



Criminal Law Theory: Doctrines of the General Part

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Rule-Violations and Wrongdoings

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Abstract and Keywords

Some moral considerations are action-guiding, while others guide judgements on or reactions to actions and their agents, rather than directly guiding such actions. Two such kinds of consideration are relevant here: one concerns excuses, the other renders blame or criticism inappropriate. The distinction between action-guiding and judgement-guiding considerations that can be found within morality has a close analogue in the criminal law. Some aspects of the criminal law define criminally wrongful actions: they declare what citizens must (or may) do (or not do); they define or identify reasons for action. This chapter focuses on three issues: in what terms the rules for citizens, or the norms of wrongdoing, address the citizens; how this schema of two kinds of rule or norm can cope with some familiar defences, such as duress; and whether the standard requirements of *mens rea* or fault belong with the rules for citizens or with the rules for courts.

Keywords: criminal law, wrongful actions, rules, defences, blame, judgements, excuses, violations, fault

A. 'Rules for Citizens' and 'Rules for Courts'

Some moral considerations are action-guiding. They generate direct reasons for action; they concern what, as moral agents, we may, must, should, or ought to do (or not to do); they can figure in the practical reasoning of a moral agent who asks herself 'What am I to do?'. They might figure as principles: 'One ought to pay one's debts'; 'One ought not to tell lies'; 'One should help those in need'. Or they might figure as more particularized, reason-imbued descriptions of a contemplated action or of the situation: 'I owe it to her'; 'That would be dishonest'; 'He needs help'.¹ Such moral

considerations identify actions as right, or wrong, or permissible, and include considerations which can *justify* otherwise or normally wrongful actions: 'I owe her this money, but I've got to give it to this desperate beggar instead'; 'That would be a lie, but it's the only way to avert disaster'; 'He needs help, but I must hurry on to a crucial meeting'.

Other kinds of moral consideration guide judgements on or reactions to actions and their agents, rather than directly guiding such actions: they concern the propriety of criticizing or blaming people (including oneself) for what they have done. Two such kinds of consideration are relevant here.

One concerns excuses: 'Yes, she was unjustifiably rude, but she was under great strain at the time, so you shouldn't blame her'; 'Yes, he lied to you, but he suffers from the paranoid delusion that you are persecuting him, so you can't blame him'; 'Yes, she walked on by when you pleaded for help, but she doesn't speak English, and thought you were propositioning her, so you can't blame her' (sometimes, the conclusion is not that we can't blame her at all, but that blame should be qualified by the factor cited). Such pleas, if successful, exculpate the agent: not by justifying the action (being rude, lying, not answering a plea for help), but by showing why the agent should not be blamed for acting thus.

(p.48) The other kind of consideration renders blame or criticism inappropriate, not by showing that the agent was not blameworthy, but by showing that the would-be blamer lacks the right or the standing to blame her—to blame her to her face, perhaps to judge her conduct at all. 'Yes, he is behaving badly to his friend—but that's none of your business'; 'Yes, he lied to you—but given how often you have lied to him, you are not well placed to blame him'.

The feature common to both these kinds of case is that the factor cited as a reason for not blaming the agent is not a factor to which the agent herself could properly attend in deciding what to do. In some cases it *could not* figure in her rational deliberation about what to do: she cannot reason 'I mistakenly believe that he is propositioning me, so I should ignore his plea for help'. In other cases, it *could* figure in the agent's deliberations, but its blame-excluding force does not depend on its doing so: Jones might see the fact that Smith has regularly lied, to her as a good reason to lie to him; but even if we (and she) deny this, we might still hold that Smith lacks the moral right or standing to criticize Jones for her lies to him.

The distinction between action-guiding and judgement-guiding considerations that can be found within morality has a close analogue in the criminal law. Some aspects of the criminal law define criminally wrongful actions'; they declare what citizens must (or may) do (or not do); they define or identify reasons for action. Thus English criminal law declares that someone who has sexual intercourse with another person without her (or his) consent commits a crime (Sexual Offences (Amendment) Act 1976, section 1(1); Criminal Justice and Public Order Act 1994, section 141); as does one who drives a car without a licence (Road Traffic Act 1988, section 87), or sells firearms to someone under 17 (Firearms Act 1968, section 24(1)), or 'without lawful excuse'

destroys or damages another's property (Criminal Damage Act 1.971, section 1.(1)). Such reason-giving aspects of the law include justifications for what would otherwise be criminal actions. These may appear in the law's definition of the offence (the Criminal Damage Act 1.971, section 5, partially specifies 'lawful excuses' for damaging others' property),² or as general justificatory defences recognized, by the law: in both cases they specify reasons which can properly guide an agent's actions.

In giving these examples, I have avoided two important questions. First, my descriptions of the relevant actions make no explicit reference to the agent's intentions or beliefs—to the elements normally classed as matters of *mens rea*. As we will see, it is controversial whether, or how, such elements should figure in this type of criminal law norm: all we need note here is that insofar as such norms express reasons for action, their simplest specification will omit any such explicit reference. What, according to the criminal law, gives me reason not to undertake the action is the fact that the person with whom I (p.49) would have intercourse does not consent to it, or that I would be driving without a licence, or that the person who seeks to buy a firearm from me is under 17, or that this action would damage another's property. Secondly, it is also unclear whether, or when, or how, the fact that the law defines the action as criminal should (in the law's eyes) figure as part of my reason for not undertaking it: am I to say to myself, 'She does not consent, so I shouldn't have intercourse with her', or 'She does not consent, and non-consensual intercourse is criminal, so I shouldn't have intercourse with her'; 'He is under 17, so I shouldn't sell him a firearm', or 'He is under 17, and selling firearms to anyone under 17 is criminal, so I shouldn't sell him a firearm'?

Other aspects of the criminal law serve not to define or identify reasons which are to guide citizens' actions, but to specify conditions under which an agent who has committed a crime should not be held criminally liable for it. Some such provisions specify exculpatory defences, or excuses; thus the insanity defence exempts from liability someone whose mental disorder was, whilst such as to justify his acquittal, not such as to negate the normal *mens rea* requirements for the crime; he intentionally killed a human being, but is acquitted on grounds of insanity. Other provisions concern 'non-exculpatory defences':³ someone whose trial is barred by a statute of limitations or who legitimately claims diplomatic immunity might have committed a crime without either justification or excuse, but cannot now be held liable for it. The feature common to both these kinds of case is that the factor which saves the agent from criminal liability is *not* one which (in the law's eyes) gives her reason to commit the crime, and is therefore not one to which (in the law's eyes) she can properly attend in deciding what to do. The fact that the person whose property I contemplate destroying has consented to that destruction gives me (permissive, rather than mandatory) reason to destroy it: by contrast, the fact that I am insane in a way that brings me under the provisions of the insanity defence, or that I have diplomatic immunity, does not (in the law's eyes) give me reason to act in a way which would, were it not for that fact, render me criminally liable.

Partly in the light of the considerations noted above, some theorists argue that we should distinguish 'rules for citizens' from 'rules for courts': rules or norms that are

addressed to citizens, aiming to guide, or to specify reasons that should guide, their actions from rules or norms that are addressed to criminal courts, specifying conditions under which they should or should not hold someone criminally liable. So Fletcher, drawing on German legal theory, distinguishes norms of ‘wrongdoing’ from norms of ‘attribution’.⁴ Robinson, drawing on his ‘functional’ account of the criminal law, argues that we should ideally have two separate criminal law codes: a ‘Code of Conduct’ containing the ‘rules of conduct’, which ‘provide *ex ante* direction (p.50) to members of the community as to the conduct that must be avoided ... upon pain of criminal sanction’, and a ‘Code of Adjudication’ addressed to the courts, containing ‘the rules to be used in deciding whether a breach of the law’s commands will result in criminal liability and, if so, the grade or degree of that liability’.⁵ He also provides drafts of each code, thus engaging more seriously than have others in the task of offering a *complete* classification of the elements of the substantive criminal law into these two categories.⁶

Part of the point of such distinctions is analytical and expository clarity: if we recognize the differences in logic and in function between different aspects of the criminal law, we will gain a clearer understanding of its structure and doctrinal organization; we can then also make the law clearer to the citizens whom it binds, for instance by legislating a ‘Code of Conduct’. Those who draw such distinctions are, however, typically more ambitious than that: they hope that by classifying various rules and doctrines into these two categories, we will be able to dissolve various doctrinal problems and confusions that have troubled courts and theorists. These are indeed worthy ambitions, and aspects of the distinction(s) between rules for citizens and rules for courts can indeed help towards achieving them. These distinctions are, however, seriously oversimplified by those who draw them: the complex structures of crime and criminal liability cannot be captured, without distortion, in any such stark dichotomy.

