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Stephen J. Morse

University of Pennsylvania Law School

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INTRODUCING CRIMINAL LAW

*Stephen J. Morse**

BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW. By *Leo Katz*. Chicago: University of Chicago Press. 1987. Pp. xii, 343. Cloth, \$45; paper, \$14.95.

CRIME, GUILT, AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION. By *C.L. Ten*. New York: Oxford University Press. 1987. Pp. i, 175. Cloth, \$39.95; paper, \$18.95.

How should one think and write about criminal law? Leo Katz and C.L. Ten have written thoughtful, instructive, and interesting books about substantive criminal law that do not discuss one substantive issue in common — Katz addresses primarily doctrinal puzzles, Ten addresses primarily general justifying theories. Nevertheless, the books have many similarities. Both authors take the world as they find it: neither suggests that there is anything fundamentally wrong with current law. Both virtually exclude from consideration the “crime problem” and the administration of criminal justice. Both are fond of and attempt to justify the usefulness of unusual or fanciful hypotheticals to make their points. Both demonstrate the value, indeed the necessity, of using theories and data from other disciplines, mostly analytic philosophy, to make coherent sense of Anglo-American criminal law. Together they offer an encompassing examination of present criminal law.

I

Bad Acts and Guilty Minds is an eloquent and entertaining romp through all the brain-teasing issues that delight criminal law teachers and scholars — conundrums, to use Katz’s apt characterization. Katz explores the act doctrine, *mens rea*, justification and excuse, causation, complicity, conspiracy, and, of course, impossible attempts. Each is introduced by an evocative, well-told fact situation that raises the issue. Here is just a small sample of the stories. How do we decide when breaking the law is desirable? To explore the justification of necessity, Katz places us in the south Atlantic in July, 1883, in the wrecked *Mignonette*’s tiny dinghy. Tom Dudley, Edwin Stephens, Edmund (Ned) Brooks, and Richard Parker spent almost three weeks

* Ferdinand Wakeman Hubbell Professor, University of Pennsylvania Law School. A.B. 1966, Tufts College; J.D. 1970, Ph.D. 1973, Harvard University. — Ed.

adrift in the lifeboat, until the prostrate cabin boy, Parker, was killed by Dudley and eaten by the remaining three. Five days later, the others were rescued by the passing German barque, *Moctezuma*. Upon their safe return to England, Dudley and Stephens were tried for murder.¹ Or, how do we decide if the conduct of a person behaving under another's powerful suggestion should be considered that person's act? To dramatize the act doctrine, Katz narrates gripping tales of a German woman and a Danish man who committed crimes while allegedly acting under the influence of post-hypnotic suggestion produced by nefarious hypnotists (pp. 128-33). Or, how do we know what a person intends? To elucidate the meaning of the *mens rea* of intention, Katz transports us to the Sudan, whose courts grappled with murder cases in which defendants killed in the culturally explicable but mistaken belief that their victims were ghosts, witches or marauding monkeys (pp. 165-69). Or, if a person has the required intent for a criminal offense and does everything he or she intends, but the crime cannot be committed because of a factual glitch, should the person be guilty of attempt? To analyze impossible attempts, Katz creates a set of judicial opinions from a hypothetical jurisdiction, Wessex, in which the defendant, one Omeira, is charged with attempting to export illegally a proscribed work of art that Omeira believes is genuine, but that turns out to be a fake and therefore was not included in the export ban.²

Katz revels in these stories and provides all the details necessary to make them interesting. Following each story, Katz analyzes the doctrinal issue raised. He employs philosophical theories primarily, but where appropriate, he also draws on psychological and economic theories and data. Rather than considering the issues in light of the purposes of the criminal law or the prerequisites for just punishment,³ he focuses on clarifying the confusions produced by our intuitions about each specific doctrine. For example, Katz illuminates the discussion of impossible attempts with philosophical consideration of the nature of intentions, the vagueness of rules, and the role of luck, but he adamantly refuses to choose between alternative rules with quite different

1. Pp. 22-26, discussing *The Queen v. Dudley & Stephens*, 14 Q.B.D. 273 (1884). Katz tells the tale extremely well, but makes some uncharacteristic mistakes. He places the shipwreck 16,000 miles from the closest land, p. 23, whereas the *Mignonette* sank about 680 miles from the nearest land and somewhat more than 2000 miles from the nearest land the crew conceivably could have reached in a small dinghy, given the prevailing winds and currents. Katz twice misspells the name of the rescuing boat, giving it as the popular but erroneous *Montezuma*, rather than the correct *Moctezuma*. Pp. 23-24. See A.W.B. SIMPSON, *CANNIBALISM AND THE COMMON LAW* 49, 70 (1984).

