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THE UNIVERSAL GRAMMAR OF CRIMINAL LAW

Stuart P. Green*

BASIC CONCEPTS OF CRIMINAL LAW. By *George P. Fletcher*. New York: Oxford University Press. 1998. Pp. xi, 223. Cloth, \$45; paper, \$18.95.

There is something about the criminal law that invites comparative analysis. The interests it protects are so basic, and its concerns so fundamental, that it is natural to ask whether there are aspects of criminal law that are somehow universal. We want to know whether familiar concepts such as murder and manslaughter, intent and negligence, and insanity and mistake, are characteristic of other systems of criminal law as well, and, if so, what role they play there.

In the last generation, no criminal law scholar has made better use of comparative law techniques than George Fletcher, the Cardozo Professor of Jurisprudence at Columbia Law School. And, not coincidentally, no scholar has done more to define and probe the fundamental principles of our own system of criminal justice. Now, twenty years after the publication of his classic *Rethinking Criminal Law*,¹ Fletcher offers *Basic Concepts of Criminal Law*, a concise, fair-minded, and remarkably clear synthesis of virtually all of the major debates in contemporary criminal law theory.

Basic Concepts should be of interest to at least three groups of readers. The first group comprises students in advanced criminal law classes, who will benefit from Fletcher's gift for finding concrete language to explain abstract concepts. The second group consists of teachers and scholars of substantive criminal law, who will want to see how Fletcher has clarified and augmented many of the arguments first made in *Rethinking*. The third group is potentially much broader. The most novel and provocative feature of *Basic Concepts* is its claim to offer a "deep structure" or "universal grammar" of criminal law, one that "transcends the enacted law of particular states and coun-

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1. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* (1978) [hereinafter *RETHINKING*].

tries" (p. 23) and "facilitate[s an] appreciation of the unity of the world's legal systems" (p. 5). This aspect of the book will be of interest to comparativists and theorists in various areas of the law, who share with Fletcher an interest in the possibility of finding timeless and universal principles that underlie their respective disciplines.²

The focus of this Review is on the claim of universality and the innovative theoretical framework on which that claim rests. Part I briefly describes the overall design of Fletcher's project, cataloguing its principal virtues and defects. Part II then explores the concepts of deep structure, universal grammar, and other kinds of human universals as they are used in other disciplines, including linguistics and anthropology. Finally, Part III seeks to test the validity of Fletcher's theory by applying it to a collection of seemingly anomalous criminal law practices and concepts from China, Japan, Iceland, Melanesia, and elsewhere. Through this process, I hope to demonstrate both the potential and the limitations of Fletcher's theory.

I. BASIC CONCEPTS — DESIGN AND METHODOLOGY

For legal theorists, the goal of *Basic Concepts* is an enormously attractive one: to "take a step back from the details and the linguistic variations of the criminal codes" (p. 4), to apply "philosophical and conceptual analysis" (p. 23), and thereby find "an underlying unity," a "deep structure" or "universal grammar" (p. 5), a "philosophical dimension" (p. vii) common to "diverse systems of criminal justice" (p. 4). How is this goal to be pursued? Fletcher's approach is simple and elegant. Each of the twelve chapters of *Basic Concepts* deals with one of twelve "dichotomies" or "distinctions" that are said to "shape and guide the controversies that inevitably break out in every system of criminal justice" (p. 4).³ These dichotomies, he says, form a common

2. As Fletcher himself has recently written, "[t]he search for structural features of the law, the elaboration of distinctions common to all legal cultures, the clarification of the basic units of legal analysis — all of these are intellectual pursuits that unite scholars from diverse traditions in a common pursuit." George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 693-94 (1998).

3. The twelve dichotomies are as follows:

- (1) What is the difference between *substantive* and *procedural* criminal law?
- (2) How do we mark the boundaries between *criminal punishment* and *other coercive sanctions*, such as deportation, that are burdensome but not punitive?
- (3) What is the difference between treating a suspect as a *subject* and treating him as an *object*, both in terms of the criminal act and the trial?
- (4) What is the difference between *causing harm* and harm simply *occurring as a natural event*?
- (5) What is the difference between determining whether a crime has occurred (*wrongdoing*) and *attributing* that wrongdoing to a particular offender?
- (6) What is the distinction between *offenses* and *defenses*?
- (7) How should we distinguish between *intentional* and *negligent* crimes?

"deep structure" of criminal law. The issues raised by these dichotomies are resolved in different ways by different systems, thereby creating variations in "surface structure," or positive law.

As a means for structuring his analysis, the dichotomy approach works superbly. By allowing the reader to focus directly on major points of controversy, the book offers considerable advantages over the more traditional "grand theory" approach to criminal law used in recent years by scholars such as Andrew Ashworth,⁴ Hyman Gross,⁵ Douglas Husak,⁶ Nicola Lacey and Celia Wells,⁷ Michael Moore,⁸ Paul Robinson,⁹ and, indeed, by Fletcher himself.¹⁰

But the dichotomy approach has its drawbacks as well. First, it tends to impose a theoretical straitjacket, forcing Fletcher to contrive distinctions that do little to illuminate his subject. The "punishment versus treatment" dichotomy, for example, turns out to be little more than a vehicle for Fletcher's discussion of punishment, with the question of "treatment" quickly pushed to the periphery. The same can be said of his discussion concerning the "justice versus legality" dichotomy, in which Fletcher's focus is almost wholly on the meaning of legality.

Second, there is, at times, a certain vagueness about the difference between surface and deep structure. Surface structure is supposed to be found in "statutory rules and case law decisions," whereas deep structure is said to be found in the "debates that recur in fact in every legal culture" (p. 4). But it is obvious that many of the questions Fletcher identifies as indicative of deep structure (e.g., "how should

(8) Why should there be defenses both of *self-defense* and *necessity*, and what is the distinction between them?

(9) Why are some *mistakes relevant* to criminal liability and others *irrelevant*?

(10) How should we distinguish between *completed offenses* and *attempts* and other inchoate crimes?

(11) What is the difference between someone who is a *perpetrator* of an offense and someone who is a mere *accessory* to the offense?

(12) How do we distinguish between *legality* and *justice* in the criminal process?

4. ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* (3d ed. 1999).

