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A TRANSACTION THEORY OF CRIME?

*George P. Fletcher**

I.

The most difficult questions are foundational. It is no surprise then that one of the most puzzling questions in criminal law frames the whole inquiry: what is the nature of crime? Positivists dispose of the question easily. If the law is whatever the legislature and courts say it is, then crime is whatever these authoritative agencies designate as crime. The question becomes more interesting, however, if we regard crime as a prepositive concept, a concept that exists logically prior to the positive law. It is not that conduct is criminal because the legislature speaks; rather the legislature speaks because conduct is criminal.¹

In the literature of criminal theory, particularly in West Germany, there are two schools of thought about the nature of crime in the prepositive sense. One theory holds that crime consists of an assault on a protected legal interest.² The assault might yield harm, as in homicide, rape, and arson. Or it might merely threaten harm, as in cases of attempts and conspiracy. The other theory seeks to reduce all criminal conduct to a breach of duty.³ The latter accounts for the traditional offenses inflicting harm and sweeps up other acts, such as victimless offenses, that threaten no apparent danger to a protected legal interest. Of course, neither of these approaches to crime amounts to much unless we have a way of determining what is a "protected legal interest" and what is a "duty." Positivists might co-opt these theories by treating the positive law as conclusive on which interests should be protected and which duties should not be breached. These competing theories represent a challenge to the positivist conception of crime only if the range of protected interests and relevant duties logically precedes the positive law.

Prepositive theories of crime are substantive in that they assert what crime really is. A substantive theory of crime might cover either more or less than the acts the legislature formally designates as criminal. In his symposium article⁴ and in a prior article,⁵ Professor

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1. The leading text in the English literature on legal positivism is H. Hart, *The Concept of Law* (1961). Hart stresses the separation of law and morals as the central premise of positivism. See *id.* at 181-82. For my own interpretation of legal positivism, see Fletcher, *Two Modes of Legal Thought*, 90 *Yale L.J.* 970, 973-79 (1981) (positivism as a meta-theory on the nature of legal discourse).

2. H. Jescheck, *Lehrbuch des Strafrechts* 6 (3d ed. 1978).

3. *Id.* (arguing that the two theories are reconcilable).

4. Klevorick, *Legal Theory and the Economic Analysis of Torts and Crimes*, 85 *Colum. L. Rev.* 905 (1985).

Klevorick proposes an alternative substantive theory about the nature of crime. He claims that crime consists in acting contrary to society's "transaction structure."⁶ This is an intriguing claim. Although there are many other aspects of Klevorick's work on crime, I should like to concentrate on this point. Is the transaction theory of crime as good or better than the alternative views expressed in the traditional literature?

It is important to be clear about the methodological status of the argument that crime consists in acting contrary to "society's transaction structure." Economists distinguish between positive and normative analyses of legal phenomena, and to our possible confusion, they use "positive" differently from philosophers. The transaction theory is nonpositive in the philosophical sense, for it seeks to do more than describe the range of acts that legislatures brand as criminal. Yet the argument is positive in the economic sense, for it seeks to give us an account of what crime really is, not to recommend changes in the enacted (positive) law. If the (economically) positive account is correct, then it must account for a large part of the data that constitute the phenomenon "criminal law." It need not account for all of the data; we may assume that the legislature might call some acts "criminal" that are not indeed criminal. The most that a theory of crime need do is explain the range of acts that we regard as characteristically or paradigmatically criminal.⁷

There are in fact three distinct theories of crime that might fit under the general label "an offense to society's transaction structure." The first and narrowest theory holds that a crime occurs only when an individual seizes for himself something (an entitlement) that he could have bargained for. The purpose of punishment is to induce him to change the means by which he acquires the desired entitlement. He should enter into negotiations with the bearer of the entitlement and offer sufficient consideration to induce a voluntary transfer. The rationale for requiring him to bargain is that only if the transaction is consensual can we say that the transfer is "efficient" as a Pareto-superior move.⁸ Both parties stand to gain by the transfer; otherwise, they would not consent. The crimes that most neatly fit this conception are trespass to land and theft.⁹

A second and broader theory encompasses all acts that fall outside

5. Klevorick, *On the Economic Theory of Crime*, in *Nomos XXVII: Criminal Justice* 289 (J. Pennock & J. Chapman eds. 1985).

6. See Klevorick, *supra* note 4, at 908; Klevorick, *supra* note 5, at 301-04.

7. I will assume that we have a shared understanding of the core of the criminal law. Undoubtedly, there might be disputes about whether some data at the fringes belong to the core that requires explanation. For further thoughts on these methodological difficulties, see G. Fletcher, *Rethinking Criminal Law* 401-06 (1978).

