Criminal Theory in the Twentieth Century

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The theoretical inquiry into the foundations of criminal law in the twentieth century, in both civil and common law traditions, is assayed by the consideration of seven main currents or trends. First, the structure of offenses is examined in light of the bipartite, tripartite, and quadripartite modes of analysis. Second, competing theories of culpability — normative and descriptive — are weighed in connection with their important ramifications for the presumption of proof and the allocation of the burden of persuasion on defenses. Third, the struggle with alternatives to punishment for the control and commitment of dangerous but non-criminal persons is compared in civil and common law approaches. Fourth, the ascendancy of feminism, as the most successful interdisciplinary school of thought applied to criminal law since the early 1970s, and its contributions in the areas of rape, self-defense, provocation, and capital punishment are charted and weighed. Fifth, one of the most distinctive facets of criminal theory in the last century has been the emergence of the victims' rights movement; its success is compared in civil and common law jurisdictions. Sixth, while it is commonplace in the civil law tradition to embed issues of criminal law within the principles of constitutional law, common law jurisdictions vary; the increasing constitutionalization of criminal law in Canada is contrasted with its decrease in the U.S. Seventh, against the backdrop of a particularly intense period of codification of the criminal law in the last half of the twentieth century, the celebrated American Model Penal Code is criticized. Finally, four predictions for the direction of criminal theory in the next century are ventured.

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INTRODUCTION

When Kant, Blackstone, and Bentham wrote about law in the latter half of the eighteenth century, they thought of law as a body of principles that transcends the legislative authority of any particular society. Kant expressed contempt for the study of positive law with his analogy between the raw statements of legislative will and the empty wooden head of Phaedrus.[1] Blackstone, too, thought of the common law as an enduring body of principles based on reason.

In the course of the nineteenth century, legal thought lost this insouciant disregard for local rules and customs. As romantic music became German or Czech or Hungarian, so too the law acquired different national identities. The once-unified body of civil law, derived from Roman sources, became codified in radically different codes in France and Germany. The grand principles of the common law became positivized in the doctrine of stare decisis: the local courts' decisions became the law, and despite some family resemblances among English-speaking countries, the idea of the "same law" applying across national borders lost its currency. Though we yearn for a body of international law, even international criminal law, we are still very much the children of the nineteenth-century movement toward localizing the law in the framework of state authority.

Yet twentieth-century developments in criminal law differ significantly from those of the nineteenth century. For the first time, serious scholars became engaged by the structure of criminal offenses, by the nature of action as a foundational element of liability, by the theory of justification and excuse, and by the criteria for blameworthy, punishable conduct. To be sure, the transition from the eighteenth century to the nineteenth century occurred gradually, without a sharp break at the turn of the century. There are apodictic statements about *actus reus* and *mens rea* dating back to Sir Edward Coke[2] in the seventeenth century and Kant's analysis, in 1797, of the shipwrecked sailors who kill to save their lives still repays careful reading.[3] Yet the literature of the twentieth century represents a major breakthrough toward a more systematic and philosophical study of the law that renders men and women criminally accountable.

The two leading traditions in this literature have grouped themselves

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1 Immanuel Kant, Metaphysics of Morals 55 (Mary Gregor trans., 1991) (1797).

2 Edward Coke, The Third Part of the Institutes of the Law of England 107 (1644) ("*actus not facit reus nisi mens sit rea*," which may literally be translated as "the act is not criminal unless the mind is criminal").

3 Kant, *supra* note 1, at 60.

primarily around German and English sources. One line of thought, dating back to Jeremy Bentham and even further still to the influential Italian critic of capital punishment, Cesare Beccaria, stresses the deterrent function of criminal law. All rules and doctrines of criminal law must be justified as factors serving the goal of inducing law-abiding conduct in the future. This line of thought is represented in the German literature by the works of Franz von Liszt and his famous pupil Gustav Radbruch. The Bentham/von Liszt line has been dominant in the pragmatic, get-the-job-done English-speaking world. The other school of thought, stemming notably from Immanuel Kant and G.F. Hegel, stresses the non-consequential duty to punish culpable wrongdoing. Punishment is a non-consequential duty of justice, an end in itself. A neo-Kantian movement (not always interested in a precise exegesis of Kant's writings) made major inroads in the twentieth century, particularly in the American philosophical literature. Among its strong supporters were Herbert Morris, Robert Nozick, Michael Moore, Joel Feinberg, Sandy Kadish, and, I suppose, myself.

The German literature captures the distinction between these two schools by referring to the Kantians as standing for *absolute* theories of punishment (punishment as a duty of justice) and the von Liszt school as promoting *relative* theories of punishment — relative, that is, to a particular purpose. The American literature makes the same distinction by referring to the difference between the Kantians, on the one hand, and the Benthamites or utilitarians, on the other.

The difference between the two schools is readily seen in the treatment of excuses. The Kantians recognize excuses because they negate culpability, and it is assumed to be unjust to punish someone who is not culpable or blameworthy for his or her actions. The Benthamites rationalize the same doctrinal conclusions in practice on the ground that excused actors are not deterrable. It causes harm and does little good, therefore, to employ the criminal sanction against non-deterrable actors.

