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The Fall and Rise of Criminal Theory

George P. Fletcher *

These are good times—at least for the theory of criminal law. This special issue of *Buffalo Criminal Law Review* testifies to a remarkable surge of interest among younger scholars in perennial questions: Why should we punish offenders? Do we require a human act as a precondition for liability and what is its structure? What does it mean for someone to be guilty or culpable for committing an offense? How do we avoid contradictions in structuring the criteria of liability? The time has come for renewed intensity in pondering and discussing these basic issues.

The contributions of this symposium follow hard on a spate of publications testifying to the revival of the field that I vaguely call “criminal theory.” Michael Moore’s properly celebrated 1993 book, *Act and Crime*, has brought to bear an entirely new body of literature on action theory to the analysis of the act requirement in different contexts.¹ Paul Robinson has several new and important books on the market.² Significantly, we are witnessing more and more young scholars devoting their energies to the perennial questions at the foundations of criminal liability.³ “Criminal

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1. MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR THE CRIMINAL LAW* (1993). See the symposium devoted to this book in 142 U. PA. L. REV. (1994).

2. PAUL ROBINSON, *STRUCTURE AND FUNCTION IN CRIMINAL LAW* (1997); PAUL ROBINSON, *CRIMINAL LAW* (1997); JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995).

3. Major theoretical contributions of the last few years by younger American scholars in the field of substantive criminal law include Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1 (1994); Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423 (1995); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996); Russell Christopher, *Unknowing Justification and the Logical Necessity of the Dadson Principle in Self-Defence*, 15 OXFORD J. LEGAL STUD. 229 (1995); Anthony Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 NW. U. L. REV. 1015 (1997).

theory" is defined by a commitment to probe the philosophical foundations of crime and punishment. You would think that in a country that houses over a million and half people in its prisons, this field would be of natural interest. In fact the issues of policy and justice that define criminal justice have gone remarkably unnoticed in the last two decades. For a variety of reasons, research and philosophical reflection on the criminal law declined in the 1980s and early 1990s.

If we look back three decades we encounter a different picture. In the mid-1960s criminal justice ranked among the premier subjects of the law school curriculum. As students now discuss feminism and originalism in constitutional interpretation, the reigning question of the 1960s was the confrontation of the state and the individual in the field of criminal justice. Every thoughtful graduate yearned for literacy in the then current decisions of the progressive Supreme Court and in the reformist ambitions of the 1962 Model Penal Code. To be educated in law meant that among other things, one pondered the future of criminal justice in the United States.

The fall and rise of criminal theory in the United States cries out for an explanation. Can we explain the decline? And what path should the new found emphasis on criminal theory take in the next several decades? These are the questions I have set for myself in this introduction to the *Buffalo Criminal Law Review* symposium on criminal theory.

This international and comparative character of the articles collected in this symposium aids our understanding of the American situation. We are not alone in the revival of philosophical interest in the criminal law. We see a similar pattern among younger scholars in Israel and England and a searching for issues of theoretical interest in Germany. The synergy of these scholars coming together for the first time in a single language and within the bounds of a single law review bodes well for the future of criminal theory as an international discipline.

In this upbeat moment it is worth reflecting on the factors producing the fall and contemporary rise of criminal theory.

I. THE TRENDS OF THE 1970S AND 1980S

In the 1960s and the 1970s the theory of criminal law found its primary stimulus not only in the work of the Model Penal Code and in the decisions of the Supreme Court but in the reflections of moral philosophers, some of whom were trained as lawyers and others not. Worthy of special mention are the contributions by H.L.A. Hart,⁴ Herbert Morris,⁵ Richard Wasserstrom,⁶ Herbert Fingarette,⁷ Joel Feinberg,⁸ Robert Nozick,⁹ and Judith Jarvis Thomson.¹⁰ When I first began writing about criminal law, I could draw on this remarkable body of newly-minted intellectual capital. A community of serious people had invested their energies in the reflective reconsideration of the basic issues of criminal responsibility.

Criminal theory began to decline in the mid-1970s.¹¹ The curricular and research primacy of criminal justice came to be threatened on all sides. The Supreme Court under the leadership of Warren Burger and William Rehnquist curtailed its expansion of constitutional procedural protection and began a slow process of retrenchment. Also, by the end of the 1970s the wave of state criminal law reform had passed.