2. Pp. 276-99. Here Katz has borrowed the methodology of Kadish, Schulhofer and Paulsen's famous casebook hypothetical, "The Case of Lady Eldon's French Lace." See S. KADISH, S. SCHULHOFER & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 604-10 (4th ed. 1983).

3. David Richards makes the same point about *Bad Acts and Guilty Minds* in a recent review. See Richards, Book Review, 99 *ETHICS* 648, 649 (1989).

criminal justice consequences.⁴ He sprinkles more general jurisprudential discussions throughout,⁵ again elucidated by philosophy, but doctrinal conundrums remain his central focus.

Katz hopes that his arguments and explanations will convince, but if not, he at least wants the stories to entice, intrigue, and give pleasure.⁶ He succeeds with the latter tasks. To use a term much-favored by my daughter when she was younger, *Bad Acts and Guilty Minds* is surely the "funnest" survey of criminal law available. And if Katz sometimes fails with the former, it is not terribly important.

Whereas Katz starts with stories, Ten begins with theories. *Crime, Guilt, and Punishment*, as its subtitle suggests, aims to be a philosophical introduction to crime and punishment, and so it is. Ten economically, lucidly, and sympathetically describes and criticizes all the major Anglo-American contenders for an adequate theory of punishment. Consequently, the first two-thirds of the book contain chapters on various approaches to utilitarian and retributive justifications for criminal prohibitions and punishment,⁷ on mixed theories (in the course of which Ten offers his own variant) (pp. 79-81), and on the theory of excuses. Hypothetical situations are employed, but only in the service of a previously established conceptual framework. I know of no better or more sophisticated brief introduction to these issues. The last third of the book uses the theoretical approaches of the earlier chapters to address, still rather abstractly, the more "practical" questions of the mentally disordered offender and the proper amount of punishment for convicted offenders. This part of the book, too, clarifies the issues by demonstrating that sensible analysis of nitty-gritty issues cannot avoid theory without lapsing into inconsistency or incoherence.

II

Readers searching for a stringent critique of the present system will be disappointed; Katz and Ten are engaged in essentially conservative enterprises. Both implicitly assume that criminality lurks in the breast of the miscreant rather than in the injustice or stupidity of

4. P. 296. In general, Katz declines to take sides in doctrinal disputes or to declare his preferences among competing approaches.

5. See, e.g., pp. 88-103, on the problems with definitions and misdescriptions, and on the incompatibility of statutes and the problem of identity.

6. P. 7. Katz's use of stories is similar to Norval Morris' recent writings that use fictional tales in the mode of George Orwell to elucidate criminal law. See, e.g., N. MORRIS, *The Brothel Boy*, in *MADNESS AND THE CRIMINAL LAW* 7-27 (1982); *Ake Dah*, 52 U. CHI. L. REV. 553 (1985).

7. Ten's discussion of the proper scope of criminalization is relatively thin, limiting itself primarily to consideration of the overlap between moral and criminal offenses, pp. 71-77, and the justification for negligence and strict liability offenses. Pp. 100-10. In both cases, Ten embeds the analysis in the theory of punishment.

our society or the criminal law, and that present criminal law is fundamentally fair. Katz tries admirably to enlighten our understanding of present doctrine, but almost never suggests or even considers whether the doctrine is worth the effort. He usually assumes that our "intuitions" are correct and thus need to be clarified or supported rather than exploded. Ten organizes and illuminates underlying theories, but does not consider whether the current foundations are justifiable or whether alternative foundations, say a Marxist theory, might be preferable. Neither book confronts the seemingly intractable conundrum of the social antecedents of criminal behavior or the blatant inequity and inefficiency of the criminal justice system.⁸ Between them the books explore an interesting range of topics, including, among others, speluncean explorers, sleepwalkers, witchcraft, and the theories of Bentham, Mill, Hart, and Herbert Morris, but nothing is said of poverty, drugs, police misconduct, or the brutal conditions in most jails and prisons.

