Fletcher's Essays on Criminal Law

Edited by RUSSELL L. CHRISTOPHER

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CHAPTER 1

Introduction

*Russell L. Christopher**

Had George Fletcher never penned a single word beyond his magisterial *Rethinking Criminal Law* in 1978, his reputation as perhaps the foremost criminal law scholar in the world would be assured. Hailed as "the most important book in the English language about the philosophy of criminal law written in the past century,"[1] *Rethinking* is still the most cited book on criminal law and one of the most cited books on law, period. *Rethinking* has been the focus of several symposia and countless analyses.

Equally important, but comparatively overlooked, are Fletcher's essays on criminal law. Though Fletcher has written more than fifty major articles on criminal law spanning more than six decades, they have neither been the focus of a symposia nor been collected in a volume—until now. It is in these essays, all but one written after the publication of *Rethinking*, that Fletcher hones and polishes the themes of *Rethinking* as well as advances new arguments and breaks new ground. They are critical in understanding the evolution of his views on criminal law.

This volume is the first to focus exclusively on Fletcher's essays on criminal law. Though not a comprehensive collection, it includes twelve selected essays. The essays selected include many of Fletcher's most famous and important articles as well as some that are less well known but equally rich and interesting. The topics of the essays range widely: punishment, mens rea, mistake, justification, excuse, self-defense, necessity, duress, construing criminal conduct as a form of domination, the specific crime of blackmail, the protection of crime victims, as well as the very status and purpose of theoretical criminal law scholarship. Reflecting this diversity, there are essays from each of the last four decades. The essays were originally published in leading student-edited law reviews, peer-reviewed journals, and foreign journals and as book chapters. They appear much as they originally did, with only two of the essays edited for length.

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This volume is unusual in three respects. First, it contains not only Fletcher's essays but also critical commentaries by leading criminal law scholars, philosophers, and an appellate judge. Each of Fletcher's twelve essays is followed by a critical assessment of its current relevance. Second, though the selected essays are representative of Fletcher's singularly distinguished career, the selection process is atypical. Neither Fletcher nor the editor nor the publisher selected the essays. Selection was done by the scholars critiquing the essays. As a result, the selection itself provides an interesting comment on the breadth, scope, and continuing vitality of Fletcher's corpus of work in the theory of criminal law. It supplies insight into the aspects of Fletcher's scholarship that still inspire, motivate, challenge, draw admiration, and induce sharp disagreement. Third, concluding the volume is a new essay by Fletcher in which he replies to the critical commentaries and reflects on his career as a criminal theorist.

Not surprisingly, the area occupying the bulk of the commentators' attention is the justification/excuse distinction. Five of the twelve essays address aspects of the distinction. These essays are presented in chronological order of original publication so as to afford a view of the evolution in Fletcher's thought. Fletcher has long been credited, and these commentators continue to extend that credit, with resurrecting the justification/excuse distinction. Lauded for prophetically "crying in the wilderness,"[2] Fletcher, in essay after essay, demonstrated the significance and importance of the distinction. He showed us the analytical richness of a criminal law embracing the distinction and the impoverishment of a criminal law denying it. But while Fletcher enjoys near-universal acclaim for focusing our attention on it, the details and contours of the distinction have wrought near-universal disagreement. Scholars, including those in this volume, find no shortage of aspects of the distinction with which to disagree with Fletcher as well as with each other. And even to the extent that Fletcher's critics agree with him, they often find that he is right for the wrong reason.

But Fletcher's true legacy might well be that even when his specific doctrinal conclusion is wrong, he is wrong for the right methodological reason. That is, Fletcher's lasting influence might not be his specific positions on doctrinal issues but the methods and modes of argumentation by which he has transformed criminal law scholarship. Fletcher favors the philosophical over the empirical and psychological, the normative over the positive, the deontological over the teleological, and principle over policy. By favoring cosmopolitanism over provincialism, Fletcher is credited with practically inventing the field of comparative criminal law. Not content to stand pat with this new field of comparative criminal law, Fletcher upped the ante by fusing it with the linguistic analysis of Wittgenstein and H. L. A. Hart. Blessed with fluency in innumerable languages, Fletcher not only critically compares the substantive doctrines of disparate legal cultures but also plumbs, for insight and understanding, the very words that different languages use to express those doctrines. In the opening words of one of his most famous articles, "The Right and the Reasonable," Fletcher lays down the challenge: "We lawyers should listen to the way we talk [in different languages]."

