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1987

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Recommended Citation

George P. Fletcher, *The Unmet Challenge of Criminal Theory*, 33 WAYNE L. REV. 1439 (1987).
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THE UNMET CHALLENGE OF CRIMINAL THEORY

George P. Fletcher†

The last several decades have witnessed an outpouring of serious articles bringing to bear the methods of analytic philosophy to the issues of substantive criminal law. J. L. Austin,[1] a philosopher and not a lawyer, may have been the first to demonstrate the potential of probing legal concepts such as mistake and accident, justification and excuse, for their philosophical potential. H.L.A. Hart carried forward the literature with several path breaking essays on criminal law.[2] It is only in the last few years, however, that we have encountered an explosion of interest in the basic questions of criminal law. As the essays in this volume, as well as other works in progress, demonstrate, we now have a critical mass of scholars interested in the philosophical dimensions of punishment, self-defense, justification, excuse, omissions, and causation.

Yet, for all this impressive growth in the literature, an important challenge remains unmet. The discussion of justification and excuse proceeds without adequately appreciating the theoretical matrix in which these questions arise. True, in his Article in this symposium, Dressler recognizes that claims of justification negate the affirmative requirement of wrongful conduct[3] and excuses negate the requirement of culpability.[4] But neither wrongful conduct nor culpability is related to an overall theory on the structure of criminal conduct. What is the connection between the conventional requirements of *mens rea* and *actus reus* and the newly discovered requirement that liability presupposes disproof of claims both of justification and

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1. Austin, *A Plea for Excuses*, 57 PROC. ARISTOTELIAN SOC'Y 1 (1956-57).

2. *See generally* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968).

3. *See* Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1161-63 nn.19-22 (1987). He also says, however, that claims of justifications negate "the social harm of an offense." That is not so clear. If, for example, the actor maliciously uses force against an aggressor without knowing the latter to be an aggressor, he would not be able to invoke the justification of self-defense, but he arguably would have realized the social harm of stopping an aggressor. *See* G. FLETCHER, RETHINKING CRIMINAL LAW 552-68 (1978).

4. Dressler, *supra* note 3, at 1163.

excuse? From a reading of the current American literature, one would be hard pressed to answer this question.

What is lacking in the American discussion of these issues is a general theory of the elements that constitute punishable criminal conduct. This theory is called the *Verbrechenslehre* in the German literature, a term that is generally translated as "theory of crime." The problem is that this term invariably invokes sociological associations. We think of a theory about the origins and genesis of crime. What in fact German theorists have in mind, rather, is a theory about the nature of punishable crime. What can be said about the structure of criminal conduct beyond noting the obvious that crime consists of antisocial conduct or conduct prohibited by the legislature? I take this question to be about a philosophical rather than a sociological theory of crime.

The absence of philosophical theory of crime becomes apparent when we ask this simple question: What do we call the case that the prosecution must prove before the defensive issues of justification and excuse become relevant? This is the set of issues that we have in mind when we define a crime. Blackstone took the core of homicide to be "causing death to another," every other issue was a matter of justification, excuse or alleviation (mitigation).[5] The definition of larceny that finally crystallized in the common law was, roughly, "taking the property of another with the intent permanently to deprive the owner thereof."[6] Note that sometimes the conventional definition includes intent and sometimes not.

Any of the following expressions might be appropriate to capture the elements that the prosecution must prove: Prima facie case, elements of the offense, prohibited act, criminal act or *actus reus*. Each of these terms is problematic. "Prima facie" has an evidentiary rather than a substantive connotation; the term refers to a level of proof rather than a conceptual dimension of crime. "Elements of the offense" might do the job, except that the *Model Penal Code* has defined the term to include the absence of claims of justification and excuse.[7] Indeed, it is not so clear why a claim of justification is not a negative element as other requirements are positive elements of the offense. The terms "prohibited" and "criminal" both suffer from the same ambiguity. Justified acts are neither prohibited nor criminal. If the terms "prohibited" and "criminal" claim too much for our purposes, the Latin standby *actus reus* tells us too little. The "elusive dimension" of criminal conduct that we are trying to identify might well include criteria of intention and negligence, thus implying that

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5. 4 W. BLACKSTONE, COMMENTARIES *201.

