

Book Reviews

Rethinking Criminal Law Excuses

Rethinking Criminal Law. By George Fletcher. Boston: Little, Brown & Co., 1978. Pp. xxviii, 898. \$18.50.

Reviewed by Herbert Fingarette†

I

Professor Fletcher's book, *Rethinking Criminal Law*,¹ is a legal cornucopia and a uniquely important work in recent criminal law jurisprudence. The detail is amazingly rich and subtle, and there are numerous insightful and provocative minipatterns of theory. Beyond this the intricately woven fabric embodies one grand overall pattern that is of major importance for anyone concerned with the foundations of criminal law. In fact, the book is so large and so replete with important material that any single topic selected for development can represent only a fraction of what the book offers.

My remarks here focus on a central pattern of ideas around which the work is organized, the distinction between what Fletcher calls "wrongdoing" and "attribution,"² a distinction that he says "is of critical importance to the criminal law."³ My particular concern will be with his conception of "attribution" as essential for criminal liability—a notion that significantly overlaps with more familiar terms such as "mens rea," "responsibility," "culpability," and "blameworthiness," and thus also is related to the notions of "voluntariness" and "excuse."

Fletcher analyzes criminal liability in terms of two basic categories: the actor's violation of the law, and the correlative attribution of

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1. G. FLETCHER, *RETHINKING CRIMINAL LAW* (1978) [hereinafter cited by page number only].

2. P. 466. Fletcher does not discuss the topics systematically at any one place in the book; instead, he examines them in a variety of different contexts throughout the last half of the book. One modest but still useful service I can perform is to draw some of these ideas together to provide a comprehensive view of his theory of attribution and to examine its parts as they relate to each other.

3. *Id.*

Justifications and Excuses

punishability to the actor; or, in Fletcher's terms of art, "the wrongful act" (or "wrongdoing") and "attribution."⁴ These notions are used to construct a basic formula of criminal liability⁵ that may be expressed as follows: A person is criminally liable if that person commits a wrongful act, and if the wrong is attributable to the person.⁶ Using Fletcher's definitions, the formula can also be expressed: A person is criminally liable if he violates a legal norm,⁷ and if he deserves punishment for that act.⁸

The distinction between the wrongful act and attribution of culpability for the act reflects simple intuitions about culpability. Generally speaking, an accusation of wrongdoing allows for two kinds of defensive strategies that, roughly, may be expressed as follows:

- (1) I didn't do anything wrong.
- (2) Yes, I did do it, but I don't deserve to be punished because I have the following excuse. . . .

Our traditional common-law approach, however, collapses the second defensive strategy into the first.⁹ This conflation is accomplished by treating an excuse as a denial of an essential element of the criminal act—commonly some element of the mens rea such as knowledge, intent, or will. Thus excuses are conceived in our law as raising a subordinate issue pertinent to one single main issue: Was the criminal act committed?

Fletcher advocates that the law keep distinct the two defensive strategies. Excuses, he says, should be conceived as raising a second, coordinate issue, not a subordinate one. To understand how he proposes to do this, we must understand his technical term, "wrongful act." Fletcher defines a "wrongful act" as conduct that violates a prohibitory norm of law.¹⁰ The "wrongful act," as so defined, should not be confused with the actus reus. Fletcher's "wrongful act" is the

4. P. 455.

5. Though Fletcher speaks often of "patterns of liability" in his extensive discussion of wrongful acts, pp. 3-390, it seems evident that ultimately he means "liability" to encompass not only the act but also attribution of culpability for the act. See, e.g., pp. 468-69 (discussion of strict liability); pp. 577-79 (attribution as component of liability).

6. P. 455.

7. Pp. 456-57. Fletcher views the prohibitory norm as modified in content by all the defenses creating privileged exceptions, which amount to "justifications." P. 459; cf. pp. 810-12 (relationships of justifications and excuses and prohibitory norms). I tacitly incorporate this elaboration into my formulation in the text.

8. P. 469.

9. Pp. 577-78.

10. P. 458; see note 7 *supra*.

entire act prohibited by law; it includes the intent, knowledge, deliberation or other mental elements included explicitly or tacitly in the legal definition of the crime.¹¹ For example, causing a person's death is not per se wrongful; but murder—intentional killing with malice—is a species of wrongful act.

