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# THE RISE OF SPANISH AND LATIN AMERICAN CRIMINAL THEORY

Luis E. Chiesa\*

*As the contributions to this two-part special issue demonstrate, Spanish and Latin American criminal theory has attained a remarkable degree of sophistication. Regrettably, Anglo-American scholars have had limited access to this rich body of literature. With this volume, the New Criminal Law Review has taken a very important first step toward rectifying this situation.*

*Although the articles written for this special issue cover a vast range of subjects, they can be divided into four main categories: (1) the legitimacy of the criminal sanction, (2) the punishability of omissions, (3) the challenges that international criminal law and the fight against terrorism pose to criminal theory, and (4) the theory of justification and excuse. The articles pertaining to the first two categories will appear in the first half of this special issue (Volume II, Number 3) and the pieces belonging to the third and fourth categories will be published in the upcoming second half (Volume II, Number 4). In accordance with this general structure, in the pages that follow I will provide a brief summary and critique of the pieces contained in both parts.*

## I. THE LEGITIMACY OF THE CRIMINAL SANCTION

### A. Deportation as Unconstitutional Punishment

In his “Uprootedness as (Cruel and Unusual) Punishment,” Professor Leo Zaibert argues that deportation and other state sanctions that consist in forcibly removing someone from her homeland (i.e., “uprooting

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a person”)<sup>1</sup> should be considered punishment. Furthermore, he contends that some instances of deportation should be considered unconstitutional because they amount to cruel and unusual punishment in violation of the Eighth Amendment.

Zaibert cleverly argues that his claims are supported by the Supreme Court’s landmark decision of *Trop v. Dulles*.<sup>2</sup> There, the Court held that stripping someone of his citizenship for having deserted the army amounted to cruel and unusual punishment. Since cases of deportation are “relevantly similar to [cases of] denationalization,” Zaibert believes that they should also be considered cruel and unusual.<sup>3</sup>

It is difficult to object to Zaibert’s conclusion that deportation amounts to punishment. As he correctly points out, the punitive nature of deportation is evident under any of the standard philosophical accounts of punishment.<sup>4</sup> Most scholars who have recently written about the subject agree and I see no reason to quibble with this conclusion.<sup>5</sup> The Supreme Court has approached this issue in a remarkably unprincipled manner and one can only hope that it will eventually realize that, as Judge Learned Hand asserted as early as 1926, deportation is often equivalent to one of the most primitive notions of punishment—exile.<sup>6</sup>

Zaibert’s second claim is more difficult to defend. Although it is easy to sympathize with the contention that deportation should be considered unconstitutional under the Eighth Amendment, it is unclear whether this conclusion logically follows from Supreme Court precedent as Zaibert wants to argue. One obvious difference between denationalization and deportation is that in the former case a citizen is stripped of his citizenship, whereas in the latter case a noncitizen is forcibly removed from the country. While it might be argued, as Zaibert lucidly does, that

1. Leo Zaibert, Uprootedness as (Cruel and Unusual) Punishment, 11 New Crim. L. Rev. \_\_\_\_ (2008) (manuscript at 2).

2. 356 U.S. 86 (1958).

3. Zaibert, *supra* note 1, at 12.

4. *Id.* at 8–9.

5. See, e.g., Daniel Kanstroom, Deportation, Social Control and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases, 113 Harv. L. Rev. 1889 (2000). See also Robert Pauw, A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply, 52 Admin. L. Rev. 305 (2000).

6. *United States ex rel. Klonis v. Davis*, 13 F.2d 630, 630 (2d Cir. 1926).

the citizen/noncitizen distinction should not matter in this context,<sup>7</sup> matter it does—at least as far as the Supreme Court is concerned. As the recent Guantánamo detainee cases demonstrate, both liberal and conservative Justices believe that this distinction affords the government with constitutionally legitimate grounds for discriminating between similarly situated persons.<sup>8</sup>

It should also be noted that even if Zaibert is right when he suggests that deportation is in many cases “indecent” under any plausible interpretation of the Eighth Amendment,<sup>9</sup> the claim of unconstitutionality of this sanction is undermined by the fact that its use is far from uncommon. This is important because, for better or worse, the constitutional text lends support to the idea that cruel or indecent punishment is only illegal if it is also *unusual*. Deportation proceedings are, of course, anything but infrequent.

Recent Supreme Court Eighth Amendment case law reinforces the notion that the rarity of the sanction is a key factor when determining whether inflicting such punishment runs afoul of the constitution. Thus, as recently as 2005, the Court reiterated in *Roper v. Simmons* that the “infrequency” of the use of a sanction constitutes an “objective indicia” of its unconstitutionality.<sup>10</sup> There are good reasons to believe that this factor is also important in the context of determining whether uprooting sanctions violate the Eighth Amendment. In *Trop v. Dulles*, for example, the Supreme Court partially justified its conclusion that punishing someone with denationalization was unconstitutional by making reference to the fact that

[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. It is true that several countries prescribe expatriation in the event that their nationals engage in conduct in derogation of native allegiance. Even statutes of this sort are generally applicable primarily to naturalized citizens. But use of denationalization as punishment for crime is an entirely different matter. The United Nations’ survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as

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7. Zaibert, *supra* note 1, at 25.

8. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

9. Zaibert, *supra* note 1, at 26.

10. *Roper v. Simmons*, 543 U.S. 551 (2005).

a penalty for desertion. In this country the Eighth Amendment forbids that to be done.<sup>11</sup>

This passage may provide the key to understanding why accepting the Supreme Court's conclusion in *Dulles* does not necessarily entail embracing the position that deportation constitutes cruel and unusual punishment. Since denationalization is seldom, if ever, imposed as punishment for engaging in a crime, there are good reasons to conclude that its imposition is both cruel *and* unusual. Contrarily, since the use of deportation sanctions is widespread, it is considerably more difficult to assert that its imposition is indecent and unusual.

Ultimately, however, one need not agree with Zaibert's interpretation of Supreme Court jurisprudence to appreciate the forcefulness of his arguments against making use of uprooting sanctions. His critique of the moral relevance of the citizen/noncitizen distinction for the purposes of the prohibition of cruel and unusual punishments is compelling.<sup>12</sup> The absurdity of a legal system that legitimizes expatriating someone who legally came to this country when he was two months old but prohibits uprooting someone who came to the United States in his mother's womb is apparent. One can only hope that Zaibert's impassioned and reasoned plea in favor of banning uprooting sanctions in our country does not fall on deaf ears.

## B. Legal Goods and the *Ultima Ratio* Principle

In his "Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law as Limits to the State's Power to Criminalize Conduct,"<sup>13</sup> Professor Santiago Mir Puig discusses the ways in which the continental theory of "legal goods"<sup>14</sup> can be used to legitimize (or delegitimize) the use of the criminal sanction. Although at first glance the concept

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11. *Trop v. Dulles*, 356 U.S. 86, 102–03 (1958).

12. Zaibert, *supra* note 1, at 25.

13. Santiago Mir Puig, *Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law as Limits to the State's Power to Criminalize Conduct*, 11 *New Crim. L. Rev.* \_\_\_\_ (2008).

14. A legal good is an interest that is worthy of the law's protection. For a discussion of the concept see Part IV(A)(2) of my *Normative Gaps in the Criminal Law: A Reasons Theory of Wrongdoing*, 10 *New Crim. L. Rev.* 102 (2007).

of “legal goods” might seem foreign to a common law trained lawyer, on closer inspection it turns out to be the continental counterpart to H.L.A. Hart and John Stuart Mill’s “harm principle.”<sup>15</sup>

One of the most interesting claims advanced by Mir Puig is his contention that not all legal goods require the tutelage of the criminal law.<sup>16</sup> Thus, he draws a distinction between legal goods that can be adequately safeguarded by making use of noncriminal sanctions and legal goods whose protection can only be secured by resorting to the criminal law.<sup>17</sup> According to Mir Puig, only conduct that harms a legal good of the latter type can be legitimately criminalized. Contrarily, conduct that harms a good of the former type should be dealt with by way of nonpunitive sanctions.<sup>18</sup>

Mir Puig’s claim dovetails with the *ultima ratio* principle, which is widely defended by continental scholars.<sup>19</sup> This principle holds that the state should only make use of the criminal law as a last resort.<sup>20</sup> As a result, conduct should be criminalized only if the interest sought to be protected by the offense cannot be adequately safeguarded by way of less intrusive means.

One problem with the theory of legal goods in general and the *ultima ratio* principle in particular is that it is difficult, if not impossible, to agree with regard to which interests are in need of the criminal law’s protection and which are not.<sup>21</sup> Since Mir Puig is aware of this problem, he dedicates the bulk of his article to attempting to identify a couple of criteria that might aid us in determining whether we should make use of the criminal sanction in order to protect a legal good.<sup>22</sup> Of particular interest is Mir Puig’s contention that conduct that causes harm to collective interests such as the “public health” or the “environment” should only be criminalized

15. See generally Nina Persak, *Criminalising Harmful Conduct: The Harm Principle, Its Limits and Continental Counterparts* (2007).

16. Mir Puig, *supra* note 13, at 1.

17. *Id.*

18. *Id.*

19. See, e.g., Claus Roxin, *Derecho Penal Parte General* 65–67 (Diego-Manuel Luzón Peña, Miguel Díaz y García Conlledo & Javier de Vicente Remesal, transl. 2000).

20. *Id.*

21. For a well-reasoned critique of the *ultima ratio* principle, see Douglas Husak, *The Criminal Law as Last Resort*, 24 *O.J.L.S.* 207 (2004).

22. Mir Puig, *supra* note 13, Part III.

when it causes “significant” and “quantifiable” harm to an individual.<sup>23</sup> Acceptance of this principle would cast doubt on the legitimacy of punishing drug possession and other so-called victimless crimes.

Mir Puig’s provocative piece raises as many questions as it provides answers. On the one hand, for those of us who are worried about the problem of overcriminalization, the theory of legal goods provides an additional weapon with which to combat the legislative obsession with criminalizing conduct. On the other hand, it sometimes seems that criminalizing conduct that does not cause significant and quantifiable harm to a concrete individual interest is legitimate. Take, for example, the crimes of animal cruelty, indecent exposure, and incest. Although the conduct proscribed by these offenses does not cause direct and substantial harm to individual human beings, it is unclear whether their criminalization is unjustifiable. Perhaps the societal benefits that might be reaped by deterring these types of conduct outweigh the burdens that are imposed on those who are punished for engaging in such offenses. In any case, and regardless of what one thinks with regard to these cases, Mir Puig’s defense of the legal goods theory provides food for thought.