6. Larceny Act, 1916, 6 & 7 Geo. 5, ch. 50, § 1; *see also* People v. Brown, 105 Cal. 66, 38 P. 518 (1894).

7. MODEL PENAL CODE § 1.13(9) (Proposed Official Draft 1962).

the *mens rea* is included as well as the *actus reus*. It is hard to believe that we have neither a recognized term for this "elusive dimension," nor any theoretical clarification for the nature and structure of this dimension of criminal liability. For this is the concept that is implicated in the Supreme Court cases from *In Re Winship*[8] to *Martin v. Ohio*,[9] decided in the current term. Everyone agrees that the prosecution must prove some set of issues beyond a reasonable doubt, but there is no term of art that clearly demarcates the undisputed core of the prosecution's case. *Winship* holds that the prosecutorial duty of proof extends to "every fact necessary to constitute the crime . . . charged."[10] But this formula hardly helps us unless we know which elements are included within the notion of "crime." Interpreting this standard laid down in *Winship*, the majority in *Martin* concluded that self-defense was not part of the "crime charged." Apparently, the state legislature and courts can determine the "elements of the offense" that the prosecution must prove.[11] Ohio had decided that murder consisted only of three elements.[12] And that, then, was the crime charged. There was nothing constitutionally untoward about requiring the state to prove only these elements beyond a reasonable doubt.

The constitutional standard proposed in *Winship* will obviously remain vacuous unless some basic theoretical work is forthcoming on the elements that should constitute the prosecution's case. Suppose that a state returned to the common law rule that in homicide cases, the defense must proof accident and mistake.[13] The issues of intention and negligence are merely the converse of mistake and accident. If the defense must prove mistake, it must disprove knowledge and intention; if it must prove (faultless) accident, it bears the burden on the issue of negligence. Under *Martin* there is no reason why a state could not tinker in this way with its rules of proof. The only barrier that could possibly stand in the way would be a conceptual argument about the issues that properly belong to the prosecution's charge.

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8. 397 U.S. 358 (1970) (holding unconstitutional juvenile court statute permitting prosecution to prevail on "clear and convincing evidence").

9. 107 S. Ct. 1098 (1987) (holding, five to four, that state may constitutionally require defendant to prove self-defense by preponderance of the evidence). The other important cases in the series are Patterson v. New York, 432 U.S. 197 (1977) (holding that state may constitutionally define "extreme emotional distress" as an affirmative defense that does not negate any element of murder, and impose burden of persuasion on defendant); Mullaney v. Wilbur, 421 U.S. 684 (1975) (holding unconstitutional state statute requiring defendant to prove provocation when it negates malice required for murder).

10. 397 U.S. at 364.

11. 107 S. Ct. at 1103.

12. *Id.* (causing death, purposely, and with "prior calculation and design").

13. *See* 4 W. BLACKSTONE, COMMENTARIES *201.

Not only do we not have the argument; we do not even have a concept that can capture the set of issues at stake.

One thing we can say about the dimension of criminal liability that eludes us is that it is incriminating in nature. By contrast, claims of justification and excuse are exculpatory. This distinction in evaluative charge helps us little, for as is well known, the absence of exculpatory issues can be restated as incriminating elements. Is it self-defense that exculpates or the absence of self-defense that incriminates?