Are the foregoing observations a problem for either Katz or Ten? I think not. Authors are entitled to set limited agendas and should be judged by how successfully they meet them. One might argue that authorial authority cannot be justified when the topic under consideration, such as criminal law, is centrally related to justice and individual suffering. But asking for more would require the authors to write different books. Pointing out moral and intellectual failures in their agendas, if such they be, can be profitably left to the critics. Those who believe that Anglo-American criminal law and justice are hopelessly corrupt will treat both books as implicit apologetics, but liberals with a less utopian, critical stance will be satisfied to engage the arguments in their own terms. By the latter standard, both Katz and Ten succeed in advancing our understanding.

Like many philosophers and criminal law theorists, Katz and Ten both have a taste for what Ten refers to as "fantastic" cases (p. 18), but the cases they choose, how they use them, and how they justify using them are markedly different. Katz's "fantastic" cases are usually real, and he provides rich detail to permit the reader to recreate imaginatively the criminal event as it occurred. His justification for routinely using "fantastic" cases, albeit real ones, is unusually scanty, however: "Few cases, even imaginary ones, are bizarre enough never to have happened before" (p. 17); "But in law, as elsewhere," he writes, "it is our encounter with the 'absurd' that lets us understand the 'normal,' by making us feel as though we saw it for the first time" (p. 16). By the "normal," Katz refers to traditional doctrinal conundrums and what might explain them. Ten, on the other hand, uses mostly fictional, rather abstract and sketchy hypotheticals, but he pro-

8. Ten does address the central consequentialist arguments about deterrence and incapacitation.

vides an incongruously lengthy,⁹ sometimes difficult, and interesting argument for employing fantastic cases. His justification, in brief, is that such cases promote honesty, depth and consistency in our moral thinking by forcing us to confront the full implications of our principles.¹⁰ Thus, fantastic cases help us decide what justifications for punishment we can really live with.

Who can reasonably oppose making us feel as though we saw normality for the first time, or promoting honesty, depth and consistency in moral thinking? Moreover, fantastic cases can be great fun. I nevertheless confess to ambivalence about fantastic cases, especially those that seem inconsistent with our conception of the facts of human existence. Moral thinking is about human conduct or it is about nothing at all. Even assuming that there are consistent fundamental principles from which all rules and decisions must be derived and that we must be consistent in our morals, I am troubled by arguments that suggest that a moral principle is unacceptable when it produces an unacceptable outcome in a situation that could not possibly exist according to the facts as we know them. If otherwise desirable principles produce consistent and coherent results in human society as we know or believe it could be, that is good enough for me. If a perfectly successful "frame-up" that produces more good than harm isn't really possible, as many believe, we need not reject solely consequential justifications because we worry about the horror of intentionally punishing the innocent to reduce crime rates. To be useful as a guide to public policy, a successful argument against consequentialism or any other theory of justification for punishment will have to avoid recourse to impossible cases.

As Ten recognizes, there is also an epistemological hitch in using fantastic cases as a form of controlled moral experimentation (pp. 25-27). It is bootless to create imaginary worlds in which impossible facts exist but all else is the same. We can imagine such worlds, but by

9. Pp. 18-32. This is obviously a philosophical question that exercises Ten quite independently of its relation to crime and punishment.

10. See especially pp. 20-21, 23, 31-32. Much of the argument rests, I believe, on controversial moral theoretical (perhaps even metaethical) assumptions about, for example, the existence and universality of "fundamental" moral principles and their relation to "subordinate" principles. Thus, the analysis is part of a wider debate about the proper way to "do" moral philosophy, which probably explains why it engages Ten so strongly and why, lengthy though the discussion is in this book, too much is assumed for the argument to be convincing. The section seems like part of an ongoing complex conversation into which one has inadvertently stumbled.

Ten inserts this justification in the context of discussing whether punishing the innocent intentionally might be optimal, an oft-used hypothetical that puts intense pressure on a solely consequentialist justification for punishment. Unless employing such fantastic cases is supportable, it becomes more difficult to defeat the commonsensical arguments in favor of consequentialism. But accepting this difficulty as an argument in support of using fantastic cases begs the question in their favor and against consequentialism. Ten does not make this error, but he does argue later for a mixed theory of punishment. Consequently, he needs to justify fantastic cases in order to demonstrate the most unappealing features of consequentialism.

doing so we unjustifiably smuggle in present conditions: a world so different in one respect would surely be different in other crucially relevant respects that we cannot imagine, but that would surely alter the moral landscape. As an antidote, Ten recommends that we not choose cases that "involve too radical a change in human nature or in the world in which we live" (p. 26). But then the argument shifts to particularly refractory and therefore unhelpful disputes about the existence or content of human nature or what is "too radical a change."¹¹ And so on. It is better to avoid such unnecessary arguments.

