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THINKING CRIMINAL LAW*

*Meir Dan-Cohen***

It's a particularly great pleasure for me to open this occasion marking a new book by George Fletcher. I've known George for many years. Our relationship goes as far back as 1972, though at that time it had gotten off to a rather bad start. George, a dashing, young, and already famous American scholar, came to visit the Hebrew University in Jerusalem where I was a student. Rumor had it then, and legend has it now, that George insisted on lecturing in Hebrew, not because he knew the language but as a way of learning it! For some reason, probably not a very good one, I failed to take his course, a fact that George has rightly held against me ever since. My relationship with George as well as my professional life have become an ongoing struggle to redeem and rectify this original sin. On both fronts, the personal and the professional, I felt the need to demonstrate over and over again that even though I haven't taken George's course, I am his student nonetheless. It would indeed be difficult to overstate how much I have learnt from him, but that does not distinguish me from anybody else in the field. A similar debt is owed to him by anyone who's written anything in criminal law in the last quarter century or so, in the Anglo-American world, and as the composition of this conference demonstrates, far beyond. By rethinking criminal law,¹ George has opened up new avenues of thought, allowing the rest of us to once again simply think about it.

In doing so, that is in thinking about criminal law, I've been particularly entranced by one of George's main themes. George has done more than anyone else to acquaint Anglo-American criminal jurisprudence with a Kantian perspective, forcefully introducing it as an antidote to the utilitarianism that had all but dominated the scene when George came on it. But eager that I was to demonstrate my credentials as a true student and follower of George, I seem to have overshot the target. As some of you may know, I went as far as contemplating in public the replacement of the utilitarian *harm principle* by a Kant-

* Remarks made at the opening dinner of the conference on George Fletcher, *The Grammar of Criminal Law: American, European, International*.

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¹ See GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* (1978).

inspired *dignity principle*,² as the organizing idea in terms of which criminal liability is to be understood and assessed. In pursuing this line of thought I admittedly entertained a secret hope to be rewarded at long last with a pat on the back, if not a high grade. It is therefore with some disappointment and dismay that I found out that in his new book George expresses serious misgivings about this entire trend.³ What I want to say this evening is not meant to be in the spirit of debate but is rather an attempt at cooptation. I'll mention some features of the approach I've adumbrated that might perhaps encourage George to recognize it as his legitimate progeny and give it his blessing after all.

You'll be relieved to hear, however, that I will not try to present this evening anything approaching a systematic argument for the shift of focus I propose. Doing so would take me over the main course and well into the time of dessert. I can only state the gist of the proposal. It is to view the agenda of criminal law in terms of a Kantian morality focused on the core value of human dignity. On this view, the main and distinctive mission of criminal law is to uphold and vindicate the equal moral worth of human beings.

A shift from fixing on harm to fixing on dignity as defining the core concern of criminal law raises many questions and requires much elaboration;⁴ here I wish to highlight one implication of this shift: reversing a trend that has characterized the evolution of criminal law under the guidance of the harm principle. The trend has been to demoralize criminal law (the pun is intended), both in regard to the idea of crime and to the idea of punishment.⁵ Playing down the distinctively

² MEIR DAN-COHEN, *Defending Dignity*, in HARMFUL THOUGHTS: ESSAYS ON LAW, SELF, AND MORALITY 150 (2002).

³ GEORGE FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, EUROPEAN, INTERNATIONAL*, (forthcoming 2007) (manuscript at 295-308, on file with the Cardozo Law Review) [hereinafter GRAMMAR MANUSCRIPT].

⁴ Even without getting into detail, it is worth pointing out that the proposed departure from the harm principle involved in focusing on dignity along Kantian lines is not as radical as may first appear. This is so since the paradigm of mistreating another person and of failing to accord her due respect is to ignore the person's interests thereby turning the other into a mere means to one's own ends. One example in which the two approaches diverge, however, would be helpful too. It involves rape by deception. Consider *State v. Minkowski*, 23 Cal. Rptr. 92 (Cal. Dist. Ct. App. 1962), where the defendant, a gynecologist, was accused of rape during the medical examinations of a number of his female patients, who on recurrent visits had not realized what was going on. It would be generally agreed that these women were indeed raped even before finding out what had happened, and so before any harm supposedly occurred. The standard rule-utilitarian response seems to me unsatisfactory here, since the crucial judgment I assume is that Minkowski's actions are reprehensible acts of rape quite apart from any likely future ramifications of condoning them.