5. HYMAN GROSS, *A THEORY OF CRIMINAL JUSTICE* (1979).

6. DOUGLAS N. HUSAK, *PHILOSOPHY OF CRIMINAL LAW* (1987).

7. NICOLA LACEY & CELIA WELLS, *RECONSTRUCTING CRIMINAL LAW* (2d ed. 1998).

8. MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1997).

9. PAUL H. ROBINSON, *STRUCTURE AND FUNCTION IN CRIMINAL LAW* (1997).

10. RETHINKING, *supra* note 1. For further reflections on various approaches to criminal law theorizing, see MOORE, *supra* note 8, at 3-80 (discussing the kinds of questions a theory of criminal law ought to consider); Nicola Lacey, *Contingency, Coherence, and Conceptualism: Reflections on the Encounter Between "Critique" and "the Philosophy of the Criminal Law,"* in *PHILOSOPHY AND THE CRIMINAL LAW* 9, 48 (Antony Duff ed., 1998) (distinguishing between "philosophical" and "critical," or doctrinal, theories of criminal law).

we distinguish between *completed offenses* and *attempts* and other inchoate crimes?" and "what is the difference between someone who is a *perpetrator* of an offense and someone who is a mere *accessory* to the offense?") are precisely the sort of questions that statutes and case law seek to resolve. What Fletcher presumably means — although he is never particularly clear on this point — is that deep structure consists not of the *rules* for determining, say, whether a defendant is a perpetrator or an accomplice, but simply of the fact that there are such distinctions in the criminal law, and that these distinctions can be observed widely, even universally.

Third, the dichotomy format means that a handful of important issues either turn up in unexpected places (e.g., the discussion of both insanity and criminal omissions is found, curiously, in a chapter entitled "Subject versus Object"), or are left out entirely. Two omissions are particularly worth mentioning. One is Fletcher's failure to deal with the question of the extent to which criminal law is necessarily a matter of *public* rather than private law.¹¹ Another, even more important, omission is the almost complete lack of attention to the subject of specific offenses (even in a chapter entitled "Offenses versus Defenses"). As we will see below, if anything is universal in criminal law, it is almost certainly the prohibition of murder, rape, and other forms of violence.¹² Yet Fletcher offers few insights as to why some acts are widely (even universally) criminalized, while others are not.¹³ Instead, like most contemporary criminal law theorists, he is preoccupied with the criminal law's general part.¹⁴

11. For example, *Basic Concepts* gives curiously little attention to the important question of standing — who is the proper party to bring a criminal case, and what that might tell us about the extent to which the criminal law reflects public, as opposed to private, interests. Fletcher mentions the issue only in passing, stating that "[i]n the United States and in most parts of the common law world today, the public prosecutor claims exclusive authority to seek punishment for crimes committed against private individuals." P. 36. But he has almost nothing to say about the extent to which the *public* aspect of criminal prosecutions might itself be part of the criminal law's deep structure.

12. See *infra* note 32 and accompanying text. Another good candidate for universality is the classification of offenses according to the nature and degree of harmfulness, which I discuss in Stuart P. Green, *Deceit and the Classification of Offenses: Federal Rule of Evidence 609(a)(2) and the Origins of Crimen Falsi*, 90 J. CRIM. L. & CRIMINOLOGY (forthcoming 2000).

13. It is worth noting that simply because some practice is universal does not necessarily mean that it is part of a "universal grammar." As used by Fletcher, universal grammar refers to a set of generalizable abstract principles that can be derived from the observation of widespread or universal practices. Thus, the fact that criminal offenses such as murder and rape are universally prohibited might lead one to derive some more general principle regarding the criminalization of certain kinds of harmful and intentional acts. For more on the various meanings of "universal," see *infra* notes 26-30 and accompanying text.

14. I have discussed criminal law scholarship's preoccupation with the general part elsewhere. See Stuart P. Green, *Prototype Theory and the Classification of Offenses in a Revised Model Penal Code: A General Approach to the Special Part*, 4 BUFF. CRIM. L. REV. (forthcoming 2000). For a recent example, see LEO KATZ ET AL., FOUNDATIONS OF

Fourth, although the various horns of Fletcher's dichotomies frequently do delineate the *range* of choices that legal systems make with respect to specific issues in criminal law, there is little explanation of how and why particular systems make the choices they do *within* such ranges. To put it another way, while the dichotomy approach does a good job of explaining what is *similar* across systems, it is much less concerned with the way in which various universals express themselves *differently* in different environments.

Finally, and perhaps most importantly, Fletcher fails to offer any meta-theory that would explain the deeper meaning of his dichotomies. For example, there is no explanation as to why the criminal law reflects these dichotomies and not others, whether the dichotomy structure is also characteristic of other areas of the law, and what the ultimate source of such dichotomies might be.¹⁵ In the end, what Fletcher provides is an exceptionally well-informed and insightful collection of deep-seated and widely observed distinctions in criminal law. What remains unclear are his views on the larger significance of that collection.

II. THE SEARCH FOR "DEEP STRUCTURE," "UNIVERSAL GRAMMAR," AND "HUMAN UNIVERSALS"

Early in *Basic Concepts*, Fletcher tells us that the "deep structure" or "universal grammar" he is pursuing is akin to Noam Chomsky's famous work in linguistics.¹⁶ To assess Fletcher's project, then, it will be helpful to know both what these terms mean for Chomsky, and what they might mean to Fletcher. In addition, we will want to know something about other kinds of "human universals" that might be relevant to the study of criminal law.

A. What Linguists Mean by "Deep Structure" and "Universal Grammar"

As he himself has acknowledged elsewhere, Fletcher is hardly the first legal scholar to assert that he is pursuing a Chomsky-like proj-

CRIMINAL LAW 4 (1999) (stating that book on foundations of criminal law will consider only the general part).

15. For a discussion of the possible shape of such a meta-theory, see *infra* note 32.

16. P. 5 ("As Noam Chomsky developed a universal grammar underlying all the particular languages of the world, here, in these twelve distinctions lies the grammar of criminal law."). Chomsky's most influential account of transformational grammar can be found in NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX (1965); NOAM CHOMSKY, SYNTACTIC STRUCTURES (1957). For a useful introduction to Chomsky's work, see JOHN LYONS, NOAM CHOMSKY (1970).

ect.¹⁷ Yet such scholars have offered almost no discussion of either what the Chomskyian project actually consists of, or the extent to which Chomsky's work provides them with a plausible theoretical model.

At the outset, it should be clear that linguists use the terms "deep structure" and "universal grammar" to refer to quite different concepts. Linguists attempt to offer an analysis of language that explains how and why certain word strings can be recognized as well-formed sentences by native speakers. Although there is an infinite number of sentences that can be formed in any language, it is possible to identify a finite collection of "phrase structure rules" and "lexical insertion rules" that build "base component" trees, the underlying structures of well-formed sentences.¹⁸ These "deep structures," or "d-structures," are then converted into one or more actual sentences (known as "surface structures" or "s-structures") by the application of linguistic devices known as "transformations." The whole system, consisting of base components plus transformations, is known as "generative" or "transformational grammar."¹⁹

"Universal grammar," as its name suggests, refers to something quite different from the language-specific deep structures of generative grammar.²⁰ The basic idea of universal grammar is that there are certain "principles," or "super-rules," that are genetically "wired" into our brains.²¹ These innate principles become instantiated as the determinate grammar of a particular language when the parameters of universal grammar are set, and thereby explain how it is that children are able, so easily and so quickly, to learn something as complex as their native language. The term "universal grammar" is therefore used to refer both to "the basic design underlying the grammars of all

17. See George P. Fletcher, *What Law is Like*, 50 S.M.U. L. REV. 1599, 1604 n.22 (1997) (citing numerous law review articles that have used the term "deep structure").