H.L.A. Hart played a key role in mediating between these two schools of thought. In distinguishing between the general aim of punishment and the criteria of fair distribution, Hart provided a way of reconciling deterrence as the aim of the system as a whole and nonconsequentialist concerns in the fair imposition of punishment in the particular case. And his defense of punishing inadvertent negligence as a form of *mens rea* or blameworthy risk-taking remains of great significance.[4] At the same time, however, leading

4 See the discussion of the Canadian developments at *infra* text accompanying notes 35-39.

theoretical voices, notably Glanville Williams and Jerome Hall, thought that punishing negligence is either wrong in principle or dubious as a partial commitment to strict liability.[5] Hart's sympathies were closer to Bentham than to Kant, but nonetheless, on the basis of rigorous analysis, he concluded that Bentham's deterrence-based theory of excuses represents a "spectacular non-sequitur."[6] Grounding excuses in the non-deterrability of excused action presupposes, he pointed out, that the only potentially deterred actors are those who are excused. Yet punishing insane or otherwise excused conduct does have a deterrent effect on those who stand outside the narrow frame of those "not-deterrable" because excused.

Hart also stood for the integration of analytic philosophy and legal analysis. He was the first of many Anglo-American lawyers to analyze substantive legal issues with the tools developed at Oxford and Cambridge in the field of analytic and linguistic philosophy. Unfortunately, he was among the last of the liberal political philosophers to show an abiding interest in criminal law.

If we look across the Western world, a few basic themes stand out as the major intellectual trends of the twentieth century. The following is my attempt to group them into seven trends — five intellectual and two institutional. Not all of these categories will be immediately obvious to the common law reader, for some of the terms originate in the European literature.

I. THE STRUCTURE OF OFFENSES

In the course of the twentieth century, the leading legal systems of the world clarified and deepened their commitment to different systems for organizing and analyzing the elements of offenses. The three basic systems that have gained adherence fall into the neat categories of bipartite, tripartite, and quadripartite modes of analysis. Using a system of two, three, or four dimensions enables lawyers to think about specific offenses in the offense-transcending manner that we call the "general part" of the criminal law. For the convenience of exposition, we will consider first the bipartite, second, the quadripartite, and finally the tripartite system.

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5 Glanville Williams, Criminal Law: The General Part 262 (2d ed. 1961) (negligence as a half-way house between *mens rea* and strict liability); Jerome Hall, *Negligent Behavior Should be Excluded from Penal Liability*, 63 Colum. L. Rev. 632 (1963).

6 H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, *in* Punishment and Responsibility: Essays in the Philosophy of Law 19 (1968).

The simplest system is the *bipartite* system, with which we are familiar in the English-speaking common law countries. This system distinguishes between *actus reus*, or the external side of criminal conduct, and *mens rea*, the internal side. The basic maxim of this system is that for every offense, there must be a union of *actus reus* and *mens rea*. This principle was first articulated by Sir Edward Coke, who inferred it from a few instances of accepted law, one of them being that a would-be-thief who first acquired possession and then formed the intent to steal is not guilty of theft.[7] The reason was that the intent occurred after, instead of concurrently with, the relevant act of acquiring possession.

The American Model Penal Code ("MPC") has elaborated on this bipartite system, distinguishing among four states of *mens rea* or, as the codifiers call it, "culpability."[8] For many, this represents an advance over the common law and most European systems, which are content to distinguish between intent and negligence as the two basic forms of *mens rea*.

The bipartite system, it is worth mentioning, is used in France and Francophile countries, which distinguish in their literature between *l'élément materiale (=actus reus)* and *l'élément morale (=mens rea)*. One of the characteristics of this system is the reduction of the theory of mistake to factors negating the required *mens rea*.[9] For example, any mistake about an element of an offense will negate intention; and a reasonable mistake will negate negligence when negligence is sufficient for conviction. Confusion remains about cases of mistake with regard to the factual circumstances of justification (e.g., believing you are being attacked when you are not). For example, the Model Penal Code purports to apply its required culpability state analysis to all elements of an offense, including defensive issues of justification and excuse, but it also contains specific rules governing mistaken beliefs in the factual conditions of justification.[10]

Though the bipartite system of thought offers some conveniences, it has one major drawback: it fails to provide a conceptual home for the entire range of defenses that are grouped under the categories of justification and excuse. All the defenses — from self-defense, to defense of property, necessity, duress, insanity, diminished capacity, and intoxication — stand outside the structure defined by *actus reus* and *mens rea*. If one tries to treat one of these defenses, say the defense of duress, as a denial of intention,

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7 Coke, *supra* note 2, at 107.

8 Model Penal Code § 2.02(2) (1962).

9 *See id.* § 2.04(1).

10 *See, e.g., id.* § 3.04.

problems crop up in defining the acceptable limits of duress when the actor feels coerced but nonetheless ought not submit to the external threat. If a good faith feeling of coercion negates intention, then it will do so, even if the threat is minor and a "person of reasonable firmness" would resist it.[11]

The common law treats these defenses by distinguishing between the case in chief and the claims of defense in confession and avoidance. This accounts for the practice in common law countries of shifting the burden of defense on some, if not all, of these defenses.[12] The question whether the presumption of innocence encompasses the denial of these defensive claims is still hotly litigated in common law countries.[13]

The bipartite mode of analysis reflects a private law model of analysis. In tort and contract cases, we tend naturally to think of dividing the total set of issues bearing on liability between the plaintiff and the defendant. In virtually every known system of private law, the defendant must prove self-defense. The extension of this model to the criminal law implies that "defensive" material should fall to the charge of the defendant. Thinking in the images of private law derives, in part, from the dominance of the adversary system, a carry-over of procedural structures into the analysis of the substantive law. This is hardly a sufficient explanation, however, for the same system appeals to the French even though they are heirs not to the adversary but to the Continental inquisitorial tradition.