On the other hand we must not suppose that by "wrongful act" Fletcher simply means the *actus reus* plus the *mens rea*. We can see this, for example, in the case of the defendant who intentionally kills a person and then successfully offers a defense based on insanity. That defense is traditionally viewed as showing that, by reason of insanity, the defendant lacked *mens rea*,¹² though controversy arises when we attempt to specify the precise respect in which the *mens rea* is absent. Without *mens rea*, there was no criminal act. In Fletcher's usage, however, a defendant who violates the prohibition against unlawful intentional killing is viewed as having committed the wrongful act. Insanity does not negate the wrongful act. Insanity, however, is a paradigmatic excuse,¹³ and thus, in Fletcher's terms, blocks attribution of culpability for having done that wrongful act.¹⁴

Given the general sense and *prima facie* plausibility of Fletcher's distinction, the next question is whether a specific and more decisive argument can be offered for it. Fletcher proposes as one of the "important theoretical pillars for the distinction between wrongdoing and attribution"¹⁵ the idea that there are two very different types of norms in the criminal law.¹⁶ The first type of norm is a prohibition (or a requirement) as to conduct, addressed to individuals, who are expected to guide their behavior by it.¹⁷ The second type of norm is addressed specifically to the judicial officer and delineates for that officer the conditions under which it is legally proper to excuse someone who has behaved contrary to the primary norm.¹⁸ So, for example, as an ordinary individual I can guide my behavior by the primary norm, "Do

11. P. 554.

12. See H. FINGARETTE, *THE MEANING OF CRIMINAL INSANITY* 123-72 (1972) (investigation of traditional legal doctrine concerning mental disease and circumstances that exculpate from criminal responsibility); H. FINGARETTE & A. HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* 15-73 (1979) (current legal doctrine on mental disability as defense).

13. Pp. 798-99.

14. Pp. 496-97, 836-39. See also p. 830 (duress as "paradigmatic example of an excuse").

15. P. 456.

16. *Id.*

17. Pp. 456-57. This type of norm has been called a "primary" norm in H.L.A. HART, *THE CONCEPT OF LAW* 78-79 (1961).

18. See p. 458 (second type of norms "spell[s] out the criteria for holding persons accountable for their deeds").

Justifications and Excuses

not kill.” But I cannot treat an excusing norm as still another primary norm or as an amendment of a primary norm. For example, I cannot tell myself it is all right for me to kill in this particular case because I am ignorant that what I am doing is killing someone, or because I am insane and so do not know what I am doing. Such suppositions are incoherent. The distinction between these two kinds of norms is a necessary conceptual or logical distinction, not one based on mere convention or policy that we could change if we so chose. Thus, as Fletcher says, a legal excuse for killing is not a license for insane or mistaken persons to kill.¹⁹ Not only is it incoherent to view an excusing norm as if it were a primary norm to guide conduct, but the excusing norms *presume* a violation of the primary norms.²⁰ The legal roles of the two kinds of norms are fundamentally different.²¹

Fletcher’s theoretical argument based on the two very different types of norms is forceful and general. I want to add some more specific arguments of my own. My argument can be summarized by stating that when we treat an excuse as a denial of some element of the act, and thus as a denial of a violation of a primary norm, the outcome in practice is confusion, arbitrariness, and controversy. This has been especially notable in the case of excuses centering on some form of disability of mind, such as insanity, diminished mental capacity, involuntary and voluntary intoxication, unconsciousness, automatism, or addictive behavior as the symptom of an unpunishable disease status.

An example may serve to put flesh on my rhetorical claim. Insane criminal offenders often do know the nature of their actions, and do

19. P. 457.

20. Fletcher also says that an excuse is “a judgment in the particular case that an individual cannot be fairly held accountable for violating the norm [Acceptance of an excuse does] not generate precedents that other people may rely on in the future.” P. 811. Here Fletcher unnecessarily confuses the issues. Of course the acceptance of an excuse, as he says, is a “judgment in the particular case”—as are all trial judgments. But surely such judgments *do* “generate precedents that other people may rely on in the future.” Excusing one person under certain conditions constitutes a precedent for the judicial officer to excuse others under relevantly similar circumstances. And there are general excusing norms, also addressed to the judicial officer, that guide these particular precedent-making decisions. I believe Fletcher’s claim that excuses are not precedents and pertain only to particular cases is a misguided attempt to extend the argument that the original actor subject to the primary norm cannot—as a matter of logic—apply the excusing norms or precedents in governing conduct, thereby in effect amending the primary norm. This, of course, is true and important.