I will focus on three issues in what follows. First, in what terms do the rules for citizens, or the norms of wrongdoing, address the citizens? Robinson and Fletcher talk, as do many theorists, of the criminal law as ‘prohibiting’ certain kinds of conduct: but in my view this embodies an inadequate conception of how the law of a liberal polity should address its citizens. Secondly, how can this schema of two kinds of rule or norm cope with some familiar defences, such as duress? Robinson and Fletcher agree that, whilst justifications belong with the rules or norms addressed to citizens,⁷ excuses belong with those addressed to courts—and that duress counts in law as an excuse rather than as a justification: but the matter is much more complicated than that. Thirdly, do the standard requirements of *mens rea* belong with the rules for citizens or with the rules for courts? Robinson and Fletcher differ on this question, and we will see that it admits of no simple answer.

(p.51) The first of these questions, to which I turn in the next section, is the most basic, since answers to the other two questions will depend in crucial part on an answer to it. I will sketch an account of the terms, and the tones, in which the criminal law should address the citizens; an account not of how *any* system of criminal law *must* address those whom it claims to bind (there are familiar problems with any such

would-be universal and ahistorical thesis), but of how the criminal law of a polity supposedly structured by contemporary liberal values should address the citizens of that polity.⁸ This account, if it is plausible, has merits and significance independently of its relation to Robinson's and Fletcher's discussions of the structure of the criminal law: but it can usefully be explained by contrast with some central features of their accounts.

B. Rules, Prohibitions and Commands

According to section 1.02(a) of the Model Penal Code, the 'general purpose' of the substantive criminal law is 'to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests'; and it is quite usual to talk of the criminal law as 'forbidding' or 'prohibiting' certain kinds of conduct—in order, as we might naturally add, to 'prevent' such conduct. From this perspective, what the law demands of and seeks from the citizens is *obedience* to its prohibitions. What ultimately matters is admittedly that the citizens refrain from crime, which need not involve *obeying* the law as distinct from behaving in a way that conforms to it: but the point of a prohibition, the aim internal to it, is to secure obedience.

To portray the law thus is to portray it as offering citizens *content-independent* reasons for action. If their reasons for refraining from conduct defined as criminal had to do solely with the nature or effects of that conduct, independently of its being defined as criminal (with its pre-legal moral wrongfulness or imprudence, for instance), their reasons would be content-dependent; they would depend on the particular content of the law, not on the fact that it was the law. In that case, however, they would not be *obeying* the law: for to obey X is to act in conformity with what X requires, *because* X requires it;⁹ whereas such citizens would be acting as they do because of what it is that the law 'requires', rather than because the law requires it. To see the criminal law as prohibiting conduct, and as requiring our obedience to its prohibitions, is to see it as offering us reasons for action that are at least partly independent of its particular content: reasons that we would not otherwise (p.52) have for acting thus; reasons having to do with the authority or power of the law itself.¹⁰

This is indeed how traditional legal positivism portrays the law, as a set of commands addressed to the citizens by a sovereign. It is also how the law *should* be portrayed insofar as it should be understood as a set of edicts imposed by a sovereign on her subjects.¹¹ But it is not how we should understand the criminal law of a liberal polity.

Consider the central kinds of criminal *mala in se*—crimes, such as murder, rape, serious assault, theft, involving conduct that is wrong independently of its being defined as criminal. (In calling such crimes 'central', I do not mean that they are the most commonly committed or punished, but that they are normatively salient; if we are to have a criminal law, it should obviously at least cover these kinds of conduct.) To say that the criminal law 'prohibits' such conduct is to say that it offers citizens reasons for refraining from it that are independent of its pre-legal wrongfulness: reasons presumably having to do either with the law's authority (citizens should obey because they recognize a general obligation to do so), or with its power (they are to

obey because the threat of sanctions obliges them to do so). Many citizens might refrain from such conduct independently of the law's prohibition, because they see it to be (pre-legally) wrong. On this account of the criminal law, however, it is primarily addressed not to those who would anyway refrain from such conduct (they need no such prohibitions), but to those who might otherwise engage in it; and it offers them new reasons to refrain from it.

One point to notice about this picture concerns the motivation of those who do obey the law—those who refrain from criminal conduct because the law prohibits it. Few, if any, are likely to obey from respect for the law's authority: for what kind of person would it be who was not motivated to refrain from murder or rape by the pre-legal wrongness of such conduct, but was motivated to refrain by his respect for the law?¹² One can imagine cases in which this would be intelligible, in particular, cases in which the law makes a determinate ruling on some morally controversial or uncertain issue: someone who thinks that voluntary euthanasia is morally permissible, for instance, or that a property holder can be morally justified in using fatal force to prevent its theft, *might* be dissuaded from such conduct by respect for the law (**p.53**) that defines it as criminal. Such cases are, however, rare; in the usual run of cases, those who obey the law will more plausibly do so from fear of its threatened sanctions.

In either case, however, whether the law exerts its power or its authority over those who obey it, the more important point to notice concerns the way in which it addresses the citizens from whom it seeks obedience. It addresses them in the peremptory tones of authority or of power; it says to them either 'Act thus, because you have an obligation to obey the law'; or 'Act thus, or else you will suffer sanctions'. But these are not the tones in which the law should address the citizens of a liberal polity.

What justifies the law in 'prohibiting' murder, rape and the like is that such actions are wrong in a way that properly concerns the law: they constitute 'public' wrongs in terms of the values of the political community.¹³ Those values claim to bind the citizens, as members of that normative community: they should be the citizens' own public values, as members of the polity. If the law is to address citizens, as it should, as members of that political community, it must therefore address them in terms of those values—the values which bind them as members, and which justify the law's own content. If it addresses them only in the peremptory language of authority or of power, it fails to satisfy this requirement: it addresses them as subjects rather than as citizens.

We can meet this point by portraying the law, not as *prohibiting* central criminal *mala in se*, but as *declaring* their public wrongfulness. In defining them as crimes it declares not just that they are wrongs, in terms of the community's own values; nor just that they are publicly recognized 'private' wrongs which belong in the sphere of civil law, and entitle their victims to sue if they wish: but that they are public wrongs which must be recognized and condemned as such by the whole political community, through the criminal law—wrongs for which the community will call their agents to account through a public criminal process, and censure them through conviction and punishment.

This is not to say that the role of the law in defining central criminal *mala in se* is *only* to declare the (public) wrongfulness of kinds of action that citizens should already recognize as wrongs. For, first, in defining such actions as public wrongs, it defines them as actions for which citizens can be called to answer: it thus requires citizens to answer for such actions (or to answer the charge that they have committed such actions) through a criminal process. This is one way in which the criminal law is a source of reasons which make a difference to what citizens ought to do: it creates a criminal process through which they are required to answer charges of what the law defines as public wrongdoing. This is also one way in which the criminal law claims authority over the citizens: it claims the authority not (as to central *mala in se*) to *make* wrong conduct that is not wrong independently of the law, but to define (p.54) certain wrongs as public wrongs, and so to require citizens to answer for their (alleged) commissions of such wrongs.

Secondly, even in relation to central criminal *mala in se*, the law must sometimes provide precise ‘*determinationes*’ of values whose pre-legal meanings or implications are uncertain or controversial.¹⁴ The law defines what counts as murder, or theft, or rape, and what can justify what would otherwise be a criminal action; in doing so, it specifies more determinate legal meanings for normative concepts whose pre-legal meanings may be less determinate, and it takes an authoritative stand on issues that may be controversial in the political community, for instance on the permissibility of euthanasia.¹⁵ A liberal polity’s law, which respects its citizens’ autonomy, will as far as possible respect their different, conflicting interpretations of the community’s values: where there is, as with euthanasia, reasonable disagreement about what those values (respect for life, for instance) require, it tries to avoid taking a stand that will require some citizens to act against their consciences. But this is not always possible: sometimes the law must either allow what some citizens firmly believe to be a public wrong, or declare as a public wrong what some citizens firmly believe to be permissible (or to be a private matter that should not concern the law), when both sides to the controversy found their beliefs on a not unreasonable interpretation of the value at stake. In such cases, what the law says to those who dissent from the stand it takes is not simply and unqualifiedly that the conduct in question is wrong, but rather that this is now the community’s authoritative view: even if they dissent from its content, they have an obligation as members of the community to accept its authority—to obey the law, even if they are not persuaded by its content, unless and until they can secure a change in it through the normal political process.

The criminal law also, of course, defines ‘*mala prohibita*’ as well as ‘*mala in se*’; and in this context there is more room to talk of the law as ‘prohibiting’ certain kinds of conduct, as creating new, content-independent reasons for action, and as requiring ‘obedience’ from the citizens, I cannot discuss the character of *mala prohibita* (or the distinction between *mala in se* and *mala prohibita*, or the question of whether these categories exhaust the content of the criminal law) here, save to note that *mala prohibita* are by no means always purely *prohibita*, i.e. kinds of conduct that are wrong *only* qua prohibited by the criminal law,¹⁶ and from which citizens would otherwise have *no* (p.55) reason to refrain. In many cases (including many driving offences, and many ‘regulatory’ offences concerning health and safety), we should rather see the law

as providing more or less artificial *determinationes* of *mala in se*—*deter-minat*kmes whose artificiality might be due, for instance, to concerns with proof or enforceability, or to a concern to specify precise requirements for agents who cannot always be trusted to decide for themselves what kinds of conduct are or are not safe:¹⁷ both kinds of factor underpin, for instance, the creation of legal speed limits (rather than relying on the *malum in se* offence of dangerous driving), and definitions of criminal ‘drinking and driving’ which refer to the proportion of alcohol in the blood rather than to the driver’s impaired fitness.