The bipartite system enjoys some refinement in the *quadripartite* system, which is a creature primarily of the Communist literature on criminal liability. The quadripartite system neatly classifies elements into the following categories: (1) the subject of the offense; (2) the subjective side of liability; (3) the object of the offense; and (4) the objective side of liability. The subjective and objective sides of the offense are the counterparts to *mens rea* and *actus reus*, respectively.

The contribution of this system lies in the notions of subject and object of the offense. The subject of the offense is the person who is addressed by the criminal norm. Thus, there is a special category for analyzing the problems of insanity and infancy, specifically, whether an immature or mentally ill defendant should be subject to sanctions under the criminal law as opposed to civil commitment or some other system of social control. With a little imagination, one can bring other claims of excuse within the ambit

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11 This expression comes from the Model Penal Code definition of duress; *id.* § 2.09.

12 *See, generally*, George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 Yale L.J. 880 (1968).

13 For more on the presumption of innocence and the burden of persuasion, see *infra* text accompanying notes 33-39.

of this category of the person capable of committing a criminal offense. Blackstone treated all excuses as questions pertaining to this extended sense of the subject of the offense. This approach survives today in the statutes following the Blackstonian model from the late nineteenth century. A good example is Section 26 of the California Penal Code, which identifies a list of exceptions to "the persons capable of committing a criminal offense."[14]

The notion of the "object" of the offense brings to bear a distinctively Communist way of thinking about criminal offenses as directed in all cases toward some social harm. The threatened harm, not necessarily mentioned in the legal definition of the offense, is the "object" of the offense. This way of thinking coincides with the liberal theory of John Stuart Mill that the state may intervene to punish conduct only when it threatens to cause harm to others. The Communist lawyers went further and posited that for conduct to be "unlawful," it had to be "socially dangerous," that is, it had to threaten a specific legally-protected interest such as life or property. The theory led to the conclusion that if conduct is minimally threatening to others, it is to be treated as a *de minimis* offense, with the indictment therefore subject to dismissal.

Paradoxically, though there is a good deal of discussion of the theory of unlawful conduct in the Communist literature, the quadripartite system does not seem to recognize the dimension of wrongful or unlawful behavior. Claims of justification, which negate the unlawfulness of the conduct, are left outside the four categories, just as they are in the common law bipartite system.

The major flaw common to both the bipartite and quadripartite systems

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14 Cal. Penal Code § 26 (West 1999):

> All persons are capable of committing crimes except those belonging to the following classes:
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> One — Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness.
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> Two — Idiots.
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> Three — Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent.
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> Four — Persons who committed the act charged without being conscious thereof.
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> Five — Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.
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> Six — Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.

is that they foster a naive psychology that distinguishes radically between the internal forum of thought and the external arena of conduct. There is no room to consider a monistic conception of thought and action, so long as the system of analysis in the criminal law remains defiantly dualistic. Whatever its flaws, this system persists in the Russian literature and, so far as I know, in the former Communist countries. Zalman Feller, a law professor of Romanian origin who later settled in Jerusalem, apparently taught a generation of Israeli law students that this is the correct way of structuring criminal liability.

The German *tripartite* system begins from premises entirely different from the bipartite and quadripartite systems. The point of departure for German theories, at least since the work of Karl Binding at the beginning of the twentieth century, has been that the criminal offense must be treated as a single entity. The inquiry focuses on a general "theory of crime" (*Verbrechenslehre*) — a concept that remains a bit mysterious to some. The point is that all the issues bearing on substantive liability must be ordered under a set of rules defining what it means to commit, and to be liable for, a crime. The consequence of this ordering is that the common law division between the prosecution's and defense's cases disappears. To be sure, nineteenth-century German criminal lawyers referred to "defenses" (*Einwände* or *Einwendungen*) just as common lawyers do today. But when the theoretical discussions took the step of ordering the entire offense under a single "comprehensive" set of rules of liability — the usage of the terms for "defense" disappeared from the language of German criminal lawyers.

The primary intellectual move necessary for the German tripartite system was to bring the defensive claims of justification and excuse within a general structure of three affirmative dimensions of liability: (1) the definition of the offense (*der Tatbestand* in German; *Tipo* in Spanish); (2) wrongfulness or unlawfulness; and (3) culpability or blameworthiness. Claims bearing on the action, harm, and causation negate the definition of the offense. Claims of justification negate wrongfulness, and claims of excuse negate culpability.

While it is fairly clear where most issues fall, there was considerable debate in the post-war German literature about the proper classification of intention and negligence. The traditional, harm-oriented school treated these factors as bearing exclusively on culpability, which implied that accidentally causing the death of another, without any culpability at all, was still considered unlawful behavior. A more subjective school, calling itself "finalist" or teleological, insisted that intention be treated as part of the definition of the offense. This debate about the classification of issues under the tripartite system became an impassioned confrontation among

German scholars, with repercussions in the academic literature of many other countries in Europe, Asia, and Latin America.