As Katz vividly demonstrates, impossible fantastic cases aren't necessary; reality will do quite well to put pressure on our concepts and justifications. He bases the facts of even his most extensive fictional cases — the speluncean explorers and Omeira — on real cases. I also agree with him that "deviant" or "absurd" cases help us define the boundaries of the normal and are therefore useful. Caution is still indicated, however. The boundary between the "normal" and the "absurd" is hardly an invariant, intrinsic feature of reality. This boundary is perceived under a contingent theoretical description that shifts in response to new cases and theories. As Katz would surely agree, despite his stance in *Bad Acts and Guilty Minds* of taking the world largely as he finds it, currently deviant cases can thus change boundaries as well as identify them. Normality can come to seem absurd as well as the reverse.¹²

Perhaps the most interesting aspect of actual deviant cases is that they make us question current justifications for punishment and specific doctrines. For example, acting consciously but under alleged post-hypnotic suggestion, hardly a standard case, causes us to rethink what it means to be in charge of oneself. Or, as Fitzjames Stephen wondered in reference to *The Queen v. Dudley and Stephens*, there may be no principle at all that disposes of the case, so we might just have to muddle along when, mercifully rarely, such cases arise.¹³ For a final example, I can come up with no adequate theoretical and practical response to a crime committed by one of the personalities of a human being with genuine multiple personalities.¹⁴ In sum, fantastic

11. Also, if human nature changes, is it "human" nature any longer, or was it "nature" to begin with?

12. Katz suggests as much when he notes that current concepts in the philosophy of mind and cognitive science perhaps should cause us to abandon, in both law and ordinary discourse, the "folk psychology" that explains human conduct in terms of desires, beliefs and intentions. Pp. 302-04, 332, n.2.

Also, most of Katz's (and Ten's) cases are not absurd or deviant, even though the locale and facts may be exotic. A mistaken but culturally explicable belief in the Sudan is abstractly equivalent to a mistaken but culturally explicable belief in Philadelphia, Buenos Aires, or Kuala Lumpur.

13. J. STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 76-77 (2d ed. 1890).

14. Kathleen Wilkes, in an analogous conceptual context, claims that our concept of the person is defeated by multiple personality. K. WILKES, REAL PEOPLE: PERSONAL IDENTITY

actual cases emphasize and create fascinating intellectual issues, but it is never clear where they will lead us, and we may overestimate their importance because they are usually so vivid¹⁵ and we desire to establish consistent, overarching theories that explain and justify our practices.

The essential lesson Katz and Ten teach, far more important than any individual move either makes, is the critical importance of theory. I believe Katz would claim that *Bad Acts and Guilty Minds* inductively demonstrates the philosophical unity that the "problems" of "intentionality" and "possible worlds" bring to the field (pp. 306-07); Ten might claim that his book demonstrates that criminal law can achieve the goals of fairness and efficiency only by the application of a clear, subtle and textured mixed justification of punishment.¹⁶ Nevertheless, although Katz and Ten present complementary but mutually exclusive theoretical worlds, the importance of theory is the implicit thesis of both books.

In his famous essay, "The Hedgehog and the Fox,"¹⁷ Isaiah Berlin distinguishes two types of writers and thinkers by using a fragment of Greek poetry that portrays the fox as knowing many things and the hedgehog as knowing one big thing. Berlin describes the two as follows:

[T]here exists a great chasm between those, on one side, who relate everything to a single central vision, one system less or more coherent or articulate, in terms of which they understand, think and feel — a single, universal, organizing principle in terms of which alone all that they are and say has significance — and, on the other side, those who pursue many ends, often unrelated and even contradictory, connected, if at all, only in some *de facto* way, for some psychological or physiological cause, related by no moral or aesthetic principle. . . .¹⁸

As should be clear by now, Katz is an instinctive theoretical fox, albeit with faint designs on becoming a hedgehog, and Ten is a theoretical hedgehog by design and probably by instinct. Let us pursue the virtues and vices of these denizens of the theoretical menagerie.