21. Fletcher distinguishes excuse from justification on this basis. A justificatory norm is addressed to the individual, is intended to guide behavior, and does amend the primary norm. I can coherently guide my behavior by the thought that if it is necessary in self-defense against unlawful attack, I may kill. So the prohibition against killing is amended, and I am licensed by law to kill under those circumstances. Justifications, then, are different in principle from excuses.

know that such acts are illegal and generally considered wrong; nevertheless, such offenders often do deliberately and intentionally commit the very act they know is criminal. It is at best a benevolent fiction that such offenders do not have the mental state—for example, the knowledge or intent—described in the definition of the offense. We can reach this verbal result by finagling with words and saying the insane do not “really” know what they are doing, or do not “appreciate” it is wrong, but no one knows what this language means—except that we want to excuse some people who in any plain English sense of the words *do* know what they are doing and know that it is a crime. Or, shifting to the issue of voluntariness, we can say the insane person’s conduct is not “really” voluntary, but often this is no more than verbal gimmickry designed to invoke the legal trigger word in spite of the fact that the person patently acted deliberately and even after long planning. *Something* is very wrong in the mind of those psychotic offenders who deserve to be excused from criminal condemnation and punishment. The real excuse, however, is that in forming and acting on their intent they are mad and irrational, and not that they do not of their own will intentionally commit what they know is a criminal offense.

Analogous doctrinal shenanigans are the rule in cases of people who are intoxicated or otherwise mentally disordered from drugs, and who commit offenses. Such persons can be legally excused partially and indirectly by finding absence of a specific intent required for mens rea, thus exposing them to conviction only for a lesser included “general intent” crime. Absence of specific intent is often “found” even though that finding is patently untrue. Juries see intuitively in many cases that the legal rationale fails to identify the real issue, which is whether and to what degree the deliberate intent to commit an act known to be criminal arose out of irrationality of mind. Until we face the excuse or irrationality as a distinct issue, rather than as a special case of absence of some mental element of the criminal act, and until we work out systematically the legal significance of such a distinct defense, we will be beset by the controversies familiar to us in this area of law.²²

II

So far, then, I applaud Fletcher’s dualistic emphasis as based on the theory of the two distinct kinds of norms. Fletcher presents, however, a second “theoretical pillar” as a foundation for his view that excuses

22. A doctrine that does embody the legal implications of this line of thought is presented and elaborated in H. FINGARETTE & A. HASSE, *supra* note 12, at 3-11, 199-261.

Justifications and Excuses

raise a fundamental and distinct question from that of the commission of the wrongful act. This second line of thought generalizes his conception to an extent and in directions that I cannot agree to follow.²³

Fletcher holds that punishment is a condemnatory sanction,²⁴ based on blameworthiness and culpability in the ordinary sense of these words.²⁵ He also holds that punishment must be grounded on a "moral assessment of the offender."²⁶ However, although desert of punishment is, as he says, "gauged" by the "kind of person" the actor is—the actor's character²⁷—the principle of legality imposes a fundamental constraint in criminal law. The only legally acceptable basis from which the actor's moral character, and thus the degree of deserved punishment, may be inferred is the wrongful act, the violation of law.²⁸ The illegal act is thus a necessary and distinctive ground for attribution of culpability.

The moral orientation pervades Fletcher's views; it is explicit, emphatic, fundamental. He argues for a theory of law built on moral, "normative" foundations,²⁹ a theory that overcomes the "positivist bias," that "transcend[s] legislative and judicial decisions," and that reveals law as "an institution of blame and punishment."³⁰ And he is persuaded that his argument dissolves the "positivist dream of a simple, well-defined set of rules for controlling judges and juries in their deliberations," and "liberates judges and juries to engage in moral assessment of the offender."³¹

There are deep ambiguities, however, in Fletcher's argument for a moralist or normative doctrine of attribution. One fatal ambiguity lies

23. Only on rare and brief occasions, *see, e.g.*, pp. 577-78, does Fletcher acknowledge that his general theory of attribution and liability requires us to adopt a legal fiction, since typically attribution of culpability to the wrongdoer is to be presumed when proof of wrongdoing succeeds. Having been forced to over-generalize and to claim that attribution is correlative to wrongdoing and must always be established in order to generate liability, he must assume a legal fiction that changes the practical import of his claim, for the raising of the issue of attribution is in practice exceptional and strictly limited to excuses. I prefer to identify the issue in question with excuses as distinctively exceptional, raising an issue that is not normally internal to the proof of liability—not even in principle.

24. *See, e.g.*, p. 467 ("criminal law as an institution of blame and punishment"); p. 469 (criminal sanctions as condemnation of wrongful acts).

25. *See, e.g.*, p. 401 ("to say that an actor is 'culpable' or 'blameworthy' for his deed is unquestionably to blame him and disapprove of the act").