I should note three points about my argument so far. First, I do not suggest that rejecting a simple positivist picture of the criminal law as a set of sanction-backed commands suffices by itself to justify the account I am offering. That account is, I think, independently plausible: but it can be usefully illuminated by contrasting it with the simple positivist picture.

Secondly, I do not suppose that the criminal law must speak *either* the purely peremptory language of power or authority, *or* the purely moral language that I claim is appropriate to it: it could speak initially in the moral language that identifies crimes as public wrongs, but seek to give its definitions of crimes more persuasive motivational force by adding the threat of sanctions as a deterrent.¹⁸ All I have claimed so far is that it must at least address the citizens in that moral language, and that to talk simply of it as ‘prohibiting’ certain kinds of conduct does not capture this crucial point.

Thirdly, on the picture sketched here the criminal law must appeal to, and depends for its legitimacy on, the shared public values of a normative political community to which all those whom it claims to bind belong, and in which they can all make their voices heard. Some will argue that no such shared values are to be found in our contemporary societies: that they are, rather, characterized by disagreement and conflict even about the central values that, on my account, should be embodied in the criminal law.¹⁹ All I can say here is that, whilst a liberal political community should indeed be characterized by, and should welcome, wide debate and disagreement about matters of value, the legitimacy of its criminal law does depend on there being sufficiently wide agreement in certain central values (both substantive and procedural) which (p.56) can properly be claimed to be binding on all citizens; insofar as such agreement is lacking, the law’s legitimacy is undermined.²⁰

Why does any of this matter in relation to ‘rules for citizens’? Do my comments amount to anything more than the trivial point that to talk of the criminal law as ‘prohibiting’ central *mala in se* is somewhat artificial? They do amount to more than this: thinking of the law as issuing ‘prohibitions’ which citizens are to ‘obey’ invites a particular, and distorting, way of thinking about the function that such ‘prohibitions’ should serve, and about how they should be formulated.

C. Identifying Wrongs

If the law is in the business of issuing prohibitions or commands, which citizens are to obey, clarity, certainty, and consistency are obvious *desiderata*; citizens must be able to understand, without doubt or confusion, what the law commands—what they must

do; and they must be able to obey—which they could not do if the law’s commands were mutually inconsistent. Now clarity, consistency, and certainty are virtues of a good criminal code, and *desiderata* for any tolerable system of criminal law:²¹ but we must ask more carefully just what they require.

Consider two features of ‘prohibitions’ or ‘commands’. First, they do not include, or invite a request for, content-dependent reasons. The content of a prohibition or command is not ‘Do not do X, because ...’, with the ‘because’ clause being filled out by some reason relating to the character of X: it is either just ‘Do not do X’, or ‘Do not do X because I tell you not to’; the reason offered concerns not the content of the prohibition, the character of X, but my authority or power thus to demand your obedience. Secondly, they neither presuppose nor seek any substantive agreement in judgements and values between the commander and the commanded: I do not suppose either that you already recognize, or that you will come to recognize, *why* (independently of my prohibition) you should not do X; I simply demand *that* you not do X. These features help to determine what will count as ‘clarity’ and ‘certainty’ in the context of prohibitions or commands.

Prohibitions are concerned with the ‘that’ rather than with the ‘why’: with making clear *that* those to whom they are addressed must not act in certain ways, rather than *why* those actions are wrong. Their addressees are not invited or expected to interpret the prohibitions in the light of the reasons that supposedly justify their content, or of the values that supposedly inform (p.57) them: for they are not expected or assumed to grasp or share those reasons and values. The prohibitions must therefore strive for *descriptive* clarity and certainty; they must provide clear, determinate factual specifications of the conduct they prohibit—specifications whose application avoids, as far as possible, any reliance on the normative understandings of those who are to apply them. In so far as they achieve such descriptive clarity and certainty, however, they are liable *not* to identify what their addressees could be expected to recognize as substantive *wrongs*, but rather to portray all crimes as mere *mala prohibita*; which, for the reasons noted above, is to distort the proper character and meaning of the criminal law as it concerns *mala in se*. What is wrong with murder, rape, theft, and the like as crimes is not that they are against the law, but that they are substantive pre-legal wrongs. A criminal law that is to be apt for liberal citizens must then declare them to be such wrongs in ways that make their wrongful character clear: but a law that aims to lay down ‘prohibitions’ or ‘commands’ for citizens to ‘obey’ will not do this, since it will have to eschew the very concepts in terms of which that wrongful character is understood.²²

Let me illustrate and explain this claim by looking at two sections of Robinson’s Draft Code of Conduct:²³

3. *Injury to a Person*

You may not cause bodily injury or death to another person [subject to an exception for ‘minor bodily injury’ caused by conduct to which the other consents; s. 4].

24. *Damage to or Theft of Property*

You may not damage, take, use, dispose of, or transfer another's property without the other's consent. Property is anything of value, including services offered for payment and access to recorded information.

Each of these sections brings under one simply defined rule a range of existing offences: this simplifying and synthesizing character is, Robinson argues, one of the Code's merits.²⁴

One point to note about both these sections is that they do *not* specify what Robinson counts as 'rules of conduct'. For, first, whilst 'conduct' (defined simply as 'physical acts' or 'bodily movement')²⁵ and its circumstances 'do contribute to the definition of the prohibited conduct,... result elements are not necessary to define the prohibited conduct. It is an actor's conduct, and not its results, that the criminal law prohibits'; the results brought about by that conduct are relevant, if at all, only to the issue of grading.²⁶ But these (p.58) sections specify the prohibited conduct in terms of its results. Secondly, the requirements of '*mens rea* or 'culpability' are generally relevant not to defining the prohibited conduct, but to determining the agent's liability for a rule-violation, or the seriousness of that violation;²⁷ but some of the terms in section 24, as they would be understood by ordinary citizens, imply a particular intention on the part of the agent. I will comment on the exclusion of *mens rea* concepts from the rules of conduct later (section E below): but we must wonder why Robinson did not draft a Code of Conduct that specified what he would count as 'rules of conduct'. For instance, why should s. 3 prohibit 'caus[ing] bodily harm or injury', rather than 'acting in a way that creates a substantial unjustified risk of causing bodily injury or death'?²⁸

One answer to this question (though not one that Robinson would offer) is that 'caus[ing] bodily injury or death' and 'creating a substantial unjustified risk of causing bodily injury or death' pick out different kinds of wrong; and a Code of Conduct should not just tell citizens that they must not engage in certain kinds of conduct, but identify recognizable wrongs from which citizens should refrain because they are wrongs. As I have indicated, I think that this is indeed what a criminal code should do for at least the central types of *mala in se* but from this perspective there are further problems with these sections, since they conflate different kinds of wrong.

Section 3 also conflates causing bodily injury and causing death, perhaps on the grounds that in both cases we have the same *kind* of wrong, and that the difference between them is one of seriousness, which belongs with the grading provisions of the Code of Adjudication;²⁹ and it conflates all the different modes of injuring which statutes have often distinguished. Underpinning Robinson's formulation might be the 'conduct-cause-harm' model of criminal wrongdoing. We first identify a relevant kind of harm (e.g. death, or bodily injury), and then identify as 'wrongs', or 'rule-violations', human actions which cause such harm. The relation between action (or 'conduct') and harm is purely contingent; the harm is identified in a way that makes no essential reference to a human action as its cause; what makes the action wrong is its causal relationship to the harm.³⁰ This is inadequate as a general model of criminal

wrongdoing, even in the case of such ‘result-crimes’ as homicide: but I will not rehearse the arguments against it here.³¹

(p.59) Section 24 also conflates different kinds of wrong, in three ways. First, it covers both what we would ordinarily count as ‘theft’ and kinds of taking that we would not (morally, or under existing law) so count. If I borrow your ladder without your consent and return it undamaged, I commit no offence under English law or under the Model Penal Code, for I do not intend to deprive you of it permanently:³² but I violate Robinson’s Code of Conduct, and, if prosecuted, could avoid conviction only if the court judged my violation to be ‘too trivial to warrant the condemnation of a criminal conviction’.³³ If we ask why the Code of Conduct should prohibit, as violations of the same rule, both theft and temporary non-consensual borrowing, the answer might be that Robinson wants, as far as possible, to avoid including culpability elements in the rules of conduct (the main difference between theft and illegitimate borrowing lies in the agent’s intention): but the cost of this is to conflate very different kinds of wrong.