Katz is interested in everything, his mind always at exploratory

WITHOUT THOUGHT EXPERIMENTS vii, 109-28 (1988). Needless to say, the failure to conceptualize the personhood of such people adequately is related to the failure adequately to conceptualize their criminal responsibility for the deeds of one personality.

15. See R. NISBETT & L. ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 45-62 (1980). Katz is very much attracted to the type of psychological analysis exemplified by Nisbett & Ross' work.

16. No specific page reference supports this conjecture, but his discussion following the presentation of various mixed views, including his own, makes sense from this perspective.

17. I. BERLIN, RUSSIAN THINKERS 22 (H. Hardy & A. Kelly eds. 1979).

18. *Id.* Berlin recognizes, of course, that some writers and thinkers are not easily classified, and that, like most such classifications, his can sometimes obscure as well as clarify. But he also believes, and I concur, that "like all distinctions which embody any degree of truth, it offers a point of view from which to look and compare, a starting-point for genuine investigation." *Id.* at 23.

play, using philosophy and psychology as tools. He moves quickly from one topic to another, covering an enormous array of criminal law conundrums, using whatever theory or scientific findings seem most appropriate for the issue at hand. He is always thoughtful, often clarifying, sometimes provoking, and never dull or dry. But he can also be frustrating and can make one understand the virtues of the hedgehog.

Consider Katz's discussion of omissions. Distinguishing acts from omissions can have crucial consequences for criminal liability, but this distinction is often notoriously hard to draw. Katz proves this with many apt fact situations, and then, using his enormously helpful understanding of counterfactual conditional analysis, he proposes the following test to distinguish acts from omissions: "If the defendant did not exist, would the harmful outcome in question still have occurred in the way it did" (p. 143)? Katz claims, largely rightly I believe, that this test clearly gets the easy cases right and that it produces equivocal results in cases where our intuitions are equivocal. He continues by demonstrating convincingly that many counterfactual conditionals are inherently ambiguous and thus cannot yield determinate results. At this point he considers the nature of omissions "settled"¹⁹ and concludes the section by raising practical and theoretical objections to criminalizing omissions — for example, the difficulty of drafting a statute, the fear of driving people away from places where they might be called upon to help, the general uncertainty about the consequences of an omission, and the intrusion on autonomy that would result. In ten well-written pages, Katz entices with stories that explore omissions, tersely describes the applicable law, and uses philosophy and common sense to illuminate the issue (pp. 135-45). So why am I still frustrated?

Katz is so good that I want him to pursue this and every other topic far deeper than he does. Surely more could be said philosophically about omissions, such as their relation to notions of causation.²⁰ More important, however, this example illustrates the book's essential conservatism. Katz assumes that a good test is one that explains current law, that most of us have the same intuitions, and, further, that the intuitions are correct and thus the proper template for legal accu-

19. P. 144. Katz has a somewhat unsettling general tendency to consider a matter prematurely settled. He often presents "solutions" to his conundrums with easy assurance, when, as he clearly knows, the philosophical or scientific literature he relies on is more controversial than he allows in the text. For example, Katz supports his discussion of why attenuation of the causal chain diminishes our anger toward a heinous actor with psychological theory and data that are quite controversial, as he recognizes by appropriate citations in the footnotes. Pp. 216-23, 326-27, esp. nn.8, 12. Also, the use of this literature leaves unclarified whether Katz believes that the psychological "facts" cited are an invariant characteristic of people or are highly contingent and thus can be altered if they predispose us to morally objectionable attitudes.

20. Indeed, Katz has a fine chapter on causation, pp. 210-51, whose insights could have been profitably related to the discussion of omissions.

racy. But these assumptions inevitably create a demand for more analysis.

Katz explains, probably correctly but too briefly, that current law is based on respect for autonomy: The person who fails to prevent harm simply fails to give away something he owns, whereas the person who brings about harm takes away something owned by someone else (p. 145). One wonders, however: Is he describing or prescribing? He doesn't indicate, but in either case there is more to say. As Katz knows well and uses to good advantage, language is sufficiently ambiguous to permit many plausible descriptions of the "same" event, each having very different consequences. Is an economic metaphor for autonomy in the context of preventing harms defensible? What does the ommitter "own"? His right to be left alone? His right to let easily preventable but horrible harms occur? Criminal prohibitions also interfere with negative liberty, so is the difference simply a matter of the degree of liberty intrusion?²¹ Katz is right that notions of autonomy underwrite the different treatment of acts and omissions, but the concept of autonomy demands unpacking to determine if it is defensible and consistent with Katz's formula for distinguishing acts and omissions and with other doctrines in the criminal law. How does the analysis of omissions cohere with the analysis of conduct under post-hypnotic suggestion, also an "act" problem, according to Katz? To unpack autonomy and to determine if its use in the context of omissions coheres with its use elsewhere in the criminal law, one would need a hedgehog's interlocking theory of action, autonomy and the purposes of the criminal law.