26. P. 496; *cf.* pp. 461-62, 800 ("punishment ought to be inflicted according to the offender's desert," gauged by assessment of his character).

27. P. 800.

28. *Id.*; *cf.* p. 458 (determining degree of wrongdoing involved in a given act is "subtle problem of moral judgment").

29. Pp. 400-01.

30. P. 467.

31. P. 496.

in his conception of the offending act. Fletcher defines his key term, "wrongful act," as the violation of a primary legal norm. This is, he says, a "purely formal concept" having no moral content in and of itself.³² On the other hand, he often uses the word "wrongdoing" interchangeably with "wrongful act," a practice he justifies by saying that "in most contexts the ambiguity need not concern us."³³ Yet, as he himself emphasizes, he means to use the concept of "wrongdoing" "as a moral category,"³⁴ a "substantive" concept reflecting the "intrinsic quality of [the] deed"³⁵ as "worthy of condemnation."³⁶ But surely this ambiguity is fatal to his theory that punishment must be morally deserved. After all, he has told us that the only legally acceptable ground for attributing such moral desert is the actor's violation of a primary norm. This is the wrongful act. But are we to assume that all violations of law, all "wrongful acts," are also and necessarily "wrongdoings," that is, moral wrongs deserving punishment?

In his more detailed analyses Fletcher acknowledges that we cannot assume all wrongful acts are moral wrongs; some legal norms—and thus presumably some wrongful acts—are "morally neutral."³⁷ He is, of course, reluctant to acknowledge a break in the logical chain between "wrongful act" and "wrongdoing," and so he alludes to such cases as "muted" or "nominal" wrongdoing.³⁸ But even these very weak claims can count for nothing when he gives examples to show that a person "might be accountable for a wrongful act . . . without being the slightest bit immoral."³⁹ Indeed, at one point he says that "references to guilt, culpability and blameworthiness in assessing criminal liability . . . do not raise questions of the actor's general moral worth or even of his moral wickedness in a particular situation."⁴⁰

32. P. 458. While Fletcher does speak of "norms of the legal system" and of "prohibitory norms" here, it is evident that he means, specifically, what he calls the "primary" norms that prohibit or require that "particular acts be performed." Pp. 456-57; cf. p. 491 ("question of wrongdoing is resolved under the set of primary legal norms . . . as supplemented by norms of justification").

33. Pp. 458-59.

34. P. 458.

35. *Id.*

36. P. 469. Here Fletcher uses the word "wrongdoing" interchangeably with "wrongful act," the concept intended in this context being the one embodying moral connotation.

37. P. 468; see p. 578 ("[T]here are many instances where the wrongful act consists merely in the violation of a legislated norm. . . . Though this conduct is technically wrongful, it could be difficult to regard the attribution of this wrongful conduct as culpable in a moral sense.")

38. P. 458.

39. P. 491; cf. p. 468 (moral neutrality of "many possession offenses"); p. 578 (moral culpability difficult to attribute in possession offenses).

40. P. 491. But Fletcher says that "culpability" and "blameworthiness" do carry their

Justifications and Excuses

Such acknowledgments of morally neutral kinds of criminal liability are incompatible with his main theses. If the actor has done no substantive moral wrong, has done what is morally neutral or only “nominally” wrong, raising no question of moral worth, and if therefore no moral wrong can be legally attributed to the actor, then in Fletcher’s view that actor is not fairly held accountable—or blamable.⁴¹ And if not blamable, then, in Fletcher’s view, the actor is not fairly punishable. So Fletcher’s general theory is undermined by his own candid analysis of specific cases.⁴²

This fatal ambiguity between “wrongful act” and “wrongdoing” has its counterpart in his analysis of attribution. Most of the substance of his analysis of the significance of attribution is to be found in his discussion of excuses, since Fletcher equates attribution and nonexcusability.⁴³ In discussing why excuses excuse, he asks initially, “Why should anyone ever be excused for unjustifiably violating the law?”⁴⁴ He offers three different answers, or—I am not sure—perhaps three versions, or aspects, of one answer. The first is that an excuse is a special condition of action that arouses in us compassion.⁴⁵ The second

“ordinary English” moral sense in his discussion, whereas “attribution” and “excusing” are “technical” terms in his usage and do not necessarily have any moral force. Pp. 401, 578. The confusion—for that is what I think it is—is related to the fact that, as Fletcher acknowledges, he uses all these terms “as though they were coextensive.” *Id.*

41. See p. 495:

[T]he claim that attribution or culpability is essentially a normative question . . . holds that the process of attribution requires a judgment about whether the accused can be fairly held accountable for his wrongful act. The question of fair accountability is expressed in assaying whether the accused can be fairly blamed for his wrongdoing.