Since that debate has run its course, German scholars have turned to other questions that are more familiar to theoreticians in the Anglo-American discussion. While the legal system has strong roots in the retributive thinking of Kant and Hegel, post-war scholars have seemed to turn their backs on these influences. Kant's views on punishment have turned out to be more influential in the United States of the late twentieth century than it has been in contemporary Germany. Some German scholars have argued in the vein of Jeremy Bentham that the deterrent purposes of punishment can explain the recognition of excusing conditions, thus dispensing with a moral category of guilt or culpability. Others have followed Günther Jakobs in developing a functionalist theory of criminal law that dispenses, or pretends to dispense, with any transcendental moral categories.[15] The debate engendered by Jakobs' views has replicated the earlier confrontation between Jürgen Habermas and Niklas Luhmann about the existence of extra-societal standards of judgment. The followers of Luhmann and Jakobs hold that all questions of value are resolved internally, within the functionalist parameters of a particular society.

These debates have had a major impact on the intellectual life of legal scholars in many countries that see themselves as falling within the German sphere of influence. The list includes Italy, Spain, Portugal, Japan, Korea, Taiwan, Greece, and virtually all of Latin America. In all of these countries, the German tripartite system is taken for granted.

II. The Normative Theory of Culpability

Let us pose a simple question: What intellectual move would be required to move from the divided, proceduralist bipartite system to the comprehensive tripartite system of German theory? To put the question another way, is there a single idea that divides these various systems into different camps? I think there is, and this idea is what we should call the normative as opposed to the descriptive theory of culpability.

All the terms referring to *mens rea* (culpability, blameworthiness, guilty mind, criminal intent, etc.) lend themselves either to a normative or to a descriptive interpretation. The normative holds that these terms are condemnatory and conclusive, in principle, on liability. The notion of

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15 *See* Günther Jakobs, Strafrecht: Allgemeiner Teil (2d ed. 1991).

culpability or *mens rea* must be interpreted, therefore, to be inconsistent with the presence of a justification or an excuse. If someone acts properly in necessity or self-defense or is excused on grounds of duress or insanity, it cannot be the case, on the normative theory, that he or she is culpable.

On the descriptive interpretation of *mens rea*, however, it is entirely possible that one might act with culpability (i.e., intention of knowledge) and yet be justified or excused. As a descriptive matter, *mens rea* refers simply to a state of consciousness, or to acting with a particular end in mind. Having that end might be perfectly compatible with acting in self-defense or under duress or even while insane.

There are signs of the normative theory having made inroads in common law thinking. As early as 1895, the U.S. Supreme Court concluded in *Davis* that the notion of "guilt" should be interpreted in this normative sense:

> The plea of not guilty is unlike a special plea in a civil action which, admitting the case averred, seeks to establish substantive grounds of defense by a preponderance of evidence. It is not in confession and avoidance, for it is a plea that controverts the existence of every fact essential to constitute the crime charged. Upon that plea the accused may stand, shielded by the presumption of innocence, until it appears that he is guilty; and his guilt cannot in the very nature of things be regarded as proved, if the jury entertains a reasonable doubt from all the evidence whether he was legally capable of committing the crime.[16]

If the reasoning of this opinion is carried to its logical conclusion, all the issues of substantive law should be seen as bearing on the question of culpability or guilt. That is what the Supreme Court meant in referring to "every fact essential to constitute the crime charged."

Nonetheless, the normative theory has not established itself, to my regret, in the thinking of common law jurisdictions. The Model Penal Code defines "kinds of culpability" as purpose and knowledge as well as recklessness and negligence.[17] That is, according to the MPC, the conduct might be culpable in the sense of being purposeful or knowing and yet the action's moral or normative culpability might be negated by a claim of self-defense, duress, or insanity.

One implication of the normative theory is that if the prosecution must prove *mens rea* or culpability beyond a reasonable doubt, then it must

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16 Davis v. United States, 160 U.S. 469, 485-86 (1895).

17 Model Penal Code § 2.02(2).

disprove all defensive claims by the same measure of proof. The trend in all common law countries is toward this position. The U.S. Supreme Court held in *Davis* that this should be the rule with regard to issues of insanity, at least as a matter of federal criminal law.[18] This movement toward a comprehensive view of the presumption of innocence suggests a covert acceptance of the thinking underlying the normative theory. Those who still favor the descriptive theory have an easier time concluding that particular defensive claims, such as insanity or self-defense, are extrinsic to the question of "guilt" and, therefore, should not be covered by the presumption of innocence.

The normative theory, it should be noted, does not entail the distinction between justification and excuse. Nor does accepting the latter distinction entail the normative theory. These are independent theoretical developments, but the far more important one — with more far-reaching consequences for criminal law — is the normative theory of culpability now accepted as self-evident in all of the countries in the German sphere of influence.

III. THE TWO-TRACK SYSTEM

Now let us return to the implications of the German tripartite system, which can be restated as requiring three stages of analysis for each offense:

1) Definition;
2) Unlawfulness (wrongfulness); and
3) Culpability (*mens rea*, responsibility, blameworthiness, etc.).

Distinguishing between the questions of wrongful and of culpable conduct enables criminal lawyers to identify conduct as wrongful (or unlawful) but not culpable. The absence of culpability provides a sufficient reason for acquittal. For example, Article 17 of the German Penal Code attaches the consequence of "acting without culpability" to a finding that the defendant labored under a reasonable (unavoidable) mistake of law. The implication is that the defendant is to be acquitted ("no culpability" implies "no liability"). This category of acting "without culpability" includes all cases of conduct excused on grounds of personal necessity, mistake of law, involuntary intoxication, and insanity.

The way some American state courts use the verdict of "not guilty by reason of insanity," the notion of "criminal but not culpable" has found a place in common law thinking as well. "Not guilty by reason of insanity"

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18 *Davis*, 160 U.S. 469.