18. See CHOMSKY, SYNTACTIC STRUCTURES, *supra* note 16.

19. *Id.* It should be noted, however, that in his later work Chomsky no longer relies on the notion of deep structures. See, e.g., NOAM CHOMSKY, THE MINIMALIST PROGRAM (1995).

20. Chomsky himself has noted the frequent confusion between deep structure and universal grammar. See NOAM CHOMSKY, LANGUAGE AND RESPONSIBILITY 171-72 (1977) ("I have often read that what I am proposing is that deep structures do not vary from one language to another, that all languages have the same deep structure: people have apparently been misled by the word *deep* and confuse it with *invariant*. Once again, the only thing I claim to be 'invariant' is universal grammar."). For an example of such confusion, see D.L. Perrott, *Has Law a Deep Structure? — The Origin of Fundamental Duties*, in FUNDAMENTAL DUTIES 1 (D. Lasok et al. eds., 1980).

21. Chomsky's claims regarding universal grammar can be found, among other places, in Noam Chomsky, *Linguistics and Cognitive Science: Problems and Mysteries*, in LANGUAGE IN FOCUS: FOUNDATIONS, METHODS AND SYSTEMS: ESSAYS IN MEMORY OF YEHOASHUA BAR-HILLEL (A. Kasher ed., 1991); CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX, *supra* note 16, at 25.

human languages” and to “the circuitry in children’s brains that allows them to learn the grammar of their parents’ language.”²²

With respect to universal grammar, a considerable amount of empirical evidence has tended to substantiate Chomsky’s claims. Starting in the early 1960s, for example, a team of scholars led by Joseph Greenberg examined a sample of thirty languages from five continents, including Basque, Berber, Burmese, Finnish, Hebrew, Hindi, Italian, Japanese, Malay, Maori, Massai, Mayan, Nubian, Quechua, Serbian, Swahili, and Turkish.²³ In these early studies, which focused on word order and morphemes, researchers found no fewer than forty-five universals. Since then, according to linguist and cognitive scientist Steven Pinker, “many other surveys have been conducted, involving scores of languages from every part of the world, and literally hundreds of universal patterns have been documented.”²⁴

B. *What Anthropologists Mean by Human Universals*

The idea that there is an empirically verifiable, innate, or at least universal, quality to something as apparently culture-specific as language is, of course, an enormously intriguing one. If it is possible to prove that human language, in all of its tremendous variety, has an underlying and unchanging unity, then it may well be possible to find proof of underlying universals in other realms of human behavior as well — including, perhaps, morality, manners, social hierarchy, family dynamics, humor, music, art, or even law. Inspired in part by the work of Chomsky and Greenberg, a number of ethnographers in recent years have turned from the anthropologist’s traditional focus on cultural *differences* to a renewed interest in finding human commonalities (or universals, as they tend to be called) — behavioral patterns and

22. CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX, *supra* note 16, at 27-30; STEVEN PINKER, THE LANGUAGE INSTINCT 483 (1994).

23. See UNIVERSALS OF LANGUAGE (J.H. Greenberg ed., 1963). Greenberg and his colleagues were not explicitly attempting to confirm Chomsky’s hypotheses, but many of their findings have nevertheless had that effect. See PINKER, *supra* note 22, at 233.

24. PINKER, *supra* note 22, at 233. According to Pinker:

Some [universal patterns] hold absolutely. For example, no language forms questions by reversing the order of words within a sentence, like *Built Jack that house the this is?* Some are statistical: subjects normally precede objects in almost all languages, and verbs and their objects tend to be adjacent. . . . The largest number of universals involve implications: if a language has X, it will also have Y. . . . Universal implications are found in all aspects of language . . . [including meaning]: if a language has a word for “purple,” it will have a word for “red”; if a language has a word for “leg,” it will have a word for “arm.”

Id. at 233-34. “What is most striking of all,” according to Pinker, “is that we can look at a randomly picked language and find things that can sensibly be called subjects, objects, and verbs.” *Id.* at 236. What has been demonstrated, he says, is “that the same symbol-manipulating machinery, without exception, underlies the world’s languages.” *Id.* at 237.

practices that are the same regardless of cultural and ethnic boundaries.²⁵

Anthropologists use the term universal in a variety of different contexts. Some universals exist at the level of the individual, or at least in every individual of a certain sex or age range; examples are certain emotions and facial expressions.²⁶ A second kind of universal exists at the level of society (generally defined as the manner in which individuals or groups relate to and among each other); an example is the sexual division of labor.²⁷ A third kind of universal exists at the level of culture (a term which refers to conventional patterns of thought, activity, and artifact that are passed from generation to generation); examples of this kind of universal are tools and kinship terminologies.²⁸ In addition, distinctions are often drawn between "substantive" and "formal" universals²⁹; and "conditional" and "unconditional" universals.³⁰ Finally, we might distinguish between those practices or ideas that are universal merely in the sense that they occur at some time in every culture, and those practices or ideas that occur (comprehensively) in every relevant case in every culture.

As in the case of linguistic universals, the search for individual, cultural, and societal universals has been quite promising. Evidence of universals of one kind or another has been found in matters as diverse as sexual jealousy and Oedipal feelings; adornment of bodies and ar-

25. See, e.g., DONALD E. BROWN, *HUMAN UNIVERSALS* (1991); ROBIN FOX, *THE RED LAMP OF INCEST* (1980). The traditional anthropological approach is exemplified most famously by the ethnographic works of Margaret Mead. See, e.g., MARGARET MEAD, *COMING OF AGE IN SAMOA* (1936). For a critique of Mead's work in Samoa, see DEREK FREEMAN, *MARGARET MEAD AND SAMOA: THE MAKING AND UNMAKING OF AN ANTHROPOLOGICAL MYTH* (1983).

26. See BROWN, *supra* note 25, at 39.

27. See *id.*

28. See *id.* at 40.

29. As Chomsky has characterized the distinction (referring to universals in language):

A theory of substantive universals claims that items of a particular kind in any language must be drawn from a fixed class of items. . . . A theory of substantive semantic universals might hold for example, that certain designative functions must be carried out in a specified way in each language. Thus it might assert that each language will contain terms that designate persons or lexical items referring to certain specific kinds of objects, feelings, behavior, and so on.

It is also possible, however, to search for universal properties of a more abstract sort. Consider a claim that the grammar of every language meets certain specified formal conditions. The truth of this hypothesis would not in itself imply that any particular rule must appear in all or even in any two grammars. The property of having a grammar meeting a certain abstract condition might be called a *formal* linguistic universal, if shown to be a general property of natural languages.