Secondly, Robinson’s Code separates out the elements of some existing crimes: it includes no offence of robbery, but separate offences of theft and of ‘Injury to a Person’ (section 3) or ‘Criminal Threat’ (section 9); no burglary, but separate offences of ‘Criminal Trespass’ (section 25) and theft (or attempted theft; section 49).³⁴ This is, Robinson argues, a beneficial simplification of the proliferation of offences in existing law: we do not need a separate offence of burglary, since burglary is no more than a combination of criminal trespass and some other attempted crime; robbery is no more than a combination of criminal injury or threat and theft.³⁵ This is right if, but only if, the aim of the rules of conduct is simply to identify, in a descriptive and morally sanitized way, kinds of conduct which are prohibited: if citizens have already been told that they must not injure or threaten others, or take others’ property without their consent, they need not also be told that they must not injure or threaten others in order to take their property without their consent. If, on the other hand, a criminal code should identify distinctive kinds of wrong that citizens are to recognize as wrongs, there is room for doubt: for burglary and robbery are, *qua* wrongs, more than (or different from) the sum of their parts. The wrongful character of the trespass committed by a burglar depends on the intention with which it is committed. Robbery is not just a physical attack or threat, *plus* theft: the character of the attack or the threat as a particular kind of wrong is determined in crucial part by the fact that it is made in order to steal.³⁶

Thirdly, Robinson’s section 24 covers both criminal damage and theft; both theft and obtaining by deception. We might (especially if we accept a **(p.60)** ‘conduct-cause-harm’ model of crime) be tempted to say that these offences are rightly classed together: in each case we find conduct that causes harm to a person’s property interests — that causes them to lose, if not their property absolutely, at least the full enjoyment of and control over their property; and the particular way in which or means by which that harm is caused makes no essential difference to the character of the wrong thus committed. But if, on the other hand, we focus on the idea of wrongful *action*, we will see significant differences amongst these cases, differences not in *degree*, but in *kind*,

of wrongdoing: between one who *destroys* another's property and one who 'appropriates' it for her own or another's use; between one who covertly steals another's property and one who obtains it by deceiving the victim.³⁷

To note that Robinson's Code of Conduct does not separate out offences that our existing systems of criminal law distinguish is not of course yet to criticize it; indeed, he would argue that this feature is one of his Code's merits.³⁸ It does, however, generate a general criticism of his Code, and of the approach to clarifying the criminal law that it exemplifies, if we think both that the criminal law, as addressed to the citizens, should identify and define relevant types of 'public' wrong in terms that enable citizens to recognize them as such, and that those terms can find no place in the austere descriptive simplicities of a Robinsonian code.

I have argued for the first of these claims already: the criminal law, in its definitions of *mala in se*, should address the citizens in terms of substantive values that already, pre-legally, demand their allegiance; it must identify crimes in terms that make clear not merely *that* such conduct is 'prohibited', but how and why it is *wrong*. This also requires the law to identify and separate out relevantly different *kinds* of wrong, so that their wrongful character can be recognized; and my first complaint about Robinson's Code is that it fails to do this.³⁹ But how can it be done?

It can be done, I suggest, only through the maintenance of a suitable set of 'thick' legal concepts, which connect rather closely to some of the 'thick' ethical concepts that structure our extra-legal moral thought.⁴⁰ Thick ethical concepts involve an indissoluble interweaving of fact and value: they describe (p.61) human beings and their actions in terms of substantive and specific ethical values. Such concepts include those that identify virtues and vices (courage and cowardice, honesty and dishonesty), and those that identify different types of moral wrong; obvious examples would be murder, rape, theft, deception, defrauding, endangering. It is on these concepts that the criminal law should draw in identifying central *mala in se*: for it is in terms of such concepts that citizens can most readily recognize wrongs as wrongs.⁴¹ The criminal law's thick legal concepts will, for various reasons, not be identical to the thick ethical concepts that structure citizens' extra-legal thought: but so long as they are closely related to some of those concepts, as specialized legal versions of them, they will enable the law to speak to citizens in the appropriate terms—in terms of what they can recognize as substantive kinds of wrong. However, it is just these kinds of concept that are missing from Robinson's Code, and that will inevitably be missing from any Code that tries to provide purified descriptive specifications of prohibited conduct. They will be missing because they are irreducibly normative concepts, whose application depends on a grasp of the substantive values they embody: they pre-suppose a set of shared values, and a shared normative language in which those values can be articulated and discussed; they are therefore radically unsuited to a criminal code which aims to provide descriptively clear and determinate specifications of 'prohibitions'.

Much more needs, of course, to be said about what kinds of thick concept are appropriate to our criminal law; about the ways in which, and the extent to which, they

can diverge from our extra-legal ethical concepts; about how *mala prohibita*, both pure and impure,⁴² should be understood and defined from this perspective; about the extent to which the requisite extra-legal agreement in values and in normative language exists—and about the implications of its non-existence. I cannot pursue these issues here: but my argument so far has been that if the criminal law is to address us, as it should, as citizens of a normative political community, it must speak to us in terms not simply of what is ‘prohibited’, but of what is wrong; and it must speak in a normative language which citizens can understand as identifying relevant kinds of wrong which should be eschewed and condemned as wrongs.

D. Excuses and ‘Attribution’: the Case of Duress

Robinson and Fletcher agree that we must distinguish offence definitions from defences; that among exculpatory defences we must distinguish justifications from excuses; and that whilst justifications belong to the ‘rules for (p.62) citizens’ (in the Code of Conduct), excuses belong to the Code of Adjudication, or the norms of attribution, which are addressed to the courts.

A ‘defence’, on this view, exempts the agent from liability for conduct that satisfies the definition of a crime specified in the ‘special part’ of the criminal law, justifications exempt her from liability because her conduct was, if not positively right or required, permissible in the law’s eyes;⁴³ excuses exempt her from liability because ... what? A familiar answer is that they exempt her because, although she committed a wrong or violated a rule of conduct, that wrongdoing cannot fairly be attributed to her, or she cannot fairly be held liable for it: whereas justifications negate the ‘wrong’ in her doing, excuses negate her responsibility or liability for the wrong that she did.⁴⁴

My primary concern in this section is with the claim that excuses do not belong amongst the ‘rules for citizens’ that the law declares. This will involve asking whether excuses do in general block the ‘attribution’ of an action to an agent, rather than, modifying the character of what is attributed: that is, whether we can completely insulate the notion of ‘wrongdoing’, or of ‘violation’ of rules of conduct, from that of ‘attribution’, or ‘liability’.⁴⁵

Sometimes, this picture seems apt—for instance in cases in which insanity serves as a distinctive defence.⁴⁶ In such cases insanity is clearly an excuse:⁴⁷ the agent committed (what would, otherwise count as) a crime—he intentionally killed another person; his insanity does not render his action, right or permissible, but exempts him from liability and condemnation for it. His insanity did not give him reason to do what he otherwise should not do—it did not entitle him to reason ‘Since I’m insane, I can legitimately kill this person.’: it gives others reasons not to hold him liable. We can see here too why we might talk of not ‘attributing’ the action to him: we identify ‘him’, as a responsible agent to whom actions can be appropriately attributed, with his sane self, whose action this was not. Even here we might wonder whether the notion of ‘wrongdoing’ can be completely insulated from that of ‘attribution’: an insane killer (p.63) violates a Robinsonian rule of conduct, and commits what the law defines as a crime, but it is not clear that the action which cannot be attributed to him is the very kind of wrong that is attributed to the sane, non-excused killer. However, I will not

pursue this issue here, since my main concern is with cases in which this picture of excuses loses its plausibility.

Consider duress, which (as a criminal defence) is standardly portrayed as an excuse.⁴⁸ If we take ‘acting under duress’ to mean something like ‘acting under a human threat’, this is surely wrong: some actions under duress are (morally and should be legally) justified by that duress. A bank clerk who hands over £10,000 of the bank’s money at gun-point, or a hostage who drives a stolen car at gun-point, commits what would, absent that threat, be a wrong, but should be neither blamed nor convicted if the threat was sufficiently serious and believable: not because she has an excuse, but because in that context her action is not wrong (it is not morally wrong, and should not count as criminal)—because it is justified.⁴⁹ We might indeed sometimes commend such an agent for doing ‘the right thing’ in that situation, and for being clear-headed enough to see what she should do; we might think that it would have been rash or stupid, rather than heroic or courageous, to resist. In other cases we might not commend the action or admire its agent, but would at least think that giving in as this person did was not wrong—that it was morally (and so should be legally) acceptable or permissible, even if not commendable. In either case, however, there is no wrong committed by that agent for which an excuse is needed (though there is of course a wrong committed by the person who made the threat).

This might seem too hasty. It might be argued that to allow duress to justify a normally criminal action would be to permit ‘the abrogation of law in the face of threats’,⁵⁰ or that this would permit third parties to assist the person under duress to commit the crime, or forbid others to resist the crime;⁵¹ none of which the law should do. But, first, neither we nor the law should require bank clerks to resist robbers at the likely cost of their own lives: they should be permitted (even expected) to hand over the money at gun-point (neither is this to abrogate the law in the face of threats—the law focuses on the threatener). Secondly, even if justifications have the implications claimed by Fletcher and (p.64) Robinson,⁵² I would think it right for another person to assist the bank clerk in giving over the money, and wrong for another to resist that giving over, *unless* that third party could effectively neutralize the threat.