⁵ It should be clear that by proposing to reverse this trend I do not espouse the position associated with Lord Devlin and don't side with him as against H.L.A. Hart in their famous exchange. LORD DEVLIN, *THE ENFORCEMENT OF MORALS* (1959); H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963). Put in Hart's terms, Devlin advocates enforcing by law a community's *conventional morality*, whatever its content. Hart contrasts this view with the utilitarians' insistence that law ought to promote social utility as a matter of *critical morality*, and so quite

moral nature of both crime and punishment effaces the distinction between criminal law and other areas along both dimensions. According to the dominant view, crime is just one source of harm among many, and is in this respect very much like fire and disease, putting criminal law in essentially the same line of business as that of fire departments and hospitals. Correspondingly, punishment is understood as the paradigmatic device used to combat crime, and thus as standing to crime in the same relationship as that in which, say, fire-hydrants stand to fire and scalpels or medications stand to disease.

The harm principle is designed to draw the boundaries of criminal liability, and as the preceding comments suggest, the resulting boundary is vague, elastic, and porous. To see clearly the problems that arise, we need first take a brief look at the boundary metaphor itself. Generally speaking, boundaries can be seen as performing a dual function. First, they delimit what they enclose and keep it from spreading and blending into the vicinity; they are thus designed to prevent what we may call *spillover*. Secondly, they hold back the surroundings and keep them from infiltrating what is enclosed, thereby securing the integrity of the enclosure against its *colonization* by the outside. Now, in defining the scope of criminal law through the harm principle, the dominant concern has traditionally been spillover: keeping criminal liability from expanding too far. But awareness of boundaries' dual role alerts us also to the opposite concern, that of safeguarding the integrity of criminal law and certain values that are embodied in it from being engulfed or displaced by external practices and attitudes. The harm principle is accordingly open to the double charge that by playing down the distinctness of criminal law and by effacing its boundary it encourages or at any rate does not sufficiently foreclose both spillover and colonization.

In raising these charges I don't mean to rush to a final verdict, but only to urge that they do merit careful consideration. As I just mentioned, one set of issues, those concerning spillover, is quite familiar. As others have remarked, given the vagueness of harm and its ubiquity, the harm principle offers at best a weak bulwark against the expansion of criminality.⁶ At the same time it may bear some of the responsibility for the by now familiar and widely studied phenomenon of *overcriminalization*:⁷ the tendency of criminal liability to spread into

apart from whether any particular community subscribes to this moral perspective. The harm principle is the product or expression of this latter approach. My proposal is on the same plane as the utilitarian, however substituting as a matter of critical morality, Kant's Categorical Imperative for Bentham's, or Mill's, or J. Austin's, utilitarian approach.

⁶ Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999).

⁷ The classical articles that sounded the alarm in this regard are by Professor Sanford Kadish. See SANFORD H. KADISH, *The Crisis of Overcriminalization*, in BLAME AND PUNISHMENT:

increasingly large areas of our lives to wherever a whiff of harm can be detected. Here the harm principle may have had a paradoxical effect: introduced as a limitation on the reach of criminal law, it has turned into an engine that propels its ever increasing expansion. To be sure, harm is seldom considered as a sufficient condition of criminality, only a necessary one. Another set of conditions concerns the perpetrator's guilt. These give rise to a plethora of requirements—substantive, procedural, and evidentiary—designed to secure that only the guilty be punished. But there is something unsettling in this conception of the relationship of the two sets of conditions. If criminal law's defining mission is the prevention of harm, then the requirement of culpability appears as an external imposition and as an impediment to the attainment of this goal. It is natural to treat it gingerly or begrudgingly.

Corresponding to these spillover effects of the harm principle, some colonization concerns arise as well. The flip side of overcriminalization is a worry about the effects that the wide expansion of criminal liability may have on our attitudes to the core offenses. The equation we create between a tax evasion or a building code violation on the one hand and rape or murder on the other can be read in both directions. By flattening the normative landscape, the message is conveyed that the same attitude is in principle appropriate to all of the state's injunctions, irrespective of whether they track morality's demands. If the difference between a parking violation and assault is just a matter of degree, measured in the metric of harmfulness, the decision whether to engage in either ought to follow the same logic.⁸ What logic is that? Here a potentially revealing, and worth pondering, locution is that of *paying the price*. When crime draws its meaning from its location in the felicific matrix and as part of the totalizing economy of pain and pleasure, it is not surprising that, like all else, it should succumb to a regime of "incentives" and carry a price tag. A morally neutralized criminal law is thus threatening to displace morality and supersede it with a positivistic spirit in which the state subjects all conduct to a unitary schedule of prices. Whether the price set is low or high, it presents individuals with a single consideration: is it worth paying?