Cf. p. 491 (“there is a relationship between moral assessment and the analysis of attribution”). Fletcher refers the reader to some sections of his discussion of mistake; I have been unable, however, to discover the answer as to the nature of that relationship in the passages cited.

42. Fletcher does at times distinguish “legal interests” from the specific legal prohibitions or requirements that embody those interests. This seems to promise a linkage between the formal wrong of violating a law and a substantive wrong entailed by this act. Pp. 472-73. Fletcher says that evaluating the gravity of wrongdoing calls for a ranking of legal interests (and estimates of proximity and remoteness of the act from the interest). But what is a legal interest? Is it whatever the legislator or judge announced it to be? If so, and if wrongdoing is merely the violation of a legal interest, we have again eliminated the moral basis so necessary to Fletcher’s theory of criminal liability and punishment. The alternative interpretation is that there is—as Fletcher said—some evaluative, moral aspect to wrongdoing, either hidden within the phrase “legal interest,” or over and above the violation of a legal interest. But now we have come full circle. Why does every law represent a morally grounded legal interest, every violation therefore being a moral wrong? This is left unargued, even denied by Fletcher’s remarks about “morally neutral” laws and morally innocent violations.

43. P. 578 (“[t]he notion of excusing is the precise reciprocal of attribution”).

44. P. 799.

45. See p. 808 (“Excuses are motivated by compassion for persons caught in a maelstrom of circumstance.”)

answer he gives is that excuses are grounded on the fact that the wrongful act reflects a "limited, temporal distortion of the actor's character."⁴⁶ Fletcher's third answer is that the generic and distinctive feature of an excuse is that the wrongful act is in some sense involuntary.⁴⁷

Now the "sentiment" or "feeling" of compassion seems to me to be a nonstarter as the basis for legally excusing offenders. It would include too much, for we can feel genuine compassion for offenders who have no legal excuse, and it would include too little, since we may feel only horror and repugnance before some offenders who have perfectly valid legal excuses. Moreover, the feeling of compassion arises too erratically for the spirit of legality. On the other hand, if Fletcher means to imply that compassion is aroused by the recognition that the accused is blameless for one of the other two reasons he mentions, then the sentiment of compassion is legally irrelevant, for, in Fletcher's theory, it is unacceptable for the law to punish the blameless.⁴⁸

The second of Fletcher's proposals—that an excuse is based upon a temporary, limited distortion of character⁴⁹—also leads to grave difficulties. Suppose, for example, an insane offender has been insane throughout adult life. In such a case, the insanity does not reflect a temporary, localized distortion of character. So by Fletcher's criterion there ought to be no excuse. But this is inconsistent with the fact, acknowledged by Fletcher, that insanity is a paradigmatic excuse.⁵⁰ Or, alternatively, consider a person whose true and abiding character is decent, prudent, and law-abiding. Because of a temporary, localized dis-

46. P. 802.

47. Pp. 802-06.

48. P. 846. Fletcher's use of "compassion" is puzzling in other respects. He says that those who "feel compassion" have "no right to begin with" to punish the accused. P. 808. Compassion, says Fletcher, is necessarily aroused when "we recognize our essential equality with the accused and identify with his situation." *Id.* But whatever the truth of this psychological claim, I fail to see why law loses the right to punish someone for an act that arouses such "compassion." Fletcher also says that compassion is limited in scope to the particular circumstances and incident, not the person and background in their entirety. Pp. 808-09. This also seems to be an arbitrary limitation of the meaning of "compassion." I believe Fletcher here has confused the concept of a psychological state or "sentiment" with a concept of a very different kind which he offers as the true meaning of "compassion": the judgment that under the particular circumstances anyone would act as the accused did. This judgment does indeed have a bearing on legal excuses.

49. P. 802. Fletcher's thesis is similar to J.L. Mackie's doctrine of excuse as that which negates the supposition that the act fulfilled desires "which fairly represent the agent as a coherent person," the "relatively permanent central personality." Mackie, *The Grounds of Responsibility*, in *LAW, MORALITY, AND SOCIETY* 175, 187 (P. Hacker & J. Raz eds. 1977).

50. Pp. 798-99. It would not help to say that the chronically insane person's character, while not limited temporally and not a distortion of his actual character, is nevertheless a distorted character, *i.e.*, abnormal. The abnormality is, of course, the insanity, and the question is *why* should insanity excuse? To answer, "Because the person's character is abnormal," is obviously to employ circular reasoning.