Those who insist that ‘duress’ is an excuse, however, need not be denying any of this: they could rather be arguing that we should reserve the term ‘duress’ for cases in which the agent acts unjustifiably, or wrongly, under the influence of a threat, and locate cases of justified action under threat in some other legal category of justification (such as necessity, in so far as that can be a justification). Duress would then count as an excuse, in so far as it provides a defence at all. But what kind of excuse is it?

Sometimes, duress does operate rather like insanity as an excuse. Suppose that someone is subjected to torture to force him to reveal secret information, and finally gives in, in pain and terror, to avoid further agony; or he is subjected to an immediate threat which is so terrifying that he is completely panicked by it, and does what he is told to do. His conduct is not strictly involuntary (if it were, he would not be doing what he must do to avert the threat); it is indeed at least minimally intentional, in that he acts as he does in order to avert the threat. But, in excusing him, we would say that

the torture or the threat rendered him incapable of rational practical thought, of ordered as opposed to disordered practical reasoning: his giving in did not display a lack of commitment to the values violated by his action; as far as we know, and as his own later response to what he has done should reveal,⁵³ he has a proper concern for those values; but the pressure to which he was subjected seriously impaired his capacity to guide his own actions in the light of that commitment. We wish, and he wishes, that he could have resisted (giving in was not justified): but he could not—his ‘will’ was ‘overborne’.⁵⁴

Even in this kind of case, duress as an excuse is not grounded in a purely factual claim that ‘he could not resist’ the threat. The figure of the ‘reasonable person’, the ‘sober person of reasonable firmness’,⁵⁵ should still play a normative and criteria! (as distinct from evidential) role: for we should ask whether a person with the kind of commitment to the values protected by the law (and violated by this action), and with the kind and degree of courage that we can properly demand of citizens, would have been thus affected by such a threat—i.e. whether his being thus affected did or did not reveal a lack of such commitment or courage.⁵⁶

(p.65) In such cases, we can certainly say that the defence of duress does not provide reasons which could properly guide the agent’s actions: if he reasons to himself ‘if I am so terrified by a threat that I cannot think straight, the law allows me to give in; I am thus terrified by this threat; so I’ll give in’, his reasoning undercuts the very claim on which he wants to rely. We can also say, with two qualifications, that we can no longer properly ‘attribute’ the action, or the wrong, to the agent: the action or wrong (betraying his country) is not properly ‘his’ as a responsible agent, because he was non-culpably rendered incapable of guiding his actions in the light of what we can suppose to be his own proper commitments.⁵⁷

(The qualifications are, first, that we would not expect someone who had such proper commitments simply to disown the action as something that happened to him: he has still betrayed his country, and we would expect that to matter to him. Secondly, is not clear that the wrong which we do not attribute to him is just the same wrong as we attribute to someone who culpably, without duress, betrays his country; this point will become clearer shortly.)

However, other cases of duress are more problematic. It seems implausible, for instance, that the defendants in *Hudson and Taylor*,⁵⁸ who committed perjury under threat of serious injury, were so panicked by the threat that they were rendered, incapable of rational thought and action; and implausible to claim that only threats which have such an effect should provide a complete defence, as distinct from mere mitigation of sentence. The exculpatory claim in such cases is, rather, that to have resisted such a threat would have required a kind or degree of ‘firmness’—of courage, of commitment to the values at stake in the situation—which we cannot reasonably expect or demand of a citizen; that is, that in giving in to a threat to which even a person of ‘reasonable firmness’ would have given in, the agent did not display a culpable *lack* of commitment or of courage.

In *this* kind of case we can say that the agent is excused because she ‘lived up to’ the ‘standards of character which were demanded of her;⁵⁹ or because she ‘attained ... society’s legitimate expectation of moral strength’.⁶⁰ Such claims might sound like justifications rather than excuses—as claiming not, admittedly, that her action was positively right or admirable (resistance would have been the admirable course), but at least that it was permissible: but they need not be justificatory. As Dressier and Gardner explain the defence, its point seems to be analogous to a defence of ‘reasonable mistake’ (of (p.66) fact): the agent’s ‘choice’ to give in was ‘deficient, but reasonable’;⁶¹ her fear of the threat was ‘rationally adequate, in [her] own eyes as well as according to the applicable standards of character, for [her] to commit the wrong’, but she ‘mistakenly’ acts for that reason.⁶² This implies that the agent must, at least at the time, *think* her action justifiable: that what excuses her is the reasonableness of that mistaken thought in that situation. That might be true in some cases: in others, however, the agent might realize that she should resist, but cannot bring herself to do so; she does not think her action justified, but is too weak, or lacking in courage, to act as she realizes she should. What excuses her is that the strength or courage required to resist such a threat is more than we can reasonably demand of a citizen: we should not demand that citizens be saints,⁶³ but it would require a saint-like courage or firmness to resist.

This is not to say that the agent is ‘permitted’ not to resist (that is, justified in not resisting), or that she does no wrong in giving in—as if, as far as the law is concerned, it does not matter or is up to her whether she resists or not: she should ideally resist, and falls short of the ideal standards of commitment and courage in failing to resist. But what citizens should ideally do is more than we, or the law, can properly *demand* that, they do, on pain of condemnation if they do not;⁶⁴ and that is why, whilst we do not regard such an agent’s action as justified, we excuse her.

In this kind of case, however, we cannot say that the agent is excused because the wrong that she did cannot be properly ‘attributed’ to her. There is *a* wrong that it would indeed, be inaccurate or misleading to attribute to her simply and without qualification: ‘committing perjury’, insofar as that bare description implies by its silence that this was *the* relevant feature of her action. Her commission of perjury is a wrong which we might instead attribute to those who threatened her and thus brought her to commit perjury, but it is not the wrong that *she* did. What she did, the action we judge, was to ‘commit perjury under threat of being seriously injured’: we do not condemn her for that, action because, although it was wrong in the sense that in committing it she fell short of the ideals (of commitment and courage) to which she should aspire as a citizen, she did not fall short of those standards which we can properly *demand* that citizens attain.

When duress provides this kind of defence, is it still, true that it does not belong among the ‘rules for citizens’, or that the legal definition of the defence is ‘not supposed to provide any guidance to those whose actions may fall foul, of (p.67) the criminal law’?⁶⁵ Such claims now look false. The defence depends on what can be properly or reasonably *demand*ed of citizens in the way of firmness, commitment, and courage: but surely the rules of conduct should give citizens ‘guidance’ on what is thus

demanding of them. This is not to say that the law should tell them that giving in to duress is 'permitted', since it is not: resistance is an ideal to which they should aspire. But if resistance is not 'demanded', this is a matter of what demands the law makes or does not make of the citizens; and such demands must be made to them. If we want to use 'selective transmission' as a way of controlling conduct (to make it less likely that citizens will give in to threats that they should ideally resist), we should certainly aim to conceal from citizens the fact they will not be convicted if they give in.⁶⁶ But if the law is to respect and address the citizens as responsible agents, a basic requirement is that it must not deceive them—it must make clear to them what the law demands of them and what is liable to happen to them if they flout those demands: 'selective transmission' is intended to deceive the citizens on these matters, and therefore has no place in the law of a liberal polity.

Part of the problem here might stem from a failure to distinguish two ways in which the existence and content of the defence of duress might figure in the practical reasoning of the agent who is under threat. One possibility is that he feeds into his reasoning the fact that if he gives in, he can nonetheless hope to avoid conviction and punishment by pleading duress; this then (as he sees it) removes what would have been a reason not to give in, and might tip the balance in favour of giving in.⁶⁷ In *this* case the defence lacks moral merit:⁶⁸ the fact that I will avoid conviction is not a good reason for giving in to a threat and committing a crime; someone who regards it as a good reason thereby displays a lack of the kind of commitment to and regard for the values violated by the crime which is properly demanded of citizens. But this is not the only way in which the existence of the defence could figure in the agent's practical reasoning.

The threatened agent has asked, let us suppose, 'What should I do?'; and his answer is, appropriately, 'I should resist'. But now he asks '*Must* I resist?'—a question which expresses, in part, his reluctance thus to sacrifice or endanger himself. That is not, admittedly, a question that a hero or an ideal citizen would ask herself: *she* would just set herself to do (or try to do) what she sees she should do. But it is a question that ordinary, indeed 'reasonable', (p.68) citizens would probably ask, since the weakness, the reluctance to sacrifice oneself, that the question reveals is not one that shows the person who asks it to be unreasonably deficient as a citizen.

What answer should this person receive? To say 'You must resist', whilst concealing the fact that he will not be condemned if he gives in (since he would not then fall short of the standards demanded of him), seems dishonest; it implies that resistance is demanded, when it is not. What he should receive is an answer that makes clear what is demanded of him: what is demanded not so much *by* the law (as if the law was the source of the demand), but *through* the law as articulating the values of the political community and the demands of citizenship of such a polity. That answer would make clear that he *should* aspire to resist (the threat is not sufficient to justify giving in.), but that resistance is not in such a case *demanded* of him; and that is just the answer that is provided, by the defence of duress, if properly expressed—as a defence which thus does properly help to guide citizens' actions.

