. For example, in August 2000, the European Commission of Human Rights accepted the complaint of a Spanish citizen convicted of an attempted felony on the ground that he was convicted under an appellate system that recognized only one stage of appeal. He properly complained that, under the European Convention, he should have had the right to hear his alleged offenses clarified and established at the first level of appeal.

The problems associated with globalization of criminal activity has created the necessity for unification and harmonization of diverse criminal laws—not only in the fields of drug offenses and money laundering, but also in the more traditional types of crimes against the values of life and property. Because contemporary crime knows no borders, it is imperative that we develop an interactive system of criminal law that transcends the narrow boundaries of territorial jurisdiction.

A third plane of development is represented by the creation of the International Criminal Court on the basis of the Rome Statute of July 1998. The general principles of criminal liability recognized by this statute could eventually become the universal standard of legislation influencing numerous countries around the world in their efforts at law reform. As an aspect of this development, we should note the complexities and tensions generated in the effort to prosecute

Chilean General Augusto Pinochet for genocide. Genocide is also defined in the ICC Statute, and that means now that in a similar case in the future, the failure of the statute in a country where the crime occurred to prosecute would result in the intervention of the International Court.

The internationalization of criminal law requires attention to the details of legal discourse in the major legal language of the western world. For good or ill, the relevant norms of all are always expressed in a particular language. The diverse traditions of the world's legal cultures have generated a conceptual apparatus that appears different in different languages. For example, in many continental European languages, the common law term "recklessness" finds no counterpart. Similarly, the Continental concept of "dolus eventualis" has no easy translation in English. The German term "Zumutbarkeit" has generated equivalent terms of art in Spanish ("exigibilidad") and Italian (essigibilità), but not in English.

The problems of language sometimes merge with misunderstandings generated by differences of philosophical temperament. For example, the terms might lend themselves to translation, but misunderstandings by scholars prevent the harmonization of legal cultures. A good example is the pair of German terms "Rechtfertigung" and "Entschuldigung," which map rather clearly onto the English terms "justification" and "excuse." According to two British criminal law scholars, "the neat conceptual frame may be useful as a model, but on close inspection we find that its elements shade into one another in a way that ultimately defies the analytical clarity to which doctrine aspires."¹ Nonetheless, George P. Fletcher and Albin Eser have emphasized the utility of this distinction as a basis for a general theory of criminal law applicable, in principle, in all legal cultures.² A general theory is then not only possible, but desirable, and it would represent the first step toward the proper internationalization of criminal law.

The challenge remains clear, and it is derived from the simple fact that the world of criminal responsibility takes on entirely different contours if it is located in the realm of the common law; in the German sphere of influence; in the French, Italian, or Spanish/Portuguese systems; or in countries with more unusual languages and cultures—e.g., Russia, China, Japan, or Korea. In view of all of these differences, is it possible to find a common language, a shared terminology that would facilitate shared principles of liability and a shared policy toward fighting crime and respecting human rights?

II. FLETCHER'S *RETHINKING CRIMINAL LAW* AS AN IMPORTANT STEP TO "UNIVERSALISATION" OF THE STRUCTURE OF CRIMINAL LAW

As an important step in this direction, I will seek to identify the basic concepts that could be used to mediate the common law and the Continental way

1. Nicola Lacey & Celia Wells, *Reconstructing Criminal Law: Critical Perspectives on Crime and the Criminal Process* 53 (2d ed., Butterworths 1998).

2. See generally Albin Eser & George P. Fletcher, *Justification and Excuse: Comparative Perspectives* (Transnatl. Juris Publications 1987).

of thinking in criminal law by commenting on George Fletcher's influential *Rethinking Criminal Law*.³

It has been twenty-six years since the publication of *Rethinking Criminal Law*. It is difficult to summarize in a few pages the main innovations and characteristics, the virtues and defects, and the lights and shadows of this worldwide-famous book. But for a general evaluation, such as this one, I would like to highlight that which seems to reflect best its principal contributions and compare them with the trends that dominate the present panorama of criminal law, and consequently, a good part of the penal codes in almost all the countries belonging to our area of legal culture.