Justifications and Excuses

tortion of character produced by a momentary temptation or some other uncharacteristic motive, this person violates the law. According to Fletcher's criterion, the fact that this person normally and truly has a decent law-abiding character should serve as a legal excuse. But, of course, in our law it does not.

Moreover, one must note that the prospect of basing judgments of criminal liability on judgments as to the defendant's "true character" poses for the law unnervingly complex problems—procedural, psychological, and even metaphysical. Fletcher himself at last reluctantly indicates a readiness to abandon this view in favor of his third answer as to why excuses excuse.⁵¹ At one point Fletcher bridges the gap between the "distortion of character" theory and his third view by speaking of such "distortion of character" as a distortion of "the actor's capacity for choice."⁵²

Here, then, we arrive at what I view as the bottom line in Fletcher's analysis.⁵³ The third proposal, expressed in various ways, at various places through the book, is that the act is excusable if "the actor's freedom of choice is constricted,"⁵⁴ if the conduct was unavoidable,⁵⁵ involuntary,⁵⁶ or, as he finally puts it, "morally involuntary."⁵⁷ I do not mean to reject outright that involuntariness should excuse; there is a kernel of truth in it. But I cannot accept it as a clear and self-evident axiom, and insofar as the thesis does contain truth, we do not need moral arguments to support it.

The language of involuntariness is fraught with ambiguities, vagueness, and contextual shifts of meaning. In common speech the involuntariness idiom may indicate mere inconvenience or embarrass-

51. Pp. 805-06.

52. P. 802.

53. True, Fletcher implies that even this rationale will not serve in the case of mistake as an excuse. P. 807. For it seems "strained" to Fletcher (and to me) to speak of "mistakes as raising problems in the voluntariness of conduct." *Id.* Fletcher says that, for this reason, he has "filtered off" the problem of mistake for separate consideration. But my reading of his discussion of mistake fails to reveal to me any further explanation of why such excuses excuse. Fletcher says that excusing a person for a mistake of law would not amount to changing the primary norm; on the contrary, the fact remains that the accused has broken the law, but "recognizing an excuse means merely that in the particular case, the actor cannot be fairly held accountable for his wrongdoing." P. 734. Now this way of putting the matter is of course consistent with his overall theory of excuses—in fact it is merely a restatement of it in part: excuses negate attribution. But it offers no rationale as to why a mistake of law should excuse, why it should negate attribution. So, with regard to the question, Why excuse?, I find in the discussions of mistake not a fourth answer, but a lacuna.

54. P. 802.

55. *See, e.g.*, pp. 496, 805-06.

56. Pp. 802-03.

57. P. 803.

ment—"I couldn't help being late; Joe is such a talker." This is certainly not a legal excuse. And in everyday affairs, an excuse in one context is not so in another. My delay due to Joe's talkativeness will excuse me if time is not important, but if important matters hang on my being prompt, the excuse will not work. Similarly, lawyers know that involuntariness means very different things in different legal contexts; it is not a purely psychologically descriptive concept but includes a crucial policy component as well.⁵⁸

In the defenses of duress and necessity the person does in some obvious sense have a choice. Are these acts involuntary? They often are said to be so. In the case of insanity, the person does often, in some obvious sense, have a choice. But insanity excuses. Then are all insane acts legally involuntary or, to use another term of Fletcher's, "unavoidable"?⁵⁹ In what sense? The notions of involuntariness and unavoidability get excessively stretched if applied to these paradigmatic excuses because they are conditions that characteristically do include some obvious and important element of choice.

Fletcher acknowledges this; therefore, he says, the act of the person under duress or of the insane person is not "strictly involuntary."⁶⁰ It constitutes, he says, "moral involuntariness"⁶¹ and so "cannot fairly be punished."⁶² When is an act morally involuntary? When, Fletcher says, "the actor's freedom of choice is constricted."⁶³ When is freedom of choice sufficiently constricted to count as an excuse? Fletcher replies, when the act is morally involuntary.⁶⁴ How do we break out of the circle? "Determining th[e] threshold," says Fletcher, "is patently a matter of moral judgment."⁶⁵ Fletcher's analysis appeared to offer in-

58. Fletcher acknowledges this. See p. 494 (voluntariness a "normative standard").

59. P. 806.

60. P. 802.

61. P. 803.

62. P. 804.

63. P. 802.

64. Fletcher does try at this point to explain matters by means of the metaphor of "pressure." To determine whether the conduct was morally involuntary, he says, we may measure the benefit to the person as compared to the harm of the act, and then we may make a "moral judgment" about what "pressures" we expect a person of reasonable firmness to resist. Pp. 803-04. The metaphor of "pressures"—whether "external" or "internal"—leaves matters unanalyzed. It is at best an obscure and questionable metaphor that begs the question as to the specific sense of "involuntariness" at issue. Certainly Fletcher offers no elucidation of what constitutes "pressure" as distinct from ordinary motive for action, or how to measure "pressure," or the sense this notion is to take in the "internal" context of mental disabilities, where the metaphor has generated more confusion than illumination.