Though the issues regarding the borders of criminality I have so far discussed are pending and troubling, they are age-old and familiar. But

ESSAYS IN THE CRIMINAL LAW 21 (1987); SANFORD H. KADISH, *The Use of Criminal Sanctions in Enforcing Economic Regulation*, in *BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW*, *supra*, at 40 [hereinafter KADISH, *Criminal Sanctions*]. However, Kadish does not diagnose the phenomenon in terms of the dominance of the harm principle. For an instructive recent update see JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007).

⁸ Cf. GLANVILLE WILLIAMS, *CRIMINAL LAW* 259 (2d ed. 1961); KADISH, *Criminal Sanctions*, *supra* note 7, at 56-58.

criminal law in this country and elsewhere faces these days a newer challenge as well. The struggle against terror confounds established categories and raises novel puzzles, about which George himself has had some illuminating things to say.⁹ Once again, the borders of criminal law are at issue. To see how the issue comes up, consider that a distinguished scholar has recently wondered in this context why “the legal regime regulating the use of lethal force in warfare—the so-called *jus in bello*—regulates the taking of life and liberty along lines that are quite different from—and far more permissive than—those that govern where the word “punishment” rather than “warfare” is thought to apply.”¹⁰ The sentiment expressed by this rhetorical question is doubtlessly laudable. The hope is to extend the restrictions imposed on the use of state power within the criminal law, thereby reining in the exercise of that power in war and so perhaps reduce carnage. There is nonetheless something baffling as well as risky in the underlying equation between war and crime. When dealing with the relationship of criminal law to other uses of state power, especially war, it may be more prudent to create a moat rather than build a bridge, since once again the bridge can carry two-way traffic. As the rhetoric of the *war on drugs*, and more broadly *the war on crime* ominously reminds us, the equation between war and crime can also be reversed. The vision of criminal law encouraged by the harm principle, as just one outpost among many in the state’s struggle against set-backs to social interests of all kinds, may encourages a militant attitude that is impatient with what it takes to be lawyers’ excessive fussiness in the face of harsh realities and the imperatives of effectively combating them.

The juxtaposition of the two common locutions I have quoted, “paying the price” and “the war on crime” is not adventitious. Markets and wars are two pervasive and powerful regimes, each valorizing a different set of values and attitudes: the relentless pursuit of material self-interest guided by a selfish maximizing rationality in the one case, and the collective use of unbridled brutality to advance social ends in the other. Both are antagonistic to the criminal law and threaten to colonize it from different directions. A conception of criminal law that accentuates its distinctive moral role, thus clearly marking and fortifying its boundary, would accordingly serve a double purpose: to prevent the undue expansion of criminal law and its incursions into neighboring territories, and to protect the criminal law itself from being colonized by the logic of a morally neutral harm-prevention agenda in the dimension of crime, and by the logic of military force in the

⁹ See, e.g., GEORGE FLETCHER, *ROMANTICS AT WAR* (2002).

¹⁰ See Stephen Schulhofer, “Punishment and the Nicer Ways to Take Life and Liberty,” delivered as the Kadish Lecture at Boalt Hall School of Law on March 21, 2006, p. 11. (On file with the author.)

