# Philosophy of Criminal Law

Douglas N. Husak

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# 1

# *Orthodox Criminal Theory*

## THE NEED FOR CRIMINAL LAW REFORM

SEVERAL KINDS OF BOOKS debunk the criminal law. The most popular are sensationalistic. These are typically written by disillusioned professionals (lawyers or judges) or laypersons (defendants or victims) who emphasize the enormous gaps between the ideals of justice taught in schools and the actual administration of criminal law. The realities of our criminal justice system fall so far short of our aspirations that the resultant charade will continue to provide the content of many a best-seller. These books usually conclude with pleas for drastic reform.

The substantive criminal law is also a frequent object of attack. Some books are nonideological. Authors compile an amusing collection of antiquated laws that remain valid but are no longer enforced. More interesting critiques, however, originate from a political perspective. Radicals argue that many of our laws serve the interests of a privileged minority. Liberals lament the erosion of our civil liberties. Conservatives insist that society has become overly permissive of immorality. Libertarians maintain that too much personal freedom is sacrificed before a government bent on increasing its power. The most familiar allegation is that the criminal justice system provides insufficient protection to law-abiding citizens. Each of these complaints is supported by an examination of recent developments in the substantive criminal law. These books also contain blueprints for improvement.

This book represents yet another attempt to expose the inadequacies of the criminal law, but the target of my criticisms is less familiar. My attack aims at what I call *orthodox criminal theory.* Since it is not common knowledge that criminal law is supported by a theory, I will first introduce its nature and function. Subsequent chapters will raise difficulties with specific parts of this theory.

If my arguments are sound, it will be clear that fundamental

changes in orthodox theory are needed, and I will indicate the direction that such revisions should take. Instead of advocating the wholesale abandonment of orthodox theory, I will identify and retain the core of good sense in the views I replace. I will refer to the end product of my proposals as *revised criminal theory.* Unfortunately, my alternative to orthodoxy is sketchy, programmatic, and incomplete. Future theoreticians will have to decide whether the principles I defend are superior or inferior to their orthodox counterparts. At the very least, I hope to demonstrate that major revisions in orthodox theory are desirable.

The study of criminal theory is worthwhile because of its impact upon practice, and this book explores this connection. Often we read about decisions that offend our sense of justice, and we wonder why such disappointing judgments are rendered. Are our judges incompetent? Are they duped by clever lawyers? Sometimes. More frequently, however, theoretical considerations beneath the surface are at work in shaping the substantive criminal law. Unless this underlying theory is brought to the surface, we cannot begin to appreciate why the law is as it is. Much of the content of the criminal law will remain mysterious and inexplicable without an understanding of its supporting theory.

Nevertheless, the study of criminal theory does not provide a comprehensive understanding of the criminal law. Only a few of the controversies that attract media attention are substantive. The study of criminal *procedure* has become almost an obsession in contemporary America. Procedural technicalities and loopholes baffling to laypersons often contribute to decisions perceived as unjust. Our society continues to debate the rationale and limitations of, for example, Miranda warnings and exclusionary rules. Why this preoccupation with procedure to the neglect of substance? One part of the answer is that the judiciary (and Supreme Court in particular) is constrained to interpret a Constitution that has been interpreted largely (though not exclusively) as a procedural document.[1] Even so, I focus here upon the theoretical deficiencies that have a pernicious influence upon the substantive criminal law.

Substantive criminal theory is critiqued infrequently, and not only because it is less well understood. When knowledgeable authorities are asked what in our criminal justice system is most worth preserving, they are likely to respond by identifying a number of the *fundamental principles of liability* that constitute orthodox theory. Anglo-American criminal theory differs in important respects from European and Eastern traditions, and there is a strong consensus in this country about the superiority of our theory over its counterparts. Although there is wide agreement that our substantive law is in need

of reform, the theoretical constraints in which improvement should take place are thought to be relatively secure. It is a testimony to the strength and influence of orthodox theory that movements to reform the criminal law almost never disregard these fundamental principles, but strain to show how the proposed changes are compatible with them. Disrespect or outright rejection of the fundamental principles of liability is almost never urged. But orthodox criminal theory, I will argue, is somewhat less worthy of preservation than is generally supposed. If the changes I recommend constitute improvements, this aspect of our criminal justice system will become even more deserving of our respect. Revised criminal theory should have a salutory impact upon the substantive criminal law.

