

# TRIPARTITE STRUCTURES OF CRIMINAL LAW IN GERMANY AND OTHER CIVIL LAW JURISDICTIONS

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## INTRODUCTION

In *The Grammar of Criminal Law*, George Fletcher distinguishes between four ways of analyzing the internal structure of criminal offenses. These are the bipartite, tripartite, quadripartite, and holistic modes of analysis.<sup>1</sup> The bipartite structure is generally used in common law countries and the tripartite structure is generally used in civil law countries, particularly Germany. The tripartite structure, which Fletcher declares is “the foundation” for his book,<sup>2</sup> will be the principal focus of this Article. The claim that the tripartite structure is preferable will be assessed by comparing it to what Fletcher terms “the simplest—but also the least accurate—system,”<sup>3</sup> the bipartite structure.

This Article assesses the claimed superiority of the tripartite structure by focusing on its difficulties in determining the appropriate conceptual place for analyzing mens rea or subjective elements of intention and negligence. Varying versions of the tripartite structure locate these subjective or mens rea elements either within the first stage (definition of the offense), the third stage (culpability), or by splitting mens rea between the first and third stages. Two possible interpretations will be considered and found unsatisfactory. First, all three versions are correct and preferable to the bipartite structure. This interpretation is problematic by generating a contradiction that an actor’s conduct is simultaneously a greater degree of wrongdoing, the same level of wrongdoing, and a lesser degree of wrongdoing than

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<sup>1</sup> GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, INTERNATIONAL* (forthcoming 2007) (manuscript at 66, on file with the Cardozo Law Review) [hereinafter *GRAMMAR MANUSCRIPT*]. For a discussion of the quadripartite structure, see *id.* at 72-75; for a discussion of the holistic mode of analysis, see *id.* at 85-89.

<sup>2</sup> *GRAMMAR MANUSCRIPT*, *supra* note 1, at 66.

<sup>3</sup> *Id.*

another actor's conduct. Second, one of the versions of the tripartite structure is correct and preferable to the bipartite structure. This interpretation is also problematic because placing mens rea, either completely or partially, in the first, or definition, stage improperly analyzes cases of faultless aggression. And by placing mens rea in the third stage—culpability—the resulting minimalist definition of the elements of attempt offenses fails to reflect a morally coherent norm. Thus, each version of the tripartite structure is problematic. As a result, neither of the two interpretations as to the differing versions of the tripartite structure are tenable. The difficulties in analyzing mens rea render the claimed superiority of the tripartite structure unclear.

#### I. TRIPARTITE AND BIPARTITE STRUCTURES OF CRIMINAL LIABILITY

The two dimensions of the bipartite system Fletcher identifies are the actus reus and the mens rea. The actus reus represents the “external side of criminal conduct” and the mens rea reflects the “internal side” of criminal conduct.<sup>4</sup> Fletcher declares that the concurrence requirement—the actus reus and mens rea temporally coinciding—is the structure's “basic maxim.”<sup>5</sup> The “one major drawback” of the bipartite structure, according to Fletcher, is that it “fails to account for the entire range of defenses that are grouped under the categories of justification and excuse.”<sup>6</sup> Despite this, “for good or ill,” the Rome Statute of the International Criminal Court incorporates the bipartite structure.<sup>7</sup>

The three dimensions, or stages, of the tripartite structure are definition, wrongdoing, and culpability. Each of these three inculpatory dimensions corresponds with an exculpatory dimension that can negate the inculpatory dimension. Unlike the bipartite system in which one might consider the actus reus either before or after the mens rea, the ordering of the stages is “critical.”<sup>8</sup> Thus, the inculpatory dimension of the first stage of definition of the offense includes, according to Fletcher, the elements of human action, norm violation, causation, and harm.<sup>9</sup> The negation of any of these elements establishes the defendant's lack of criminal liability. If, however, the defendant's conduct satisfies all the elements of the first stage and none of these elements is negated, the defendant's conduct is presumed to satisfy the

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<sup>4</sup> *Id.* at 67.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 69.