dimension of punishment.¹¹

Even if these results are deemed desirable, however, they don't by themselves settle the particular terms in which criminal law's moral mission ought to be understood. And as I promised earlier, I will not attempt to argue for the merits or attractiveness of the morality of dignity I favor. All I wish to point out is that a conception of criminal law as upholding and vindicating people's equal moral worth will better serve the goals just mentioned than the harm principle has done. According to the proposed conception, the distinguishing characteristic of crime is not the harmful end-result, but the fact that the result is brought about through intentional human agency, since only such agency can convey a proper or improper attitude to people and is therefore the appropriate object of moral concerns. Consequently, when it comes to human life, for example, criminal law is not at all in the same line of business as fire departments and hospitals, since its direct and basic purpose is not to save lives but to prevent homicide. Correspondingly, a distinguishing mark of punishment is that it is a practice designed both to vindicate the victim's dignity as well as to affirm the wrongdoer's responsibility, hence autonomy, and hence her dignity as well. Punishment is not on a par with other uses of state power to achieve social ends, since punishment is not merely instrumental to the ends it serves but is rather constitutive of them. Relatedly, it is a mistake to think of culpability and the various standards and procedures associated with it as *constraints* on the pursuit of some independently definable goals. Rather these standards of criminal law are also constitutive of the goals themselves. They give meaning to the conception of criminal law as expressing and upholding a particular moral ideal, and so form an essential factor of criminal law's point or mission. Since on this interpretation of criminal law, crime is radically discontinuous with other sources of harm and punishment is radically discontinuous with other uses of state power, we get a criminal law that is both more secure and less threatening within more narrowly and more visibly drawn boundaries.

I find these consequences of the approach I've sketched attractive, and perhaps George will agree. I'd like to conclude, however, by mentioning two additional considerations which tie more directly to George's new book. The first relates to what is likely the book's main theme: a quest for a balance or accommodation between the universal and the particular in criminal law. Focusing on human dignity as the core value promoted by criminal law strikes such a balance and offers such an accommodation. This is primarily due to the expressive nature

¹¹ This statement of course leaves entirely open the all-important questions regarding the permissible use of state power in the regions outside the criminal law.

of the value of human dignity. To assess actions in regard to their bearing on dignity is to attend to their meaning. Though the test we apply, i.e. the action's conformity to the ideal of the equal moral worth of all human beings, is of universal validity, the meaning of an action, like that of an utterance, derives from the cultural setting in which it is performed.

However, this aspect of focusing on dignity—attentiveness to expressivity and meaning-dependence—may exacerbate one of George's main misgivings regarding this approach. My final point is meant to allay this misgiving. George's worry is that a Kant inspired focus on dignity and respect would render the criminal law dangerously subjectivist, turning the defendant's state of mind of disrespecting the victim into the real basis of liability.¹² My insistence on the expressive side of dignity may indeed seem to fan this worry. However, George himself provides the resources for a response, specifically in the *communicative theory of action* he espouses. Noting that "it is not uncommon to think of crime as a form of communication,"¹³ George goes on to advocate "a humanistic approach to the concept of action," according to which linguistic communication serves as the model for all human actions. The core idea is that "we know that somebody is acting in much the same way we understand the meaning of a word or phrase." As he points out, "words do not convey meaning in the abstract but only in the context of human interaction."¹⁴ Viewing the criminal law as enforcing the Categorical Imperative does indeed change the nature of the judicial inquiry, but not by turning it into an exclusive concern with the state of mind of the accused. Nothing in the dignity-based approach requires that we resurrect the picture of the mind as the ghost in the machine, and direct our attention to that ghost. Rather the judge is invited to conduct an inquiry into the *meaning* of the allegedly criminal *action*, namely whether the action conveys respect for humanity. The main insight of the theory of action George alludes to is that actions, and not just linguistic utterances, carry meaning. In ascertaining that meaning, the defendant's intention naturally plays a role, but not as an independent and exclusive factor. As in the case of interpreting an utterance, in interpreting an action too we must eventually reach a unitary judgment in which semantic as well as pragmatic and contextual factors are combined.

Let me conclude by confessing that in making these remarks I've tried to sound more confident than I actually am. The truth is that I do have serious doubts about almost everything I've said. How could it be otherwise? The issues I've touched on go not just to the heart of

¹² GRAMMAR MANUSCRIPT, *supra* note 3, at 295.

¹³ *Id.* at 408-09.

¹⁴ *Id.* at 410.

criminal law, but to the fundamentals of our public—legal and political—morality. But if there is one thing we should have learnt from George over the years it is that in thinking about criminal law we are inescapably lead to such fundamentals. As he states in the opening sentence of his magnum opus: “Criminal law is a species of political and moral philosophy.”¹⁵ And if my own response to this daunting challenge is inadequate, you know why: it is because at an early and formative stage I failed to take George’s course!

¹⁵ FLETCHER, *supra* note 1, at xix.