It is timely that criminal theory should attract general attention. Although the past few decades have witnessed unprecedented change in state and federal criminal law and procedure, there is good reason to believe that these reforms signal the beginning rather than the end of a welcome trend. Despite these reforms, widespread public dissatisfaction with our system of criminal justice persists. Pressures to increase the efficiency of law enforcement exert a powerful force to compromise the content of the fundamental principles of criminal liability. We must understand when these compromises are defensible, and when they should be resisted. For example, is it really important that we continue to observe the requirement that persons be punished only for offenses that include a mens rea, if greater social protection could be achieved by dispensing with this principle? Familiarity with criminal theory is essential if this kind of question is to be answered.

Moreover, it seems apparent that our system of criminal justice is strained beyond its capacities, and may soon be on the brink of collapse. One of our most significant social and political failures has been our inability or unwillingness to develop effective noncriminal solutions to contemporary problems. Alcohol and drug abuse, for example, have ususally been addressed within our criminal justice system, largely because there has been nowhere else to turn. Had such alternatives been available, it is unlikely that the criminal sanction would be used so widely. Much behavior that constitutes a legitimate object of social concern does not fit the paradigm of blameworthy, reprehensible conduct, and seems ill suited for disposition within our criminal courts. What is urgently required is a rethinking of the kinds of conduct for which criminal penalties are appropriately imposed.[2] As we will see, this issue is absolutely central to revised (though less to orthodox) theory.

Most works by criminal theorists are exceedingly cautious and uncritical of the fundamental principles they apply. Almost all recog-

nize flaws, but none is as sweeping in its objections as this book. The closest recent work is George Fletcher's *Rethinking Criminal Law*,[3] the most important criticism of criminal theory in several decades. It has been hailed as having exposed "the poverty of American criminal jurisprudence."[4] Fletcher's book is perhaps the first to observe that several of "the artificial words of the law" in which the fundamental principles of liability are expressed are "ambiguous beyond repair," and that criminal theory "can do quite well without them."[5] Previous theorists commonly proposed to overcome ambiguity by submitting their own technical (and equally mysterious) definitions. Fletcher, to his credit, substitutes "terms in the way they are ordinarily understood by lay speakers."[6] If his insights are heeded, future authors of criminal law textbooks need not caution readers that "there is remarkably little correlation between the common usage or dictionary meanings of words and their legal usage."[7] Thus I am overwhelmingly sympathetic to the spirit of Fletcher's remarks, although the details of our reservations about orthodox criminal theory differ substantially.

If the deficiencies in orthodox criminal theory are as glaring as I will suggest, it is important to speculate about why the great criminal theorists of this century have failed to correct them. The suggestion that orthodox theory is radically defective is likely to be dismissed unless there is good reason to believe that these defects would have escaped the notice of previous theorists. There is perhaps no single satisfactory explanation for this oversight, but the following factors are especially significant.

First, it is important to appreciate that criminal theory, like the actual practice of law, is a discipline with an internal bias toward conservatism. The legal authority may be unique in that he distinguishes himself by demonstrating that his scholarship is unoriginal. Outstanding legal research invariably builds upon the work of established experts. It is exceedingly difficult to dislodge principles that are firmly in place and upheld by the great weight of authority. Such entrenchment and widespread support are frequently cited as conclusive evidence that the principles *must* be correct. Some theorists apparently believe that legal principles should be preserved simply because they represent the accumulated wisdom of ages. Anyone who hopes to be taken seriously by legal professionals who share this methodological orientation cannot reject too much conventional wisdom all at once.