## II. THE PUNISHABILITY OF OMISSIONS

### A. Special Duties and Omissive Liability for Result Offenses

Should a person who finds his spouse injured on the street be held liable for homicide if he contributes to her death by failing to assist her? Professor Dopico Gómez-Aller argues that he should not in his “Criminal Omissions: A European Perspective.”<sup>24</sup> This solution flies in the face of the standard Anglo-American approach to omissive liability for offenses of harmful consequences. In common law jurisdictions, an omission may trigger responsibility for a crime of harmful consequences if the actor had a special duty to act.<sup>25</sup> Thus, a breach of a person’s duty to aid his spouse might generate criminal liability for homicide if the spouse dies as a result of the failure to act.

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23. *Id.* at 6.

24. Jacobo Dopico Gómez-Aller, *Criminal Omissions: A European Perspective*, 11 *New Crim. L. Rev.* \_\_\_\_ (2008) (manuscript at 22).

25. See generally Joshua Dressler, *Understanding Criminal Law* 113–17 (4th ed. 2005).

According to Dopico Gómez-Aller, this solution is flawed because “the fact that someone is married to another person does not mean that he has to manage the means of his spouse’s protection.”<sup>26</sup> He further contends that “although spouses do jointly manage certain aspects of their life they do not *manage or handle the protection of each other* as they would effectively do with young children.”<sup>27</sup> Thus, he concludes that “although a spouse may find his partner injured in the street and fail to provide her with any assistance, this does not mean that he killed his spouse.”<sup>28</sup> Ultimately, argues Dopico Gómez-Aller, the spouse’s omission may warrant greater punishment than that which would be imposed upon someone unrelated to the victim, but it surely deserves less punishment than that which should be imposed upon someone who kills his spouse by way of an affirmative action.<sup>29</sup>

This is not a trivial matter. If Dopico Gómez-Aller is right, the Anglo-American “duty to act” approach to omissive liability for result offenses is fundamentally flawed. I must confess to having conflicting intuitions with regard to the hypothetical put forth at the beginning of this subsection. On the one hand, it is difficult to disagree with Dopico Gómez-Aller’s conclusion that the spouse deserves less punishment than a person who kills his partner by way of an affirmative action. On the other hand, a slight modification of the facts would probably change my intuitions about the proper solution to the case. Suppose, for example, that as John comes home from work he finds his wife, María, lying on their bed bleeding to death. Should John be held liable for homicide if instead of calling 911 or taking his wife to the hospital he decides to watch TV and María bleeds to death? Something tells me that he probably should.<sup>30</sup> This, however, is difficult to reconcile with Dopico Gómez-Aller’s contention that the spouse in the original hypothetical should not be held liable because spouses do not assume the responsibility of “managing or handling the protection of each other.”<sup>31</sup> If the person in the original hypothetical does

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26. Dopico Gómez-Aller, *supra* note 24, at 22.

27. *Id.*

28. *Id.*

29. *Id.*

30. For what it’s worth, I have asked my students to share their intuitions with regard to these cases and they agree that John should be held liable for homicide as if he had caused María’s death by way of an affirmative action, regardless of whether he had control over the original source of danger.

31. *Id.*



not have the responsibility to “manage the protection of his spouse” it should follow that in my modified hypothetical John also does not have a responsibility to handle the protection of his wife. Accepting this proposition would lead to not holding John liable for homicide. This strikes me as counterintuitive.

Of course, the solutions afforded by Professor Dopico Gómez-Aller to these cases might be right even if they are counterintuitive. Furthermore, even if his solutions to these hypotheticals are problematic, his broader point might still be true, for it is not altogether clear why all breaches of a special duty to act that contribute to the causation of a result should be punished in the same manner as if the result had been brought about by an affirmative action. Anglo-American scholars have glossed over this important matter. I hope that Dopico Gómez-Aller’s article convinces us that this is an issue worth examining in more depth.

## B. Omissions of Intermediate Gravity

As Professor Jesús-María Silva Sánchez asserts in his “Criminal Omissions: Some Relevant Distinctions,” most of the world’s legal systems have adopted a bipartite system of punishable omissions that only distinguishes between cases of “authentic” omissions and instances of “commission by omission.”<sup>32</sup> Crimes of “authentic” omission consist of the breach of a duty that requires the performance of certain conduct regardless of whether nonperformance of such acts causes harm to others. Take, for example, the crime of failing to file a tax return. Since we have the obligation of filing our tax returns on or before April 15, the failure to perform this act generates criminal responsibility even if no one suffers harm as a result of the omission. Another example of a crime of “authentic” omission is the offense of “failing to aid others in an emergency.” In the jurisdictions in which such conduct is criminal, the citizenry has a general duty to assist those who are in need of aid. The breach of this duty automatically entails penal liability even if the person in need of assistance did not suffer harm as a result of the omission.<sup>33</sup>

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32. Jesús-María Silva Sánchez, *Criminal Omissions: Some Relevant Distinctions*, 11 *New Crim. L. Rev.* \_\_\_\_ (2008) (manuscript at 1).