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

5. See HERBERT MORRIS, *ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY* (1976).

6. See Richard Wasserstrom, *Strict Liability in the Criminal Law*, 12 *STAN. L. REV.* 731 (1960).

7. See HERBERT FINGARETTE & ANN F. HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* (1979); HERBERT FINGARETTE, *THE MEANING OF CRIMINAL INSANITY* (1972).

8. See JOEL FEINBERG, *DOING AND DESERVING* (1970).

9. See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974) [hereinafter *ANARCHY*]; *PHILOSOPHICAL EXPLANATIONS* (1981).

10. See the reprint of Thomson's earlier essays in JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* (1990).

11. I confess that my own book *RETHINKING CRIMINAL LAW* (1978) received much more attention than I expected.

The Model Penal Code ceased being a stimulus to new legislation and became instead a dogmatic resource for teaching criminal law. The Code contained definitive positions on the meaning of purpose, knowledge, recklessness and negligence,¹² the nature of necessity and self-defense,¹³ and the relevance of mistakes both of fact and of law.¹⁴ With these problems seemingly solved in codified black letter, there was little impulse to think through these issues anew.

By the mid-1980s the signs of trouble became apparent. New modes of theoretical were on the rise, and with few exceptions they had little to offer the theory of criminal law. The Law and Economics movement was winning new adherents everywhere, and it had little insight to offer on the old fashioned issues of guilt and punishment. From the vantage point of criminology and moral philosophy, the economists made all the wrong assumptions. First, they assumed that all sanctions were simply prices that actors pay for engaging in their preferred conduct. Philosophers had always stressed the expressive and condemnatory nature of punishment,¹⁵ a factor that simply fell beyond the economist's ken. Further, economists assumed that potential criminals made rational calculations about whether committing a crime was worthy of their time and trouble. This simple minded view of criminal conduct could only make criminologists smile. In the end, despite some good faith efforts, those interested in economic analysis of law simply had to ignore the complications of criminal justice.

The critical legal studies movement fared no better. Except for one article by Mark Kelman,¹⁶ the "crits" had al-

12. AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES § 2.02 (Official Draft and Revised Comments 1985).

13. *Id.* §§ 3.02, 3.04.

14. *Id.* §§ 2.04, 3.09.

15. See, e.g., Joel Feinberg, *The Expressive Function of Punishment*, 49 THE MONIST 397 (1965); Jean Hampton, *An Expressive Theory of Retribution*, in RETRIBUTIVISM AND ITS CRITICS 1 (Wesley Cragg ed., 1992); Herbert Morris, *A Paternalistic Theory of Punishment*, 18 AM. PHIL. Q. 263 (1981).

16. Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

most nothing to say about criminal justice. This was, in fact, surprising. A leftist Marxist criminology was available for borrowing from France and Germany, but this critique of crime as a product of Capitalist society never seemed to catch on in the United States.

The only academic movement of the 1980s that made an impact on criminal law was feminism. With her taboo-shattering article, Susan Estrich pinioned the field of rape for critical reassessment.¹⁷ Since then numerous feminist critiques have emerged of the discriminatory treatment of women in the criminal law. The introduction of a "battered women's defense" led to sustained inquiry on the foundations of self-defense, particularly the importance of the requirement that the defender be subject to an "imminent risk" of attack.¹⁸ The defense of provocation has also received its share of debunking criticism, the claim being that the cultural assumptions underlying the defense favor the defense of men who kill women rather than of women who kill men.¹⁹ The feminist critique of criminal justice was surely long overdue—though there may be dangers now of ideological excess.²⁰ Capital punishment also poses a field for sexist critiques, both as it affects women and men. As typified in the O.J. Simpson case, prosecutors rarely demand the death penalty when men kill their wives or former wives. At the same time, the death penalty is rarely applied against female murderers—a pattern of discrimination against men that is rarely voiced.²¹ There are undoubtedly patterns of discrimination in the law that require exposure and correction. Whether this remains an arena for long-range study and publication remains to be seen.

17. Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

18. For a critical assessment of the battered woman's defense, see Coughlin, *supra* note 3.

19. Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997).