But whatever might be said about this rationale in general, it has little application to the *philosophy* of criminal law. A willingness to reconsider large parts of established theory is distinctive of the philosophy of criminal law. It is true that tens of thousands of creative

and talented minds have devoted millions of hours of careful thought to the development of the criminal law, but almost all their attention has been focused in the context of specific cases. A criminal lawyer researches and reflects upon particular issues that arise in a real incident involving a person whom he prosecutes or defends. If the lawyer has sufficient experience, he may be able to relate his insights about the specific case to others that share relevant similarities. Yet he is unlikely to have an occasion to integrate his thought into a systematic theory. Thus even those most familiar with the practice of law may be remarkably unsophisticated as theoreticians. Criminal theory examines relations between issues that almost always are studied in isolation.

A discussion of how this conservative bias might be resisted suggests a second explanation for the paucity of attacks upon orthodox criminal theory. What external standards are available for testing the adequacy of the fundamental principles of liability? The answer provided here draws heavily from contemporary work in moral and political philosophy. Criminal theorists finally have begun to rediscover the intimate connections between their discipline and normative ethics. The opening sentence in Fletcher's book admits that "criminal law is a species of political and moral philosophy."[8] Hyman Gross notes that "if criminal justice is to be accepted as the rational and morally enlightened response to crime that it is said to be . . . an account is required which satisfies the demands of common sense and of morality."[9]

These remarks appear extraordinary only in the context of the almost complete absence of similar observations by criminal theorists of preceding eras. The leading authorities of the first half of this century did not acknowledge the connections between criminal theory and moral and political philosophy. Two factors conspired to prevent an earlier fusion between these disciplines. First, moral and political philosophers were preoccupied with metaethical issues and were unconcerned about substantive questions at the time these criminal theorists were educated. By contrast, philosophy journals today are filled with spirited discussions of contemporary normative controversies. Almost no respectable philosopher wrote about such topics prior to 1970. The dominant ethical theory of the earlier era, if any, was utilitarianism, and its influence on criminal law had been operative for more than a hundred years. Utilitarians who attempted to apply those principles that best promote the general interest were unable to respond to the accusation that their recommendations might violate rights and promote injustice. But the adequacy of criminal theory must ultimately be measured by reference to justice,

not utility. The recent development of nonutilitarian accounts of justice, as well as a surge of interest in rights, dramatically increases the potential use of moral and political philosophy to criminal theory.

Moreover, the most influential legal philosophers on both sides of the Atlantic had officially banished ethical inquiry from criminal theory. These authorities were prepared to go to extraordinary lengths to construe their discipline as methodologically distinct from (and superior to) that of moral and political philosophy. These theorists explored differences, rather than similarities, between their principles and those of moral and political philosophy. Jurisprudence was to be scientific, objective, factual, and certain. Moral and political philosophy, by contrast, possessed none of these *desiderata.* In retrospect, it appears that these theorists suffered from what might be called "moral arguophobia," that is, a fear that their discipline might require the production and evaluation of moral and political arguments. Orthodox criminal theory is almost unintelligible unless this fear is understood, for it explains the importance attached by these authorities to a number of concepts and principles. The content of the fundamental principles of liability reflects the fantasy that criminal theory embodies no moral or political presuppositions. The pretense that the issues of concern to criminal theorists are somehow unlike those investigated by moral and political philosophers has severely stunted the development of criminal theory. As a result, criminal theory has stagnated and lost its association with moral and political philosophy. Shortcomings in orthodox theory become apparent when these connections are reestablished.

An additional reason helps explain why orthodox criminal theory has persisted so long in its present form despite its inadequacies. Consider the dominant form of contemporary legal education. Almost all law students are fed a diet of cases; it is not uncommon for a student to complete his entire legal education without having consulted (let alone read in its entirety) a single treatise. Law professors may even actively discourage the reading of textbooks. Thus the largest potential market for scholarly works in any discipline—students who hope to gain a competence in that field—is unavailable. It is not surprising that the supply is responsive to the demand, and that few critical works on criminal theory are written.