For the past two centuries, western societies have regulated criminal law through various penal codes that share the same fundamental ideas. At the start of the twentieth century, German philosopher Georg Jellinek said that "if the historical legacy of a people were to consist only of its Penal Code, this would be enough to reveal the cultural, ethical and intellectual level of its people, in the same way that a palaeontologist can reconstruct the structure of a prehistoric animal starting with just one bone."⁴

Nevertheless, one (bad) consequence of codification is, as Fletcher says, "that every country goes its own way. Every country has adopted its own conception of punishable behavior, its own definitions of offenses, its own principles for determining questions of self-defense, necessity, insanity, negligence, and complicity. Criminal law has become state law, parochial law."⁵

There have been many causes for this "nationalization" of criminal law. But there is already much greater unity among diverse systems of criminal justice than we commonly realize. And related to that, I will try in the following pages to identify and discuss some of the principal topics of Fletcher's *Rethinking Criminal Law* that illustrate at the same time the "deep structure" of the structures commonly called the General Part of all systems of criminal law.

III. THE CONCEPT OF WRONGDOING: THE PUNISHMENT OF ATTEMPTS AND THE STRUCTURE OF ATTEMPTS IN CASES OF IMPOSSIBILITY

The traditional approach to crime stresses the consequences more than the actor's intention: death is worse than wounds, actual murder is worse than attempted murder. In traditional criminal law, the theory of wrongdoing is hinged, therefore, on harm suffered by the victim. But if the heart of attempt is in fact the intention, not the harm, must an attempt be punished with less severity than the completed crime? Of course, the crime of attempt falls short of

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

4. Georg Jellinek, *Die Sozialethische Bedeutung von Recht, Unrecht und Strafe* 45 (2d ed., O. Häring 1908).

5. George P. Fletcher, *Basic Concepts of Criminal Law* 3 (Oxford U. Press 1998) (available in Spanish in George P. Fletcher, *Conceptos Básicos de Derecho Penal* (Francisco Muñoz Conde trans., Tirant lo Blanch 1997)).

completion, and harm does not happen. But many criminal law theorists believe that the completion of an intended offense is merely a matter of chance and does not properly belong to the heart of the concept of wrongdoing. The modern theory of criminal law stresses the actor's intention and supports the view that the attempt should be the primary offense, that is, the heart of the concept of wrongdoing.⁶ "[T]he crime of attempt is the flagship of modern [criminal law]"⁷ But shooting intending to effect the commission of homicide must be punished as homicide itself?⁸

In my opinion, the relevance of the victim's suffering in the criminal law poses a serious hurdle to this trend. The point of view of the common man on the street is still that, for instance, actual homicide must be punished more severely than attempted homicide. It is very important to understand, as well, the meaning of harm when the consequences of crime are irreversible, such as death, arson, mayhem, and the like, and the exemption from liability recognized in all the modern codes for the voluntary abandonment of the criminal plan before the harm occurs.⁹ The penal codes from the majority of all countries recognize this possibility and confirm, in my opinion, the importance of harm for the completion of the concept of wrongdoing in the modern criminal law. As Fletcher says: "We cannot adequately explain why harm matters, but matter it does."¹⁰

According to the definition of attempt, an objective basis is necessary to justify its punishment. The heart of attempt is in fact the intention, but an attempt is not only the intention. The endangering of legally-protected interests is the minimal prerequisite for the intervention of criminal law.¹¹ This shift is more evident in cases where the actor intends to do harm but the action he or she undertakes in fact poses no concrete threat. These are the so-called impossible or inept attempts. In fact, seen *ex post*, all attempts are impossible, but under impossible attempts people understand cases where *ex ante*, objectively seen, some specific barrier prevents the completion of the offense: the gun is unloaded, the pocket is empty, the powder is just talcum powder and not heroin, the abortifacient is a harmless substance. In these objectively innocuous actions, the actor wants to commit an act that would clearly be criminal if the facts were as he

6. See *id.* at 173.

7. George P. Fletcher, *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* 70 (Free Press 1988).

8. This subjective point of view explains that punishment for attempt in section 23 of the Strafgesetzbuch (StGB), the German Penal Code, does not necessarily imply mitigated punishment.

9. See Francisco Muñoz Conde, *El desistimiento Voluntario de Consumar el Delito* (Editorial Bosch 1972); Francisco Muñoz Conde, *Theoretische Begründung der Strafflosigkeit Beim Rücktritt vom Versuch*, in *Zeitschrift für die Gesamte Strafrechtswissenschaft* 756 (de Gruyter 1972); Francisco Muñoz Conde, *Der Misslungene Rücktritt vom Versuch*, in *Goldammer's Archiv* 33 (R.V. Decker's Verlag 1973).