8. See, e.g., Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 *Hofstra L. Rev.* 509, 512-13 (1980) (A move is Pareto superior if it renders no one worse off and the welfare of at least one person is improved.).

9. See R. Posner, *Economic Analysis of Law* 39-40, 121 (2d ed. 1977).

the range of permissible transactions. This view of crime encompasses transactions that are different not only in form from those that are permissible, but in substance as well. The narrower theory requires that for every crime there be a consensual alternative. The broader theory holds in addition that there are some voluntary transactions in which the offender may not engage. The rationale for punishment under the broader theory is not always to induce the offender to change the form of his acquiring the desired entitlement, but in some cases to abandon that desire altogether.

Both of these theories are to be contrasted with an allocative theory of crime, which invokes hypothetical transactions in order to determine the ownership of the entitlement in question. The allocative theory might explain certain institutions of the criminal law, such as the defense of lesser evils. Yet the more challenging theories are those that explain crime as the violation of an actual, not a hypothetical, transaction structure. With some license, I shall use Klevorick's position as a springboard for assessing the narrow theory, which claims more and therefore poses a more interesting alternative to more conventional views about the nature of crime. Klevorick also criticizes the narrow transaction theory;¹⁰ my critique goes further by exploring a number of ways in which the narrow theory offers an inadequate explanation of the criminal law. In conclusion, I shall discuss the allocative theory and its relationship to the narrow transaction theory.

II.

It is difficult to see how the narrow transaction theory helps us to understand the difference between torts and crime. Trespass and theft generate private causes of action as well as punishment for criminal wrongdoing. The private remedy provides a sanction for breaching the transaction structure. Why should that not be enough? From an economic point of view, it seems highly questionable for the state to invest in the costly measure of criminal prosecution when the tort remedy might do the job. Also, why should the state subsidize the processes of detection, apprehension, and prosecution when it would seem more sensible to allow private, aggrieved parties to decide whether to invest in these activities? Criminal prosecution—particularly when it duplicates the tort remedy—carries all the faults that free market economists attribute to economic planning. The tort system reflects the principle of consumer sovereignty in a free market. If detection, apprehension, and sanctions are important to the victim, the tort system permits him to decide whether to invest in a law suit. The contingent fee provides access to this system even for indigent plaintiffs.¹¹

10. See Klevorick, *supra* note 4, at 906–07; Klevorick, *supra* note 5, at 301–04.

11. The analogy between the tort system and the free market obviously has its limits. Law suits entail uncompensated costs that inhibit investment in “seeking justice.”

There are good reasons for imposing criminal sanctions in addition to making tort remedies available to victims. But the most persuasive considerations seem to be distinctly non- and even anti-economic. Criminal punishment has a levelling effect, affecting both rich and poor as individuals, not as economic actors. If killers and rapists were allowed simply to pay off those victims (and families) who apprehended and sued them, the rich would enjoy an intolerable privilege to force the sale of lives and human dignity.

An important cleavage does in fact run between torts and crimes. The distinction is not expressed well as that between a *nonmoral* tort law and a *moral* criminal law.¹² For tort theories—both fault and strict liability—might be based on solid moral principles.¹³ The cleavage is better appreciated by taking note of the equal moral standing of all torts as contrasted with the differential moral status of different crimes. There is no gradation of torts, some more serious than others.¹⁴ Battery is not necessarily worse than defamation; an intentional tort is not per se more serious than a negligent tort. It all depends on the harm done. Even the slightest negligence, if sufficient to impose liability, can generate backbreaking liability for damages. The principles underlying tort law sidestep the question whether the gravity of the act stands in proper proportion to the degree of liability.

Criminal law differs. The system of crimes and punishments presupposes that some crimes are more serious than others. Whether the rationale of punishment is retribution or deterrence, the graver crimes require more severe punishment. Yet this feature of crime, as opposed to tort, eludes the narrow transaction theory. If all intentional crimes, like all intentional torts, violate the transaction structure, then it is hard to see how some should weigh more heavily in the balance than do others. At least one of the standard theories of crime described earlier captures this feature of graded criminality. If crime consists in an assault on a legally protected interest, then assaults on the more serious interests should be treated as more serious crimes. Life is more important than property, and therefore homicide is a more serious offense

My only claim is that decentralized decisionmaking might be more efficient in this area as often as it is in managing the economy.

12. Jerome Hall's claim that "moral culpability" is more important in criminal than in tort law might be true in principle. See J. Hall, *General Principles of Criminal Law* 243 (2d ed. 1960). In the actual development of these fields, however, tort law may reflect greater sensitivity to criteria of personal responsibility than do some formal doctrines of the criminal law, such as the felony-murder and misdemeanor-manslaughter rules. See G. Fletcher, *supra* note 7, at 287-90.