The main result of this section is that legal excuses should sometimes figure in the 'rules for citizens', since they do sometimes provide reasons which can properly guide the citizens' actions. This result follows from the account sketched earlier of the terms and tone in which the criminal law should address the citizens, and a recognition of the complexities of duress as a defence; and it illustrates one way in which the distinction, between 'rules for citizens' and 'rules for courts' is somewhat porous. I turn now to another way in which that apparently clear distinction becomes less clear and determinate on closer examination.

E. Rule-Violations, Wrongdoings and *Mens Rea*

Should the normal requirements of *mens rea* or 'fault' figure in the rules or norms addressed to the citizens, or only in those addressed to the courts? For Robinson, they generally have no role in the Code of Conduct: they are relevant not to specifying the kinds of conduct which are prohibited, but to the doctrines of liability and grading by which, courts are to be guided; they therefore belong in the Code of Adjudication.⁶⁹ Fletcher by contrast, finally rejects the 'objective' theory of wrongdoing, which makes such matters as intention or knowledge relevant to attribution rather than to wrongdoing, in favour of the view that wrongdoing must be defined in terms that include such matters.⁷⁰ Someone who injures another person through blameless inadvertence violates section 3 of Robinson's Code of Conduct,⁷¹ but is saved from liability by the blamelessness of that inadvertence: on Fletcher's account, however, he commits no act of wrongdoing for which he needs to be excused or saved from liability.

(p.69) Now there is at least this much to be said for Robinson's account of the content of rules of conduct: if I am laying down prohibitions, I will not normally formulate them in terms that make explicit reference to intention, recklessness, or negligence: the rule will say 'Don't Φ ', not 'Don't Φ intentionally/through recklessness/through negligence'.⁷² Similarly, a simple expression of many of the action-guiding norms that figure in the criminal law would make no such explicit reference: 'You do wrong if you have sexual intercourse with someone who does not consent to it or is under 13/drive a car without a licence/sell a firearm to someone under 17/destroy or damage another's property without lawful excuse'.

On the other hand, and even if we think only of how the rules of conduct can make clear to citizens what they may not do, the claim that the rules of conduct need not refer to such *mens rea* requirements seems doubtful. For without *some* indication—explicit or implicit—of a 'fault element', the prohibition's addressees will have no clear idea of how they may or may not behave. If what is prohibited is simply Φ -ing intentionally (or knowingly), they will know how to go about obeying the prohibition: they simply have to refrain from acting in ways that they intend to (or know or believe would) constitute Φ -ing. But a prohibition of 'caus[ing] bodily injury or death to another person' is far wider than that: it prohibits any conduct that actually causes injury or death.⁷³ To try to obey that prohibition, I must take care lest I cause injury or death; but what kind or degree of care must I take? Similarly, if what is prohibited, is 'caus[ing] false alarm or panic among a gathering of persons', or 'possess[ing] stolen property',⁷⁴ I need to know what kind or degree of care I must take lest I cause such

alarm, or lest I have stolen property in my possession. Am I required merely to refrain from actions that I realize might satisfy the Code's definitions (leaving aside the question of what kind or degree of risk that 'might' should involve)—in which case recklessness as awareness of risk is implicit in the Code of Conduct; or to take steps to ensure that I notice and guard against such a risk (leaving aside the question of how strenuous those steps should be)—in which case negligence is implicit in the Code of Conduct?

Suppose I know that under the Code of Adjudication I will be liable to conviction only if I am 'at least reckless as to each element of the violation as described in the Code of Conduct' except that negligence suffices for homicide under section 3 and as to the victim's age in section 14(b)–(c).⁷⁵ (p.70) Can I properly infer from this that what is prohibited under the other sections of the Code of Conduct is only conduct that the agent intends or expects to cause, or realizes might cause, the relevant result: that the Code does not generally require me to *take* the kind of care that it is negligent not to take, but only to refrain from doing what I intend or expect to cause, or realize might cause, a relevant result? This would be at odds with Robinson's insistence that *mens rea* elements do not generally belong in the Code of Conduct, and would undermine the insulation he seeks between the question of whether a rule of conduct has been 'violated', and that of whether the violator should be held liable for that violation. But I find it hard to see how he can avoid this result.

It is not plausible to say that what is required of the citizens is that they take *every* care to avoid causing the specified results,⁷⁶ but that they are excused so long as they do not cause the result intentionally or through recklessness (or, for sections 3 and 14, through negligence). For someone who pays reasonable attention to and takes reasonable precautions against any risk that his actions might cause death or that his sexual partner is under age, and who refrains from acting in ways that he realizes might well cause injury to another's body or damage to another's property surely lives up to the standards of conduct that a Robinsonian law requires of him.

Robinson's Code of Conduct is meant to 'provide *ex ante* direction to the members of the community as to the conduct that must be avoided (or that must be performed) upon pain of criminal sanction'.⁷⁷ If a citizen seeks guidance on what conduct she must avoid in virtue of section 3 of the Code, in particular on what its implications are for driving a motor vehicle (for she knows that this activity, however carefully conducted, can cause death or injury), what should she be told? One kind of answer would talk of driving with due care and attention, of the kinds of care she should take to make her driving as safe as is reasonably possible, whilst recognizing that even such care cannot guarantee that she will not cause death or injury. Another answer would tell her that the only way to make sure that she did not violate the law, as far as this aspect of her life was concerned, would be not to drive at all. A rational criminal code would surely generate the first kind of guidance; but if Robinson's Code of Conduct excludes all fault elements, it can only generate the second kind of guidance.

If the Code of Conduct is to perform the function Robinson assigns to it, of providing '*ex ante* direction' to the citizens, it cannot be cleansed of fault requirements to the

extent that he wants to cleanse it; nor can issues of ‘rule violation’ be separated from issues of liability as sharply as he wants to separate them.

(p.71) There is a further and deeper objection to Robinson’s attempt to eliminate fault elements from the Code of Conduct, arising from the objection discussed in, section C above. I argued in section C that the criminal law should not operate as a set of rules which ‘prohibit’ certain kinds of conduct: it should rather, in addressing the citizens, declare and define certain kinds of public wrong, in ways that enable citizens to recognize them as wrongs, ‘Causing bodily injury or death’, however, does not specify a recognizable kind of wrong: not just because it conflates causing injury and causing death, and different modes of causing them,⁷⁸ but because it conflates different kinds of wrong that may be done in causing death or in causing injury, and conflates wrongs with harm-causing actions that are not wrongs. If I cause death or injury to another through a non-culpable accident, they have suffered serious harm through my agency, but I have not wronged them. Even if I do wrong by causing their death or injury, the *kind* of wrong I do depends on whether I cause death or injury intentionally, or through recklessness, or through negligence. An intended killing differs from killing through recklessness not just (nor always) in degree of seriousness or wrongfulness, but in the kind of wrong it perpetrates: apart from any extrinsic differences that there may be in the agent’s motivation or in the actions’ context, there is the crucial intrinsic difference between attacking another’s life and (wilfully, knowingly) endangering it; and between the focused, practical indifference to the lives of those whom I endanger that I display in recklessly endangering their lives and the unfocused lack of proper care that I display in negligently endangering life.⁷⁹

These different kinds of wrong are of course connected: it would be morally strange, if not incoherent, to accept that I would do wrong in intentionally killing or injuring another, whilst recognizing no wrong in acting in ways that create a substantial and unjustified risk of causing death or injury.⁸⁰ They are, however, still different kinds of wrong; and a criminal law which is to define public wrongs in ways that will make them recognizable as wrongs by the citizens should itself incorporate a recognition of such differences—else it will fail to connect to the extra-legal moral concepts on which, I have argued, its legitimacy depends.

(p.72) Should we then say that the declarations and definitions of wrongs that the criminal law addresses to the citizens must include the fault elements of each offence—the requirements of intention, knowledge, recklessness, or negligence that constitute conditions of liability (not to mention other possible fault elements, such as dishonesty in theft)? Unfortunately, the matter is not that simple: whilst the fact or kind of wrongdoing does often depend on such aspects of the action, this is by no means always true. One example must suffice to illustrate this point, the further ramifications of which I cannot discuss here.

Fletcher argues that mistakes of fact sometimes negate wrongdoing, but sometimes serve instead to provide an excuse for wrongdoing; mistakes about elements in the *definition* of the offence negate wrongdoing, and should secure an acquittal even if they are unreasonable; but mistakes about justificatory facts extrinsic to the definition

of the offence can only provide an excuse, and therefore exculpate only if they are reasonable,⁸¹ I am not now concerned with the general claim, but with its application to the issue of mistaken belief in consent in the context of rape, and to *Morgan* in particular.⁸² Fletcher argues that a mistaken belief in the victim's consent should be reasonable or free from fault if it is to justify an acquittal; and that rather than seeing the victim's lack of consent as part of the definition of rape as a wrong, we should see her consent as a justification for what would otherwise be a wrong (for a violation of a prohibitory norm). Given his general account of wrongdoing (as satisfying the definition of an offence plus lack of justification) and attribution (as a matter of whether a wrongdoing can be attributed to the agent), he can sustain the first claim only if he can also sustain the second: but whilst the first claim is right, the second is wrong—in which case, the neat structure of Fletcher's account is undermined.