65. P. 804. This quote applies specifically to the pressure metaphor, see note 64 *supra*, which forms an intermediate step in the circular reasoning from moral involuntariness to "constriction" of freedom of choice.

Justifications and Excuses

voluntariness as the notion in terms of which we could explain the moral decision to excuse. Now it turns out that it is the moral decision that defines the act as appropriately involuntary.

In the end, then, Fletcher's analysis, like so many others, turns our attention to the region of will and choice. But that is as far as his legal analysis of the issue goes. From there, we are left to make a moral judgment of an unspecified kind. Must we go this route in order to make sense of excuses?

III

I want to outline an alternative theory of excuses that points toward a conclusion similar to Fletcher's thesis.⁶⁶ My theory, however, derives the force of an excuse from the very idea of governing by law, without introducing extra-legal values or norms, without making psychological, sociological, or empirical assumptions of any kind.⁶⁷

My account of the rationale for excusing from punishment rests, not surprisingly, on a prior argument as to the rationale for criminal punishment in the first place.⁶⁸ Law is addressed to the individual as a self-governing being. If individuals do not effectively govern their own behavior in regard to law, then addressing the law to them is pointless. The paradox is that if an individual is self-governing in regard to what the law enjoins, then by hypothesis he can elect to ignore or defy the law. This is paradoxical because the law as an institution of government is conceived as the exercise of genuine power over people. The law, as we say, *requires* us to behave in certain ways. But if the very idea of law implies that those to whom the law is addressed can ignore or even defy the law, what does it mean to say that they are required, rather than merely urged, to comply?

66. See pp. 1003-04 *supra*.

67. A brief word on terminology: I will speak of "transgression" of law rather than "wrongful act." It is the identical concept as Fletcher's "wrongful act," but it avoids the misleading moralistic overtones. As for the word "attribution," it seems to me syntactically awkward and ambiguous. What I have in mind is the inevitable ambiguity between attributing a certain act to a particular actor and attributing culpability to the actor for having done the act. This ambiguity appears at the very outset of Fletcher's introduction of the term, in spite of his awareness of the issue. P. 455. Does "attribution" include the element of "fairness"? Sometimes Fletcher speaks of "fairly attributing," and at other times it seems the element of fairness is part of the meaning of "attributability." There is syntactical confusion as well: Shall we "attribute the wrongdoing to the actor," or "attribute culpability (or accountability) to the actor," or merely speak of "attribution"? As I have tried to use the term, I have found constant need to qualify and explain. I prefer, for criminal law purposes, to speak of "liability," meaning liability to criminal punishment according to law—with no moral content intended.

68. For a more detailed presentation of this theory, see Fingarette, *Punishment and Suffering*, 50 PROCEEDINGS & ADDRESSES, AM. PHILOSOPHICAL ASS'N 499 (1977).

The answer takes on a new significance when examined from the present perspective. If someone acts noncompliantly, the law consequently imposes a constraint on that person's will, a constraint on his capacity for self-government. In more familiar terms, the law punishes the transgressor. Although this response is familiar, it raises a new puzzle: What is the point of this subsequent constraint, since the offending act has already been committed? I here exclude from consideration answers based on empirical hypotheses about the possible deterrent or rehabilitative effect of punishment or of the threat of punishment; I also exclude moralistic justifications for punishing. I do this arbitrarily for the sake of brevity, because I want to press the question whether there is some logical point about the idea of law *per se* that will stand independently of controversial empirical and moral arguments.

To see the logical point, assume for the moment the contrary. We know that the law antecedently leaves me the power to comply or not; imagine, then, that I have done what the statute prohibited. And now for the sake of argument we are going to suppose it understood that there is no policy of retributive punishment. In this event, neither before nor after the act does legal policy effectively constrain me in respect to the act in question. The law then becomes functionally a mere appeal, not an exercise of power to compel obedience. Unless, therefore, there is understood to be a policy of retributive punishment—that is, a policy of imposing a constraint simply by reason of past transgression—the concept of law as a *requirement* becomes unintelligible, for there is no constraint intended antecedently or subsequently.