(NGI) presupposes that the actor is "guilty" of committing the unlawful act. The claim of insanity negates merely the actor's culpability or responsibility. The German system generalizes this practice to cover all cases of excused conduct. They are treated as wrongful but not culpable.

After an NGI verdict, the trial court typically confines the acquitted defendant to a mental institution on the grounds of his or her dangerousness. The threshold for this finding of dangerousness is lower than in cases of civil commitment without the prior finding of a criminal, unlawful act.[19] The German "two-track system," now followed in many Continental countries, represents a generalization of this basic idea.

The German Penal Code contains a whole range of provisions that the judge might apply in cases of wrongful but excused conduct, provided that the defendant is dangerous to others (whatever that means). This is called the second track of "therapeutic and security measures."[20] The common law confinement of the defendant after an NGI verdict represents an exceptional remedy of social protection. The two-track system has institutionalized this exception into a systematic response to wrongful but excused conduct.

The institution of therapeutic and security measures first came into force during the Nationalist Socialist period in Germany, and the German Penal Code is still marred by a provision that permits the state to keep dangerous offenders in prison even after they have served their prescribed terms.[21] Despite these dubious provisions that place public safety ahead of individual rights, a broad coalition supports the therapeutic and security measures as enlightened penal policy. The argument is sometimes that it is good to provide therapeutic assistance to people who need it and sometimes that it is good to take steps to protect society. Either way, the factors of wrongful conduct and personal dangerousness combine to generate a distinct judicial power to deprive individuals of their liberty.

This institution is now generally accepted in the Continental and Asian countries under the German sphere of influence. The German response to critics is that in fact, the common law also recognizes the second track of civil commitment — e.g., after a verdict of NGI and in the application of sexual predator laws[22] — but does so less forthrightly. The apologist for the common law can reply that the common law attaches civil

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19 Jones v. United States, 463 U.S. 354 (1983).

20 *See* StGB §§ 61-72.

21 StGB § 66 (*Sicherungsverwahrung*).

22 Generally, American law limits the use of the distinct judicial power to cases in which the defendant is not merely excused, but excused on grounds of mental illness. *But see* Kansas v. Hendricks, 521 U.S. 346 (1997) (upholding the power of the state

commitment to dangerousness only in cases of mental illness, interpreted broadly to include the situation of being a sexual predator. The German practice is open and clearly regulated. The American style of civil commitment remains exceptional, less visible, and basically outside the system of criminal law.

Paradoxically, the standard European expressions for "criminal law" include *Strafrecht, derecho penal, diritto penale*, etc. Yet all these labels emphasize the punitive element in punishment. In fact, these systems that employ the two-track system seek not to punish as the only response to crime, but to offer a range of possible responses, some punitive and some "therapeutic." The Continental systems would do better with the term "criminal law," while the common law emphasis on punishment should generate the label "penal law."

IV. THE FEMINIST CRITIQUE

Let us now turn to some distinctive interdisciplinary contributions to criminal law in the twentieth century. The disciplines that most influenced the law in the early post war era were psychiatry and philosophy. These opposing schools of thought, the first tending to downplay personal culpability and the second tending to accentuate it, played a major part in the thinking of American scholars in the 1950s and 1960s. The entire Yale school of criminal law (including Abe Goldstein, Joe Goldstein, Jay Katz, and Alan Dershowitz) was grounded in law and psychiatry. The call of the philosophers came from Oxford, and the leader was undoubtedly H.L.A. Hart, who worked in collaboration with John Austin, Philippa Foot, Herbert Morris, and other analytic scholars.

In American academia as a whole, the three most influential schools of thought since the early 1970s have been: law and economics, critical legal studies, and feminism. As it turned out, however, the "econolawyers" and the "crits" have had little to say about 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 offenders pay for engaging in their chosen conduct. Philosophers have always stressed the expressive

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to impose a term of detention after the defendant labeled a "sexual predator" had served his prescribed term).

and condemnatory nature of punishment,[23] a factor that simply falls beyond the economists' ken. Further, economists assumed that potential criminals make rational calculations about whether committing a crime is 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 the economic analysis of law have simply ignored the complications of criminal justice.

The critical legal studies movement has fared no better. Except for one article by Mark Kelman,[24] the "crits" have had suprisingly little to say about criminal justice. A leftist 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 1970s and 1980s to have had an impact on criminal law is feminism. With her taboo-shattering article, Susan Estrich virtually exposed the entire field of rape law for critical reassessment.[25] Since then, numerous feminist critiques have focused on the discriminatory treatment of women in substantive criminal law. The general recognition in case law and legislation of a "battered women's defense" led to sustained inquiry into the foundations of self-defense, particularly the importance of the requirement that the defender be subject to an "imminent risk" of attack. The defense of provocation has also received its share of debunking criticism, the claim being that the cultural assumptions underlying the defense favor men who kill women rather than women who kill men. The feminist critique of criminal justice was surely long overdue — though there may be dangers now of ideological excess.[26]

Capital punishment is another field that poses the issue of identifying sexist impulses in the criminal law. 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 females convicted of brutal murderers — a pattern of discrimination against men that is rarely noted. These are undoubtedly patterns of discrimination in the law that require exposure and correction.[27]

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23 *For example* Joel Feinberg, *The Expressive Function of Punishment, in* Doing and Deserving 95 (1974).

24 Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 Stan. L. Rev. 591, 598 (1981).