10. See Fletcher, *supra* n. 7, at 83.

11. This view dominates German and Spanish theory of Criminal law. See e.g. Francisco Muñoz Conde & Mercedes García Arán, *Derecho Penal: Parte General* 78 (5th ed., Tirant lo Blanch 2002); Claus Roxin, *Strafrecht* 11 (3d ed., C.H. Beck 1997). But recently the concept of legally protected interest ("Rechtsgut," "Bien jurídico protegido") and its harm or endangering it as a prerequisite of the intervention of criminal law have been criticized. See e.g. Gunther Jakobs, *Strafrecht, Allgemeiner Teil: Die Grundlagen und die Zurechnungslehre Lehrbuch* 36 (2d ed., de Gruyter 1993).

believed them to be. According to the subjective theory, the actor's perception of the events should be considered as the only decisive element in punishing attempt. That is a tendency in theory as well as in the courts and penal codes of many countries of the west, such as the United States and Germany.¹² The former Spanish Penal Code admitted in Article 52(2) the general punishment of the so-called "impossible crime" and punished expressly in Article 411 attempted abortion in a non-pregnant woman (believing that she was pregnant).¹³ This position permitted avoiding to prove the existence of pregnancy.

As a reaction to the excesses of this extremely subjective point of view that consequently implies criminal responsibility in cases of superstitious or imaginary attempts, Article 16(1) of the new Spanish Penal Code says that the actions of attempt "objectively" must be able to achieve the result.¹⁴ The meaning of this expression "objectively" seems to exclude the punishment of all kinds of impossible attempts. But the statutory standard of "objectively" does not mean that only actions that according to scientific standards, seen *ex post*, are able to achieve the result could be punished as attempt. The statutory standard is objective in the sense that an attempt can only exist if the "ordinary reasonable man in the defendant's situation" could have believed that the facts were as the defendant believed them to be.¹⁵ Only in this case can the conduct appear to be dangerous and disturbing to the community as a whole. Only this objective theory of wrongdoing in cases of attempt can limit the excesses of a subjective theory, in which the lack of actual danger to anyone in the action and no manifestation of danger to unnerve the community are irrelevant. Surely there are also difficulties with the objective theory's attempt to find a proper solution in those aforementioned cases—the gun is unloaded, the pocket is empty, the powder is just powder. But the objective view is the only one that can adequately explain why superstitious, imaginary, or unreal attempts should not be punished and why attempts should generate, objectively, for a reasonable man in the defendant's situation, a risk of harm, even if that harm, seen *ex post*, could not occur in the particular case. As we will see later, this objective standard of the "ordinary reasonable man" can also be applied to clarify the distinction between justification and excuse in cases of mistakes about factual elements of justification (putative justification).

IV. POSSESSION OFFENSES, CRIMES OF ENDANGERING, AND MISTAKES ABOUT LEGAL ASPECTS OF THE DEFINITION: THE TREND TOWARD FUNCTIONALIZATION

The principle that criminal attempt requires the objective endangering of legally protected interests has become well established as a model for defining

12. See Fletcher, *supra* n. 5, at 177; Fletcher, *supra* n. 3, at 146-57.

13. To this regulation, see Francisco Muñoz Conde, *Derecho Penal: Parte Especial* (14th ed., Tirant lo Blanch 2002).

14. See Muñoz Conde & García Arán, *supra* n. 11, at 427.

15. *Id.* at 436.

other offenses that fall short of causing harm. As Fletcher says, “[p]ossession offenses are a spin-off from the law of attempts, acquiring the tools of criminal activity being a typical stage in the progression from the onset of a criminal plan to its harmful realization.”¹⁶ Sometimes the possession itself (e.g., of weapons) is prohibited. But the most common form of such possession offenses is the possession of other tools for some criminal purpose—from counterfeit plates and computer programs to burglary tools and trafficking drugs. In all of those cases, the crime is not the possession itself, but the possession with the typical subjective requirement of a criminal use, for instance, trafficking or leading another person to consume the prohibited drugs. This makes it very difficult for the defendant to prove that it was not his or her intention.¹⁷ But the “major difficulty with the offenses of possession is,” as Fletcher says,

that they sweep too wide. They encompass cases where there is no potential social harm. People can possess burglary tools without an intention to use them. Unlike drugs and guns, burglary tools are not likely to be dangerous if they fall into the wrong hands. For this reason, courts have responded very skeptically toward statutory provisions that prohibit tools appearing to have primarily a criminal use.¹⁸