<sup>7</sup> *Id.* at 71.

<sup>8</sup> *Id.* at 79.

<sup>9</sup> *Id.* at 78.

second stage of wrongfulness. This presumption of wrongfulness can be negated by a justification. The inapplicability of a justification leads to a presumption that the defendant satisfies the third stage of guilt, culpability, accountability, or responsibility. This presumption can be negated by an excuse. The inapplicability of an excuse, however, leads to a determination of the defendant's criminal liability.

Perhaps the most significant controversy within the tripartite structure has been whether mens rea or the subjective elements of, for example, intention and negligence, belong in the first stage as part of the definition of the offense or in the third stage as part of culpability or blameworthiness.<sup>10</sup> Various accounts of the tripartite structure place it within the first stage and others place it within the third stage. Another possibility is that mens rea is neither entirely in the first nor third stage. The factual, descriptive component of mens rea might be in the first stage<sup>11</sup> and the evaluative, normative component might be in the third stage.<sup>12</sup>

Most scholars seem to place it within the first stage; the definition of the offense. Wolfgang Naucke defines the definition of the offense as "embrac[ing] all of the elements of a particular crime" which presumably include the element of mens rea.<sup>13</sup> Markus Dubber similarly defines the inculpatory dimension of the first stage as

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<sup>10</sup> *Id.* at 81; George P. Fletcher, *Criminal Theory in the Twentieth Century*, 2 THEORETICAL INQUIRIES L. 265, 272-73 (2001) [hereinafter Fletcher, *Criminal Theory*].

<sup>11</sup> Under the descriptive theory, "mens rea refers simply to a state of consciousness, or to acting with a particular end in mind." Fletcher, *Criminal Theory*, *supra* note 10, at 274. Fletcher further explains that "[o]n the descriptive interpretation of mens rea, however, it is entirely possible that one might act with culpability (i.e., intention or knowledge) and yet be justified or excused." *Id.*

<sup>12</sup> As Fletcher explains:

All the terms referring to mens rea (culpability, blameworthiness, guilty mind, criminal intent, etc.) lend themselves either to a normative or to a descriptive interpretation. The normative holds that these terms are condemnatory and conclusive, in principle, on liability. The notion of culpability or mens rea must be interpreted, therefore, to be inconsistent with the presence of a justification or excuse. If someone acts properly in necessity or self-defense or is excused on grounds of duress or insanity, it cannot be the case, on the normative theory, that he or she is culpable.

*Id.* at 273-74. As a result, under a normative theory, mens rea must be within the third stage. This is because a normative theory of culpability within the first stage would render the second and third stages superfluous. If a defendant was deemed normatively culpable, then that defendant cannot be justified or excused and there would be no need to go to the second and third stages. Similarly, if a defendant was deemed to be not normatively culpable, then the defendant could not be criminally liable and again there would be no need to consider the second and third stages. As a result, if a normative theory of culpability was employed in the first stage, regardless of whether the defendant was deemed normatively culpable or not, consideration of the second and third stages would be superfluous. To avoid rendering the second and third stages superfluous, a normative theory of culpability must not be a part of the first stage. It must be within the third stage.

<sup>13</sup> Wolfgang Naucke, *An Insider's Perspective on the Significance of the German Criminal Theory's General System for Analyzing Criminal Acts*, 1984 BYU L. REV. 305, 312.