20. See my critique of the trial of Mike Tyson in GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 120-31 (1995).

21. For a critique of the Soviet proposal (later adopted as law in Russia) to eliminate the death penalty against women as a matter of law, see George P. Fletcher, *On Trial in Gorbachev's Court*, N.Y. REV. BOOKS 13 (May 18, 1989).

With the major exception of feminism, then, the intellectual trends of the 1980s did little to make criminal law attractive to ambitious young scholars looking for new and fashionable methods of argument. For good or for ill, novitiates avoided the field. Major law schools—such as Harvard, Yale, Michigan, Stanford—appointed younger faculty who started teaching criminal law without any interest in probing the philosophical foundations of criminal law. By the early 1990s, one could say, with sadness, that there was virtually no one under forty writing in the field.

II. CRIMINAL THEORY AND TORT THEORY

The decline of criminal theory during the latter period stands in useful contrast to the rise of tort theory, a field that in my view was born of the challenge posed by the economic analysis of law. The question was whether the Kaldor/Hicks test and the principle of efficiency could properly displace criteria of justice in allocating tort liability.²² Two articles, published in the early 1970s, struck back against the emergent paradigm of economic efficiency.²³ The leader of the economist camp, Guido Calabresi, then felt compelled to respond and defend his views on the primacy of economic efficiency.²⁴ The anti-efficiency, pro-justice literature came to group itself under the rubric "corrective justice." Ernest Weinrib and Jules Coleman became leaders of the justice camp, each eventually producing a book length statement of their position.²⁵ The field became attractive to younger scholars who sensed, quite properly in my view, that these were issues worth arguing about.

22. For a summary of the arguments, see the chapter "Efficiency" in GEORGE P. FLETCHER, *BASIC CONCEPTS OF LEGAL THOUGHT* 155-71 (1996).

23. Richard Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

24. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

25. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995); JULES L. COLEMAN, *RISKS AND WRONGS* (1992).

It is fair to say that today, corrective justice represents an established school in tort law. It has a name, a label, a "flag" that its adherents can rally behind; it stands for an important question of value that goes to the heart of private law. Most importantly, it has a powerful opponent in the school of economic analysis.

One should not underestimate the importance of articulate opponents or intellectual enemies in developing the profile of an academic field. Positivism needs to attack the "dogmatism" of natural law, as natural law needs to attack the "moral arbitrariness" of positivism. The economists need arcane and inefficient rules to criticize, and corrective justice could have not have taken off unless the economists were there to serve as an appropriate and influential target.

The only exception to this general pattern seems to be feminism. The "enemy" for feminism is not a body of academic literature, for no one wants to define himself or herself as anti-feminist. It would be akin to declaring yourself opposed to human rights. The enemy for feminist literature is not an academic school but the sexist practices of the legal system itself.

At this stage of its revival, criminal theory still lacks many of the characteristics that have led to the development of the leading schools of the last two decades. There is no "flag" like corrective justice to rally behind. Most significantly, there is no apparent enemy. Who stands opposed to the style of argument represented in this remarkable and insightful collection of essays? The opposition consists not in an articulated set of views but rather in indifference.

Indifference is an elusive enemy. Policy makers in the field of criminal justice should pay more attention to academic criticism. Those who contemplate draconian sanctions like "three strikes and you're out" should heed the arguments of experts who predict what will happen when the law goes into effect.²⁶ But in their day-to-day operation,

26. See, e.g., Samuel H. Pillsbury, *Why Are We Ignored? The Peculiar Place of Experts in the Current Debate About Crime and Justice*, 31 CRIM. L. BULL. 305 (1995).

legislatures and courts pay little heed either to criminologists or theorists of the criminal law.

The general indifference to theoretical work in the criminal law accounts for the dreadful state of the case law. Pause and consider whether there is any opinion in the leading casebooks that you could take to be reliable or even plausible exposition of the philosophical foundations of criminal responsibility. Is there any case about which you could say? "I am proud to teach a body of law in which these views are expressed." In tort law, there are many of this sort—ranging from the classic essay by Justice Cardozo in *Palsgraf*²⁷ to the path-breaking exposition by Justice Traynor in his concurring opinion in *Escola*²⁸ to the thoughtful arguments of Judge Lehman on the issue of negligence per se.²⁹ Legal opinions of this quality mean that contemporary tort theorists can write about corrective justice without distancing themselves entirely from the teachings of the judiciary. Their views find support and resonance in the great legal opinions of the last century.