Finally, criminal lawyers and judges have a prejudice against theory that is shared by practitioners of most other professions. Theories are typically denounced as abstract, remote, and impractical. Undoubtedly the familiar phrase "that may be fine in theory, but it doesn't work in practice" was coined by a practitioner who hoped to excuse his ignorance of theory. In fact, nothing is as useful to sound practice as a good theory. I hope to show that the poverty of Anglo-

American criminal theory is among the most significant contributors to substantive injustice. Perhaps the most important thesis of this book is that attention to theory can shed light on recurrent substantive problems and thus help stimulate principled criminal law reform.

## THE FUNDAMENTAL PRINCIPLES OF CRIMINAL LIABILITY

THE RECEIVED VIEWS in orthodox theory, to be described in this section, are expressed by a number of generalizations I call the *fundamental principles of criminal liability.* Most authorities subscribe to these principles, at least in rough outline, although probably no single theorist adheres to everything I will claim on behalf of orthodoxy. Although most of the views described here have been contested,[10] each continues to represent the majority position. This summary does not elaborate orthodox criminal theory in great detail.[11] My point is to introduce a theory vulnerable to attack, and subsequent criticisms are sensible only in the context of what they reject.

One final comment about methodology should be mentioned before introducing the fundamental principles of criminal liability. The key to an understanding of any principle is to determine what would count as a violation of it. These fundamental principles are not to be interpreted as vacuous tautologies. They are alleged to express requirements to which particular offenses may or may not conform. Thus it must be possible to imagine substantive criminal laws that transgress them. My elucidation of these principles will focus on controversial areas in which it is unclear how, or whether, they apply. Uncertainty about what would amount to a violation indicates a lack of clarity about the requirements themselves. Possible violations are noted to help understand the principles.

Jerome Hall contends that "seven principles . . . underlie and permeate [criminal law]: legality, mens rea, act, the concurrence or fusion of mens rea and act, harm, causation, and punishment."[12] This list provides a sensible introduction to orthodox criminal theory. But nearly every authority, not excepting Hall, includes chapters on burdens of proof and defenses to liability. With these latter topics added to the above list, Hall has provided an accurate enumeration of the fundamental principles of liability that constitute orthodox criminal theory. In this section I briefly discuss each of these eight principles, with special focus on what they are thought to preclude.[13]

### *1. Legality*

Most authorities begin their texts with the principle of legality, expressed by the maxim *nulla poena sine lege* (no punishment without

law). Impositions of liability must always be justified by reference to some criminal law that has been violated. Adoption of the principle of legality is perhaps the crucial step in the transition from the rule of men to the rule of law.

The most flagrant disregard of the principle of legality would consist in the punishment of a person known not to have committed a criminal offense. Not all punishment pursuant to law, however, would satisfy the demands of the principle of legality as it is explicated by contemporary criminal theorists. The principle is said to have four distinct but related corrolaries.

A. The first prohibits *vagueness*. The principle of legality cannot be circumvented by enacting legislation so unclear and open-ended that it could be invoked to punish anyone whose conduct is deemed objectionable. A criminal statute is defective on this ground if persons "of common intelligence must necessarily guess at its meaning and differ as to its application."[14] The vagueness rationale has been used to strike statutes that proscribe "vagrancy,"[15] or prohibit assemblies of persons who "conduct themselves in a manner annoying to persons passing by."[16] But no better example of vagueness could be produced than the infamous "doctrine of analogy" popularized under Stalin and Hitler. A (repealed) provision of the Soviet Criminal Code stated: "If any socially dangerous act is not directly provided for by the present Code, the basis and limits of responsibility for it shall be determined by application of those articles of the Code which provide for crimes most similar to it in nature."[17] In other words, any "socially dangerous act" became an offense.