“satisfaction of all offense elements as defined in the statute.”<sup>14</sup> Dubber further explains that this first stage “begins by determining whether the defendant’s conduct matches the definition of a criminal offense—say, because she has *intentionally* caused the death of another human being, thus satisfying the definition of murder.”<sup>15</sup> Stefan Trechsel includes intention within the first stage of definition of the offense as one of the “specific aspects of ‘definition.’”<sup>16</sup> Albin Eser, one of the leading German criminal law scholars, includes intention, negligence, and other subjective elements such as purpose or motive in the first stage, the definition of the offense.<sup>17</sup> Eser notes that the traditional view that intention was part of the third stage has been largely supplanted by the more modern view of intention as part of the definition of the offense.<sup>18</sup>

Although in *The Grammar of Criminal Law* Fletcher carefully avoids explicitly declaring whether mens rea belongs in the first or third stage, or in both stages, he does assign mens rea to the third stage in a recent article.<sup>19</sup> Fletcher defines the third stage of culpability as including “mens rea, responsibility, blameworthiness etc.”<sup>20</sup> Fletcher explains that the debate as to the proper classification of mens rea became an “impassioned confrontation” but now “that debate has run its course.”<sup>21</sup> The debate, however, has apparently not dimmed commentators’ enthusiasm for the tripartite structure. Trechsel declares that he is “quite convinced . . . [that the tripartite] structure is superior in logic to any other one. This opinion seems to be shared by some American scholars, e.g., Professor George Fletcher of Columbia University.”<sup>22</sup> But curiously Fletcher’s placement of mens rea in the third stage seems to conflict with other leading scholars of German criminal law. If the debate has run its course, what explains the apparent dissensus?

## II. ARE ALL THE VERSIONS OF THE TRIPARTITE STRUCTURE CORRECT?

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<sup>14</sup> Markus Dirk Dubber, *Theories of Crime and Punishment in German Criminal Law*, 53 AM. J. COMP. L. 679, 680 (2005).

<sup>15</sup> *Id.* (emphasis added).

<sup>16</sup> Stefan Trechsel, *Comparative Observations on Human Rights Law and Criminal Law*, 2000 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 1, 17.

<sup>17</sup> Albin Eser, *Justification and Excuse: A Key Issue in the Concept of Crime*, in 1 JUSTIFICATION AND EXCUSE: COMPARATIVE PERSPECTIVES 17, 62 (Albin Eser & George P. Fletcher eds., 1987).

<sup>18</sup> *Id.* at 65.

<sup>19</sup> Fletcher, *Criminal Theory*, *supra* note 10, at 275.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 272-73.

<sup>22</sup> Trechsel, *supra* note 16, at 16.

Perhaps this apparent dissensus is irrelevant if all the various versions of the tripartite structure are correct and preferable to the bipartite structure. But, as will be demonstrated, if all are correct, a contradiction arises.

Consider the following example involving a comparison of the wrongdoing of two actors—Ava and Upton—who each commit a homicide under similar circumstances except for differences in their mens rea. Though Ava's conduct does not constitute a crime, her conduct satisfies some of the elements of reckless homicide.<sup>23</sup> Ava kills another *aware* of the risk that her conduct posed a risk. The risk was substantial and unjustified, but Ava does not run afoul of the reasonable person standard of recklessness. Ava does satisfy the part of the definition of the offense of reckless homicide containing the factual, descriptive component of the mens rea of recklessness—awareness of the risk. However, she does not satisfy the normative component of the mens rea of recklessness.

Like Ava, Upton satisfies some (but not all) of the elements of reckless homicide; unlike Ava, Upton commits the crime of negligent homicide.<sup>24</sup> Upton kills another *unaware* (though he should have been aware) that his conduct posed a risk. The risk was substantial, unjustified, and Upton runs afoul of the reasonable person standard. Although Upton does not satisfy the descriptive component of the mens rea of recklessness, he does satisfy both the descriptive and normative components of the mens rea of negligence.

Let us first compare Ava's and Upton's conduct under the version of the tripartite structure with mens rea in the first stage. Though Ava satisfies the descriptive component of the mens rea of recklessness, she

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<sup>23</sup> For a definition of recklessness see, for example, the Model Penal Code:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustified risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(2)(c) (Official Draft and Revised Comments 1985). For Fletcher's discussion of the descriptive and normative components of this conception of recklessness, see GRAMMAR MANUSCRIPT, *supra* note 1, at 471-77.