CHOMSKY, *ASPECTS OF THE THEORY OF SYNTAX*, *supra* note 16, at 28-29.

30. An "implicational" or "conditional" universal (in contrast to an "unrestricted" or "non-conditional" universal) is a trait or complex that appears if and only if certain conditions obtain — for example, "all societies possessing paved highways possess centralized government." See BROWN, *supra* note 25, at 45.

rangement of hair; recognized facial expressions of happiness, sadness, anger, fear, disgust, and contempt; food taboos and fondness for sweets; gifts and the exchange of labor, goods, and services; and logical relations including *and*, *not*, *same*, equivalence, opposites, general versus particular, and part versus whole.³¹ In addition, anthropologists have found a number of universals that are directly relevant to the criminal law — including concepts like intention, responsibility, rights, and property; distinctions between voluntary and involuntary behavior; procedures for seeking redress of wrongs; government, in the sense of binding collective decisions about public affairs; institutions for punishment; and “legal” prohibitions on rape, murder, and other forms of violence.³²

C. Fletcher and the Search for Universals in Law

If these linguists and anthropologists are right, if human beings really do share universal norms and practices of these sorts, what implications might there be for our understanding of law in general, and the criminal law in particular?³³ Fletcher never tells us precisely what he has in mind here, although at least two possibilities can be ruled out. First, it seems clear that when Fletcher invokes Chomsky, he is

31. See *id.* Brown’s findings are helpfully summarized in PINKER, *supra* note 22, at 412-15.

32. See BROWN, *supra* note 25, at 69, 134-39, 176-78, 182. Assuming that such concepts, distinctions, procedures, institutions, and prohibitions are in fact universal, the next question we would need to ask is: How did they get that way? Among the possible kinds of explanations that might be offered are the following:

(1) *Diffusionist Explanation*: Some cultural practices, such as cooking and the use of fire, seem to have been invented in some small number of societies and then spread widely throughout the world in a process known as “diffusion.” To develop a diffusionist theory of criminal law, we would need to compile evidence that various criminal law concepts (such as, say, accomplice liability or the principle of legality) developed in a similar manner.

(2) *Physical Explanation*: Some aspects of culture are thought to be a response to certain physical characteristics in humans. For example, various kinship roles seem to be a response to the physical requirements of sexual reproduction. Under a physical theory of criminal law, concepts such as rape and murder might be viewed as a response to conflicting human tendencies towards, say, violence (on the one hand) and the desire for physical safety (on the other).

(3) *Evolutionary Explanation*: Many forms of human behavior are believed to be the product of evolved human characteristics — the result of natural selection, the process by which better adapted organisms outbreed those that are less well adapted. Under an evolutionary theory, certain aspects of criminal law (again, the prohibitions on rape and murder provide a good example) would be viewed as analogous forms of adaptation.

For a survey of the literature concerning these and others explanations for human universals, see *id.* at 88-117.

33. Other legal scholars have begun dealing with similar issues. See, e.g., Jim Chen, *Law as a Species of Language Acquisition*, 73 WASH. U. L.Q. 1263, 1279 (1995) (“The existence of universal grammar reinforces the discovery of universals in other language-based disciplines.”); John O. McGinnis, *The Human Constitution and Constitutive Law: A Prolegomenon*, 8 J. CONTEMP. LEGAL ISSUES 211 (1997) (suggesting that work in the social sciences involving evolutionary theories of human nature should begin to inform legal scholarship).

not referring to the search for some finite set of underlying rules (a deep structure) from which an infinite number of legal propositions (the surface structure) can be derived — a process that would be analogous to the transformations that occur in linguistic theory. Nor does he suggest that human beings share some genetic predisposition, some “hard wiring” in our brains that manifests itself in different surface structures, norms, or behaviors that, in turn, give content to the criminal law.³⁴

Rather, what Fletcher seems to be claiming is simply that there is, in his words, some “underlying unity among diverse systems of criminal justice,” some “basic design” that is common to all of these various and disparate systems. To put it another way, what Fletcher seems to be saying is that, if a society does develop a system of criminal justice,³⁵ then that system will possess characteristics that are contained in the continuum marked out by his collection of dichotomies.

III. TESTING FLETCHER’S CLAIM OF UNIVERSALITY

Just as linguistic anthropologists have done fieldwork intended to confirm the theoretical construct developed by Chomsky, it is natural to ask whether empirical evidence could be found to support the thesis developed by Fletcher. But how exactly does one “test” a universal theory of law?

As noted above, anthropologists have had some success in discovering universals that are relevant to the criminal law.³⁶ Nevertheless, there is obviously a wide conceptual gap between generalized criminal law universals of this sort and criminal law universals of the sort posited by Fletcher. That is, even if there were evidence that every culture, say, distinguishes between voluntary and involuntary behavior, or imposes basic legal prohibitions on murder and rape, one might still

34. For an example of such reasoning, see Perrott, *supra* note 20, at 10.

35. There may, of course, be societies that never actually develop such a system. One such possible exception is the Ifugao tribe of the Philippines, described in E. Adamson Hoebel’s survey of literature on the world’s legal cultures:

By virtue of the nature of Ifugao social organization there can be no criminal acts. All other legally recognized offenses are of the type known in Anglo-American law as torts: private (or civil) wrongs or injuries independent of contract. Among the Ifugao the responsibility for initiating any prosecution rests with the aggrieved; any damages, penal assessments, or physical punishment inflicted upon the defendant are imposed by the plaintiff and his kinsmen. The lines of procedure are anything but raw self-help, however. Custom requires that proper procedural protocol be carefully exhausted before resort to direct seizure of the lance is taken.

E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS* 113-14 (1967) (footnotes omitted) (citing R.F. BARTON, *IFUGAO LAW* (1919)). Unfortunately, as noted *supra* note 11 and accompanying text, one of the important issues on which Fletcher has little to say in *Basic Concepts* is the extent to which a system of public, as opposed to private, prosecutions is fundamental to the idea of a criminal law.

36. See *supra* note 32 and accompanying text.

be skeptical about the claim that every criminal law system recognizes more refined distinctions such as those between self-defense and necessity, or perpetration and complicity. If we are to find evidence of those kinds of distinctions, we need to go beyond the findings of the anthropologists.

There are two ways in which Fletcher's theory might be tested. One is to take the theory articulated in *Basic Concepts* and attempt to apply it, *in toto*, to various criminal law systems around the world. Indeed, this seems to be exactly what Fletcher has in mind. He tell us that there are plans to publish the book in various foreign editions, in which "a local commentator takes charge of the translation and adds material on the way the twelve universal distinctions . . . find expression in local positive law."³⁷

Unfortunately, this process is likely to take years to complete. A book review calls for something more expedient. Rather than using Fletcher's approach to examine foreign criminal law systems in their entirety, I suggest that we use it to look at a collection of specific foreign criminal practices and principles. In particular, I propose that we take a collection of specific criminal law practices and principles that Fletcher himself does not consider, and which, from the perspective of contemporary Western practice, may seem anomalous; and then ask whether and to what extent Fletcher's theory can provide an adequate account.