In substantive criminal law, I dare say, there are literally no opinions of this quality. Of course, we all like to teach and ponder the situation of cases like *Dudley & Stephens*³⁰ or the *Goetz*³¹ case. And the arcane technical opinions of the California felony murder cases remain a perennial favorite. But could anyone plausibly claim that the Queens Bench fathomed the depths of criminal responsibility in *Dudley & Stephens* or that we really wish to argue on behalf of a jurisprudence of felony murder? The fact is that stripped of their power and their judicial robes, these authors of opinions in the criminal law have very little to say. They stand to Cardozo's reflections on risk in *Palsgraf* as doggerel stands to poetry.

27. *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928).

28. *Escola v. Coca Cola Bottling Company of Fresno*, 150 P.2d 436 (Cal. 1944).

29. *Brown v. Shyne*, 151 N.E. 197 (N.Y. 1926).

30. *Regina v. Dudley & Stephens*, [1884] 14 Q.B.D. 273.

31. *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986).

The puzzle confounds further. The same judges who write the memorable tort opinions also write opinions in criminal law. How could they could be so intelligent and insightful when writing about torts but have so little to say about the criteria of criminal responsibility? The reason, I believe, is that the theoretical structures of criminal responsibility are too weak to resist the political pressures favoring conviction.³² The commitment to do justice buckles in the face of the potential deterrent advantages of conviction. Accordingly, common law courts remain committed to very few firm principles in the field of criminal justice. They impose strict liability. They disregard claims of mistake of law and even mistakes of fact in cases when a conviction will send the right "message" to society. They shift the burden of persuasion when it is convenient to do so. They persist in applying catch-all prosecutorial doctrines, such as the felony-murder rule and vicarious liability for co-conspirators. Most seriously, the courts refuse to pay heed to the conceptual tools—such as clarifying the concept of mens rea (culpability) or distinguishing between justification and excuse—that would enable the judiciary to state robust and compelling principles of liability.

That the American procedural system so clearly favors defendants makes it difficult to work out fair-minded, even-handed criteria of criminal responsibility. U.S. Prosecutors have only one crack at conviction, for in contrast to the situation on the European Continent and even in Canada, U.S. prosecutors cannot appeal jury verdicts of not guilty. This means that judges will deny instructions that might favor the prosecution, for if the judges err in favor of the state they can be reversed; if they err in favor of the defense they cannot be reversed.³³ As a result, the state receives

32. This may be generally true, but it does not explain judicial monstrosities favoring acquittal, the leading example of which is *D.P.P. v. Morgan*, [1976] A.C. 182.

33. A good example is the refusal of trial judges to eliminate the biased instructions that permitted juries to infer consent from an alleged rape victim's prior sexual experience. See FLETCHER, *supra* note 20, at 108-31.

compensation for its procedural disadvantages at the level of substantive law. Strict liability, felony-murder, vicarious liability, and conspiracy doctrines make it easier to secure a conviction in the face of the defense's credibly disputing the factual basis for charges of culpable conduct.

Whether these accounts suffice or not, the fact remains that the opinions in the field of substantive criminal law lack educational power. And yet the conventional manner of teaching criminal law in the United States requires professors to mull over these second rate disquisitions on criminal responsibility. Not surprisingly, decades of teaching opinions we do not respect have hardly advanced the refinement of the general understanding of the criteria of criminal responsibility. Given the conventions of American law teaching, first year teachers are not likely to turn to intelligent texts and monographs to improve the level of discourse. The best alternative to the case method remains the dogmas of the Model Penal Code.

III. OVERCOMING THE BIASES OF CODIFICATION

The Model Penal Code is not the only code that stifles theoretical inquiry. Every place you go in the Western world, you will find a criminal code that lays out the definitions of offenses in the code's "special part" and prescribes general principles of responsibility in the code's "general part." Germans are proud of their code enacted in 1975. The French show off a new 1994 code, as do the Spanish their 1995 innovation. One of the first items of business in the post-Communist countries of Eastern Europe is to adopt new criminal codes to reflect their new emphasis on human rights and the just treatment of criminal suspects.