Fletcher also favors argument from reason over argument from authority. In one of his essays in this volume he declares that philosophy is about great ideas, not great philosophers. In his concluding essay to this volume, Fletcher reminisces that at the start of his career he was the rebel outsider railing against the establishment figures of criminal law. It cannot be understated that this is no longer the case. Now that Fletcher has ascended to the status of an authority, one might expect that he might feel conflicted about his original views on reason over authority, great ideas over great thinkers. But, if anything, one senses in Fletcher that the conflict runs the other way. One senses his nostalgia for an earlier time when *only* reason was his ally.

In his Nobel Prize acceptance speech, William Faulkner remarked that the only thing worth writing about was "the human heart in conflict with itself." Such internal conflict may be at the heart of criminal theory. As Fletcher's first essay in this volume notes, criminal theory truly came alive in the conflict between Jeremy Bentham's utilitarianism and Immanuel Kant's and Georg W. F. Hegel's retributivism. If the true spirit and function of this enterprise of criminal theory is dialectical—thesis and antithesis clashing to reach a synthesis—the form of this volume follows suit. Each of Fletcher's twelve essays is followed by a critical comment. And following each of these twelve pairs of contrasting views is Fletcher's critical reply to his critics. Whether Fletcher's reply essay reaches a true and lasting synthesis is open to question. Perhaps the most that can be hoped for is a tentative and transitory reflective equilibrium at which only the reader and future generations of criminal theoreticians will arrive.

Bertrand Russell once said of Ludwig Wittgenstein, after Wittgenstein supplied a particularly withering critique of Russell's argument: "I couldn't understand his objection—in fact he was very inarticulate—but I feel in my bones that he must be right." In contrast, neither Fletcher nor any of his critics is inarticulate; and clearly, neither feels in his or her bones that the other is right. Each pair of essay and corresponding critical reply suggests a quarrel. But while there are pointed words and sharp disagreement, there is no Wittgenstein chasing Karl Popper with a fireplace implement. This volume spawns no mythic tale of Fletcher's Poker. If each pair of essay and corresponding critical reply suggests a quarrel, it is, as many of the critical replies attest, a lover's quarrel.

What follows is a brief summary of the twelve selected articles and their critical replies, followed by a brief comment on Fletcher's closing essay replying to his critics.

Introduction and Overview

In his aptly named essay "The Nature and Function of Criminal Theory," Fletcher seeks to describe and explain the curious enterprise of theoretical criminal law. He situates it in the intersection of positivist law and philosophy.

Though Fletcher dates the philosophical roots of this enterprise as far back as Aquinas and Aristotle, philosophical methodology truly bears fruit for criminal law in the clash between Kantian retributivism and Benthamite utilitarianism. Why philosophy? Fletcher answers that criminal theory is more a humanist inquiry than a social science; it is not an empirical endeavor.

The task of the criminal theoretician is both to articulate the intuitions that underlie widely accepted features or doctrines of criminal law and to support them with convincing argument. Likening the criminal theoretician to a religious scholar, both must interpret authoritative, but parochial or indigenous, sources or texts and by applying reason draw out universal principles that might have persuasive force to all.

But what if source, text, or practice conflicts with theory and reason? This occurs in two different ways. First, the authoritative sources, traditional doctrines, or widespread practices may be seriously wrong or violate other principles of criminal law. For example, the felony murder rule is deeply entrenched in America, despite its violation of both the culpability requirement and the presumption of innocence. Second, a widely accepted theoretical position may be seriously wrong in its opposition to a nearly universal feature of criminal law systems. For example, perhaps a substantial majority of scholars wrongly opposes the widely accepted doctrine of punishing completed offenses more severely than attempts.

In addressing these conflicts, the criminal theoretician faces a crisis of method. First, the use of intuitions to resolve the conflicts is problematic because we are unsure as to whose intuitions should be dispositive—the average person on the street or lawyers/judges or a scholar such as Michael Moore. Additionally, one's intuitions might conflict. For example, Fletcher suggests that one might hold both of the following seemingly conflicting intuitions: (1) the consequences of an actor's conduct should be irrelevant as to the punishment of an actor, and (2) punishing as felony murder the robber who accidentally kills. Second, a comparative law analysis that a doctrine or practice is not merely embedded in one legal system but many or most legal systems worldwide may provide some support. But this method is flawed because worldwide trends or widespread practices may be as wrong as they are right. For Fletcher, the parochial view of the United States favoring felony murder and capital punishment in the face of worldwide opposition suggests that the U.S. position is wrong. But impossible attempt liability is wrong despite the widespread support it enjoys throughout the world's legal systems. Third, in addition to legal authority, the philosophical authority of, for example, a Kant or Aristotle might be invoked. But "philosophy is not the history of philosophy." While we may grant Kant or Aristotle the honor of the first word in the debate, we should not grant them the last. In addition, philosophical argument may be misused by lawyers. For example, Fletcher demonstrates how Kant's views have been misread as supporting the irrelevance of the consequences

of our actions in determining our punishment. Fourth, "strict logical argument" might be utilized, but "strict logical arguments are rare in the literature." Fletcher concludes that the criminal theoretician's methods are a hodgepodge of intuition, case law, philosophical references, and policy arguments.