33. The person in need of aid could suffer no harm as a result of a person’s omission to assist her if, for example, someone else comes to her aid before she suffers harm.

Sometimes, however, the law punishes omissions only if they contribute to the causation of a harm that is prohibited by the criminal law. Continental criminal theorists refer to such cases as instances of “commission by omission.” The paradigmatic example is the case of the mother who contributes to causing the death of her child by refusing to feed him. In such cases, the mother’s omission would give rise to criminal liability for the result offense (homicide) as if she had caused the result by way of an affirmative act. These cases represent instances of “inauthentic” omissions, for responsibility is not imposed for the omission *per se*, but rather for the occurrence of a criminally prohibited result.

According to the standard approach, liability for a crime of “authentic” omission arises when an actor has breached a duty to act that is imposed on the general populace (e.g., the general duty to file taxes or the general duty to aid someone in need of assistance). Contrarily, liability for a crime of “inauthentic” omission typically arises when the actor has caused harm as a result of a breach a duty to act that has been specifically imposed on him in light of his special relationship with the victim or with the source of danger that threatened the person in jeopardy. Since cases of authentic omission merely involve the breach of a general duty to act, they are generally punished less severely than instances of inauthentic omission that involve the breach of a special duty. Thus, the mother who fails to save her drowning child is punished more severely than the stranger who refuses to rescue the child. This distinction makes sense, for the mother’s omission is surely more worthy of condemnation than the stranger’s failure to act.

Despite the logical appeal of the bipartite system of punishable omissions, Silva Sánchez takes issue with this approach. For him, there should be an “intermediate category of omissions which, being more serious than [authentic] omissions,”<sup>34</sup> are not as serious as cases of commission by omission in which the actor failed to exercise control over the source of danger that harmed the victim. Although these omissions of intermediate gravity are more worthy of moral condemnation than authentic omissions, they “do not warrant charging the offender with the commission of a crime of harmful consequences as if he had caused the harm by way of affirmative conduct.”<sup>35</sup>

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34. *Id.* at 15.

35. *Id.*

According to Silva Sánchez, a police officer's failure to help someone in danger constitutes an example of an omission of intermediate gravity. Since police officers have a special duty to aid people in danger, such an omission should be punished more severely than omissions consisting in a breach of a general duty to rescue. However, if, as is usually the case, the police officer did not have control over the source of danger that initially caused harm to the individual, he should not be punished as if he had actively endangered the third party.<sup>36</sup>

Silva Sánchez's proposal has much to commend it. It is, however, vulnerable to the same objections that can be voiced against Dopico Gomez-Aller's conception of criminal omissions. It seems that Silva Sánchez would not hold John liable for the death of his wife because he lacked control over the source of danger that caused harm to his spouse in the first place. In spite of this, it could be argued that the fact that he had the control and power to stop his wife's bleeding coupled with the special duty that spouses owe to each other should be sufficient to establish that his omission should be punished as if he had actively caused her death. Whether John had control over the source of danger that initially caused harm to María seems to be of negligible moral relevance.

Nevertheless, it is hard to disagree with Silva Sánchez's more basic claim that some omissions should be punished more severely than authentic omissions and less severely than true cases of commission by omission. If he is right, the bipartite system of punishable omissions is in need of an overhaul.

### C. Causation and Omissions

In the last article appearing in the present number, "Causation in Criminal Responsibility," Professor Marcelo Ferrante challenges the conventional view that holds that the law treats harm brought about by actions differently than harm produced by omissions because acts can cause results whereas omissions cannot.<sup>37</sup> This somewhat puzzling feature of the law gives rise to what has been called the "act/omission asymmetry." Drawing on Joel Feinberg's approach to the problem, Ferrante argues that

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36. *Id.* at 16–17.

37. Marcelo Ferrante, *Causation in Criminal Responsibility*, 11 *New Crim. L. Rev.* \_\_\_\_ (2008) (manuscript at 2–3).

the key to explaining the asymmetrical legal treatment afforded to acts and omissions lies in “the way we solve the coordination problems [that the imposition of positive duties to act] give rise to” rather than in the different causal force of acts and omissions.<sup>38</sup>

If, for example, we all had a strong positive duty to aid people who are in danger of drowning, many people might attempt to save a drowning person. Although at first glance this would seem to be desirable, Ferrante points out that “if we all jump at once into the pool where [the person] is drowning in order to discharge a general duty to save her, the likely event is that [the person] will not get saved—she will drown under the crowd of rescuers.”<sup>39</sup> Furthermore, he suggests that “many of us may drown as well.”<sup>40</sup> If we foresee this possibility, we might decide to “wait and see whether someone else jumps in first, with the likely consequence that no one will try to jump [into the water].”<sup>41</sup> Legal systems usually resolve these coordination problems by “allocating in advance responsibilities for every possible risk that may call for a rescue of some sort.”<sup>42</sup> Thus, if a person is drowning, the law will typically designate an individual who is “specially obligated to save [the person in peril]”—a lifeguard, for example.<sup>43</sup>

Ferrante goes out of his way to clarify that his account of the act/omission legal asymmetry does not entail accepting that allowing harm to happen is morally equivalent to affirmatively causing harm. Thus, he claims that his position “is consistent with the judgment that, when all other things are equal, it is somewhat worse to do harm than to allow harm to occur.”<sup>44</sup> In light of his reliance on Feinbergian theories of duties and his rejection of the metaphysical defense of the act/omission asymmetry, Ferrante’s deliberate refusal to embrace the moral equivalence of harms brought about by acts and failures to act is difficult to explain. If Ferrante is right in claiming that the causal explanation of the alleged moral difference between acts and omissions is flawed, it is hard to see what reasons justify abiding by the judgment that, *ceteris paribus*, it is worse to affirmatively

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38. Id. at 13.