One consequence of codification is that every country asserts its own conception of philosophical truth about the definitions of offenses and the principles for determining questions of self-defense, necessity, insanity, negligence, and complicity. The dogmas of the local positive law inhibit local scholars from probing the philosophical issues that lie behind the code. The role of scholars is reduced to writing

commentary on the proper interpretation of the code. At the most they can propose readings of the official text that suit their sense of justice, but they cannot approach problems as philosophical issues to be resolved without being cabined by authoritative starting points. Further, the parochial nature of codification discourages the development of an international body of scholars all engaged in a conversation about the same basic issues.

Yet as the world has in fact become more localized in criminal justice, the contrary aspiration has become stronger. The talk today in the European Union is of the "Europeanization" of criminal law. "Globalization" has become the cliché of the times, but criminal law remains confined and indebted to its nationalist premises.

The thesis of my forthcoming book *Basic Concepts of Criminal Law*³⁴ is in fact that diverse systems of positive criminal law already display greater unity than we commonly realize. In order to perceive this underlying unity, we must take a step back from the details and the linguistic variations of the criminal codes. The unity that emerges is not on the surface of statutory rules and case law decisions but in the debates that recur, explicitly and implicitly, in every legal culture. My claim is that a series of distinctions shapes and guides the positions taken on doctrinal points in every system of criminal justice. Whether you start from the Model Penal Code or the German Criminal Code, you will inevitably confront disputes about these questions, such as the distinction between substance and procedure, punishment and treatment, crimes and offenders, offenses and defenses, intention and negligence, attempts and completed offenses. A total of twelve distinctions of this sort constitute the "deep structure" of criminal law all over the world.

These basic concepts of criminal justice are philosophical and conceptual in nature. They possess a truth value that cannot be resolved simply by an act of law-making will. A

34. GEORGE P. FLETCHER, *CONCEPTOS BASICOS DE DERECHO PENAL* (1997) (English version forthcoming 1998).

legislature can no more resolve a philosophical problem than it can determine a matter of scientific controversy. There is no way that a code—or case law for that matter—could decide definitely whether, say, the statute of limitations is substantive or procedural. Nor could a code decide whether deportation is a criminal sanction, requiring the full array of procedural measures reserved for criminal trials. These questions require the lawyer or the judge to ponder the nature of substantive rules or of punishment and to assay whether the particular institution is to be classified as part of the concept or not.

Codes must be understood, therefore, as tentative answers to eternal questions. Scholars must remain committed to probing the depths of those eternal questions, whatever the local code may say on the matter.

IV. NEW DIRECTIONS FOR CRIMINAL THEORY

A certain impulse toward revival occurs in any body of theory when scholars realize that a previously dormant idea casts their work in a new light. Thus economists gain energy from the assumption that efficiency shapes and drives the common law. The “crits” thrive on the notions of indeterminateness and hegemonic power implicit in legal doctrine. In criminal law, as well, major conceptual reorientations have advanced the field. This happened at the end of the 19th and early 20th century in the U.S. and Germany alike when many theorists and judges thrust the notion of guilt to the center of their thinking.³⁵ All of a sudden they grasped that guilt or culpability was the issue to which all other issues related. This insight led in Germany to decades of debates about the way the various issues were related to culpability. It led in the U.S. to the insight that all “defenses”—for example, self-defense, insanity, duress—ultimately bore on guilt or culpability. If the prosecution had to prove guilt beyond a responsible doubt, then it must

35. See *Davis v. United States*, 160 U.S. 469 (1895); Judgment of May 8, 1894, 33 RGZ [Decision of the Supreme Court in Civil Cases] 352.

also prove all matters bearing on guilt to the same degree of certainty.

Insight comes from bringing to bear a novel way of thinking to previously settled bodies of law. Today we are more inclined to think, as I claimed in the introduction to *Rethinking Criminal Law* that "criminal law is a species of moral and political philosophy." This hasty remark might adventitiously have been correct. It might have presaged a pattern of interest in exploring the connections between the criminal law and moral and political philosophy. Surprisingly, this did not come to pass. The omission in the literature remains to be filled.