13. See Fletcher, *Fairness and Utility in Tort Theory*, 85 *Harv. L. Rev.* 537, 539-40 (1972).

14. The commission of some torts might be so outrageous as to warrant punitive damages. See W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* 9-11 (5th ed. 1984).

than theft. This obvious feature of the criminal law does not lend itself to explanation under the narrow transaction theory.

The narrow transaction theory of crime treats the criminal harm as the violation of a single person's interest in not suffering the involuntary loss of his entitlements. The focus falls on the harm to a single individual. Lost in this perspective is the widely held assumption that criminal harms are not merely private and thus limited to the victim, but public in their impact.¹⁵

The public nature of crime is reflected in Robert Nozick's account of why we punish some harms that are compensable as well in tort.¹⁶ The distinguishing characteristic of crime, Nozick argues, is the element of fear.¹⁷ We are all affected by witnessing or hearing reports of muggings, rapes, burglaries, and homicides. I am not sure why this is so, but reports of deaths on the highways do not unnerve the public in the way that reports of subway robberies put everyone in fear. If Bernhard Goetz had shot at an obviously erratic and dangerous driver, everyone would have thought he was insane; his shooting at petty thieves made him a national hero to many. The fear of crime touches a sensibility far deeper than the fear of accidental injury. That additional fear confers upon crime its public nature and, arguably, justifies the punitive intervention of the state. Of course, it is not so easy to elicit this public component in many property offenses and in victimless sexual crimes. Though the public component is admittedly vague, there does seem to be something more to crime than compensable harm to a single individual.

If the narrow transaction theory of crime were correct, there would be a voluntary transaction corresponding to every offense. This is the case for trespass and theft. The use of land and title to goods can be purchased as well as seized. But this is not true of certain offenses where the policy of the legal system is to reject trading altogether. Consent is not a defense, for example, to homicide, maiming, or statutory rape. If death, mutilation, or sex with an underaged girl were a desired good, it would not be a good available for purchase. Though prohibitions may well reflect a paternalistic concern for whether individuals can consent to significant losses, they are nonetheless a widespread feature of the criminal law. No account of the criminal law can safely ignore these restrictions on consensual transactions. Admittedly, the broader transaction theory can accommodate these cases of inalienable entitlements.¹⁸

15. See I. Kant, *The Metaphysical Elements of Justice* 99 (J. Ladd trans. 1965) (limiting punishment to public as opposed to private crimes).

16. See R. Nozick, *Anarchy, State, and Utopia* (1974). Battery is an example of a harm compensable in tort and punishable under the criminal law.

17. *Id.* at 67.

18. For further elaboration on this theme, see Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 *Colum. L. Rev.* 931 (1985).

The idea of a transactional alternative to the crime means that the offender can acquire, in a voluntary transaction, the good that he seeks by committing the crime. Instead of stealing an object, he can acquire it by paying for it. Instead of trespassing, he can purchase access. This is not always the case. Sometimes the point of a crime consists not in acquiring a particular entitlement, but in subjecting the victim to the involuntary loss of the entitlement. Rape is the best example. What rapists typically seek—namely, the subjection and humiliation of the victim—cannot be sought out and purchased in a voluntary transaction. If the victim consents, in advance, to being ravaged when he or she least expects it, this might seem like a consent to rape, but the rapist who agrees to this transaction loses what might well be the point of violent attack.¹⁹ If the victim agrees, he or she is no longer victimized, since at least according to current views of the crime, victimization is the point of the sexual assault. In all cases where, as in rape, the criminal means are essential to the actor's motives, it is simply false to conceptualize the crime as the evasion of an available transactional alternative. There is no transaction structure to offend against.

Several other types of crime do not fit readily into the narrow transaction theory. Attempts are not simply voluntary trades carried out by other means, for attempts are failed efforts to bring about harm. If we punish consummated criminal acts in order to channel behavior back into the transactional structure, it would hardly make sense to punish attempts in order to channel these failures back into the market of voluntary exchanges. Society has no interest in encouraging abortive efforts to trade entitlements.