39. Id. at 11.

40. Id.

41. Id.

42. Id. at 12.

43. Id.

44. Id. at 13.

cause harm than to let harm take place. As Feinberg has pointed out, “where minimal effort is required to prevent harm, the moral duty to prevent it seems every bit as stringent as the negative duty not to inflict that same harm directly.”<sup>45</sup> Thus, assuming that there is no significant difference in the way in which acts and omissions causally contribute to producing harm, the arguments in favor of the conclusion that there is no intrinsic moral difference between doing harm and letting harm occur are forceful.<sup>46</sup>

Regardless of Ferrante’s position concerning the moral equivalence between acts and omissions, his theory about the role of causation in criminal responsibility is compelling. Even if there is a physical difference between the processes of causation that underlie harms brought about by acts and harms produced by omissions, such differences are morally irrelevant. Thus, as Ferrante lucidly argues, “whatever we call it, the causal requirement is such that it does *not* mark a difference between actions and omissions.”<sup>47</sup>

### III. CHALLENGES OF INTERNATIONAL CRIMINAL LAW AND THE FIGHT AGAINST TERRORISM

#### A. The Legitimacy of Justice Done “from Without”

Scholars have long debated the question of whether international and foreign courts should assume jurisdiction over crimes of concern to the international community regardless of whether domestic courts are willing and able to try the suspected perpetrators of the offenses. These concerns undergird the ongoing debate amongst international criminal lawyers with regard to whether the jurisdiction of international courts should be grounded on the principle of “primacy” (no deference to

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45. Joel Feinberg, *The Moral and Legal Responsibility of the Bad Samaritan*, 3 *Crim. Just. Ethics* 56, 67 (1984).

46. See, for example, Peter Singer’s convincing defense of the intrinsic moral equivalence between killing and allowing to die in Peter Singer, *Practical Ethics* 205–12 (1993). This, of course, does not mean that all cases of doing harm and letting harm occur are morally equivalent. Despite the intrinsic moral equivalence between acts and omissions, there might be factors extrinsic to the act/omission distinction that might justify treating instances of affirmatively causing harm differently than cases of letting harm take place. *Id.*

47. Ferrante, *supra* note 37, at 38.

local courts) or on the principle of “complementarity” (deference to local courts).<sup>48</sup>

In “State Criminals and the Limits of Extra-Communitarian Criminal Justice”—the first article of the second half of this special issue (Volume 11, Number 4)—Professor Jaime Malamud Goti argues that “in dealing with domestic state abuses, the purposes of criminal justice can be satisfactorily accomplished only by courts ‘from within’ (i.e., *local courts*).”<sup>49</sup> Consequently, Malamud Goti contends that international criminal courts should defer the prosecution of state-sponsored crimes to domestic courts. This preference for courts from within stems from his belief that the punishment of the perpetrator cannot fully vindicate the victim’s interests unless the verdict of culpability is considered to be fair and legitimate by the community to which the victim belongs.<sup>50</sup> When the harm inflicted on the victims has been the product of state-sponsored acts that have polarized the country into warring factions, justice meted out by foreign courts will be considered inherently suspect by the losing side. Since these trials “from without” are more prone to “alienat[ing] a large segment of the community of the perpetrator, [they] dramatically limit the formation of judicial authority.”<sup>51</sup> This undermines the legitimacy of the verdicts rendered by foreign courts and, consequently, it hinders both the possibility of national reconciliation and victim vindication.

A possible shortcoming of Malamud Goti’s proposal is that relying on courts from within to try the people responsible for state-sponsored domestic abuses is a recipe for selective prosecution and for the imposition of punishment that is not commensurate with the perpetrator’s guilt. Thus, as Malamud Goti acknowledges, courts from within might “employ a high degree of selectivity”<sup>52</sup> in deciding whether to dismiss charges pending against a defendant and might feel “compelled . . . to devise nuanced distinctions to establish and gradate responsibility on the basis of peculiarities that we commonly regard as legally irrelevant.”<sup>53</sup> In spite of this, he believes

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48. For an in-depth examination of the “primacy” vs. “complementarity” debate, see Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 *Yale J. Int’l L.* 383 (1998).

49. Jaime Malamud Goti, *State Criminals and the Limits of Extra-Communitarian Criminal Justice*, 11 *New Crim. L. Rev.* \_\_\_\_ (2008) (manuscript at 1).

50. *Id.* at 9.

51. *Id.* at 14.

52. *Id.* at 16.