Nevertheless, the trend in the modern penal codes and legislation is the frequent use of crimes of endangerment, especially in its version of “abstract danger,” and the broad protection that is granted to universal, collective, or institutional legal rights. For example, in the rubric of Title XIII of the Spanish Penal Code of 1995, the term “socioeconomic order” appears next to patrimony, whose protection leads to crimes such as false advertising,¹⁹ the possession of any tools “specifically designated” to facilitate the suppression or neutralization of any technical device that has been used to protect computer programs,²⁰ or the non-authorized use of a geographical indication as representative of the quality of a product,²¹ which in no way is different from simple administrative infractions, some of which are already contained in their respective sectorial laws. The same occurs in “crimes against the ordering of territory,”²² “historical heritage,”²³ “natural resources and the environment,”²⁴ and “flora and fauna,”²⁵ whose autonomous configuration in Chapters I, II, III and IV of Title XVI gives rise to some cases of abstract danger which exactly coincides with the administrative infractions that also exist in the administrative laws that regulate these areas.²⁶

16. Fletcher, *supra* n. 5, at 176.

17. See decisions of the Spanish Supreme Court in Muñoz Conde, *supra* n. 13, at 639.

18. Fletcher, *supra* n. 5, at 176.

19. C.P. art. 282.

20. C.P. art. 270.3.

21. C.P. art. 275.

22. C.P. art. 319.

23. C.P. art. 321.

24. C.P. art. 325.

25. C.P. art. 332.

26. See e.g. C.P. arts. 319, 333, 335.

An ulterior consequence of this trend is a certain tendency toward deformalization, that is to say, the weakening of the strict *principle of legality of crimes and punishments* (*nullum crimen, nulla poena sine lege*). That can be observed in the frequent use of indeterminate concepts and of general clauses which leave the decision of what should or should not be a crime in the hands of the judge. For example, Article 607 of the Spanish Penal Code punishes with up to two years in prison “the dissemination by any means of ideas or doctrines which deny the acts typified as genocide in Art. 607.1,” assuming that the judge agrees to consider that certain historical events (for example, Nazi concentration camps) but not others were really genocides, and, even if so, it will always remain within the judge’s powers to decide for what historical period the prohibition to disseminate these ideas applies. The concept of “moral integrity” is also hardly precise (Title VII: “Crimes against moral integrity”²⁷), nor is the concept of “racist motives” as it appears as an aggravating factor N^o4 of Article 22, or the configuration of the crime of “provocation . . . to hatred . . . against groups or associations” in Article 510.1. But where the most discretion is left to the judiciary is in the determination of the “severity” of negligence in the cases in which this is expressly declared to be punishable²⁸ or of the “danger” in crimes against collective safety. The latter is mentioned sometimes in the definition of the crime with the addition of the qualifier “concrete” in relation to the life and physical integrity of persons,²⁹ but there isn’t a good understanding concerning the nature of this kind of criminal act related to other legally protected interests.

Up to a certain point it seems logical that the legislator, in times of rapid social change or highly conflictive situations, would fall into the temptation of granting the judiciary broad discretion, not only regarding the determination of the legal consequences of crimes, but also the definition of the criminal act, offering flexible decision making programs which violate the principle of the division of powers which is at the basis of the principle of legality, running the risk that afterwards, in practice, judges would assume roles of direction and regulation of social life for which they are not legitimated constitutionally. And if this appears serious, it is considerably more serious that administrative authorities, if only indirectly, decide the criminal character of an act. Cases where the penal code delegates the power to decide the criminal character—to administrative law or to other dispositions which are hierarchically inferior to that of a penal statute—have involved references with certain frequency to the so-called “penal statute as *carte blanche*”³⁰ which has never enjoyed much support from the best

27. C.P. art. 173.

28. See e.g. C.P. arts. 142, 146, 152, 158, 159.2, 220.5, 267, 301.3, 317, 324, 344, 347, 358, 367, 391, 447, 532, 601, 621.