25 Susan Estrich, *Rape*, 95 Yale L.J. 1087 (1986).

26 For a superb survey and critique, see Ann Coughlin, *Excusing Women*, 82 Cal. L. Rev. 1 (1994).

27 See my critique of a Soviet proposal (since accepted by Russian Duma) to exempt

V. THE VICTIMS' RIGHTS MOVEMENT

One of the distinctive features of the current criminal law scene, in both Continental Europe and the English-speaking world, is the emergence of victims as an organized pressure group in criminal justice. Sometimes the emphasis is on potential victims and sometimes on the concrete victim. Of greater current interest is the concrete victim. With the rise of public prosecution, victims have tended to lose their status and influence in the criminal process. Continental systems still recognize the right of the victim to compel prosecution, but the victim in the United States is totally dependent on the prosecution's decision with respect to charging and plea-bargaining.

Admittedly, victims and their sentiments have come to play a major role in sentencing in the United States. Victims are encouraged to speak at the time of sentencing and to express their personal preferences about what should happen to the convicted defendant.[28] Since the victims usually are interested in the defendant suffering as much as possible, this practice serves the interests of prosecutors. But the sentiments of the particular victims seem to me less important than the interests of the class of victims violated by the particular offense. In the crime of homicide, for example, it should not matter whether the decedent was a solitary old woman killed for her money or the mother of three killed in a drive-by shooting.

Continental procedures, which are willing to recognize more than just two parties at trial, have always been more victim-friendly than the common law adversary system with its insistence that two, and only two, parties litigate every dispute. Placing responsibility for the trial in the hands of an inquisitorial-style judge frees up the system to include the victim as well as the prosecution as parties in opposition to the defendant. The Continental system is also more flexible in allowing joinder of the victim's tort claim to the prosecution of the criminal offense.

It is not clear how far the victims' rights movement will go in the United States. A proposed constitutional amendment to protect victims' right to be present and to be heard at all proceedings has received substantial vocal support from politicians who would see political advantage in their support for victims' justice.

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women from capital punishment. George P. Fletcher, *On Trial in Gorbachev's Courts*, 36(8) N.Y. Rev. Books 13 (1989).

28 On the constitutionality of these procedures in capital cases, see Payne v. Tennessee, 501 U.S. 808 (1991).

In Germany and, to some extent, in the English-speaking world, the victims' rights movement has expressed itself in efforts to use mediation to resolve the "conflict" between the offender and the victim. The German system sees the use of mediation, at least for less serious offenses, as the beginning of a third track — after punishment and therapeutic sanctions — for institutionalizing a response to criminal behavior.

VI. CONSTITUTIONALIZATION

One of the distinguishing features of twentieth-century jurisprudence in criminal law is the tendency to elevate the basic principles of criminal responsibility to a constitutional level. Germany and Italy both regard the principal of culpability — no liability without blameworthy execution of an offense legislatively prohibited in advance — as a basic principle of constitutional justice. In 1988, the Italian Constitutional Court ruled that the provision in Italian Penal Code on mistake of law, which essentially provided that mistakes of law should be irrelevant, was unconstitutional as an over-inclusive rule permitting conviction of the morally innocent.[29]

Scholars have often urged similar developments under the due process clause of the U.S. Fourteenth Amendment, but the Supreme Court has never taken more than a few tentative steps in the realm of substantive criminal law without backtracking almost immediately.[30] In their first intervention, the Justices in Washington struck down a California statute for supposedly punishing the status of being a narcotics addict.[31] The Court declared that due process requires, at a minimum, that punishment be imposed for actions, not for status. This sounds like a well-defined and limited principle, but in fact, the concept of status is not so easily defined and lends itself to expansion to include all forms of involuntary conduct. Public intoxication looks much like narcotic addiction, but then so does kleptomania, prostitution, gambling, racketeering, and involuntary sexual aggression. A few years after the initial decision, a defendant convicted of public intoxication asserted that his crime was a status offense because it was the product of addiction. The Court quickly realized that it had trod into very uncertain territory. The public drunk lost his

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29 Judgment of Italian Constitutional Court, Mar. 23, 1988, 31 Revista Italiana di Diritto e Procedura Penale 686 (1988).

30 For a description of these efforts, see George P. Fletcher, *The Meaning of Innocence*, 48 U. Toronto L.J. 157 (1998).

31 Robinson v. California, 370 U.S. 660 (1962).

case, and the Court seemed chagrined that it had dared to ponder the minimally acceptable criteria of criminal responsibility.[32]

The Justices fell into temptation once again when it seemed that they should do something about state decisions to shift the burden of persuasion on matters that the prosecution should properly prove. The problem was figuring out whether the prosecution should bear responsibility for disproving all issues that bear on guilt or innocence beyond a reasonable doubt. The primary areas of controversy were insanity, self-defense, provocation, and extreme emotional disturbance in homicide cases. This line of cases ended in a formalistic tragedy. The Court had already concluded that the prosecution must disprove common law provocation beyond a reasonable doubt; the question then became whether the same principle would govern the issue of extreme emotional disturbance, which is in fact nothing more than the Model Penal Code's version of provocation.[33]

A formal difference distinguishes common law provocation from extreme emotional disturbance. The former negates malice, so that if one assumes that the prosecution must prove malice beyond a reasonable doubt, it follows logically that the prosecution must also disprove provocation by the same degree of proof. The Model Penal Code abolished malice but nonetheless recognizes "extreme emotional disturbance" as a ground for mitigating murder into manslaughter. New York followed the structure laid down by the MPC, which made "extreme emotional disturbance" appear to be a free-standing affirmative defense, negating no particular element in the prosecution's case. Accordingly, the State of New York thought it permissible to require the defense to prove extreme emotional disturbance by a preponderance of the evidence. In *Patterson v. New York*,[34] the Court concluded that this shift in the burden of proof was constitutionally acceptable. The Court affirmed that the prosecution must prove beyond a reasonable doubt "every ingredient in an offense." But the notion of "offense" did not necessarily include independent factors in "confession and avoidance" that negated no formal requirement of liability. Accordingly, if New York decided that "extreme emotional disturbance" was a defense rather than the negation of an element in the prosecution's case, there was no constitutional impediment to shifting the onus of proof to the defense. The classifications of issues as elements of the offense or as "defenses" was left, therefore, to the discretion of

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32 Powell v. Texas, 392 U.S. 514 (1968).