Criminal punishment is the most elementary and obvious expression of the state's sovereign power. One would expect, therefore, that the theory of punishment and of criminal law would be high on the agenda of those interested in the philosophical foundations of the state. In the contemporary writing on political theory, however, both criminal law and criminal procedure receive short shrift. A appealing challenge awaits us in exploring the implications of libertarianism, liberalism, communitarianism, republicanism, and other political theories for the details of criminal liability. This project requires not only a study of the relevant political theory but of the technical details of criminal law.

The criteria of criminal responsibility also provide a laboratory for testing sensibilities of moral right and wrong. The utilitarians and Kantians have in fact had much to say about the rationale for punishment. Virtue theorists have recently offered us a more subtle account of culpability.³⁶

Yet philosophical training provides no assurance of wisdom. I will discuss two examples that illustrate philosophical thinking gone awry. I present these views here in order to make an important point about the revival of criminal theory. No revival occurs without debate. Though I regard the views I shall discuss as wrong, they are nonetheless plausible and thoughtful positions. They warrant credit for

36. See Huigens, *supra* note 3; Kahan & Nussbaum, *supra* note 3.

providing the stimulus for ongoing debate about the foundations of liability.

The two examples pose perennial puzzles in criminal theory. The first is the problem whether completed offenses should be punished more severely than attempts. And the second is whether a coherent distinction obtains between causing harm and letting it happen. The latter problem is often termed the problem of distinguishing between acts and omissions.

Philosophers and philosophically minded lawyers often argue that attempts should be punished the same as completed acts. There is no difference, they maintain, in the culpability of someone who shoots and kills and someone who shoots and misses.³⁷ Culpability is expressed in control, and, the argument is, the shooter has ultimately no control over the path of the bullet. What happens after the bullet leaves the gun is a matter of fortuity and therefore not properly laid to his charge. There is something plausible about this view, although in fact people do regard themselves as responsible only for the harm they cause—and not the harm they intend or the harm they nearly cause. If a modern day Raskolnikov suffered paralyzing guilt for putting poison in the drink that his intended victim never touched, one would wonder about his mental stability.

Those who favor the principled equivalence of attempts and caused harms might respond that those who intend and try to bring about harm ought to feel just as guilty as those who actually do bring it about. This claim of "ought" merely restates the view that culpability is based on control and no one has control over the causal sequence that connects one's actions to the occurrence of harm.

The mistake in the equivalence thesis (trying to kill = actually killing) is ignoring that culpability in law is relevant only as it relates to wrongdoing. To be more precise, if

37. See, e.g., JOEL FEINBERG, *DOING AND DESERVING* (1970); Sanford Kadish, *The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 1501 (1994).

culpability is a function of wrongdoing, then the following syllogism applies:

- 1) If the wrong is greater, the culpability is greater.
- 2) The harm and therefore the wrong of killing is greater than the wrong of attempting to kill.
- 3) Therefore, the culpability for killing is greater than the culpability for attempting to kill.

The problem, then, is establishing that in law the only form of relevant culpability is culpability for wrongdoing. The way to grasp this proposition is to see it as a problem of political as well as moral philosophy.

Punishment for crime becomes defensible as a matter of political theory only if the actor has done something to encroach upon the common sphere, the public space. This encroachment could be defined, as John Stuart Mill defined it, as causing harm to others,³⁸ or it could be understood as violating the rights of the community to order and security. Actions are wrong—or represent wrongdoing—when they encroach in this way on the rights of others or the shared public interest in security.

The political philosophy standing behind this proposition would be liberal or libertarian. It recognizes the distinction between the private and public spheres, the purpose of criminal punishment being solely to safeguard the public sphere. However bad our thoughts in the private sphere, they do not constitute a justification for the state's intervening in our lives, subjecting us to trial, and imposing punishment on us as though the evil that lurks in our hearts were the business of all.