<sup>24</sup> For a definition of negligence, see, for example, the Model Penal Code:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustified risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(2)(d). For Fletcher's discussion of the descriptive and normative components of this conception of negligence, see FLETCHER, GRAMMAR MANUSCRIPT, *supra* note 1, at 471-77.

satisfies the normative component of the mens rea of neither recklessness nor negligence. Thus, Ava fails to satisfy the elements of the definition of the offense of any crime and her conduct is not wrongful. Though Upton fails to satisfy the descriptive component of the mens rea of recklessness, he does satisfy both the descriptive and normative components of the mens rea of negligence. Upton thus satisfies the elements of the definition of the offense of negligent homicide. Lacking a justification, Upton's conduct is wrongful. As a result, Upton's wrongdoing of negligent homicide is worse than Ava's nonexistent wrongdoing.

Next let us analyze their wrongdoing under the version of the tripartite structure placing mens rea in the third stage. With the issues of mens rea removed to the third stage, the differences between Ava's and Upton's mens rea will not affect the analysis of their wrongdoing in the second stage. As a result, both Ava and Upton commit the same wrongdoing of some type of homicide.<sup>25</sup>

And finally let us analyze their wrongdoing under the version of the tripartite structure splitting mens rea between the first and third stages. Under this version, the descriptive component of mens rea is in the first stage and the normative component is in the third stage. Since Ava satisfies the descriptive component of the mens rea of recklessness, Ava's conduct satisfies the first stage—the elements of the definition of the offense of reckless homicide. Lacking a justification, Ava's conduct is wrongful; she commits the wrongdoing of reckless homicide. Since Upton satisfies the descriptive component of the mens rea of negligence (but not recklessness), Upton's conduct satisfies the first stage—the elements of the definition of the offense of negligent homicide. Lacking a justification, Upton's conduct is wrongful; Upton commits the wrongdoing of negligent homicide. As a result, Ava's wrongdoing of reckless homicide is worse than Upton's wrongdoing of negligent homicide.

The three different versions of the tripartite structure supply three different outcomes of the comparative analysis of Ava's and Upton's wrongdoings.<sup>26</sup> With mens rea in the first stage, Upton's wrongdoing of

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<sup>25</sup> Note that the type of homicidal wrongdoing—murder, reckless homicide, negligent homicide, etc., cannot be specified because with mens rea in the third stage, mens rea does not contribute to or determine the wrongdoing.

<sup>26</sup> One might argue that comparisons of what wrongdoing is worse than other wrongdoing are inapt. Only whether or not actors are criminally liable provides a useful basis for a comparison. But the concept of wrongfulness, or wrongdoing, is important and does serve as a basis for making comparisons. Fletcher explains that “[i]t is important to maintain these distinctions [between the definition, wrongdoing, and culpability stages] for they capture important nuances in our perception of criminal conduct.” GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 81 (1998) [hereinafter FLETCHER, *BASIC CONCEPTS*]. According to Fletcher, wrongfulness means that the conduct stands “in violation of a rule of law.” *Id.* at 77.

negligent homicide is worse than Ava's nonexistent wrongdoing. With mens rea in the third stage, they both commit the same wrongdoing of some unspecified form of homicide. With mens rea split between the first and third stages, Ava's wrongdoing of reckless homicide is worse than Upton's wrongdoing of negligent homicide.

If all three versions are correct, then the degree of Upton's wrongdoing is simultaneously more than, the same as, and less than the degree of Ava's wrongdoing. To avoid this contradiction, the premise that generated the contradiction must be rejected. As a result, the premise that all the versions are correct must be rejected. Therefore, two of these versions of the tripartite structure are incorrect and, at most, only one of the versions may be correct.