53. *Id.* at 12.

that these drawbacks are justified when the perpetrators and the victims belong to the same community, since only courts from within can issue verdicts that “attain a minimal amount of credibility”<sup>54</sup> amongst the factions represented by both perpetrator and victim. This credibility is essential to “avoid fracturing the polity into two unwavering rival segments.”<sup>55</sup>

## B. Enemy Criminal Law vs. Citizen Criminal Law

In a conference held in Berlin in 1999, the influential German criminal theorist Günther Jakobs argued in favor of the need to make use of two distinct types of criminal law: a criminal law for citizens and a criminal law for enemies. Whereas the purpose of citizen criminal law is to communicate with the perpetrator, the aim of enemy criminal law is to neutralize the offender, even if this means that we should simply get rid of him (e.g., “three strikes and you’re out” laws).<sup>56</sup> Jakobs’ assertions generated an impassioned debate in continental legal circles about the nature and legitimacy of so-called “enemy criminal law” that continues to this day.<sup>57</sup>

In his “Enemy Combatants versus Enemy Criminal Law,” Professor Gómez-Jara Díez introduces Anglo-American scholars to this debate and explains the philosophical underpinnings of enemy criminal law. Enemy criminal law, Gómez-Jara Díez explains, is characterized by three chief features: (1) the punishment of conduct well before it harms a legally protected interest, (2) the imposition of punishment that is disproportionate to the harm caused, and (3) the reduction of the procedural rights of the defendant.<sup>58</sup> Although Gómez-Jara Díez recognizes the explanatory value of the concept, he appeals to systems theory in order to demonstrate that the state should not make use of enemy criminal law because in doing so it would be “annihilating itself” by “betray[ing] its own rules” and enacting legislation that “contradicts its very essence.”<sup>59</sup>

54. *Id.* at 14.

55. *Id.*

56. See generally George P. Fletcher, *The Grammar of Criminal Law: American, Comparative and International* 172 (2007).

57. See, for example, Francisco Muñoz Conde’s keen critique of Jakobs’ positions in his *De nuevo sobre el “Derecho Penal del Enemigo”* (2d ed. 2008).

58. Carlos Gómez-Jara Díez, *Enemy Combatants versus Enemy Criminal Law*, 11 *New Crim. L. Rev.* \_\_\_\_ (2008) (manuscript at 2).

59. *Id.* at 29.

The continental debate about the legitimacy of enemy criminal law should be of relevance for American legal scholars. An examination of many of the laws that have been enacted in the post-9/11 era reveals that our government is increasingly making use of criminal legislation that can only be described as pertaining to the realm of enemy criminal law. Thus, we might be well served by consulting the overwhelming continental literature about enemy criminal law when determining how to neutralize the draconian expansion of our criminal laws that has taken place in recent years. Gómez-Jara Díez's contribution to this special issue demonstrates the fruits that we might reap by doing so.

### C. Why Is Membership in a Criminal Organization Wrongful?

In many European and Latin American countries, the mere act of becoming a member of a criminal organization is a crime. Furthermore, membership in an unlawful association is sometimes considered a sentencing factor that can substantially increase the punishment to be imposed on the defendant. In his "The Wrongfulness of Crimes of Unlawful Association," Professor Manuel Cancio Meliá attempts to identify the wrongdoing that is sought to be prevented by punishing such conduct. This is no easy task, since "the conduct performed in order to become a member of a criminal organization conceptually pre-dates any concrete acts of preparation or perpetration that participation in an offense of harmful consequences entails."<sup>60</sup> As a result, Cancio Meliá notes that punishing membership in an unlawful organization supposes a dangerous expansion of the criminal law, for it entails imposing liability for "conduct that does not even come close" to causing or risking harm to others.<sup>61</sup>

In his laudable attempt to limit the scope of offenses of criminal organization, Cancio Meliá proposes that membership in an unlawful association be considered criminal only when the act of joining the organization "makes the member complicit in the [criminal] acts of the collective."<sup>62</sup> According to this theory, the "wrongfulness of crimes of

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60. Manuel Cancio Meliá, *The Wrongfulness of Crimes of Unlawful Association*, 11 *New Crim. L. Rev.* \_\_\_\_ (2008) (manuscript at 1).

61. *Id.*

62. *Id.* at 16.



unlawful association flows from the wrongdoing *of the organization* and the possibility to attribute such wrongdoing to its members.”<sup>63</sup>

Cancio Meliá’s conception of the wrongfulness of offenses of belonging to a criminal organization has broad implications for how these crimes ought to be interpreted by courts. Perhaps the most interesting consequence of his proposal is that only “active” acts of membership that clearly demonstrate the actor’s desire to “permanently belong to the organization” should trigger the imposition of criminal liability for such offenses.<sup>64</sup> The reason for this lies in the fact that “nonactive” modes of membership (e.g., financial contributions or distribution of propaganda) do not generate sufficiently strong ties to the organization to justify considering the passive member complicit in the unlawful acts of the association.<sup>65</sup>

At first glance, American scholars might believe that Cancio Meliá’s discussion is of little relevance to them. After all, the United States Supreme Court ruled in the seminal case of *Scales v. United States* that criminalizing the mere status of being a member of an unlawful association runs afoul of notions of fundamental fairness embodied in the due process clause of the Fifth Amendment.<sup>66</sup> Nevertheless, in light of our government’s recent penchant for prosecuting people for engaging in the offense of “providing material support or resources to designated foreign terrorist organizations,”<sup>67</sup> Cancio Meliá’s proposals might prove very useful to American criminal lawyers. Given the inherently vague nature of the notion of “material support,” such a statute comes very close to criminalizing the mere act of being a member of an unlawful association. Courts have struggled mightily with how to interpret this law in a way that the attribution of responsibility to the individual respects the principle of personal culpability.<sup>68</sup>

63. *Id.* at 15.