Finally, is current law morally defensible? Should the act/omission distinction be so broadly drawn? Why should our intuitions be the template? If law and moral intuitions are in reflective equilibrium, won't changes in the law lead to changes in our intuitions? What is the criminal law good for? If we reflect on the moral implications of the current distinction between acts and omissions, would we change the law? Would it be any harder to draft a workable statute for criminalizing omissions than, for example, to draft statutes prohibiting negligent conduct?

Virtually all of Katz's discrete analyses have the many virtues I have described, although most do not dig really deeply into the literatures or consider his conundrums in light of the general justifying aims of the criminal law. But given the complexities of the philosophical and psychological materials Katz employs, the book would lose much of its sparkling narrative force if he presented either much lengthier

21. For example, prohibitions on actions arguably affect liberty in only a finite number of cases, whereas duties to act could be virtually unlimited depending on the luck of one's experiences. Some hapless people may simply keep running into abandoned infants drowning in tiny puddles in summer or into situations in which their neighbors are assaulted in a shared courtyard.

philosophical analyses or cautiously qualified accounts of his "tentative" solution to each conundrum.²² He is an exquisite fox, who demonstrates repeatedly and convincingly the indispensability of theory for clarifying individual doctrines. Thus particular disagreements²³ or even the rare errors²⁴ do not undermine a general thesis or the overall

22. I think Katz has made an entirely reasonable choice about how to present the material, but it could somewhat mislead the nonspecialist reader. On the other hand, if he were more "balanced," the book would be much longer and would doubtlessly repel the nonspecialist.

23. For example, I disagree with his analysis of the appropriate response to action in accord with hypnotic suggestion. Katz believes that a person acting under post-hypnotic suggestion should be excused because his or her acts reflect the will of the hypnotist rather than his or her own will. P. 134. Because a person acting under post-hypnotic suggestion meets Katz's earlier test for action, pp. 127-28, I am not sure if he is being inconsistent. In any case, my disagreement follows from a theory of responsibility that would treat a hypnotic suggestion simply as a cause like many others that a person may or may not be aware of, but which motivates an actor on the spur of the moment. Examples of such other causes would be a ravishingly persuasive argument, an effective emotional appeal, or any unrecognized situational variable that causes a strong desire/belief set. See D. DENNETT, *ELBOW ROOM: THE VARIETIES OF FREE WILL WORTH WANTING* 63-65 (1984).

For another example, which I cannot resist because Katz has entrapped me into discussing it, consider his discussion of whether entrapment excuses. Katz claims that entrapment raises "act" problems: the entrapped defendant is being punished for his disposition to crime. Here is his justification for this claim. First, he alleges that "criminal" dispositions "reside within all of us." P. 160. (Katz footnotes this assertion but it needs no footnote because no one knows this as a matter of empirical "fact": it is a matter of opinion about which Katz is as expert as anyone else.) He continues by asking how we should respond to the lifeboat case if it had been contrived as a police set-up and one of the crew had been stopped just prior to killing another crew member:

If the situation were for real, he might be guilty of attempted murder. But it isn't. Is he still guilty? I don't think so. Everyone, I think, is entitled to his turn at the wheel of fortune. If he is lucky, he will never be faced with a situation in which his criminal disposition surfaces.

Entrapment is a way of rigging the wheel.

Pp. 160-61. Thus, Katz's argument is that but for the bad luck of being the object of a law enforcement "sting," the defendant's criminal disposition would never have surfaced and we are really condemning him for his disposition.

But why is luck the issue, and in what way, morally relevant to the actor's responsibility, is the entrapment situation unreal? How would Katz respond to an impoverished slum dweller who claims that if he had been luckier and our society had been more just, he would not have been exposed to an exceptionally criminogenic environment. But for being born into that environment, he claims, his criminal disposition would not have surfaced either: the "wheel was rigged" against him in a way he was particularly helpless to avoid. Should the difference in the cause of the "surfacing" of the disposition — the intentional conduct of the police versus the contingency of ancestry and the injustice of society — support a difference in guilt? Perhaps so or perhaps not, but not because of considerations raised by the act doctrine.