To sustain the second claim, Fletcher argues that the definition of rape should simply be 'sexual penetration':⁸³ the 'prohibitory norm' whose violation the other's consent justifies is a norm prohibiting sexual penetration. Now this must be a 'morally coherent' norm, one that makes sense as a moral norm to citizens of our society.⁸⁴ but it is implausible as a moral norm that could underpin the offence of rape. First, even those who think that *extramarital* sexual relations are wrong do not typically think that 'sexual penetration' *per se* violates a norm—that it 'incriminates the actor' or 'is typically sufficient to regard the act as wrongful'.⁸⁵ for there is in their eyes nothing (p.73) thus intrinsically incriminating about the fact of intra-marital sexual penetration; but the law of rape covers non-consensual intra-marital sexual penetration without the victim's consent.⁸⁶ Secondly, those 'morally coherent' norms which do portray extra-marital sexual penetration as wrong or 'incriminating' do not typically portray it as the same kind of wrong as rape; what is supposedly wrong with extra-marital sexual penetration has to do with the proper role of sex in human relationships (relationships assumed in this context to be consensual), with its connection to procreation, and so on; what is wrong with rape is that it exercises a brutal power over its victim and denies her or his sexual integrity.⁸⁷ We thus cannot understand rape as a wrong by seeing it as a violation of a norm prohibiting sexual penetration, which is not justified by the other person's consent.

On Fletcher's account, a man who has sexual intercourse with a woman in the mistaken belief that she consents has violated a prohibitory norm, without justification; and since his mistake concerns a justificatory fact, rather than a defining element of the offence, he should be acquitted only if that mistake was itself 'free from fault'. Were lack of consent part of the definition of the offence, even a culpably unreasonable mistake would suffice to acquit him, since it would negate the intent' which is essential to the violation of the relevant norm (as it is to the violation of all prohibitory norms, except those covering negligent conduct). On my view, lack of consent is part of the definition of rape, since it is essential to the kind of wrong that rape involves: but it does not follow from this that even an unreasonably mistaken belief that the victim consents should entitle the defendant to an acquittal. For whatever the agent's beliefs, the victim was subjected to non-consensual sexual intercourse; which is to say that she suffered, at his hands, the wrong of being raped.⁸⁸ Intrinsic to that wrong is at least the man's intention to have sexual intercourse with her: but it does not necessarily involve

his 'intent' as to her lack of consent. It follows that we cannot simply say, as Fletcher wants to, that the normal requirements of *mens rea* are part of the definition of every offence, of the wrongdoing that every offence must involve.

(Is this true of other offences than rape? I cannot pursue this question here, but suspect that something like this might also be true of, for instance, theft and criminal damage. That the property I take or damage belongs to another person is, I take it, part of the definition of theft and criminal damage as (p.74) wrongs: if I covertly take from another person what I mistakenly believe to be my property, or deliberately destroy her property in the mistaken belief that it is mine, she has suffered a wrong of the relevant kind.)

F. Concluding Remarks

I have argued that we should not understand the criminal law as laying down 'prohibitions' or 'rules' for the citizens, which they are to 'obey': it should rather aim to declare and define 'public' wrongs, from which citizens should refrain because they recognize them as wrongs. I have also argued, on the basis of that general view of the terms in which the criminal law of a liberal polity should address its citizens, that the neat distinctions which some theorists want to draw between 'rules for citizens' and 'rules for courts' cannot be sustained: in particular, that excuses such as duress undermine such sharp distinctions; and that we cannot say either (with Robinson) that the requirements of *mens rea* should not generally figure in the 'rules of conduct', or (with Fletcher) that those requirements must always figure in the definition of the offence, and thus among the norms of wrongdoing addressed to the citizens.

I have not offered an alternative account of the structure of the criminal law, to replace those offered by such theorists as Robinson and Fletcher, neither can I claim that it is only lack of space that prevents me offering one here; nor do I suggest that the kinds of distinction that they want to draw, in particular that between wrongdoing and attribution, would have no part to play in such an account—indeed, I have argued that the specification of relevant kinds of wrongdoing is central to those aspects of the criminal law that are directly addressed to the citizens. My aim has been in part to argue that any normative account of the structure or logic of the criminal law must begin with a suitable conception of how, in what terms or tones, the criminal law should address the citizens, and to sketch what I take to be a suitable conception. I have also indicated some of the implications of that conception—partly in the hope that if those implications are anyway plausible in themselves, they will also help to render plausible the conception from which they flow. Further defence of that conception, and explorations of its further implications, are tasks for other occasions: but one result that we should not look for is the articulation of a new, logically neat and tidy, structure for the criminal law. For the point is not just that our actual criminal law is in fact much less tidy than theorists' accounts of its structure often suggest (they can recognize, but deplore, that fact), but that an adequate normative account of what the criminal law *ought* to be must also be much less tidy than such theorists would like.

Notes:

(1) I leave aside here questions about the relationship between such particular descriptions and general principles, for instance whether such descriptions must imply suitable general principles.

(2) J. C. Smith and B. Hogan, *Criminal law* (8th edn., London, 1996) 702–12.

(3) P. H. Robinson, *Structure and Function in Criminal Law* (Oxford, 1997) 71–72.

(4) G. Fletcher, *Rethinking Criminal Law* (Boston, 1978) chs 6, 7, 9–10.

(5) Robinson (n. 3 above) 125, 183.

(6) See also M. Dan-Cohen, ‘Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law’ (1984) 97 *Harvard LR* 625; P. Alldridge, ‘Rules for Courts and Rules for Citizens’ (>1990) 10 *Oxford Journal of Legal Studies* 487. On Dan-Cohen, see R. Singer, ‘On Classism and Dissonance in the Criminal Law; A Reply to Professor Dan-Cohen’ (1986) 77 *Journal of Criminal Law and Criminology* 69.

(7) They disagree about the conditions of justification: should it suffice that the justificatory facts existed; or must the defendant have been aware of or motivated by those facts? See Fletcher (n. 4 above) 555–66; Robinson (n. 3 above) 100–124.

(8) R. A. Duff, *Punishment, Communication, and Community* (New York, 2000) ch. 2

(9) H. L. A. Hart, *The Concept of Law* (2nd edn., Oxford, 1994) 19–20, 51–61.

(10) P. Markwick, ‘Law and Content-Independent Reasons’ (2000) 20 *Oxford journal of Legal Studies* 579.

(11) See R. Cotterrell, *Lam’s Community* (Oxford, 1995) ch. 11, on the ‘imperium’ model of law; and R. A. Duff, ‘Inclusion and Exclusion; Citizens, Subjects and Outlaws’ (1998) 51 *Current Legal Problems* 241.

(12) J. Raz, *Ethics in the Public Domain* (Oxford, 1994) 343–344

(13) S. E. Marshall and R. A. Duff, ‘Criminalization and Sharing Wrongs’ (1998) 11 *Canadian Journal of Law & Jurisprudence* 7.

(14) J. Finnis, ‘On “The Critical Legal Studies Movement”’, in J. Eekelaar and J. Bell (eds.), *Oxford Essays in Jurisprudence*, 3rd Series (Oxford, 1987) 145, at 146–147.

(15) Sometimes the law’s *determinatio* reflects not so much an authoritative account of the value that is thus determined, as a concern with what courts can reasonably be expected to decide within the constraints of the trial process—the contents of the substantive criminal law are determined in part by procedural considerations.

(16) For this as the defining mark of *mala prohibita*, see e.g. G. Williams, *Criminal Law; The General Part* (2nd edn., London, 1961) 189; G. H. Gordon, *The Criminal Law of Scotland* (2nd edn., Edinburgh, 1978) 17–20; W. R. LaFare and A. W. Scott,

Criminal Law (2nd edn., St Paul, 1986) 32–35.

(17) J. Raz, *The Morality of Freedom* (Oxford, 1986) ch 3.

(18) Compare the suggestion that criminal punishment is to be justified partly in retributivist terms as communicating the censure that criminals deserve, and partly in deterrent terms as providing a prudential disincentive for those who are insufficiently motivated by the law's moral appeal: A. von Hirsch, *Censure and Sanctums* (Oxford, 1993) ck 2; Duff (n. Duff 8 above) ch. 3. 3.

(19) For examples of such arguments (reflecting different starting points and arguing to very different conclusions) see A. W. Norrie, *Crime, Reason and History* (London, 1993); H. Bianchi, *Justice as Sanctuary* (Bloomington, 1994); J. Waldron, *Law and Disagreement* (Oxford, 1999).

(20) Duff (n. 8 above) ehs. 2, 5.

(21) See Law Commission No. 143, *Codification of the Criminal Law* (London, 1985) paras. 1.3–9, and No. 177, *A Criminal Code for England and Wales* (London, 1989) para. 2.1. Hence the moral qualms that are rightly provoked by Dan-Cohen's commendation of a system of 'selective transmission': see Dan-Cohen (n. 6 above); Singer Singer (n. 6 above).

(22) R. L. Gainer, 'The Culpability Provisions of the Model Penal Code' (1988) 19 Rutgers LF 575.