### III. IS ONE VERSION OF THE TRIPARTITE STRUCTURE CORRECT AND PREFERABLE TO THE BIPARTITE STRUCTURE?

At most one version of the tripartite structure may be correct and preferable to the bipartite structure. This part assesses the three versions of the tripartite structure by applying them to two issues: (i) defensive force against faultless aggressors, and (ii) attempts. The version with mens rea in the first stage will be demonstrated to incur problems when applied to the faultless aggression issue. The problems are avoided by placing mens rea in the third stage. The version with mens rea in the third stage, however, will be demonstrated to incur a problem when applied to attempts. The problem is avoided by placing mens rea back into the first stage. Splitting mens rea between the first and third stages avoids the problems of placing mens rea entirely in the third stage but incurs the same problems as placing mens rea entirely in the first stage. As a result, each version of the tripartite structure is problematic.

#### A. *Defensive Force Against Faultless Aggressors*

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The concept of wrongdoing is related. *Id.* at 80 ("It will be convenient to use the terms interchangeably . . ."). Wrongdoing entails a "characteristically dangerous and feared way of doing harm to others." *Id.* at 78. It means "action invading the protected interests of others." *Id.* Either as the violation of a rule, a substantial harm, or an invasion of the interest of another, wrongfulness or wrongdoing is an appropriate basis for comparing which actor's conduct is worse.

Moreover, the very concept of wrongdoing is inherently comparative in nature. As Fletcher explains, "wrongdoing is expressed in degrees. Murder is worse than burglary, which is worse than larceny . . ." *Id.*

Consider the issue of whether a victim of an attack by a faultless aggressor may be justified in using defensive force against the faultless aggressor. Compare the following attacks by two different types of faultless aggressors:

Psychotic Aggressor: A psychotic or insane aggressor, *PA*, shoots at an innocent victim.

Mistaken Aggressor: An aggressor, *MA*, reasonably and unavoidably, but mistakenly, believing that an innocent victim is a tree, shoots at the innocent victim.

Would the innocent victim be justified in using defensive force against the two aggressors? In order for a victim of aggression to be eligible to be justified in self-defense against an aggressor, the aggressor's conduct must be wrongful. The German Criminal Code provides that "'Self-defense' refers to a defense necessary to ward off an imminent *wrongful* attack from oneself or another."<sup>27</sup> Let us then analyze whether each aggressor's conduct is wrongful under the three versions of the tripartite structure in order to determine whether the innocent victim is eligible to be justified in using self-defense against the aggressors.

#### 1. Mens Rea Within the First Stage—Definition of Offense

Let us first analyze the case of the psychotic aggressor. Under the version of the tripartite structure placing mens rea in the first stage, the definition of the offense, *PA*'s conduct presumptively satisfies the inculpatory dimension of the definition of the offense. *PA*'s insanity fails to negate any aspect of the definition of the offense. *PA*'s conduct is thus presumptively wrongful. Lacking a justification to negate the second stage, or wrongdoing, *PA*'s conduct is wrongful.<sup>28</sup> Since *PA*'s attack is wrongful, the victim would be eligible to be justified in self-defense against *PA*.

Let us next analyze the case of the mistaken aggressor. *MA*'s conduct presumptively satisfies the inculpatory dimension of the definition of the offense. But *MA*'s reasonable and unavoidable mistake negates the definition of the offense stage. With the definition of the offense negated, *MA*'s conduct is not wrongful. Since *MA*'s conduct is not wrongful, the innocent victim is ineligible to be justified in self-

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<sup>27</sup> Strafgesetzbuch [StGB] [Penal Code] § 32(2) (1975) (translated by George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 967 (1985) (emphasis added)).

<sup>28</sup> Though wrongful, *PA*'s insanity would negate presumptive satisfaction of the third stage, the culpability stage, and thus *PA* would not be criminally liable for the attack.