A. *Six Case Studies*

Viewing Fletcher's theory through the lens of the six case studies presented here should prove useful in several ways. By applying the theory to the specifics of various legal systems, we will be able to assess its reliability and comprehensiveness, confirm its significance, question its premises, and suggest possible modifications. In addition, if the theory is a good one, it should yield valuable insights into the specific legal rules and principles that are the subject of our case studies.³⁸

37. P. vii. One can only hope that Fletcher's foreign publishers serve him better than his prestigious English language publisher, which has released the book with a distracting number of typographical errors. See e.g., p. 14 ("The evidence on that evidence [sic] is simply inconclusive."); p. 45 ("it follows from the above syllogism — that there would be something just [sic] or conceptually untoward about punishing the bystander."); p. 111 ("These are case [sic] of intentional conduct . . ."); p. 114 ("Suppose that absentmindedly you leave the library without having first having [sic] checked out the book you were reading."); p. 123 ("Does Oswald want or desire to injury [sic] either JFK or Connally?"); p. 125 ("If Oswald acts intentionally regardless of the gun pointed at his head, how he [sic] could possibly escape liability for murder?"); p. 126 ("Oswald suddenly turned on the KGB agent and grabbed the latter's rifle, causing it [sic] discharge in the direction of the crowd below.").

38. Cf. RICHARD S. KAYNE, *FRENCH SYNTAX: THE TRANSFORMATIONAL CYCLE* xviii (1975) (stating similar goals for study that uses French syntax as case study in test of Chomskyan transformational grammar).

Before I catalogue the cases, though, several comments are in order. First, it should be noted that most, though not all, of the examples are historical. This departs from Fletcher's own orientation to contemporary legal systems, but is nevertheless well within the claims of a universal theory. Indeed, Fletcher has elsewhere referred to his dichotomies as involving "eternal questions,"³⁹ and it seems reasonable to infer that his goal is to develop a universal theory that can account for historical, as well as contemporary, practices.

It is also worth noting that the countries from which my examples come are mostly non-Western. This focus will, I hope, provide a useful antidote to the Western bias in Fletcher's own scholarship. William Ewald has described the tendency among theorists to "elevate the local rules of [their] own time and place into universal truths for all humanity."⁴⁰ With his deep knowledge of German and Anglo-American legal history and jurisprudence, and his respectable acquaintance with Italian, French, Spanish, Israeli, and Talmudic criminal law, Fletcher is certainly less guilty of this vice than other scholars. Yet even such considerable erudition cannot, without more, justify a claim of universality.

Finally, it should be recognized that the descriptions offered below have been drawn primarily from secondhand accounts of foreign law. I have not sought to confirm independently the validity of the interpretations offered. Nor, in general, have I sought to provide a broader context for the practices discussed. In my attempt to test the flexibility of Fletcher's theory, I have more or less taken the descriptions at face value.

Here, then, is a range of criminal law principles and practices that, from the perspective of contemporary Western legal systems, should strike the reader as anomalous:

- Much of Western legal history has witnessed cases involving the criminal prosecution and punishment of animals and inanimate objects. The *Book of Exodus*, for example, provides that an ox that gores a man or woman to death is to be stoned, and its flesh not eaten. The ancient Greeks regularly held trials involving both animals and inanimate things (e.g., stones, beams, and pieces of

39. George Fletcher, *The Fall and Rise of Criminal Theory*, 1 BUFF. CRIM. L. REV. 275, 285-86 (1998) ("These basic concepts of criminal justice are philosophical and conceptual in nature. They possess a truth value that cannot be resolved by an act of law-making will. A legislature can no more resolve a philosophical problem than it can determine a matter of scientific controversy. . . . Codes must be understood, therefore, as tentative answers to eternal questions. Scholars must remain committed to probing the depths of those eternal questions, whatever the local code may say on the matter.").

40. William Ewald, *Comparative Jurisprudence (I): What Was It Like To Try A Rat?*, 143 U. PA. L. REV. 1889, 1958 (1995). Ewald goes on: "[I]ndeed, as is well known, the great systems of Natural Law of the seventeenth and eighteenth centuries were largely rearrangements of the rules of Justinian's *Digest*." *Id.*

iron that had caused the death of a person by falling on him).⁴¹ Barthelemy Chassenée, a leading French lawyer and scholar of the sixteenth century, wrote *A Treatise on the Excommunication of Insects*, which discusses the full range of issues that would be expected to arise during a trial of insects, and offers a theoretical analysis of the issues raised by the prosecution of animals more generally, including “a careful distinction between punitive prosecutions of animals, and prosecutions that are merely intended to deter future harmful conduct.”⁴²

- *Crime and Custom in Savage Society*, Bronislaw Malinowski's seminal work of legal anthropology, published in 1926, describes the early twentieth century legal culture of the Trobriand Islands in Melanesia.⁴³ Although many legal practices in Melanesian society seem vague, Malinowski describes a striking incident of what he regards as a paradigmatic exercise of criminal justice: A young man was having a sexual relationship with his maternal cousin, the daughter of his mother's sister — a relationship that was prohibited by Trobriand law. When the affair was discovered by a rival lover, the rival insulted the offending man in public, accusing him of incest. “For this,” Malinowski tells us, “there was only one remedy; only one means of escape remained to the unfortunate youth. Next morning he put on festive attire and ornamentation, climbed a coco-nut [sic] palm and addressed the community, speaking from among the palm leaves and bidding them farewell.... Then he wailed aloud, as is the custom, jumped from a palm some sixty feet high and was killed on the spot.”⁴⁴
- The criminal law of mediaeval Iceland (around the year 800) was dominated by an elaborate system of rules regarding revenge. According to one commentator, “an individual was not regarded as a separate being to the same extent as he is today, but was looked upon as a link in the long family chain. It was the family that was responsible for right and wrong, for revenge, and for defending its own reputation. The duty to take revenge for any insult was an unwritten law based on the concept that a man's hon-

41. See Walter Woodburn Hyde, *The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times*, 64 U. PA. L. REV. 696, 698 (1916); see also EDWARD P. EVANS, *THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS* (1906); Paul Schiff Berman, Note, *Rats, Pigs, and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. REV. 288 (1994).

42. See Ewald, *supra* note 40, at 1900-01.

43. BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (1932). For criticism of Malinowski's methodology and findings, see sources cited *infra* note 61.