The proper way to think about criminal liability, therefore, is to recognize the lexical ordering of wrongdoing, responsibility, and culpability (or guilt). As Robert Nozick captured the ordering: $C = W \text{ times } r$, where W stands for wrongdoing, r for the degree of personal responsibility, and C for the level of culpability. W increases with the level or

38. JOHN STUART MILL, *ON LIBERTY* 13 (Currin V. Shields ed., 1956) (1859).

harm or proximity of the threat of harm;³⁹ r varies between 0 and 1.⁴⁰ It is lower for negligently risking harm than for intentionally bringing it about. In the case of excuses, r is reduced to 0.

Several implications follow from this liberal approach to criminal responsibility. First, as I have argued, because W is greater for actually causing harm, C for completed crimes is greater than for attempted crimes. Further, because wrongdoing is indispensable, there should be no criminal liability in cases of impossible attempts where the action itself is wholly innocuous. The standard example is mistaking sugar for cyanide and putting a large dosage in the coffee of someone you want to kill. The action consists in putting sugar in coffee with the intent to kill. The Model Penal Code section 5.01 recognizes liability in this case, as does the German Criminal Code section 22. The rationale for liability is that by acting on his wicked intent, the actor shows himself to be dangerous. Despite the influence of the German law on the Continent, the overwhelming trend of Continental jurisdictions is to hold fast to the liberal principle that culpability presupposes external wrongdoing that actually encroaches upon the rights of others.⁴¹

Philosophers who have argued in favor of the equivalence thesis have ignored the interplay in this context of moral and political philosophy. They assume, it seems, that the problem of criminal punishment depends solely on moral responsibility, and that moral responsibility is something that occurs in the realm of intending. Whether they are right or wrong on the moral point, they simply disregard the significance of punishment as an act of state power and the necessity of justifying punishment as an intervention of public authority in the lives of free individuals.

39. NOZICK, *supra* note 9, at 60-63 (the original formula was $R=r \times H$, where R is the quantity of deserved punishment and H is the amount of harm).

40. This proposition, if accepted, has powerful implications. For a recent application in the field of hate crimes, see Dillof, *supra* note 3.

41. The trend is typified by the new Spanish Criminal Code, which returns to the liberal principle in a deliberate rejection of the fascist past. See SPANISH CIVIL CODE § 16 (1).

A second conundrum reflecting similar confusion attends the effort to distinguish between actions and omissions. This problem often gets confused with the nature of human action.⁴² But the issue is not action versus inaction, for decisions to remain passive also reflect human agency. The issue is properly expressed as the opposition of letting harm occur and bringing about harm by assertive action. The question is whether if someone stands by as another suffers, the wrongdoing of failing to intervene and arrest the suffering is as bad as actually causing it. It seems to me fairly obvious that the wrongdoing of causing harm (say, actually drowning someone with your own hands) is much greater than merely standing by and failing to intervene to prevent it (passively observing the drowning). But there are at least three lines of thought that support skepticism about the distinction:

A) A consequentialist, particularly utilitarian analysis of acts and omissions would render acts and omissions equivalent: they both have the same consequences.

B) A strictly moral, subjectively focused assessment would also render acts and omissions equivalent. After all, if culpability is located in intentions (as argued above in favor of the equivalence theory of attempts), then the intention of the person who stands by and fails to intervene might be just as wicked as that of the person who kills with his own hands. Immanuel Kant argued that failing to rescue others violated the categorical imperative.⁴³

C) In controverted cases, the distinction loses its grip and it becomes almost impossible to achieve consensus on classifying the case. For example, is turning off a respirator an act of killing (action) or of

42. See generally MOORE, *supra* note 1. For my critique of Moore's view of omissions, see George P. Fletcher, *On the Moral Irrelevance of Bodily Movements*, 142 U. PA. L. REV. 1443 (1994).

43. IMMANUEL KANT, *GROUNDWORK TO THE METAPHYSICS OF MORALS* 17-22 (Herbert James Paton trans., 1962).

letting die (omission)? Difficulties in borderline cases induces skepticism about the distinction in general.

This a powerful confluence of forces, enough to make one wonder why the law holds so firmly to the distinction. And lately many people have argued that the law should abandon the distinction as morally irrelevant.

