

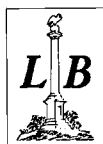
# *Rethinking Criminal Law*

*George Fletcher*

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To Fanny Fletcher Naxon  
*a woman of valor*

## *Preface*

Criminal law is a species of political and moral philosophy. Its central question is justifying the use of the state's coercive power against free and autonomous persons. The link with moral philosophy derives from one answer to the problem of justifying the use of state power. If the rationale or a limiting condition of criminal punishment is personal desert, then legal theory invariably interweaves with philosophical claims about wrongdoing, culpability, justifying circumstances and excuses.

A number of factors have inhibited the refinement of Anglo-American criminal law and its underlying theory. First, for over a century the prevailing philosophy of criminal law has been the utilitarian theory of sanctions inspired by the work of Beccaria, Bentham, Holmes, Stephen and, in our time, Herbert Wechsler and the Model Penal Code. Though the utilitarians have sharpened our sensitivity to the social costs and benefits of punishment, this emphasis on goals has distracted our attention from the problem of justice to the individual accused. The question whether a sanction is in the social interest has overshadowed the more basic inquiry whether the punishment of the accused is morally justified.

The emphasis in much recent thought is on the use of the criminal law to identify and confine potentially dangerous offenders. This is the explicit rationale in the Model Penal Code for assessing liability in cases of criminal attempts. The good of the whole is furthered by isolating a dangerous person in prison. And this is all that is thought necessary to justify the suffering of the individual confined.

The shift in emphasis from guilt to dangerousness betokens a movement to merge the criminal law with the administrative pro-

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cess of civil commitment. The confinement of the dangerously insane was once radically distinguished from punishment of the guilty. But the fashion now is to view both processes as aspects of one mechanism of social control. Even the requirement of culpability is reinterpreted as an evidentiary index of dangerousness. That the wicked are punished and the insane confined, is no longer taken to be an ordering distinction of the law. Not surprisingly, this emphasis on social control has inhibited refinement of the basic principles of criminal law. The emphasis on interrelated instruments of social control calls into question the identity of criminal law as a distinct field of inquiry.

Another factor inhibiting study of the theoretical foundations of criminal liability is the progressive legitimization of discretionary judgments within the formal criminal process. Insensitive laws are no evil if we can rely on the "good sense" of prosecutors. If there are important differences among offenses and offenders, we can rely on judges and parole boards to individualize punishment under systems of discretionary and indeterminate sentencing. Thus the criminal law may have a function in warning the public about conduct that might be punished, but the fine discriminations in the level of punishment are left to discretionary judgments.

If this has been the general drift of the criminal law, there are nonetheless signs that the tide may change. The revival of normative ethics and political theory signals the retreat of utilitarian influence. The sustained critique by Rawls, Nozick, Dworkin and Unger—all writing from the perspective of different moral philosophies—has expanded the potential of normative theory. Our minds are coming unstuck from the calculus of utility and groping toward new theories of justice and of the good. More than a decade ago, H. L. A. Hart helped to stimulate this search, first, by limiting the principle of utility to the justification of the criminal law as a whole; and further, by demonstrating that the criminal law lends itself to rigorous philosophical analysis. In more recent years, the search for justice in the criminal law has revived retribution as the rationale of punishment. There is also growing concern that moral culpability function as a necessary condition of lia-

bility. In the openness of the present climate and with the groundbreaking philosophical work of the last decade, the times may be right for a major commitment by many scholars to reworking and refining the substantive criminal law.

There are in fact urgent practical reasons for taking the criminal law seriously as a body of principles bearing on the just punishment of offenders. The mood of the country has suddenly shifted against indeterminate sentencing. Whatever the stimulus for this shift, the future may well lie with determinate sentencing schemes of the type recently enacted in California. The new scheme prescribes a standard penalty for each offense, with a permissible variation of one year upwards or downwards. If a sentencing judge elects the more serious or the more lenient sentence, he or she must justify the deviation in a written opinion. Parole is limited to time earned for good behavior.