44. MALINOWSKI, *supra* note 43, at 78.

our and that of his family had to be maintained intact.”⁴⁵ “The starting point for penal law was the *mannhelgi*, or a free man’s legally guaranteed immunity with regard to his person, property, honour, personal peace, and security. Every violation was considered an insult to the offended person, or to his family, and the offender, by committing his unlawful deed, automatically lost his immunity partly or totally, and became *óheilagr*. This meant that in the event of revenge, nothing could be claimed for him by his family. The most appropriate response to violation was revenge, permitted everywhere, at any time, and upon any member of the opposing family.”⁴⁶

- Under Japanese law of the thirteenth through fifteenth centuries, local officials known as *kendan* were given extensive powers to enforce harsh theft laws. Under these laws, punishment extended to the thief’s wife and children, in addition to the thief himself. According to one commentator, these laws tended to be enforced less for the purpose of deterring crime than for the purpose of enriching the *kendan* (and thereby preserving their place in the chain of power that ran from the emperor to the local samurai).⁴⁷
- The contemporary criminal justice system in Japan has as its principal goal the “reintegration” of the offender into the community. As Daniel Foote has described, the Japanese criminal justice system “place[s] primary emphasis on reformation, which involves considering family circumstances, employment status, and other types of support mechanisms available to the offender, and, to a lesser extent, satisfaction of the victim. Confession also plays a key role . . . as both a means to and reflection of the moral catharsis of the individual deemed essential to true reform [The] approach is consciously benevolent to the extent that it reflects the view that generosity will generate feelings of gratitude and indebtedness, thereby encouraging offenders to rehabilitate themselves.”⁴⁸ Similar patterns of “benevolent” or “paternalistic” criminal justice have been observed in several Native American systems described by Karl Llewellyn.⁴⁹

45. Martina Stein-Wilckshuis, *Punishment in Iceland, A Survey*, in RECUEILS DE LA SOCIÉTÉ JEAN BODIN POUR L’HISTOIRE COMPARATIVE DES INSTITUTIONS (Vol. LVI) — LA PEINE 87 (1991).

46. *Id.* at 89.

47. See Shiro Ishii, *Crime and Punishment: Japanese Traditions*, in RECUEILS DE LA SOCIÉTÉ JEAN BODIN POUR L’HISTOIRE COMPARATIVE DES INSTITUTIONS (Vol. LVIII) — LA PEINE 411, 416 (1991).

48. Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 360 (1992).

49. KARL N. LLEWELLYN, *The Anthropology of Criminal Guilt*, in JURISPRUDENCE, 439-50 (1962). Llewellyn says that, in Cheyenne and New Mexican Pueblo culture, the pur-

- One of the principal objects of penal law during the Chinese imperial period was to secure the enforcement of fundamental Chinese morality.⁵⁰ "Lack of filial piety" and violation of mourning laws were both considered particularly serious offenses. For example, the Ch'ing code (1644-1911) provided that a person who concealed the death of a parent or husband and did not go into mourning was to be punished with penal servitude for one year and sixty blows with the heavy stick. Removal of the formal mourning garments before the requisite period had elapsed and indulgence in pleasures such as music or banqueting was to be punished with ninety blows from the heavy stick. The T'ang code (618-907) imposed even harsher penalties for such offenses. Moreover, if a father beat his son to death and then secretly buried the body, the father was held liable not for the killing but for the secret burial.⁵¹ In addition, a child whose parent committed suicide could be held liable where the suicide could be attributed, even in the most tenuous way, to unfilial conduct.⁵²

B. *Applying Basic Concepts to the Test Cases*

There is much in these cases to distinguish them from contemporary Western criminal law. In what follows, I focus on certain particularly intriguing details to illustrate both how Fletcher's theory works and where its limitations might lie.

1. *The Subject/Object Dichotomy and the Criminal Prosecution of Animals*

Can Fletcher's theory account for the historically observed practice of criminal prosecutions involving animals and inanimate objects? At one point, Fletcher seems to say no. According to Fletcher, "[a]ll legal systems concur that punishment is imposed only for human action. . . . It is considered barbaric to punish animals for causing harm."⁵³ In fact, however, this is merely a statement about positive law. (Despite the goal of digging beneath surface structure, Fletcher can hardly

pose of the trial is to "bring the erring brother, now known to be such, to repentance, to open confession, and to reintegration with the community of which he *was and still is regarded an integral part.*" *Id.* at 448 (emphasis in original).

50. See GEOFFREY MACCORMACK, *THE SPIRIT OF TRADITIONAL CHINESE LAW* 52-68 (1996).

51. *See id.* at 61.

52. *See id.* at 65.

53. P. 44. Fletcher also deals with the prosecution of animals in *Rethinking*, in a somewhat different context. *See RETHINKING*, *supra* note 1, at 343-49 (using history to illustrate distinction between "blaming" and "tainting" in law of forfeiture and homicide).

avoid characterizing and taking various positions on positive law). As it turns out, Fletcher's dichotomy theory may well be broad enough to accommodate such prosecutions.

To deal with the question of prosecuting animals, we need to look to Chapter 3 of *Basic Concepts*, in which Fletcher discusses his dichotomy between treating defendants as "subjects" — as someone who acts, an end in himself — and treating them as "objects" — someone or something that is acted upon, a mere means to an end. Although not posed directly in positive criminal law, Fletcher says, this distinction underlies many disputes about defining and determining who is liable for committing an offense (p. 43). Retribution-based theories, under which a responsible agent is "called to account for his wrongdoing," are consistent with the Kantian requirement that human beings be treated as subjects, or ends in themselves. A deterrence-based theory, by contrast, treats a defendant as a mere object, a means to an end (p. 43).

So how should we approach the criminal prosecution of animals and inanimate objects under Fletcher's theory? Three hypotheses suggest themselves. First, one might think that such prosecutions simply reflect the far end of the subject/object spectrum. Assuming that the purpose of such prosecutions is, if not to deter, then at least to incapacitate, one might argue that prosecuting and punishing animals is merely the most extreme manifestation of an object-based system of criminal justice, the clearest case of treating a defendant as a means to an end. Second, one might use Fletcher's theory as an occasion to look more deeply into the metaphysics of such prosecutions. Perhaps animal defendants *were* being viewed as subjects, as responsible moral agents, or ends-in-themselves. Or perhaps such trials were intended, as one scholar has put it, to restore the "moral equilibrium of the community [that] had been disturbed by the" crime and further the view "that somebody or something must be punished or else dire misfortune . . . would overtake the land."⁵⁴ Third, one might make the kind of argument that advocates of natural law have long favored — namely, that despite their formal trappings, such prosecutions are "not really" criminal prosecutions after all, that they fall outside the universe of what Fletcher is attempting to describe.⁵⁵

It is hard to say for sure which of these three approaches Fletcher would favor. His statement that "punishment is imposed only for human action" suggests that he would probably be sympathetic to the

54. Hyde, *supra* note 41, at 698. Cf. Paul Schiff Berman, *An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions Against Objects*, 11 YALE J.L. & HUMAN. 1, 4-5 (1999) ("such legal proceedings permitted the community to heal itself after the breach of a social norm by creating a narrative whereby a symbolic transgressor of the established order was deemed to be 'guilty' of a 'crime' and cast beyond the boundaries of the society").