29. See e.g. C.P. arts. 348, 349, 350, 343, 351, 363.

30. It is difficult to translate into English the German expression “Blankettstrafgesetz” and the Spanish “normas penales en blanco,” which mean that the definition of a crime in a penal statute refers to a more specific definition of the prohibited conduct in the dispositions and enactments of administrative authorities which are hierarchically inferior to that of penal statute. See e.g. Muñoz Conde & García Arán, *supra* n. 11, at 39, 114 (providing an example in Spanish criminal law); Hans-Heinrich Jescheck & Thomas

penal theory. Criminal norms of this type can be found in crimes against public safety by manipulating pharmacological or food substances.³¹ The norms can also be found in some of the crimes against the public treasury, where in order to know what acts constitute fraud of other European Community countries, it is necessary to reference European Community Law.³² As a result of this, the elements of possession offenses and endangering crimes contain references to mixed questions of law and fact, and then the question arises whether a mistake about those elements should be considered a mistake of fact or a mistake of law. Article 14 of the new Spanish Penal Code distinguishes between (i) *mistake about the fact* constitutive of the crime, and (ii) *mistake about the wrongfulness* of fact constitutive of the crime.³³ The first kind of mistake—reasonable or unreasonable, avoidable or unavoidable—negates the required intent for the offense, and if it is not subject to prosecution on the basis of negligence, it categorically prevents conviction. The second kind of mistake (mistake of law) only negates culpability if it is not avoidable (reasonable), but if it is avoidable (unreasonable) it leads to conviction of the intentional offense with an obligatory reduction of penalty.

Now, we have to determine when to apply each strategy. As Fletcher says, “the search for a theory to map some mistakes onto one solution and some, onto the other, is the primary concern”³⁴ of this regulation. This question is even more important in countries where mistakes of law do not excuse or are irrelevant. If in one of the aforementioned crimes of endangering (for instance, against the environment) or in possession offenses (for instance, possession of a prohibited gun or drug) the defendant believes, reasonably or unreasonably, that administrative authorities permit the activity or possession, should that be considered as a mistake about the elements of the definition (that includes such legal aspects as well) or as a mistake about the wrongfulness of the act? The first solution prevents conviction, regardless of whether the mistake is reasonable or unreasonable, if the crime is subject to prosecution only for intentional commission; the second outcome prevents conviction and negates culpability only when the mistake is reasonable or unavoidable, and if it is avoidable or not reasonable, the intentional offense will result in conviction with an obligatory mitigated penalty.³⁵ The question is whether phrases such as “without permission” or “without authority of law” are necessary elements of the required intent. In my opinion, the solution is linked to the general theory of crime as a sequence. If the first step in the sequence that leads to a conviction is proof of the factual or legal elements of the definition, mistakes about those elements must be considered as

Weigend, *Lehrbuch des Strafrechts: Allgemeiner Teil* 111 (4th ed., Duncker & Humblot 1997) (providing an example in German criminal law).

31. See C.P. arts. 325, 333, 334, 335, 336.

32. See C.P. arts. 306, 309.

33. This distinction corresponds to the distinction between “Tatbestands (or Tatumstände)-und Verbotsirrtum” in sections 16 and 17 of the Strafgesetzbuch, the German Penal Code.

34. Fletcher, *supra* n. 3, at 690.

35. In the German penal code, this mitigation of penalty is only facultative. See §§ 17, 49 StGB.

mistakes negating intent required for the offense, independent of its factual or legal character.³⁶ This kind of *sequential reasoning* has nothing to do with a formalistic reading of statutes, but with the definition of the crime as an expression of the strict principle of legality (*nullum crimen sine lege*). I agree that my opinion leads to a restriction of penal responsibility in these sectors of criminality, but as Lüderssen says “the greater the complexity of statutory definitions and regulations of crimes, the more indulgence should be applied at the subjective level.”³⁷

As is logical, the sectors that are most affected by the trends are those most representative of a criminal law that Hassemer defines as “modern.”³⁸ Those sectors are characterized by omnipresent intervention in the spheres where scientific or technical progress, economic trade, or the possibility of great danger to the environment, quality of life, and even to humanity itself, pose problems of enormous complexity that cannot be satisfactorily resolved with the models of a “classic” criminal law—an “old” criminal law that is tied to the technique of the crime of injury and structured fundamentally on the protection of individual legally-protected interests.