Perhaps this overstates the problem. We intuitively grasp that self-defense is a justification. And we are not inclined to think the same way about the claim that the defendant's shot was not the one that killed the victim. Denying a causal connection does not exculpate the actor in the same way that a justification does. There is probably no better way to express it than to invoke distinctions from the common law of pleading. While denying the causal connection between actor and harm concedes nothing, a claim of justification is a plea in "confession and avoidance." The justification concedes the incriminating dimension of the act asserted by the prosecution, and argues that, nonetheless, the act is not wrongful or criminal. Excuses are also claims in "confession and avoidance." The assertion of the excuse concedes that the act is unjustified and criminal, but argues, nonetheless, that the actor should not be held accountable. There are, then, some clear differences between claims that deny the prosecution's case and claims that, by their nature, function as claims of justification and excuse.[14]

If the "elusive dimension" of crime consists of incriminating acts, we can hardly avoid the question: What makes these acts incriminating? Surely, it is relevant that the legislature has prohibited the acts in question. But are acts incriminating because the legislature has prohibited them, or has the legislature prohibited them because they are incriminating? Because we assume legislative supremacy in the criminal law, we are inclined to think that acts are incriminating for no reason other than running afoul of legislative prohibitions. This is what we might call the "positivist" version of incrimination; it is only because an authoritative body has spoken that we know acts are incriminating. The alternative "naturalist" approach to the problem holds that acts we want to regard as criminal are, by their nature, incriminating. They are, as criminal lawyers were once wont to say, *malum in se*—wrong in themselves.[15]

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14. There are admittedly some borderline issues. A good example is consent in cases of assault and rape. Is nonconsent an element of the prosecution's case or is consent a claim of justification? For the consequences of treating the issue one way or the other, see G. FLETCHER, *supra* note 3, at 699-706.

15. The positivist view of incrimination is captured by the alternative expres-

I am inclined to think there is more to the naturalist theory of incrimination than modern lawyers are willing to assume. Significantly, claims of justification and excuse have to be seen as having a naturalist foundation. No one would argue that self-defense is exculpatory just because the legislature says it is. And the defense of necessity or lesser evils has found its way into modern criminal codes precisely because the academic community has insisted that the defense is right as a matter of principle. Claims of excuse speak to our sense of justice and compassion. We cannot countenance punishing those who do not have a fair opportunity to conform their behavior to what is expected of them.[16] Of course, legislatures seek to capture claims of justification and excuse in legal language. But the impulse behind these provisions lies in our sense that it is wrong to punish in the face of these exculpatory considerations. The problem, then, is whether, in one system of thought, one can wed a naturalist theory of exculpation with a positivist theory of inculpation. The former is substantive (what is right and just) and the latter is purely formal (inconsistency with legislative command). I am inclined to think that the two cannot mesh. It is like attempting to argue against history with logic or against valid inferences from accepted premises with claims of truth. Accordingly, it is difficult to coordinate our system of justification and excuse with purely regulatory offenses; acts that are admittedly incriminating only because prohibited. The entire system of justification and excuse fits naturally with offenses as to which we can say that legislation describes but does not constitute the offense.

Of course, it is difficult to accept the naturalist theory of incrimination, for we are so accustomed to thinking that legislatures must be supreme in defining criminal offenses. There is inconsistency, however, between recognizing the naturalist basis for our understanding of homicide, rape, larceny, burglary and other core offenses, and yet acknowledging that the legislature must specify the contours of the offenses in borderline situations.

The unmet challenge of criminal theory consists in working out the basis of the incriminating dimension of crime and relating this incriminating dimension to the exculpatory dimension of justification and excuse. One of the issues that must be confronted is whether intent and negligence are always part of the incriminating dimension, or can we say sometimes, as Blackstone held in homicide cases, that the converse elements—accident and mistakes—function as

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sion *malum prohibitum* — wrong only because prohibited. For a skeptical approach to this distinction, see G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 936 (2d ed. 1983).

16. This is Hart's argument for excuses in H.L.A. HART, *supra* note 2, at 17-24.

claims of excuse? This question taxed postwar German theorists for more than a generation, but they seem to have turned away from it, without having resolved it.[17] There is no doubt this and other questions in the theory of crime pose problems that do not lend themselves to a ready consensus. But then this is only proof that we are in the presence of genuine philosophical problems.

17. For a discussion of the debate, see G. FLETCHER, *supra* note 3, at 476-81.