Skepticism about acts and omissions surfaced recently in the dispute about assisted suicide. The conventional way of thinking about Dr. Kevorkian's death mask is that providing the mask to terminally ill patients (allowing them to pull the fatal string) differs fundamentally from the patient's refusing medical care necessary to stay alive. The former is an act facilitating suicide, the latter is a mere refusal to accept treatment, an omission. As a result, all states—with the once disputed exception of Oregon⁴⁴—allow patients to refuse treatment but explicitly prohibit medically assisted suicide.

Critics argue that this distinction is irrational. There should be no difference, they say, between acts "aiming at death" and omissions "aiming at death." Ronald Dworkin recently led a distinguished group of philosophers in writing a Philosophers' Brief in Supreme Court litigation on the constitutionality of prohibiting assisted suicide.⁴⁵ The Brief explicitly rejects the moral relevance of the distinction between the patient's refusing medical care and the physician's acts facilitating death. The only relevant issue, Dworkin argues, is whether the action or inaction "aims at death." This is another example of an effort to influence the contours of the law with ill considered philosophical arguments.⁴⁶ Fortunately, the Supreme Court ruled nine votes to zero that the lower courts (as well as the philosophers)

44. *Lee v. State*, 107 F.3d 1382 (9th Cir. 1997) (permanent injunction against enforcement of act vacated for lack of standing and case remanded).

45. Ronald Dworkin et al., *Assisted Suicide: The Philosophers' Brief*, N.Y. REV. BOOKS 41 (Mar. 27, 1997).

46. See George P. Fletcher, *Assisted Suicide: The Philosophers' Brief—An Exchange*, N.Y. REV. BOOKS 45 (May 29, 1997) (responding to Dworkin et al., *supra* note 45).

were wrong.⁴⁷ The distinction between facilitating the death of another and refusing medical care bears a compelling political and moral truth that we would disregard at our peril.

As a matter of political theory, there is little doubt about the critical distinction between state action and state inaction. The entire edifice of American constitutional law rests on the distinction. The due process clause of the Fourteenth Amendment prohibits states from affirmatively violating the rights of citizens; it does not prohibit states from passively tolerating these violations on the initiative of other citizens. Of course, the distinction is difficult to draw in many cases, and many critics complain that it is sometimes applied with morally dubious consequences.⁴⁸ The distinction may resist easy application, but exist it does. There would have been great irony in a Supreme Court holding that a distinction constituting the very foundation of constitutional law was irrational.

As a matter of libertarian political thinking, the distinction between failing to aid others and interfering in their rights proves to be of cardinal importance. The libertarian spirit of Kant's philosophy of law led him to favor liberty under the law over the dictates of morality. The moral duty to rescue others in distress would not have applied in his scheme designed to protect liberty under law. Those who argue from Kant's moral philosophy to conclusions about duties to rescue under the law confusingly conflate moral principles with legal and political philosophy.⁴⁹

Mistaken philosophical claims about acts and omissions have much in common with the errors we encountered in examining the efforts to equate attempted crimes with actual crimes. Skepticism both about the distinction between acts and omissions and about the distinction between attempts and completed crimes derives from the same root

47. *Vacco v. Quill*, 117 S. Ct. 2293 (1997).

48. See *DeShaney v. Winnebago Co. Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

49. For an example of this confusion, see an article by an otherwise careful legal philosopher, Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 *YALE L.J.* 247 (1980).

misconception. Both are premised on a dubious moral theory that takes bad intentions to be the core of immoral conduct. This view of morality would be influential only if theorists committed the additional mistake of failing to integrate political theory into their views of just punishment.

It should be clear, I think, that the future of criminal theory rests on an adequate appreciation of both moral and political philosophy. It is after all the state that seeks to inflict punishment. Without a view about the proper relationship of the state to its citizens, moral theories about crime and punishment can lead us astray.

Despite these mistaken uses of philosophy in criminal theory, we have reason to celebrate. The field of criminal theory, all too ignored not long ago, is now coming center stage in the thinking of those concerned about justice in the legal system. This Symposium itself marks a major stride forward. The next step, one should hope, would be a set of responses and arguments with the articles published here. The time has come to ponder, question and criticize the basic use of state power to punish those who engage in wrongdoing against others.

I congratulate the *Buffalo Criminal Law Review* for bringing together these articles and contributing to the ascendancy of criminal theory.