(23) Robinson (n. 3 above) 211–220.

(24) *ibid.*, 185–188.

(25) See *ibid.*, 26, 51; nor need conduct prohibited by the Code of Conduct be voluntary; involuntariness blocks liability for rule-violations (see Robinson *ibid.*, p35–38; Draft Code of Adjudication, s. 220).

(26) (n. 3 above) 128.

(27) Robinson *ibid.*, 129–137:

(28) The suggested replacement is a particularized version of s. 51 of Robinson's Draft Code.

(29) Robinson (n. 3. above) 232;

(30) J.J. Feinberg, *Harm to Others* (New York, 1984) chs. 1–3.

(31) See R.A. Duff, *Criminal Attempts* (Oxford, 1996) 366–369. See too J. Gardner, 'Rationality and the Rule of Law in Offences Against the Person' (1994) 53 Cambridge Law Journal 502, J. Border, 'ethinking Non-Fatal Offences against the Person' (1994) 14 Oxford Journal of Legal Studies 335, on Law Commission No. 218, *Legislating the Criminal Code; Offences against the Person and General Principles*

(London, 1993) (and compare ss. 70–72 of the Draft Criminal Code in Law Commission No. 177, n. 21 above): their critiques can also be applied to Robinson's Code.

(32) Theft Act 1968, ss. 1 (1), 6;

(33) Robinson (n. 3 above) 225;

(34) Contrast on robbery Theft Act 1968, s. 8, Model Penal Code, s. 222.1; on burglary, Theft Act 1968, s. 9, Model Penal Code, s. 221.1.

(35) Robinson (n. 3 above) 188.

(36) A. P. Simester and G. R. Sullivan, *Criminal Law; Theory and Doctrine* (Oxford, 2000) 493–494

(37) Compare S. Shute and J. Horder, 'Thieving and Deceiving: What is the Difference?' (1993) 56 *Modern Law Review* 548; J. Gardner, 'On the General Part of the Criminal Law', in R. A. Duff (ed.), *Philosophy and the Criminal Law; Principle and Critique* (Cambridge, 1998) 205, at 247–249.

(38) Robinson n. 24 above.

(39) One could also appeal here to the 'principle of fair labelling': the law's definitions of offences (and the verdicts brought against those convicted of such offences) should as far as practicable give accurate, reasonably precise specifications of the wrong committed; see A. J. Ashworth, 'The Elasticity of Mens Rea', in C. F. H. Tapper (ed.), *Crime, Proof and Punishment* (London, 1981) 45, at 53–56 (using the better notion of 'representative labelling'), *Principles of Criminal Law* (3rd edn., Oxford, 1999) 90–93. But the crucial question here is: what is it that must be fairly or representatively labelled?

(40) B. Williams, *Ethics and the Limits of Philosophy* (London, 1985) ch. 8.

(41) I do not suggest that such thick ethical concepts are always and wholly *pre*-legal; indeed, it would be surprising if they were *not* in part conditioned by the law's concepts.

(42) Williams n. 16 above.

(43) I take it here that we do, and the law should, count as 'justified' not only conduct that we praise as 'the right thing' to do, but also conduct that we regard as merely permissible: see J. Dressier, 'New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and *Rethinking*' (1984) 32 *UCLA LR* 61, at 70–75, 81–87, criticizing Fletcher's arguments on this issue; S. Uniacke, *Permissible Killing: The Self-defence Justification of Homicide* (Cambridge, 1994) 14–15.

(44) See Fletcher (n. 4 above) chs. 6–7, 10.3; Robinson (n. 3 above) 69, 81–82, 157, 197; Alldridge (n. 6 above).

- (45) See J. Dressier, 'Reflections on Excusing Wrongdoers: Moral Theorv. New Excuses and the Model Penal Code' (1988) 19 Rutgers LJ 671, S. Shute n. 37.
- (46) As distinct, that is, from cases in which it negates a standard *mens rea* requirement; and from cases in which it renders the person wholly non-responsible, not answerable for anything that he does.
- (47) J. Gardner, 'The Gist of Excuses' (1998) 1 Buffalo Criminal Law Review 575, at 589).
- (48) See, e.g., Fletcher (n. 4 above) 829–835; P. Aildridge, 'Developing the Defence of Duress' [1986] Criminal LR 433, 'Rules for Courts and Rules for Citizens' Alldridge (n. 6 above) at 495–499; J. Dressier, 'Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits' (1989) 62 Southern California LR 133; Robinson (n. 3 above) 69, 227 (Draft Code' of Adjudication, s. 224); J. Gardner (n. 47 above).
- (49) This is not to say that if the agent-victim in a case of justifying duress was actually brought to trial on a criminal charge, she would plead duress as a distinct defence; it might rather be that, in virtue of the duress, she lacked the requisite *mens rea*. But duress still justifies, renders right or permissible, what would otherwise have been a wrongful action.
- (50) P. Aildridge, 'The Coherence of Defences' [1983] Criminal LR 665, at 668.
- (51) On these supposed implications of justification, see Fletcher (n. 4 above) 759–762; Robinson (n. 3 above) 96.
- (52) Dressier (n. 43 above) at 87–98.
- (53) *Nicomachean Ethics* III.1,
- (54) *Hudson and Taylor* [1971] 2 QB 202,
- (55) *Graham* (1982) 74 Cr App R 235,
- (56) See R. A. Duff, 'Choice, Character and Criminal Liability' (1993) 12 Law & Philosophy 345, at 357–359. Hence the significance of Aristotle's comment that 'some acts, perhaps, we cannot be forced to do, but ought rather to face death after the most fearful sufferings' (*Nicomachean Ethics* III.1, 1110a26–28)
- (57) Gardner (n. 47 above) 598.
- (58) [1971] 2 QB 202.
- (59) Gardner (n. 47 above) 598.
- (60) Dressier (n. 48 above) 1334.
- (61) Dressier (n. 48 above) 1.367, n. 194. Dressier actually quotes Kadish (S. Kadish, 'Excusing Crime' (1987) 75 California LR 257, at 259, 262) on the action as being

‘deficient, but reasonable’: but his own account is focused on the agent’s choice.

(62) Gardner (n. 47 above) 597, 589.

(63) Dressier (n. 48 above) 1367, 1373.

(64) I leave aside the question of whether it is more than they can demand of themselves, or condemn themselves for failing to do: as so often, the agent’s appropriate first person judgements on or responses to her own conduct do not necessarily match the appropriate second or third person judgements of responses of others.

(65) Gardner (n. 47 above) 597; see G. Fletcher, ‘Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?’ (1979) 26 UCLA LR 1355; and references in Dressier n. 48 above.

(66) See Dan-Cohen (n. 6 above) 632–634, 637–643, 671; for criticism, see Singer Singer (n. 6 above) 84–100.

(67) This seems to be the possibility Gardner has in mind Gardner (n. 47 above, 597); see Fletcher (n. 65 above); Alldridge (n. 6 above) 499–501.

(68) Which is not to say that it should not succeed in law; we must ask whether and how it would be in practice possible to exclude it without doing injustice to others.

(69) See Robinson (n. 3 above) 129–137, and Robinson n. 27 above.

(70) Fletcher (n. 4 above) 475–478, 553–554, 695.

(71) Robinson n. 25 above.

(72) Fletcher (n. 4 above) 477–478.

(73) Robinson (n. 3 above) 213

(74) Robinson (n. 3 above) 216–217

(75) Robinson (n. *ibid.* 225

(76) We do of course talk of taking ‘every care’ to avoid some harm; but ‘every care’ in such contexts means ‘all reasonable care’.

(77) Robinson (n. 3 above) 125.

(78) *See* J. Gardner n. 31 above.

(79) On attacks and endangerment see further Duff (n. 31 above) 363–366; on recklessness and negligence, see R. A. Duff, ‘*Caldwell* and *Lawrence*: The Retreat from Subjectivism’ (1983) 3 Oxford Journal of Legal Studies 77, at 90–91.

(80) *take care* J. Horder (ed.), *Oxford Essays in Jurisprudence* 4th Series (Oxford,

2000) 85, at 89).

(81) Fletcher (n. 4 above) ch 9; see A. P. Simester, 'Mistakes in Defence' (1992) 12 *Oxford journal of Legal Studies* 295.

(82) See Fletcher (n. 4 above) 699–707; *Morgan* [1975] 2 WLR 923; but contrast Robinson (n. 3 above) 214 (Code of Conduct, s. 14(a)).

(83) Fletcher (n. 4 above) 705. *Morgan*

(84) Fletcher (n. 4 above) 567.

(85) Fletcher *ibid.*, 562,

(86) Criminal Justice and Public Order Act 1994, s. 142.

(87) J. Gardner and S. Shute, 'The Wrongness of Rape', in J. Horder (ed.), *Oxford Essays in Jurisprudence*, 4th Series (Oxford, 2000) 193.

(88) Does it follow that he has 'committed rape' (cf. Lord Cross in *Morgan* [1975] 2 WLR 923, at 926)? Yes, in that he has raped her. See further R. A. Duff, *Intention, Agency and Criminal Liability* (Oxford, 1990) 167–172.

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