According to the minority, "objective" rule, the difficulty with entrapment is not an act problem. Rather, we simply cannot stomach certain types of conduct from public (or, more rarely, private) agents and we excuse the "entrapped" defendant to deter such conduct. Even the majority, "subjective" entrapment rule, which does focus on the defendant's disposition, only accepts the defense if the "entrapper" plants the criminal disposition in a person otherwise lacking such tendencies. Thus the majority rule denies Katz's first premise about universal criminal dispositions.

Finally, Katz's use of a concept like a criminal disposition coheres uncomfortably with his seeming preference for situational explanations of behavior and his skepticism about "folk psychology." Also, is a disposition "criminal" if its behavioral outcome is not a crime?

But enough of such quibbles.

24. For example, Katz appears to believe that all excuses, including insanity, are based on "extraordinary pressures" and are thus all variants of "necessity and duress." P. 81. But what do "extraordinary" and "pressure" mean? A delusional person may act entirely coolly and with-

success of the book. Nevertheless, intense fox-hunting makes me yearn for the solidity and depth of a hedgehog. As one applauds Katz's virtuosity, one simultaneously generates the inevitable hedgehog questions he never addresses. I don't know Leo Katz, but I know he would have thoughtful, useful and *theoretical* responses to every question I could raise.

By expressing my frustration and raising the dread specter of unasked questions, however, am I not violating my injunction to take a book on its own terms? Not at all. I began this review by asking how one should write and think about criminal law. *Bad Acts and Guilty Minds* is a successful example of one approach. I am simply indicating that when foxes scamper through the criminal law, no matter how good they are — and Katz is very good, indeed — they will inevitably produce a limited account. As we shall see next, the same result occurs when hedgehogs root about in the same field.

Whereas Katz relies on theories to illuminate specific doctrines, Ten relies on theories to justify the entire criminal law. As noted, he describes and analyzes the utilitarian and retributive justifications for criminal prohibitions and punishments. The book aims to be a "primer," but it is surely for very sophisticated neophytes and can be profitably read by specialists, who will find new arguments and considerations in the wealth of material Ten economically presents.²⁵ Ten properly avoids the impulse to ground retributive and utilitarian theories metaethically, contenting himself with making the most sense of each without reaching for a metaphysical purchase. Because *Crime, Guilt, and Punishment* is a didactic primer, Ten reigns in any impulse to permit his own thesis to dominate, but the necessity of using general justifying and distributive theories and the desirability of a mixed theory are the clear messages.²⁶

out any more sense of "pressure" than a person who acts on the basis of nondelusional beliefs. Infancy is an excuse, but infants do not act because they are "pressured." Finally, a defendant victimized by a hard choice that she did not create will succeed with a duress defense even if there was no sense of pressure. Now Katz may mean by "pressure" nothing more than a hard choice that leaves a person with no reasonable alternative, and if so, he is right about duress. But this still will not do for insanity or infancy. A delusional defendant's choice to act on his deluded beliefs is no harder in the relevant sense than the choice of the nondeluded defendant. Perhaps, however, extraordinary pressure is synonymous with abnormal causation, but if so Katz needs far more analysis of what abnormal causation is and why it excuses. Katz lacks in general a theory of responsibility.

I suggest that irrationality, not pressure, is what explains the excuses of insanity and infancy, and the partial excuse of provocation. See Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 782-84, 787-92 (1985); Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOL. 1, 20-23, 29-30 (1984); see generally Morse, *Psychology, Determinism, and Legal Responsibility* in NEBRASKA SYMPOSIUM ON MOTIVATION 1985: THE LAW AS A BEHAVIORAL INSTRUMENT 35 (G. Melton ed. 1986).

25. Ten's sophistication and complexity remind me of other high-level "primers" that are useful for more sophisticated readers. See, e.g., G. HARMAN, *THE NATURE OF MORALITY: AN INTRODUCTION TO ETHICS* (1977).