The burden imposed by the logical necessity for a legal policy of retributive punishment is presumably outweighed by the distinctive advantages of the institution of law in regulating social behavior.⁶⁹ These advantages are rooted in the fact that under government by law, those to whom the law is addressed are required to bring their own judgment and intelligence to bear and to govern their own conduct according to the law as it applies under the conditions of the moment. They are allowed to shape their own conduct as they wish, conventionally or idiosyncratically, according to individual tastes and values, adapting to circumstance—all of this *so long as, whatever they choose to do, it is in compliance with law.*

The balance of benefit and burden makes no difference to my argu-

69. See *id.* at 514-15 (where this presumption, accepted for the sake of argument in the text above, is argued more fully but also is questioned).

ment. All I must establish is that the decision to use law to govern presupposes that the law is addressed to self-governing agents on whom the law imposes requirements, and that the legal policy of retributive punishment is logically included within this very concept of law.

Why should a person ever be legally excused from punishment? To answer this, we need only to suppose that the essential presupposition of law does not hold true—to suppose, in short, that under certain circumstances I am not self-governing in respect to what the law would require of me. If I am not self-governing in regard to what the law in question enjoins, it is incoherent to treat me as one to whom that law is addressed, to call on me to govern my conduct in accord with that law. Now if there is no sense in treating me as one who is addressed by the law, and if the policy of retributive punishment is legally and logically grounded in the concept of law as addressed to self-governing agents, then a fortiori in regard to me the legal policy of retributive punishment is pointless.

When is a person not self-governing in regard to a law? The essence of the concept of a self-governing person in regard to a law is that he has, or effectively can achieve, a practical grasp of the meaning of that law as it bears on the particular circumstances, and that he effectively can bring this understanding to bear in shaping his legally relevant conduct. Such self-government in no sense implies that the person actually will comply with the law or even will care about what the law requires. One may be a self-governing agent in regard to a law, and yet be either disrespectful of it or negligent. When, however, for some reason he cannot effectively and rationally determine his own behavior in regard to the law, he is not self-governing in regard to it.

The sorts of circumstances that amount to absence of self-government in regard to law are, of course, the familiar types of excusing conditions. One major category is mental disability. This may consist of a lack of mental ability to understand even the minimal sense of the law. Obviously, if I lack the mental ability to understand the law in some respect, I lack the ability to govern my own conduct in regard to that law in that respect. Or mental disability may imply an inability to grasp how certain kinds of circumstances have a bearing on what the law requires. The schizophrenic whose emotional life is grossly impoverished, or the paranoid who is living by a delusional world view, may understand the law to a certain significant extent, but he may in certain contexts be unable to weigh the significance of what he is doing in the light of the law. For example, what a rational person would see as excessive force is not assessed as such by one who grossly

lacks emotional rapport with people or by one who thinks an antagonist is literally an agent of the Devil.

In these kinds of cases, it is pointless to oblige these persons to govern their conduct on such occasions by reference to the law in question. It is logically pointless, therefore, to enforce the legal policy of retributive punishment. Hence these are legal excuses; they require in this regard no moral judgments, nor even any empirical, psycho-sociological hypotheses.⁷⁰

My conclusions may now be stated: Criminal liability does indeed center solely on the doing of the act that is specifically forbidden by requirement of law. So far, then, I follow our common law tradition of legal analysis. Nevertheless, I agree with Fletcher that a radically different sort of issue, a profoundly important one, is raised when a legal excuse is offered, but I do not think the issue lies *within* the theory of liability. I would argue, *contra* Fletcher, that a legal excuse raises in question a foundational presupposition concerning how the law applies and to whom. I maintain that a legal excuse establishes that one of the presuppositions that give sense to the enterprise of governing by law has in some respect failed to hold true: specifically, the individual in question was not self-governing with respect to the legally relevant conduct. This is an issue that arises in various and complex forms; I do not pretend to settle it here, but to raise it. It warrants extensive study, which it has not had in common law thinking. Instead, a series of conceptual makeshifts has been used to treat legal excuses merely as denials of elements of the offense. This appealingly simple-looking approach has generated much of the confusion that is so characteristic in the common law doctrines of excuses. Fletcher's proposed cure—in the spirit of other theories of punishability and excusability—opens wide a door through which ever shifting, ever controversial moral and political doctrines and psychological and sociological theories, are brought into the province of legal doctrine to serve as the internal framework of legal analysis. My own approach presents the basic issues as internal to the concept of law.

70. A systematic attempt to develop the significance of mental disability excuses is presented in H. FINGARETTE & A. HASSE, *supra* note 12.