The turn toward determinate sentencing means that the drawing of close distinctions can no longer be avoided by the exercise of judicial discretion. The burden falls on the criminal law to state the criteria that ought to be sufficient for the standard sentence and which should point in favor of aggravation or mitigation. If there is an important difference between the perpetrator who fires the fatal shot and the accessory who supplies the weapon, the distinction should be articulated and defended in principle. If there are good reasons for recognizing excuses, such as mistake of law, the claims should be recognized openly in the criteria defeating liability, not covertly in the process of prosecutorial or sentencing discretion. If determinate sentencing is going to work, then we must pay closer attention to the criteria that justify prescribed sentences.

This book does not propose a detailed set of criteria defining criminal liability; rather it provides the groundwork for others to carry forward the enterprise. If there is a contribution, it lies in reworking the apparatus with which we think about criminal liability.

Two methodological guidelines shape the argument of the book. First, as often as possible, the method of analysis is com-

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parative, with primary attention to German law. German legal theory suggests alternatives to Anglo-American law; first, because the dominant strain of the German literature has remained relatively insulated from utilitarian legal theory, and secondly, because the system has long regarded prosecutorial discretion as an impermissible solution to substantive legal issues. Ironically, as the mood is changing in the United States, so it is in West Germany. As we rediscover the virtues of retribution, younger German scholars press for rehabilitation as the proper focus of the criminal law. As Kant and Hegel are exhumed in the United States, they are interred in the land of their birth. These ebbs and flows of intellectual history do not undermine the lessons we can derive from the German experience and they, from ours. But the two legal cultures' being out of phase requires us to be conscious of our historical situation. The next step for us, as for the Germans, may be to cultivate ideas that are in eclipse in their country of origin.

The second methodological premise reveals my debt to the Anglo-American legal tradition. As the common-law judge eschewed abstract principles for concrete precedent, we begin by embracing the details of the law—concrete and technical details about larceny, burglary, attempts and homicide. General propositions emerge from these details, but slowly. The first set of general claims seeks to organize the major criminal offenses in three patterns of liability—the patterns of manifest criminality, subjective criminality and of harmful consequences. The thesis of the first five chapters is that the criminal law is a polycentric body of principles. Each of the major patterns of liability must be appreciated on its own terms. We must resist the temptation to reduce the criminal law to a single formula for determining when conduct ought to be treated as criminal.

It is only in the second half of the book that we take up general themes that cut across the three patterns of liability. In Chapter Six, we explore the conceptual bases for formulating general principles of criminal liability and then seek to defend the distinction between wrongful acts and personal accountability for wrongdoing. What we find, however, is that the theory of



wrongdoing is buffeted by the three conflicting patterns of liability and that one's view of the criminal law is influenced by which of the three patterns one takes to be representative of the whole.

Chapter Seven carries the process of distinction one step further and explores the internal structure of wrongful conduct. In Chapter Eight, we turn away from structural issues and seek to develop a general theory of derivative liability, uniting the seemingly disparate fields of omissions (failing to avert harm) and accessorial liability. This chapter rounds out the basic claims for organizing our thoughts about criminal liability. In Chapter Nine, we apply the results of our investigation to the problematic field of mistake, and in Chapter Ten, we return to the study of wrongdoing and accountability, but from the more conventional perspective of the theory of justification and excuse.

This book builds heavily on the work of common law as well as Continental theorists. My regret is not being able to document more fully my debts to prior writers. Early in my work on the book, Susan Laemmle Fletcher made me realize that I was writing neither a hornbook nor a treatise, but a reformist, critical work. The titling of the book is her doing. From this conception of the enterprise, one can derive, with some charity, a policy of footnoting that leaves some important sources unmentioned.