33 *See* Model Penal Code § 210.3(b) (defining manslaughter as based on a finding of extreme emotional disturbance).

34 432 U.S. 197 (1977).

state legislatures. Hence, a second chapter in the Court's intervention in state criminal justice came to an abrupt end.

One of the reasons why the U.S. Supreme Court is reluctant to enter the fray is that there is so much diversity in the substantive criminal law of the fifty states that a morass of pitfalls awaits those who insist that there is only one correct view of criminal responsibility under the Constitution. For the sake of mastering its work load in other areas, particularly in the field of criminal procedure, the Court is not likely ever to tangle with the issues of substantive criminal law.

The situation differs radically in Canada, where the nineteenth-century Blackstonian Criminal Code applies nationwide, and the Canadian Parliament has not succeeded in its efforts to enact a more modern code. As a result, the coming into force, in 1982, of the Charter of Rights and Freedoms provided the Canadian Supreme Court with the authority to undertake a systematic review of the substantive criminal law under constitutional principles. The Court has no textual guide in the Charter except the recognition of the "presumption of innocence" in Section 11(d) and the very abstract principle of Section 7 requiring criminal law to conform to "principles of fundamental justice."

The problem that has beset the Canadian Supreme Court has been merging the process of common law development with the pursuit of basic principles of criminal justice. It made sense as a matter of incremental, case-by-case evolution to strike down laws of absolute liability by requiring the defendant to bear the onus of proving due diligence or the absence of negligence. After all, the defendant is better off after the change. Diachronic thinking — comparing before and after — can justify a synchronic set of principles as a process of improvement, but it cannot justify them as claims of justice, supposedly binding regardless of their genesis. If the presumption of innocence requires the prosecution to prove guilt or *mens rea* beyond a reasonable doubt and if negligence negates *mens rea*, at least as that concept is understood normatively, then the prosecution must also disprove negligence or the absence of due diligence. The shift in the burden of persuasion, therefore, stands in contradiction with the presumption of innocence.[35]

The argument in favor of shifting the burden of proof is that the issue of "due diligence" — the denial of negligence — falls outside the ambit of guilt and innocence. But if due diligence does not bear on innocence, why recognize the issue at all? If it is covered by the presumption of innocence,

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35 See my analysis in Fletcher, *supra* note 30.

then the prosecution must also disprove the claim of due diligence as it must any other issue bearing on innocence.

It took several decades for the Canadian Justices to recognize their mistake. Part of the problem was that the Court relied on the descriptive theory of *mens rea* as developed by Glanville Williams[36] and, therefore, subscribed to the dogma that "real *mens rea*" requires subjective foresight of the relative consequences. The turning point came in 1990, when Justices Dickson and Lamer shifted in *Martineau*[37] from the received wisdom, namely, the descriptive theory, and adopted H.L.A. Hart's conception of negligence.[38] Admittedly, the Court in *Martineau* struck down the statutory felony-murder rule equating an intent to cause grievous bodily harm with an intent to kill. Yet, at the same time, the Court laid the intellectual groundwork for accepting the culpability of negligence in the *Creighton* case four years later.[39] The jurisprudence of the Canadian Supreme Court has now evolved toward a more sophisticated jurisprudence of culpability and, for that reason alone, deserves to be recognized as a leader in the field of criminal law in the English-speaking world.

VII. CODIFICATION

The movement toward the revision of criminal codes and the enactment of new ones was surely one of the major features of criminal justice in the industrialized world in the closing decades of the twentieth century. In the period from 1975 to 1995, German, France, Spain, Finland, Israel, and Russia all adopted new codes of substantive criminal law. Also, beginning in the 1960s, roughly thirty-five states in the United States adopted new criminal codes following the basic structure and terminology of the Model Penal Code. For a relatively short period of time, the legislative activity during this period was one of the most intense in history.

1962 was a critical year in the process of recodifying criminal law in the West. In that year the American Law Institute approved the "Proposed Official Draft" of the Model Penal Code, and a Commission of German scholars, working totally independently, approved a draft for the reform of the 1871 German Criminal Code. The drafters of the MPC paid almost no

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36 Williams, *supra* note 5, at 262.

37 R. v. Martineau, [1990] 2 S.C.R. 633.

38 *See* H.L.A. Hart, Punishment and Responsibility (1968), *cited in Martineau*, at 642.

39 R. v. Creighton, [1993] 3 S.C.R. 3.

attention to the European experience in criminal law, and the Germans and subsequent Continental drafters — with the exception of Israel — paid no attention to the concepts, doctrines, and structure of the MPC. Developments on the two sides of the Atlantic have, unfortunately, taken place without reciprocal fertilization.