Another set of crimes that falls outside the narrow transaction theory consists of all those crimes that, in more conventional views, are seen as crimes against the government. Consider counterfeiting and interfering with the administration of justice. Do these acts circumvent possible transactions with the government by which would-be offenders would bargain for the right to print money or tamper with the processes of justice? I suppose one could imagine the government selling these rights to individuals, yet these transactions would hardly make economic sense. In both cases significant externalities would fall on parties other than the purchasing actor and the government. If the price of printing one thousand one-hundred dollar bills were such that someone had an incentive to print the bills, the public would suffer in direct proportion to the gain received by the purchasing printer. If someone could purchase the right to tamper with a jury or commit perjury, the externalities would fall on the people whose fates turned on the distorted judicial process. The full price for these extraordinary rights to print money and to interfere with the organs of justice would

19. See Schwartz, *Economics, Wealth Distribution, and Justice*, 1979 *Wis. L. Rev.* 799, 804–08.

have to reflect the internalization of costs falling on third parties. If these costs were properly internalized, one might wonder whether a sale of the right in question here would still be thinkable.

This analysis reveals that the transaction theory of crime holds only where the harm falls exclusively on the victim who might consent to trading an entitlement in a voluntary transaction. In all other cases, some externalities would fall on third parties. If these externalities are not internalized (if, for example, transaction costs prohibit affected third parties from bargaining with the party seeking the entitlement), the price will be too low: it will not reflect the impact of the act on the public as a whole. Yet the public dimension of crime is indispensable in distinguishing crimes from torts. The element of generalized fear is an externality that justifies the state's intervention.²⁰ Indeed, one might well argue not that the crime is an offense against the transaction structure, but that because no transaction can possibly internalize the externality of fear, the state must punish as well as provide a remedy for tort damages. The narrow transaction theory may provide a good account of some torts, such as trespass and theft, but it fails to capture the salient features of criminal law.

III.

The transaction theory poses additional problems when it comes into conflict with the allocative theory of entitlements. Both theories wind their way through the literature of economics and law. The narrow transaction theory holds, as we have noted, that individuals should not be allowed to circumvent the transaction structure when bargaining for entitlements is possible. The core example is the trespasser who parks in another's garage when it would be possible for him to buy permission to use the garage.²¹ The allocative theory holds that when the impediments to bargaining—information and transaction costs—become too high, the entitlement should be allocated to that person in the conflict who, in Calabresi's inventive phrase, would be the "cheapest cost avoider."²² The cheapest cost avoider is that party who would, in a hypothetical transaction, pay more for the entitlement in question or who would be in the best position to trade the entitlement to the party who values it most highly.²³ The standard example for the allocative theory is Coase's parable of the railroad emitting sparks and the farmer who suffers a resulting loss of grain.²⁴ The problem is allocating the incompatible entitlement (the right either to emit or to be free from sparks) to the party who values it more highly.

20. See *supra* text accompanying notes 15–17.

21. See R. Posner, *supra* note 9, at 39–40.

22. G. Calabresi, *The Costs of Accidents*, 143–52 (1970).

23. *Id.*

24. See Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1, 29–30 (1960) (using Pigou's example, see A. Pigou, *The Economics of Welfare* 134 (4th ed. 1932)).

Both the narrow transaction and allocative theories purport to seek the efficient solution. Efficiency obtains when the party who values an entitlement most highly acquires it. Where unimpeded bargaining is possible, the transaction theory holds that individuals must actually trade; the car parker must pay for the privilege of parking in the garage. Where bargaining is not possible, the state must intervene and allocate the entitlement (the right to act or prevent action) to the party who would acquire it under conditions of costless bargaining. The railroad need not pay for the damage done by its sparks if it would pay more for the right to emit the sparks than the farmer would pay for the right to be free from fires. If the entitlement is assigned to the party that values it most highly, the net gain to that person exceeds the loss to persons who are thereby affected. This net gain makes the allocation efficient.

The transaction and allocative theories of efficiency bear a superficial resemblance, but in fact they differ radically. The narrow transaction theory requires actual bargaining and payment for the transfer of entitlements. It affirms the existing allocation of entitlements and the sovereignty of the two parties in deciding whether a trade should occur. If the railroad parks its engines on a particular farmer's land, it must pay to do so. The allocative theory holds, in contrast, that when bargaining is impractical, the existing allocation of entitlements is subject to reassessment. If the railroad sparks damage many farmers' grain, then the cost of bargaining may become so high as to effectively impede bargaining, and for that reason alone, the right of the farmers to enjoy their land without interference comes into question. They must, in principle, be willing to pay the railroad to leave them alone; their grain must be worth more to them than emitting sparks is worth to the railroad.