64. *Id.* at 20.

65. *Id.*

66. *Scales v. United States*, 367 U.S. 203, 224–25 (1961).

67. 18 U.S.C.A. § 2339(b).

68. The United States Court of Appeals for the 9th Circuit recently held the “material support” statute to be unconstitutional because it improperly established guilt by association. See *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (9th Cir. 2007).

For a discussion of additional cases dealing with similar problems, see generally David Henrik Pendle, *Charity of the Heart and Sword: The Material Support Offense and Personal Guilt*, 30 *Seattle U. L. Rev.* 777 (2007).

Cancio Meliá's proposal of limiting the acts of membership to "active" modes of integration into the organization might do just that.

#### IV. THEORIES OF JUSTIFICATION AND EXCUSE

##### A. Is Putative Self-Defense a Justification or an Excuse?

Anglo-American and Continental commentators have long grappled with the problem of how to deal with cases of putative self-defense. Such cases arise when an actor uses force against another person in the mistaken belief that doing so was necessary in order to repel an unlawful and imminent attack. Although it has been unanimously held that these mistakes should not generate criminal responsibility if they are reasonable, the grounds for such an exemption of liability are unclear. George Fletcher has argued that reasonable mistakes as to the factual elements of justifications should generate an excuse to criminal liability rather than a justification.<sup>69</sup> Thus, he believes that force used in putative self-defense, although not punishable, remains wrongful. Others, like Kent Greenawalt, believe that putative justification based on a reasonable mistake should be treated as a justification in itself.<sup>70</sup>

In his "Putative Self-Defense: A Borderline Case Between Justification and Excuse," Professor Francisco Muñoz Conde sides with those who believe that putative self-defense should be considered a justification. In his opinion, when the "aggression is inexistent *ex post*, but one can rationally, reasonably, and objectively presume its *ex ante* existence, we should conclude that the actor's defensive response falls within the range of legally acceptable courses of action."<sup>71</sup> This, in turn, leads to concluding that the conduct of the reasonably mistaken defender is "not wrongful and should not generate penal or civil liability both in the case of the actor who defends himself and in the cases of third parties who come to his aid."<sup>72</sup>

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69. George P. Fletcher, *Basic Concepts of Criminal Law* 90–91 (1998).

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

71. Francisco Muñoz Conde, *Putative Self-Defense: A Borderline Case Between Justification and Excuse*, 11 *New Crim. L. Rev.* \_\_\_\_ (2008) (manuscript at 18).

72. *Id.*

Limiting the realm of justifiable self-defense to instances in which the actor's *ex ante* beliefs about the existence of an unlawful aggression turn out to be correct *ex post* is unacceptable for Muñoz Conde because "requiring total congruence between objective reality and subjective perception is practically impossible."<sup>73</sup> Thus, negating the justifiable nature of reasonably mistaken putative defenders would encourage people "who need to act quickly in light of the imminence of what objectively looks like an aggression to calmly and coolly corroborate all of the objective criteria that support [their] beliefs before proceeding to defend [themselves]."<sup>74</sup> According to Muñoz Conde, this would surely be absurd. This argument is reminiscent of Justice Oliver Wendell Holmes's famous assertion in *Brown v. United States* that it would be injudicious to demand "detached reflection . . . in the presence of an uplifted knife."<sup>75</sup>

Muñoz Conde's solution to the problem of putative justification would probably be objected to by Fletcher. According to Fletcher, treating putative self-defense as a justification is problematic because it would have the infelicitous consequence of barring the innocent victim from using justifiable force against the putative defender.<sup>76</sup> The reason for this lies in what Fletcher has called the incompatibility thesis, which holds that "if two people are making an effort to execute incompatible acts, both of them cannot be justified."<sup>77</sup> Muñoz Conde cursorily responds to this objection by stating that "the right of the victim to defend her- or himself [against the reasonably mistaken actor] . . . can be admitted as both a case of necessity and a claim of justification."<sup>78</sup> Muñoz Conde's position with regard to this matter is sensible, for, contrary to what Fletcher claims, admitting conflicting claims of justifications, while perhaps counterintuitive, is by no means illogical or contradictory.<sup>79</sup>

73. *Id.* at 12.

74. *Id.*

75. 256 U.S. 335, 343 (1921).

76. Fletcher, *supra* note 69, at 89–91.

77. George P. Fletcher, Should Intolerable Prison Conditions Generate a Justification or an Excuse For Escape?, 26 UCLA L. Rev. 1355, 1360 (1979).

78. Muñoz Conde, *supra* note 71, at 3.

79. See, e.g., Charles Fried, Right and Wrong 48 (1978) and Greenawalt, *supra* note 70, at 1909. See also Russell Christopher, Mistake of Fact in the Objective Theory of Justification: Do Two Rights Make Two Wrongs Make Two Rights. . . , 85 J. Crim. L. & Criminology 295 (1994).