55. See, e.g., LON L. FULLER, *THE MORALITY OF LAW* 96-106 (rev. ed. 1969).

natural law, "not really" criminal law argument — one that, unfortunately, suffers from circularity.⁵⁶

Whatever his favored response, though, it seems to me that Fletcher's theory *does* provide the analytical tools to address the question posed. Whether a particular system allows for the criminal prosecution of animals and inanimate objects is ultimately a question about whether such defendants are regarded as subjects or objects. To find the answers, we would obviously have to examine the historical evidence. The value of Fletcher's theory lies in the questions it leads us to ask.

2. *The Perpetration/Complicity Dichotomy and Mediaeval Icelandic and Japanese Law*

Chapter 11 of *Basic Concepts* offers a distinction between perpetration and complicity. A perpetrator is the person who commits the actual *actus reus* of the crime. An accomplice is the one who counsels, assists, advises, or solicits (p. 188). The distinction is key to determining both how responsibility should be allocated among different participants in a common scheme, and the extent to which groups *qua* groups can be held liable for a crime. Here, again, Fletcher has some interesting observations on how this distinction is played out in positive law. Some ancient legal systems, he says, seem not to have recognized accomplice liability at all. American and French law tend to support the view that perpetrators and accomplices should be treated equivalently. German and Russian law incline to the view that accomplices should be punished less severely (pp. 188-89).

The question here is whether Fletcher's dichotomy can help explain the practice in mediaeval Icelandic and Japanese law of applying criminal sanctions not just to the person who actually committed the offense but also to members of the perpetrator's family. Put another way, does it make sense to speak of the perpetrator's family members as "accomplices"? Or is some other dynamic at work?

At first glance, it seems obvious that family members per se cannot meet the requirement of complicity. Neither counseling, assisting, advising, nor soliciting is a prerequisite to liability. Their only crime, as it were, is that they happen to be related — a notion that strikes our modern, Western sensibilities as deeply unjust. On the other hand, under modern statutes, a parent can be held criminally liable for "improperly supervising," or "contributing to the delinquency of," a minor.⁵⁷ Perhaps, one might think, the theory that underlies Icelandic

56. For criticism of the natural law argument, see, for example, RONALD DWORKIN, *LAW'S EMPIRE* 102 (1986).

57. See, e.g., LA. REV. STAT. §§ 14: 92, 92.2 (West 1990).

and Japanese familial liability is similar to the theory that presumably underlies such statutes — that family members have certain duties or responsibilities to each other and that failing to prevent such criminal activity is a culpable breach of that duty. Perhaps. But it seems obvious that there is a significant moral difference between imposing liability on a parent for the acts of a child and imposing liability on a child for the acts of a parent.

One is left with the impression that familial liability in mediaeval Iceland and Japan lay somewhere outside the perpetration/complicity dichotomy. One would, of course, want to know more about the circumstances under which mediaeval Icelandic and Japanese law imposed criminal penalties on otherwise non-complicitous family members. At a minimum, though, such liability is likely to put a strain on Fletcher's conceptual framework.

3. *The Punishment/Treatment Dichotomy, Malinowski's Trobriand Suicide, and the "Benevolent Paternalism" of Contemporary Japanese Criminal Justice*

In Chapter 2 of *Basic Concepts*, Fletcher seeks to formulate a universally applicable definition of "punishment" by contrasting that concept to the notion of "treatment." The term "treatment" he uses to refer to assertedly nonpunitive coercive measures such as civil commitment of the dangerously insane, deportation, disbarment, and impeachment and removal from office (p. 28). All of these measures, he says, are intended to "deprive an individual of the status that enables him or her to constitute a continuing social threat," rather than to "expiate or atone for" some crime (p. 29).

But it is punishment — the "institution [that] provides the distinguishing features of criminal law" — that is Fletcher's main focus. Here, Fletcher begins, as he did in *Rethinking*,⁵⁸ with H.L.A. Hart's famous positivistic account of punishment, consisting of five elements: (1) punishment must involve pain or other consequences normally considered unpleasant, (2) it must be for an offense against legal rules, (3) it must be of an actual or supposed offender for his offense, (4) it must be intentionally administered by human beings other than the offender, and (5) it must be imposed and administered by an authority constituted by a legal system against which the offense is committed.⁵⁹

Fletcher then "de-positivises" Hart's definition by emphasizing the phrase "for his offense" in the third element, and focusing on the con-

58. See FLETCHER, *RETHINKING*, *supra* note 1, at 409-12.

59. See H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, in H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 4-5 (1968).

ceptual link between the crime and the punishment. Punishment must be imposed *for* the criminal act. "Strictly speaking," Fletcher says,

deportation for a heinous criminal act is not imposed *for* the criminal act; it is carried out for the sake of protecting the public. Disbarment and removal from office exhibit the same ambiguity. These sanctions may be imposed *in response* to criminal behavior but they are carried out *for the sake of* protecting the public. [pp. 34-35]

So can Fletcher's theory account for the Trobriand Island and contemporary Japanese criminal law practices described above? Let us examine each system in turn. First, consider the Trobriand Islanders. How would Fletcher's theory deal with Malinowski's claim that the Trobriand islander who committed suicide after violating the tribe's incest taboo was applying a legally approved, apparently paradigmatic, penal sanction? Looking to Fletcher's rewriting of Hart's definition of punishment, we see that conditions 1 and 2 (that punishment involve pain or other unpleasant consequences and that it be *of* an actual offender, respectively) are obviously both satisfied. So too, it seems, is condition 3 (that it be *for* an offense against legal rules). But, inasmuch as the suicide fails to satisfy condition 4 (that the punishment be "intentionally administered by human beings *other than the offender*"), it clearly fails the Hart/Fletcher test.

Even more troublesome, though, is condition 5. Would the suicide meet the requirement that it "be imposed and administered by an authority constituted by a legal system against which the offense is committed"? Here we can see the potential difficulty of finding empirical evidence to confirm or disprove Fletcher's purportedly universal theory. Malinowski, for his part, regards the suicide as a paradigmatic function of Melanesian criminal justice. In Melanesian society, he says, suicide has a "distinct legal aspect."⁶⁰ Two methods of suicide are prescribed — *lo'u* (jumping off a palm tree) and *soka* (taking of poison from the gall bladder of a globe-fish). Festive dress and ornamentation are worn. The suicide in this case occurred "in the presence of a pronounced crime: the breach of totemic clan exogamy . . . , one of the corner-stones of totemism, mother-right, and the classificatory system of kinship."⁶¹

For Fletcher, then, the Trobriand suicide creates a dilemma analogous to the one we saw above in the discussion of animal prosecutions. Either the suicide is regarded as "treatment," or it falls outside the punishment/treatment dichotomy entirely.