26. The advantages and defects of various justifying theories are well-trodden ground and,

If one wishes to build a coherent, consistent and just criminal law from the ground up, Ten's discussion identifies the right foundational level. He asks what the criminal law is good for: When is the state justified in prohibiting and punishing conduct? It is unthinkable that one could fully consider any doctrinal question or any institutional arrangement without attending to the underlying theory. Notions of just deserts, crime prevention, social cohesion and the like are indispensable to help us to decide whether and how to respond to the lifeboat cannibals, to those who kill intentionally in response to mistaken beliefs, to those who act under post-hypnotic suggestion, to those who are able to prevent harm but do not, to the problem of measuring causal "chains," to the problem of moral luck, to group criminality, and to all the rest of the doctrinal questions Katz so ably addresses. But Ten is no Reverend Casaubon, the character in Eliot's *Middlemarch* who aimed to recover the key to all mythologies in a tradition originally revealed.²⁷ He presents his own mixed justification with admirable restraint, and rightly so. For who would expect, in light of the history of such theories and the counterarguments that Ten makes so successfully, that solid objections would not arise? Any grand theory proposed to solve all the doctrinal conundrums individually, to make all the doctrine cohere together, and to convince us of the justice of the whole system is unlikely to survive challenge. Nevertheless, we simply cannot talk encompassingly about criminal law without general justifying theories.

Even if we all agreed that one of the contending general theories was the right one, however, our problems are still not solved because translating general theories into specific rules is difficult. Suppose you are a utilitarian: Should criminal behavior in response to provocation be punished more or less harshly than unprovoked behavior? As Ten clearly demonstrates, a reasonable argument can be offered for either position and neither will be entirely convincing (pp. 146-50) (unless, I imagine, we are all hooked up to undeniably accurate utilometers). Assuming no constitutional constraints, should abortions be prohibited or capital punishment instituted? Pick your preferred general theory: Is the answer determinate? General theories are necessary but founder when we move to the level of "details." The historical record is littered with intellectually elegant and rigorous theories, large and small, that just could not be "worked out" in practice.

because I have done so elsewhere, I will reign in my impulse to quibble with Ten and to advance my preferred view. See, e.g., Morse, *Justice, Mercy and Crazyness* (Book Review), 36 STAN. L. REV. 1485, 1493-509 (1984) (reviewing N. MORRIS, *supra* note 6). The thrust of my objection to Ten, Hart, Morris, and other mixed theorists is that I simply do not find useful the distinction between the general justifying aim and the alleged distributive aim of criminal punishment. Moreover, mixed theories will, I believe, produce punishments for people convicted of the same offense that are unjustifiably unequal.

27. G. ELIOT, *MIDDLEMARCH* 25 (Modern Library ed. 1984).

The appropriate response to the indeterminacy of these theories is to understand that general theories must always be in "reflective equilibrium" with their multifarious implications and with our conceptions of the facts about ourselves and our society. Thus, if one is interested in public policy, one finally wishes for specific cases and doctrines with which to test and refine the general theories and vice versa. After creating the grand house of theory, one also wants furniture one can live with.

Ten cannot be faulted for scant "practical" details. His self-conscious task in this relatively short book is primarily the hedgehog's — analyzing grand theories. Moreover, he does include many details, although almost none at the specific level Katz addresses (and none in common). Ten's limited approach is a bit less frustrating than Katz's because one expects less from a primer, but it is frustrating nevertheless. Again, I am not violating my injunction to take a book on its own terms. I am simply indicating that even a fine hedgehog's account of the criminal law — and Ten is very good, indeed — must inevitably be as limited as the fox's.

III

So, how should one think and write about criminal law? The ideal thinker and writer is both a hedgehog and a fox, combining the best of general justifying theories with the best of microtheories about specific doctrines, practices, and institutions to produce a consistent, coherent and just whole. Needless to say, few have the talent, ambition or courage to complete such a daunting project successfully.²⁸ If either Katz or Ten had considered the questions the other explicitly and implicitly raises, both would have written very different, much longer, and by no means more surely successful books.

If one desires a sophisticated, interesting theoretical view of doctrines, one can do no better than to read Katz; and if one desires a sophisticated, interesting brief review of general theory that also makes original arguments, one can do no better than to read Ten. But if one desires an overview of substantive criminal law, one should read them both. The order in which they should be read, of course, depends on whether the reader is a hedgehog or a fox.

28. George Fletcher's *RETHINKING CRIMINAL LAW* (1978) is the most noteworthy recent attempt, and a useful point of comparison with both Katz and Ten.