## B. The Nature of the Duress Defense and Its Limits

Courts have approached the duress defense in an unprincipled and haphazard manner. The following hypothetical afforded by Kadish and Shulhofer illustrates the problems inherent in the Anglo-American interpretation of the defense:

*X* is driving a car along a narrow and precipitous mountain road which drops off sharply on both sides. The headlights pick out two drunken persons lying across the road in such a position as to make passage impossible without running them over. When *X* tries to stop, he notices that his brakes are not working. Thus, his alternatives are either to run down the drunks or to run off the road and down the mountainside.

Kadish and Shulhofer correctly point out that if *X* chooses to save his own life by running down the drunks, he would not be excused under the Model Penal Code's duress provision.<sup>80</sup> The reason for this is that the Code provides no defense for nonhuman threats, regardless of whether a person of reasonable firmness would have been unable to resist them.<sup>81</sup> The solution to this case would be the same if it were judged according to the common law understanding of the defense.

In the last article of the upcoming number, "Duress and the Antcolony's Ethic: Reflections on the Foundations of the Defense and Its Limits," Professor Daniel Varona Gómez puts forth a conception of the duress defense that would lead to excusing *X* if he decides to run down the drunks in order to save his life. For Varona Gómez the rationale of the duress defense can be traced back to the principle of "fair expectations" or "un-demandability."<sup>82</sup> According to this principle, a person should be

80. M.P.C. § 2.09.

81. Sanford Kadish, Stephen Shulhofer & Carol Steiker, *Criminal Law and Its Processes* 842 (8th ed. 2007).

82. Daniel Varona Gómez, *Duress and the Antcolony's Ethic: Reflections on the Foundations of the Defense and Its Limits*, 11 *New Crim. L. Rev.* \_\_\_\_ (2008) (manuscript at 8).

I have translated the concept of "inexigibilidad" as "un-demandability" or "fair expectations." "Un-demandability" is a more literal translation of the concept ("un" = "in", whereas "demandability" = "exigibilidad"). See my *Duress, Demanding Heroism and Proportionality: The Erdemovic Case and Beyond*, *Vand. J. Transnat'l L.* (forthcoming, 2008).

What is meant by the concept is that there are circumstances in which the law cannot legitimately demand that a person act in conformity with the law. In such instances, conduct in conformity with the law would be "un-demandable."

excused when we *cannot fairly demand* him to act in a lawful manner, *regardless of the source of the threat*. Varona Gómez acknowledges that the notion of “undemandability” is “inherently indeterminate.”<sup>83</sup> Thus, he devotes a substantial portion of his article to fleshing out the vague contours of the “fair expectations” principle.<sup>84</sup> Drawing upon the philosophy of Thomas Nagel, Varona Gómez concludes that an actor should be excused in light of the doctrine of undemandability when he has a sound agent-relative reason for having engaged in the wrongful act.<sup>85</sup> More specifically, he contends that duress should excuse wrongful conduct when it can be concluded that the actor’s reasons for action reflected a legitimate preference for his own interests.<sup>86</sup>

It should be noted that Varona Gómez is careful to point out that “although an actor’s legitimate preference for his own interests might provide us with reason to excuse his conduct, it does not afford us with sufficient reasons to justify his act.”<sup>87</sup> When examining the justifiability of an act, he proposes that we adopt an impartial (i.e., “agent neutral”) perspective that “assigns equal value to all of the conflicting interests involved.”<sup>88</sup> Thus, Varona Gómez concludes that “when both parties to the conflict have an identical claim to the protection of the legal order, conduct should only be deemed justified if the harm caused by the actor is less than the one avoided.”<sup>89</sup>

Varona Gómez’s suggestion that we distinguish between justifications and excuses by appealing to the difference between agent-neutral (justifications) and agent-relative (excuses) reasons for action is intriguing. This proposal, however, raises a difficult question that Varona Gómez does not

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George Fletcher has translated “inexigibilidad” as “cannot fairly be expected.” George P. Fletcher, *Rethinking Criminal Law*, 833–34 (2000). This translation, while not literal, is a fair adaptation of the concept. Fletcher’s translation reflects the core of the theory of “inexigibilidad”: that a person should not be punished when we *cannot fairly expect* him to act in a lawful manner. Thus, one can profitably restate the doctrine of “inexigibilidad” as the theory having to do with “fair (and unfair) expectations.”

83. *Id.*

84. *Id.* (Part II).

85. *Id.* at 11–12.

86. *Id.* at 13.

87. *Id.* at 21.

88. *Id.* at 15.

89. *Id.* at 21.

directly address: can a person's agent-relative reasons for action sometimes be taken into account when determining whether his conduct is justifiable from a societal point of view? Suppose, for example, that Mary is asked at gunpoint to kill either Jack or Fred. Assuming that Jack is her son and Fred is unrelated to her, it could be argued that Mary's decision to kill Fred in order to save her son is justifiable instead of merely excusable. After all, shouldn't society want to encourage mothers to save the lives of their children instead of the lives of strangers *even if from an agent-neutral point of view every life is to be considered of equal value?* Hopefully, Varona Gómez's thought-provoking article will spark interest in examining these and other interesting issues having to do with the relevance of the agent-neutral/agent-relative distinction for judgments about justification and excuse.

## FINAL REMARKS

Judging from the articles contained in this special issue, there is much to be learned from Spanish and Latin American scholarly writings on the criminal law. I commend the New Criminal Law Review for contributing to making this literature available to the Anglo-American public and feel honored to have played a minor role in this endeavor.