B. The second corrolary prohibits the enactment of *ex post facto* criminal law. Early in the eighteenth century the Court formulated the conditions under which a criminal statute is retroactive and thus in violation of the principle of legality:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.[18]

C. A somewhat more controversial corrolary of the principle of legality requires "strict construction" of criminal laws. Ambiguity and uncertainty in the application of criminal laws must be resolved in favor of the accused. For example, a judge refused to construe a viable fetus as a "human being" in order to find a defendant guilty of murder.[19] When reasonable persons might differ about the meaning, scope, or application of a criminal statute, that interpretation most favorable to the defendant will be adopted.

D. Finally, the principle of legality has been cited to discourage the judiciary from creating offenses not enacted by the legislature. At one time, state courts were openly permitted to punish new and ingenious forms of antisocial conduct not expressly prohibited by existing statutes. Contemporary state courts rarely fill "gaps" in the law by creating new offenses. In 1955 a defendant was convicted of making obscene telephone calls even though such conduct was not explicitly proscribed by statute or precedent.[20] The principle of legality opposes such enlargements of the common law of crimes.

Fair notice is the most frequently cited rationale for the principle of legality and its several corrolaries. Justice requires that persons have a reasonable opportunity to avoid criminal penalties by choosing to conform their conduct to law. Moreover, the principle limits the discretion of legal officials at virtually every level. Historically, unfettered discretion has been one of the most pervasive characteristics of a repressive political regime.

### *2. Actus Reus*

Criminal liability requires that the conduct of the defendant includes an *actus reus.* Each offense must contain some physical, outward, external, behavioral component or manifestation in order to satisfy this fundamental principle. Controversial applications of the actus reus principle are as follows:

A. Authorities disagree about whether criminal liability was ever imposed for such offenses as "compassing or imagining the king's death." Such a statute, if interpreted to dispense with overt behavior, unquestionably would infringe the actus reus requirement. No crime can be committed simply by one's thoughts or mental states.

B. This principle has been used to prohibit *status* offenses, that is, criminal laws that impose liability for what a person *is* rather than for what he *does.* A personal condition or

character trait is not a physical act, and cannot be made an offense. For example, a state cannot punish a person for being "addicted to the use of narcotics,"[21] because "criminal penalties may be inflicted only if an accused has committed some act."[22] Many authorities relate their reservations about status offenses to the proper function of the criminal justice system, which is designed to punish dangerous *behavior* rather than to apprehend and detain dangerous *persons*. Other kinds of coercive state intervention (e.g., quarantine, civil commitment) differ in this respect.

C. This principle has also been invoked to explain the disparity between acts and *omissions*. Our criminal justice system (as well as most other coercive systems) punishes positive actions far more frequently than omissions, or failures to act. When a statute (e.g., homicide) specifies some result (e.g., death) that must occur in order to give rise to liability, it is crucial to decide whether the defendant's conduct is a positive action or an omission. Persons owe duties to all others not to kill them by positive action, but a person can commit homicide by omission in only a few carefully defined circumstances.

D. It is doubtful that *possession* constitutes an act in the ordinary sense of the term. Nor does it constitute an act in the technical legal sense, if "act" is defined as bodily movement. Most American authorities, however, have managed to reconcile possessory offenses with the actus reus requirement. English courts have been less confident about this reconciliation. For example, an indictment charging possession of obscene material was held not to constitute a criminal offense, since no act was alleged.[23]

E. Many authorities have invoked the actus reus principle to disallow liability for *involuntary* conduct. According to Gross, "an involuntary act is simply not an act, just as a movie set is not a village, or an art forgery an old master."[24] The Model Penal Code, however, allows that conduct may qualify as action even though involuntary; voluntariness is included as a requirement in addition to the actus reus principle.[25]

F. Actus reus creates difficulties in imposing liability for *attempted* crimes. It is extremely difficult to determine when the defendant has made sufficient progress toward his criminal objective that he may be said to have committed an attempt. Insufficient progress that does not constitute an attempt is generally described as "mere preparation." A person has not committed an attempt unless his conduct manifests an actus reus.[26]