I am indebted to many people for helpful suggestions about this draft of my ideas as well as earlier papers reworked in the book, specifically, to Hans-Heinrich Jescheck and Albin Eser, for useful critical suggestions about German law; Pat Hanlon, then of the *Harvard Law Review*, for insights about the history of larceny; Bruce May and Cole Durham, for valuable assistance and criticism in the summer of 1977; Fred Parnon, for working on the index; Paul Brest, for thoughtful comments about Chapter Six. The manuscript would not have taken shape without the assistance of Paul Kahn, Susan Krinsky, Irene Jensen, Sandra Mullings, Fran Richtman and Antonia Turman. Above all, I am indebted to my students without whose audience and patient criticism these ideas would never have matured. Neither they nor my colleagues

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could save me from the mistakes that careful readers will discover and which I trust they will call to my attention.

A grant from the American Council of Learned Societies provided me with the free time necessary for thinking through this book and writing the first draft.

*George P. Fletcher*

Santa Monica, Calif.  
March, 1978

## *Table of Abbreviations and Short-Form Citations*

Baumann	J. Baumann, <i>Strafrecht: Allgemeiner Teil</i> (7th ed. 1975)
Bay. OLGSt.	Decisions of the High State Court ( <i>Oberlandesgericht</i> ) in Bavaria, Criminal Cases
BGB	German Civil Code ( <i>Bürgerliches Gesetzbuch</i> )
BGHSt.	Decisions of the German Supreme Court ( <i>Bundesgerichtshof</i> ), 1951 to present
Blackstone	W. Blackstone, <i>Commentaries on the Law of England</i> (1765–69) (4 volumes)
Bouzat & Pinatel	P. Bouzat & J. Pinatel, <i>Traité de droit pénal et de criminologie</i> (2d ed. 1970) (2 volumes)
Bracton	Bracton on the Laws and Customs of England (S. Thorne trans. 1968) (4 volumes)
BVerfGE	Decisions of the German Supreme Court in Constitutional Cases ( <i>Bundesverfassungsgericht</i> ), 1952 to present
Caljic	California Jury Instructions: Criminal (3d ed. 1970)
3 Coke	E. Coke, <i>Third Institute</i> (1644)
<i>First Report</i>	<i>First Report from His Majesty's Commissioners on Criminal Law</i> , 26 Parliamentary Papers: Criminal Law (1834)
Foster	M. Foster, <i>A Report of Some Proceedings of the Commission for the Trial of the Rebels in the Year 1746 in the County of Surrey and of other Crown Cases</i> (1762)
GA	Goltdammer's Archiv für Strafrecht

*Table of Abbreviations and Short-Form Citations*

Hale	M. Hale, <i>History of the Pleas of the Crown</i> (1736) (2 volumes)
Hall	J. Hall, <i>General Principles of Criminal Law</i> (2d ed. 1960)
Hawkins	W. Hawkins, <i>Pleas of the Crown</i> (1716) (2 volumes)
Holmes	O. W. Holmes, <i>The Common Law</i> (1881)
Jescheck	H. H. Jescheck, <i>Lehrbuch des Strafrechts: Allgemeiner Teil</i> (2d ed. 1972)
JS	<i>Juristische Schulung</i>
JZ	<i>Juristenzeitung</i>
Kurs (GP 1968)	<i>Criminal Law: The General Part</i> (eds. H. Belaev & M. Shargorodsky 1968) (in Russian)
Kurs (GP 1970)	<i>Course in Soviet Criminal Law: The Criminal Offense</i> (eds. A. Piontovsky, P. Romashkin & V. Chkhikvadze 1970) (volume 2 in series) (in Russian)
Kurs (GP 1972)	<i>Soviet Criminal Law: The General Part</i> (eds. M. Gel'fer et al. 1972) (in Russian)
Kurs (GP 1974)	<i>Soviet Criminal Law: The General Part</i> (eds. V. Men'shagin et al. 1974) (in Russian)
Kurs (SP 1968)	<i>Criminal Law: The Special Part</i> (eds. I. Zagorodnikov & V. Kirichenko 1968) (in Russian)
Kurs (SP 1973)	<i>Course in Soviet Criminal Law: The Special Part</i> (ed. M. Shargorodsky 1973) (in Russian)
Lambert	L. Lambert, <i>Traité de droit pénal spécial</i> (1968)
LaFave & Scott	W. LaFave & A. Scott, <i>Criminal Law</i> (1972)
Maurach GP	R. Maurach, <i>Deutsches Strafrecht: Allgemeiner Teil</i> (4th ed. 1971)
Maurach SP	R. Maurach, <i>Deutsches Strafrecht: Besonderer Teil</i> (5th ed. 1969)
MDR	<i>Monatsschrift für deutsches Recht</i>
Merle & Vitu	R. Merle & A. Vitu, <i>Traité de droit criminel</i> (2d ed. 1973)