The drafting of the Rome Statute authorizing the International Criminal Court, approved by 120 states in July 1998, did, however, bring together common law ideas and at least some Continental principles. This experience may portend greater emphasis on comparative legal studies in the future.

Most American observers of criminal law in the twentieth century would underscore the importance of the MPC.[40] Although the organizational and political accomplishments of the MPC are undoubtedly impressive, I have my doubts about the significance of the MPC as an intellectual and theoretical achievement.[41] Most of these doubts derive from the failure of the drafters at the American Law Institute to pay attention to legal traditions other than their own. The major defects of the MPC are as follows:

1. The MPC over-defines. The MPC provides definitions of action,[42] causation,[43] and various mental states like purpose and negligence.[44] The German Penal Code of 1975 defines none of these. It is by no means apparent as to whether a criminal code should undertake to reduce these inherently philosophical concepts to black letter rules. All of these definitions in the MPC are, in fact, too complicated for ordinary lawyers and judges to understand and to employ in practice. It is far better to leave the clarification of these philosophical concepts to scholars who are eager to contribute their reflective insights to the elaboration of the law.

2. The MPC rejects the history of the common law. The historical development of crimes like larceny and embezzlement reflects considerable thought and experience. The drafters arrogantly rejected all of this experience for the sake of a unified crime of theft. Also, in the General Part defining the criteria of justification, the Code ignores historical standards like the

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40 *See, e.g.*, Sanford Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 Cal. L. Rev. 943 (1999).

41 I have even greater doubts, I should add, about the Rome Statute defining the International Criminal Court. I will publish this criticism in the next few years.

42 Model Penal Code § 2.01(2).

43 *Id.* § 2.03.

44 *Id.* § 2.03(2).

imminence requirement for self-defense and necessity.[45] It discards the word "intent" for the sake of a new start with the term "purpose."[46]

3. The MPC violates the rule of law. In punishing omissions, the MPC permits the courts to develop duties of intervention on a case-by-case basis. This practice, as the French have long recognized, is clearly inconsistent with the principle that all offenses should be legislatively-defined prior to their commission *(nulla poena sine lege).*[47]

4. The MPC has no coherent theory of crime or culpability. The Code fails to take a clear stand on the issues that, viewed from a comparative perspective, constitute the primary themes of twentieth-century jurisprudence in criminal law. These include the normative theory of culpability, the problem of a comprehensive theory of crime, and the proper ordering of issues like insanity, mistake of law, entrapment, and other controversial matters. The MPC treats these as part of a laundry list of relevant questions, but its structure fails to reflect the relationship between these claims and the basic principles of liability. It is no wonder that many American legislators think they can abolish the insanity defense or compromise mistake of law and entrapment without encroaching on basic questions of justice to the defendant.

The lack of a coherent normative theory of culpability in the MPC permits the Code to make the same mistake that we noted in the case law of the Canadian Supreme Court. The drafters shifted the burden of persuasion in certain cases where (like the Canadian Supreme Court) the Code makes the diachronic judgment that the reform improves the situation of the defendant who, therefore, has no reason to complain about bearing the burden of persuasion.[48]

The worst feature of the MPC is its success, particularly in academic circles. Too many teachers of criminal law take the MPC as the ideal code, and they measure the rather pitiful doctrinal analysis in the opinions published in the standard casebooks against this supposed ideal of clarity and precision. As a result of this glorification of black letter rules in the MPC, more speculative and critical inquiries about the foundations of criminal justice flounder.

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45 *Id.* §§ 3.02, 3.04.

46 *Id.* § 2.02(2)(a).

47 *Id.* § 2.01(3)(b) (liability for failure to perform any duty "imposed by law" where the notion of "law" is not limited to statutory definition).

48 *Id.* § 2.03(4) (mistake of law); § 2.13(2) (entrapment).

VIII. TOWARD THE NEXT CENTURY

Of the seven features of twentieth-century criminal law that I have underscored, it is difficult to know which, if any, could have been predicted a hundred years ago. Therefore, with some trepidation, I venture a few guesses about the jurisprudence of criminal law in the twenty-first century.

First, I think we will have to deal with the problem of criminalizing the use of drugs. At a theoretical level, that means we will have to rethink the power of the state to use the criminal law as a teacher of proper moral behavior. It also means that we will have to pay closer attention to the efficacy of criminal law in reaching its objectives. Punishing the use of drugs might well stand to the twenty-first century as the criminalization of homosexuality stood to the twentieth century. We will not remain indifferent to drug use as a health problem. I predict that when the intractability of the problem becomes clear, we will conclude that decriminalization, coupled with intensive advertising against the use of drugs, is a wiser policy than relying on the criminal sanction.

Second, the international consensus against the death penalty will continue to grow, with the resulting isolation of the United States, which is not likely to heed world public opinion in this matter.

Third, the internationalization of criminal law will grow along with the Internet and the consciousness of globalization. A hundred years from now, the work of the International Criminal Court, soon to ratified by sixty countries on the basis of the Rome Statute of 1998, will be at the very center of our discipline.

Fourth, we will begin to think of criminal law as but one of many disciplines that serve the basic values of securing public safety, declaring our moral condemnation of evil conduct, and reintegrating the victim into society. The American model of tort law — preferring a victim-controlled private remedy to state-sponsored prosecution — will gain influence in the world as a whole. There will be new techniques of social control, not yet concrete or even conceived, that will challenge the sensibilities of criminal lawyers to remain faithful to their task of finding the just balance between the claims of the victim, the interests of society, and fairness to the suspect.