60. MALINOWSKI, *supra* note 43, at 94.

61. *Id.* at 78-79. For a skeptical view of Malinowski's assessment, see HOEBEL, *supra* note 35, at 177-210 (criticizing Malinowski's methodology); Peter Sack, *Punishment in Melanesia and Kima'i's Suicide. Instead of a General Report*, in RECUEILS DE LA SOCIÉTÉ JEAN BODIN POUR L'HISTOIRE COMPARATIVE DES INSTITUTIONS (Vol. LVIII) — LA PEINE 421 (1991).

A similar, though subtler, problem occurs in the case of contemporary Japanese criminal justice. The Japanese system is striking for the way in which it departs from our traditional Western notions of criminal justice. Rather than focus on either retribution or deterrence, the Japanese system emphasizes rehabilitation and reintegration. Can Fletcher's theory account for it?

Perhaps it can, but only with difficulty. On the one hand, the Japanese ideal seems far from the civil commitment, deportation, disbarment and impeachment of the "treatment" model. Whereas each of these processes is intended to *separate* the offender from society, the Japanese model is intended to do just the opposite — namely, to bring the offender back in. On the other hand, it is also probably wrong to speak of the Japanese ideal as involving "punishment." Although the Japanese model does satisfy conditions 2-5 of the Hart/Fletcher test, it has difficulty satisfying condition 1 — that it "involve pain or other consequences normally considered unpleasant" — i.e., that it be punitive.⁶² Like the Trobriand suicide, then, the modern Japanese system of criminal justice seems to pose a serious challenge to Fletcher's universal theory.

4. *The Crime/Offender Dichotomy and Chinese Imperial Law*

Among the numerous puzzling issues raised by Chinese imperial criminal law is the harsh treatment meted out for what we would regard as relatively minor acts of disobedience. A person who failed to show the proper filial piety or fulfill various mourning rites was subject to severe penalties. In light of modern criminal law, these practices seem aberrant. Once again we need to ask: To what extent can Fletcher's theory account for them?

One approach to this puzzle can be found in Chapter 5 of *Basic Concepts*, which offers two sets of pertinent distinctions (both of which will be familiar to readers of *Rethinking*⁶³). The first is between crime and offender. The term "crime" refers to an offense in the abstract. The term "offender" refers to an actual person who has committed a crime. The second distinction refers to two different ways in which a criminal act can be wrong — either through wrongdoing or wrongfulness. Wrongdoing involves the violation of a victim's interest. ("Stabbing, poisoning, stealing, robbing, [and] breaking in all involve wrongdoing" (p. 78)). Wrongfulness involves the violation of a legal rule. (Homicide and theft involve wrongfulness (*Id.*)). As the crimi-

62. I say difficult, rather than impossible, because even the Japanese system will be viewed by some defendants as punitive. Although "benevolent" and "paternalistic," the Japanese system nevertheless entails both an intrusion on defendants' autonomy and some degree of stigma. Thus, it is not correct to say that it is entirely non-punitive.

63. See FLETCHER, *RETHINKING*, *supra* note 1, at 455-59.

nal law has become increasingly a product of legislation (rather than judicial decisionmaking), Fletcher contends, its moral content has tended to shift from wrongdoing to wrongfulness. The purpose of punishing offenders, he says, "is rarely seen as an effort to restore the moral order of the universe. The primary purpose is to defend the authority of the state" (p. 80).

So how should one characterize the moral content of Chinese imperial offenses such as failing to show proper filial piety and observe mourning rites? Having written previously about the significance of defiance as an element of moral content in the criminal law, I am sympathetic to Fletcher's distinction between wrongdoing and wrongfulness.⁶⁴ Nevertheless, it seems to me that Fletcher's moral matrix is still too simplistic to account for criminal offenses of this sort. In Chinese society, of course, lack of filial piety and failure to fulfill mourning rights did involve violations of a legal rule. But they also involved more. In addition to the two kinds of moral content Fletcher identifies — violations of a particular victim's interests and violations of a legal rule — we need also to consider harm to society's institutions and violation of moral (as opposed to legal) norms.⁶⁵ Although moral content of these sorts is often associated with the understandably controversial criminalization of "morals offenses" (such as gambling, adultery, and prostitution), it is also essential to uncontroversial criminal offenses such as contempt, perjury, and obstruction of justice. Here, in the context of lack of filial piety and failure to fulfill mourning rites, it is precisely these two forms of moral content that would appear to be present.

Fletcher's failure to offer a sufficiently broad account of moral content also explains why his claim regarding the historical shift from wrongdoing to wrongfulness is faulty. As we have seen, the history of mediaeval Chinese law exemplifies a pattern of development that is precisely the converse of Fletcher's claim (i.e., a shift from wrongfulness to wrongdoing, rather than the other way around). A longer and wider comparative law perspective helps to show why the historical trends are actually more complicated than implied by Fletcher's account.

CONCLUSION: "RETHINKING" *BASIC CONCEPTS*

Criticizing George Fletcher for being insufficiently comparativist is a bit like denigrating the Pope for being insufficiently Catholic. It has not been my intention to do so here. Rather, I have sought to go beyond the contemporary Anglo-American and European context in

64. See Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997).

65. See *id.* (discussing both kinds of moral content).

which Fletcher often works masterfully, in order to test the specifically *universal* and *timeless* claims of his theory.

Fletcher himself has recognized the need for such expanded analysis. In the coming years, one can look forward to foreign editions of *Basic Concepts* augmented by local criminal law materials. (It is unclear, though, whether any non-Western systems will be included.) In the meantime, we can begin to assess the validity of Fletcher's claims through an admittedly piecemeal and preliminary process of analysis.

The results of that initial assessment, I believe, are mixed. A brief and anecdotal look at selected historical practices in Japan, Iceland, China, Melanesia and elsewhere reveals a bewilderingly complex range of conduct involving what we would recognize as criminal law: animals and inanimate objects subject to prosecution and punishment, suicide serving as a recognized criminal sanction, radically divergent ideas about the purpose of criminal justice, non-complicit family members being held liable for criminal acts of a related perpetrator, and severe sanctions imposed for relatively minor acts of disobedience.

One is left, I hope, with a sense of how varied criminal law practices can be, and how difficult it is to construct a universal theory. The reader cannot help but be impressed by what Fletcher has achieved. Although Fletcher's claims to universality sometimes overreach, his dichotomy theory is rich enough to provide the tools for analyzing many of the examined anomalies. As the project to publish *Basic Concepts* in various foreign editions takes shape, this richness should become increasingly evident.