In any case, the trend towards the protection of institutional or universal legal interests seems inevitable in modern criminal law, and in order to protect these efficiently, one must refer to possession offenses, to crimes of endangering, and to “penal statute as *carte blanche*.” But this should never justify the loss of identity of criminal law and its conversion to a “soft law” by making it achieve the objectives that are more appropriate for administrative law and infringing one of its basic tenets, the *principle of minimal intervention*.³⁹ A prudent decriminalization policy in these areas, which in the short run is less visible to public opinion, and thus less lucrative politically, can be more effective in the long run and, obviously, much less damaging to the rights of citizens than criminal law intervention at all costs. The protection of legal interests, the fundamental task of any legal order, does not necessarily imply protection by criminal law, but rather, as Claus Roxin says, protection before reaching criminal law, because one cannot forget that the concept of a legally-protected interest was originally conceived more as a limit than as a legitimization of the intervention of criminal law.⁴⁰ Perhaps if this idea had been taken more into account when drafting the new penal code, it would have been possible to avoid including in it acts that can be

36. Francisco Muñoz Conde, *El Error en Derecho Penal* 107 (Tirant lo Blanch 1989); see Winfried Hassemer, *In die Grundlagen des Strafrechts* 188, 231 (München 1981) (discussing the sequential nature of the general theory of crime and its implications).

37. Klaus Lüderssen, *Die Parteispendedproblematik im Steuerrecht und Steuerstrafrecht, Vorsatz und Irrtum* 230 (Wistra 1985); see Wolfgang Naucke, *Über Generalklauseln und Rechtsanwendung im Strafrecht* (J.C.B. Mohr (Paul Siebeck) Tübingen 1973).

38. Winfried Hassemer, *Produktverantwortung im Modernen Strafrecht* 9 (C.F. Müller 1994); Winfried Hassemer & Francisco Muñoz Conde, *La Responsabilidad por el Producto en Derecho Penal* 26 (Tirant lo Blanch 1995).

39. Regarding this principle, that stresses the character of Criminal law as “ultima ratio” instrument of legal order, see Francisco Muñoz Conde, *Introducción al Derecho Penal* 59 (Bosch 1975).

40. Claus Roxin, *Sinn und Grenzen der Staatlichen Strafe*, in *Roxin, Strafrechtliche Grundlagenproblemen* 14 (de Gruyter 1973).

adequately prevented and sanctioned by other non-penal legal means. At the same time it could allow the criminal law to serve as a pretext or as a “screen” to remedy the defects in regulation or functioning of other legal institutions.

In sum, one can deduce that the new Spanish Penal Code, as it concerns the protection of collective or universal interests, has a more penalizing than depenalizing aim that, at least in this area, conceives criminal law more as a political instrument of social direction than as a mechanism of legal protection subsidiary to other branches of the legal order. That is, without a doubt, a consequence of the trend towards functionalization. It is not only a consequence of systemic functionalism and the “orientation towards consequences,”⁴¹ that is so influential nowadays in the theory of criminal law⁴² and the social sciences in general, but also of the inevitable instrumentalization of criminal law by a criminal justice policy that does not conceive itself anymore, as von Liszt would have it,⁴³ as a mere directorate limited by the unbreakable barrier of criminal law, but as an instrument of direction and social configuration that tries to resolve the most crucial problems of the societies of our time with the *prima facie* and not purely secondary help of criminal law. It is obvious that a criminal law that is functionalized by criminal justice policy and general deterrence interests is easier to justify by public opinion, and it is more viable politically than a minimal criminal law that purely offers guarantees, conceived as the last ratio of the legal order.⁴⁴ But this vision of criminal law is dangerous in that tasks are assigned to it that in practice it cannot accomplish, thus offering deceitfully to the public a perspective on problem solving that later cannot be verified in reality.