The allocative theory accounts for some institutions of the criminal law. The defense of lesser evils, for example, represents exactly the kind of reassessment of entitlements that the allocative theory explains.²⁵ Under emergency conditions, the law protecting certain entitlements might give way to a reallocation of entitlements. If a fetus threatens the life or health of the woman bearing it, the fetus' entitlement to life might have to yield to the mother's entitlements to health, privacy, and life. If a ship is endangered in a storm and seeks moorage at a privately owned dock, the dock owner might be held to waive his right to control access to the dock. The conventional mode of analyzing these issues stresses the relative importance of the competing interests. The allocative theory provides an account, first, of why an involuntary reallocation is necessary (bargaining is impossible under emergency conditions) and second, of what it means in economic terms

25. On lesser evils, see Model Penal Code § 3.02 (Proposed Official Draft 1952); Strafgesetzbuch § 34 (W. Ger.).

to say that one interest is more valuable than others (the affected party would be willing to pay more for it).

If the allocative theory were consistently applied to the criminal law, however, it would generate some peculiar results. Consider drunk driving. If only one driver were endangered by the drinker, the narrow transaction theory would require the drinker and the second driver to negotiate a price for the latter's loss of safety. If the endangered driver does not accept the price, the drinker's threatening conduct would violate his entitlement to safety; if he does accept the price and consents to the drunk driver's risk-creation, his consent would preclude a finding that the driver's behavior is criminal.

As the number of drinking drivers increases, the possibilities and risks of an accident that would injure the single sober driver multiply. Under the circumstances, it becomes easier for the sober driver to pay each of the drunks to stay home rather than for the several drinking drivers to consolidate and offer a single price to the sober potential victim to waive his claim to safety. As a result, the right of the sober driver to be immune from the risks created by drunk driving would come into question. The entitlement to safety would depend on how much the sober driver was willing, hypothetically, to pay the drinkers for desisting. Because we might not be able to determine whether this hypothetical payment is greater than the hypothetical amount the drinkers would offer, the allocative theory requires that we assign the entitlement (either to drive drunk or to drive sober without drunks around) to that person or group who would have the greatest impediments to purchasing that entitlement if they in fact valued it more highly than the opposing group. As we shift from one potential injurer to many, we increase the transaction costs on the side of the injurers and generate a good argument under the allocative theory for assigning the entitlement to drink and drive to the potential drunks. This is a remarkable maneuver. If there is one person endangering another, the entitlement is secure, and violating it, without consent, would be punished as a crime. If more people are creating the danger, the entitlement comes into question. It would be a curious theory of crime that would treat risks created by gangs more leniently than risks created by individuals.

It seems questionable to advance both the transaction theory, which treats entitlements as fixed, and the allocative theory, which potentially reassigns entitlements, in the same theoretical matrix. The very least we should demand of law and economics is a meta-theory explaining when, in principle, the transaction theory gives way to the allocative theory. It would make perfectly good sense to insist, for example, that the theories must operate at different stages of social planning. The allocative theory responds to the problem of distributive justice: it establishes the basic entitlements prior to the beginning of social and economic relations. The transaction theory responds to the

problem of commutative justice: when entitlements already assigned may be permissibly transferred. It is true that from an economic point of view efficiency may inform both distributive and commutative decisions. The common label of efficiency, however, should not induce theorists to mix, without better foundations, the allocative and transaction theories in solving legal problems.

The transaction and allocative theories reflect, in fact, different concepts of legal relations. The transaction theory starts with the assumption that two distinct individuals desire to use a single resource. Their conflict should be resolved, if possible, by a voluntary arrangement between them. The allocative theory, inspired by the Coase theorem,²⁶ treats the two claimants as aspects of a single entity whose overall efficiency is to be maximized. Their conflict is resolved by advancing the interests of a single firm of which they are both part. This explains why, under the hypothetical bidding for the single resource, the recipient of the entitlement need not compensate the losing party.²⁷ Both winners and losers are facets of the same social organism.

Crime may have external effects on the public as a whole, but the offender and the potential victim remain entirely distinct individuals. Crime cannot properly be understood simply as a misallocation of resources within the same social organism. The allocative theory might serve for many to illuminate the law of torts, but it has no place as an explanation for a body of law that stresses the distinctness of injurer and victim.

Neither the allocative nor the narrow version of the transaction theory provides a good account of the criminal law. It is true that some crimes might appear to be impermissible alternatives to what one should only do on the basis of consensual agreement. But the data thereby explained are but a pocket of the criminal law. Yet there is something to be learned even from a theory that fails in its purpose. Both the transaction and allocative theories of crime remind us of several features of the legal system that we might otherwise overlook.

26. See Coase, *supra* note 24, at 40.

27. This standard is generally called the Kaldor-Hicks test or potential Pareto superiority. See Coleman, *supra* note 8, at 513. So far as I know, the test came into currency in American legal circles with Michelman's analysis of efficient takings in Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1214-18 (1967).