*Table of Abbreviations and Short-Form Citations*

MPC	Model Penal Code (Proposed Official Draft 1962)
NJW	Neue Juristische Wochenschrift
Packer	H. Packer, <i>Limits of the Criminal Sanction</i> (1968)
Perkins	R. Perkins, <i>Criminal Law</i> (2d ed. 1969)
Proposed Federal Criminal Code	S. 1437, 95th Cong., 1st Sess. (1977)
Prosser	W. Prosser, <i>Law of Torts</i> (4th ed. 1971)
RGBl.	Reichsgesetzblatt (German session law prior to 1945)
RGSt.	Decisions of the German Supreme Court ( <i>Reichsgericht</i> ) in Criminal Cases, 1880 to 1944
RGZ	Decisions of the German Supreme Court ( <i>Reichsgericht</i> ) in Civil Cases, 1879 to 1944
Rudolphi in SK StGB	See SK StGB <i>infra</i> .
Samson in SK StGB	See SK StGB <i>infra</i> .
Schmidhäuser	E. Schmidhäuser, <i>Strafrecht: Allgemeiner Teil</i> (2d ed. 1975)
Schönke-Schröder-Cramer,	P. Cramer, A. Eser, T. Lenckner, & W. Stree, <i>Kommentar von Schönke-Schröder zum Strafgesetzbuch</i> (18th ed. 1976) (each segment of the <i>Kommentar</i> cited to the author responsible for that segment)
Schönke-Schröder-Eser,	
Schönke-Schröder-Lenckner,	
Schönke-Schröder-Stree	
SGP	Soviet State and Law (periodical in Russian)
SJZ	Süddeutsche Juristenzeitung
SK StGB	H. J. Rudolphi, F. Horn, E. Samson, H. L. Schreiber, <i>Systematischer Kommentar zum Strafgesetzbuch</i> (1975) (each segment of the <i>Kommentar</i> cited to the responsible author)
Smith & Hogan	J. Smith & B. Hogan, <i>Criminal Law</i> (3d ed. 1973)

*Table of Abbreviations and Short-Form Citations*

Stefani & Levasseur	G. Stefani & G. Levasseur, <i>Droit Pénal Général</i> (9th ed. 1976)
Stephen	J. F. Stephen, <i>History of the Criminal Law of England</i> (1883) (3 volumes)
StGB 1871	The former German Criminal Code, in force from 1871 to 1975
StGB	German Criminal Code (current)
StPO	German Code of Criminal Procedure
Stratenwerth	G. Stratenwerth, <i>Strafrecht: Allgemeiner Teil I</i> (2d ed. 1976)
Ugol. kod.	Criminal code in force in a republic within the Soviet Union, cited to the particular republic; e.g., Ugol. kod. (RSFSR) refers to the code in force in the Russian Soviet Federal Socialist Republic.
Welzel	H. Welzel, <i>Das Deutsche Strafrecht</i> (11th ed. 1969)
Williams	G. Williams, <i>Criminal Law</i> (2d ed. 1961)
ZStW	<i>Zeitschrift für die gesamte Strafrechtswissenschaft</i>

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