In addition to the competing, contributing perspectives of law and philosophy, criminal theory also "defines an intersection between moral and political philosophy." Individual guilt and punishment is the domain of moral philosophy while collective guilt and state punishment is the domain of political philosophy. While considerable attention has been paid to the debate between retributivism and deterrence as the preferable justification for punishment, the logically prior question of political philosophy—"What makes it legitimate for the state to make people suffer?" under either or any justification of punishment—receives comparatively short shrift. Fletcher defends two propositions emanating from his political theory. First, the criminal law should be act-based not actor-based. But liability for impossible attempts and enhanced punishment under "three strikes and you're out" legislation punish not for conduct but rather because of the dangerousness of the actor. Second, the criminal law should serve as the remedy of last resort for wrongful harms. But this principle conflicts with retributivism's view that the state has an absolute duty to punish all those who deserve it.

For Fletcher, the function of criminal theory "is to probe the basic concepts that bear on legal analysis, order these concepts in some kind of structure, and elaborate the values and principles that lie behind the structure of liability. That is, the theorist takes the details of the criminal law as more or less given and tries to elicit from these details some synthetic principles." An example is the maxim formulated by Lord Coke that "'the act is not criminal unless the mind is criminal.'" This is not a philosophical truth of reason but rather has become a recognized truth about the law that has become a constituent element of law as authoritative as any case or legislation. Fletcher himself offers ten such synthetic claims of criminal law. These principles differ from Ronald Dworkin's famous ethical maxims like '"no one should profit from his own wrong.'" Rather, they derive "from theoretical reflection and generalization from the concrete instantiations of the principle." Fletcher stresses that Americans should join Europeans and Asians as recognizing that such principles derived from theoretical reflection may enjoy the same binding status as case law and legislation. Theoretical commentary should be a primary source of law.

But even Fletcher questions what it might mean for these principles to be sources of law. What happens if these principles conflict with the conventional sources of primary authority? Fletcher answers that they are not refuted because "their appeal and their binding force are a function both of the extent to which they are realized in practice and of their intrinsic moral and logical appeal." But then, on that basis, are cases and statutes invalidated by a conflict with these principles?

In Kyron Huigens's reply, "On 'The Nature and Function of Criminal Theory,'" Huigens addresses the precise nature of the criminal law's obligation to conform to these principles. Huigens expresses surprise that Fletcher does not helpfully invoke Kant's account of the law which stresses that law has a necessary and universal content based on "inherent, universal features of human reasoning." Moreover, Huigens finds that Fletcher describes the normativity of criminal theory in terms inconsistent with Kant. Whereas Fletcher explains that criminal theory involves generalization from particulars, a Kantian account would proceed from the universal to the particular. Huigens concludes that after reading Fletcher's essay, "one is virtually certain to be at a loss to know what the nature and function of criminal law theory might be." Huigens attributes this loss to Fletcher not invoking "the legal theory that most clearly satisfies the need he describes."

Punishment

In "What Is Punishment Imposed For?" Fletcher poses a deceptively simple but rarely asked question. Fletcher interprets it as posing neither of the traditional questions of punishment: What qualifies as punishment and what is the justification of punishment? In tort law it is clear for what compensation is paid—for the injury suffered by the victim. Although the answer is less clear for punishment than it is for compensation, both are only for something that has already happened. While compensation may be paid or punishment inflicted "for the sake of" some forward-looking goal like deterrence, compensation may be paid and punishment inflicted only "for" some "untoward state of affairs" that has already happened. The preposition "for" presupposes a backward perspective because both compensation and punishment are remedies. But while it is clear that compensation is meant to remedy the injury, it is not so clear what punishment is meant to remedy.

Fletcher considers four possibilities. First, punishment is imposed as compensation for the crime victim's injury just as tort law affords compensation for the tort victim's injury. But if both are compensation then a victim should not be able to be compensated twice—once in criminal law and once in tort—for the same injury (as the law does allow). Another difference is that in tort law the degree of liability does not determine the degree of damages; in criminal law the degree of liability is a factor in the degree of punishment. Second, punishment is imposed for the act of wrongdoing—"the unjustified violation of a statutory norm." This view finds support in one of H. L. A. Hart's elements of the definition of punishment: "'punishment must be for an offense against legal rules.'" Third, punishment is imposed for culpability alone. The view finds support in the punishment of impossible attempts. The difficulty of both the second and third possible views, however, is that each ignores the other: inflicting punishment for wrongdoing