V. THE DISTINCTION BETWEEN JUSTIFICATION AND EXCUSE

One more general question that illustrates Fletcher’s concerns about theoretical problems is the legal nature of exemptions from penal responsibility and the distinction between justification and excuse. This distinction is not particularly difficult to understand. Claims of justification concern the rightness of an act that nominally violates the law—for instance, self-defense, necessity, consent, use of force in law enforcement, and the so-called “indications” in cases of legal abortion. No one is entitled to defend him or herself from a justified act, and third parties are permitted to assist the justified actor. Excuses, such as insanity, involuntary intoxication, duress, or mistake of law, imply that the actor is not personally to blame for the untoward act.⁴⁵

So far, so good. Some penal systems, notably the German and Spanish ones, cultivate this distinction as basic elements in the structure of criminal acts, but

41. Hassemer, *supra* n. 38, at 22.

42. See Jakobs, *supra* n. 11.

43. See Franz v. Liszt, *Strafrechtliche Aufsätze und Vorträge* 80 (Walter de Gruyter & Co. 1970).

44. Cf. Muñoz Conde & García Arán, *supra* n. 11, at 78.

45. See generally Eser & Fletcher, *supra* n. 2; Fletcher, *supra* n. 5, at 176; Fletcher, *supra* n. 3, at 799-800; George P. Fletcher, *The Right and the Reasonable*, 98 Harv. L. Rev. 949 (1985).

then arises the question of how to solve cases of so-called *putative justification*, that is, of *mistakes about factual elements of justification*. The new Spanish Penal Code contains no legislated solution for the problem; the way we should treat mistakes of this sort confounds both courts and theorists. Some systems, such as the French and Anglo-American systems, which have shown little concern about elaborating the distinction between justification and excuses and exploring its implications, treat putative justification as a justification in itself; in this sense the Model Penal Code has taken the position that putative self-defense should be treated just like actual self-defense: if the actor believes that he or she is being attacked or that the use of force is immediately necessary to repel the attack, then the use of force is justified.⁴⁶ That is the traditional position of the Spanish Supreme Court as well.⁴⁷ The German courts and theorists support the position that putative justification negates the required intent and by analogy apply the rule for mistakes of fact⁴⁸ to mistakes about the factual elements of a justification. Fletcher thinks the correct view in cases of putative justification is to treat it, if the mistake is reasonable, as an excuse;⁴⁹ in this way, the aggression of the putative defender remains wrongful and it is possible as well the right to defend against one who mistakenly believes, either reasonably or unreasonably, that she or he is a victim of an aggression. But in my opinion, the standard of “a reasonable man in the defendant’s situation” belongs to the concept of wrongdoing, to solve problems not only of impossible attempts, but also of putative justification.⁵⁰ The strategy of this argument is, as Kent Greenawalt says, to shift from whether the invasion of the victim’s interest was justified to whether the risk that the actor took—regardless of the impact on the victim—was reasonable and therefore justified.⁵¹

This position does not mean that the only requirement for justification is the good-faith subjective beliefs of the defendant, but that the subjective beliefs and reactions of the defendant must be tested against the objective community standard of reasonableness. This standard is then a “‘two-pronged’ or ‘hybrid’ test.”⁵² In its first prong, the test requires that the defendant actually believe there are the factual elements of justification (an aggression in case of self-defense, a risk to life or physical integrity of the woman in case of legal abortion, the consent of the woman in case of rape, legal authority to arrest and detain a suspect in case of kidnapping). The second prong is that this belief must correspond to what a reasonable person would believe under the circumstances. Only if the test passes both prongs, the subjective and the objective standards, could the action be

46. See Eser & Fletcher, *supra* n. 2.

47. See Jescheck & Weigend, *supra* n. 30, at 466.

48. See § 16 StBG.

49. See Fletcher, *supra* n. 5, at 90-91.

50. See e.g. Francisco Muñoz Conde, *Putativ Notwehr*, in *Coimbra-Symposium für Claus Roxin* 220 (Karl Heymanns K.G. 1995).

51. See Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 Colum. L. Rev. 1897 (1984).

52. See Fletcher, *supra* n. 7, at 42.

considered taken in putative justification as a justified action and putative justification as a justification itself. The right of the victim to defend her or himself, which Fletcher considers incompatible with this position,⁵³ can be admitted as both a case of necessity and a claim of justification, but also as another sort of claim of justification that the claim of justification can invoke the putative actor. When Fletcher says “[o]thers may be wrong, but their wrong path might still be on the map of reasonable alternatives,”⁵⁴ why not on the map of justified alternatives too?

53. See generally Fletcher, *supra* n. 5, at 89-91.

54. Fletcher, *supra* n. 7, at 40.