defense.<sup>29</sup>

a. Treating Similar Cases Dissimilarly

Although the version of the tripartite structure analyzing mens rea in the first stage treats the two cases dissimilarly, are these similar cases that should be treated similarly? Both aggressors are faultless. Both victims of aggression are innocent. Both victims of aggression face attacks from faultless aggressors. So why should the victim of one type of faultless aggression enjoy a right of self-defense and the other victim not? Under the version of the tripartite structure analyzing mens rea in the first stage, the answer is because one victim faces a wrongful attack and the other faces a non-wrongful attack. *PA*'s attack is wrongful and the victim is thereby eligible to be justified in self-defense. But *MA*'s attack is not wrongful and the victim is not eligible to be justified in self-defense. But if both aggressors are faultless, why is one aggressor's conduct wrongful and the other aggressor's conduct not wrongful? Under the version of the tripartite structure analyzing mens rea in the first stage, the answer is because what makes the psychotic aggressor's conduct faultless is not analyzed until the third stage, whereas what makes the mistaken aggressor's conduct faultless is analyzed in the first stage. But apart from this formal difference, there does not seem to be a substantive difference in principle that makes one faultless aggressor's conduct wrongful and the other faultless aggressor's conduct not wrongful. This version of the tripartite structure analyzing mens rea in the first stage treats similar cases dissimilarly.

b. Barring Innocent Victims from Using Justified, Defensive Force

In addition to treating similar cases dissimilarly, this version of the tripartite structure analyzing mens rea in the first stage bars an innocent victim from being eligible to justifiably use force in self-defense against *MA*. But surely, this is a counter-intuitive and unfortunate result. The innocent victim should be eligible to be justified in using self-defense

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<sup>29</sup> See *supra* note 27 and accompanying text.

against *MA*.

Compounding this unfortunate, counter-intuitive result, the aggressor might even be eligible to justifiably use force in self-defense against the innocent victim. Suppose the innocent victim intentionally does use force, in self-protection, against *MA*. The victim's intentional use of force satisfies the definitions of some offenses—for example, battery or attempted murder. Since the victim does not commit a mistake of fact, there is nothing to negate the victim's satisfaction of the inculpatory dimension of the definition of the offense. Thus, the victim's force would be presumptively wrongful. Since the victim would not qualify for a self-defense justification, the presumption of wrongfulness would not be negated. The victim's conduct would be wrongful. And since the victim's force is wrongful, any force *MA* might use against the victim would now be eligible to be justifiable self-defense. As a result, not only is the victim barred from being justified in using self-defense against *MA*, but also *MA* may become justified in using self-defense against the victim. As applied to the case of the mistaken aggressor, the version of the tripartite structure analyzing mens rea in the first stage incorrectly bars the innocent victim from being, and incorrectly privileges the aggressor to be, justified in self-defense.

### c. Possible Resolutions

This section considers three possible resolutions to the problems incurred by the version of the tripartite structure analyzing mens rea in the first stage. First, even if self-defense is unavailable, the defense of necessity might apply. Second, even if self-defense and necessity are inapplicable, the distinct defense of “defensive necessity” might apply. Third, the mistaken aggressor's non-wrongful conduct might arbitrarily be deemed wrongful for purposes of a victim's claim of self-defense.

#### i. Necessity

One possible resolution is to allow the victim of mistaken aggression to use defensive force not under self-defense, but rather under the defense of necessity.<sup>30</sup> Unlike self-defense, the defense of necessity does not require the defensive force to be used only against a

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<sup>30</sup> I am indebted to Luis Chiesa for pointing out to me that this approach is the predominant solution in civil law jurisdictions that place the analysis of mens rea in the first stage.

wrongful threat.<sup>31</sup> Thus, the victim's force against *MA* would be eligible to be justified under the defense of necessity despite *MA* not posing a wrongful threat. In order to qualify for the necessity defense, the victim's force must protect an interest that "substantially outweighs" the interest invaded.<sup>32</sup> That is, the victim's life must substantially outweigh *MA*'s life. If so, then the victim has a defense for the force used against *MA*. And as a result, placing mens rea in the first stage would not lead to the inappropriate outcome of the innocent victim being barred from justified defensive force.

But it is not clear that the victim's life outweighs, let alone substantially outweighs, *MA*'s life. As Fletcher observes with respect to another case of faultless aggression—the psychotic aggressor attacking an innocent, "if it is life against life, it is hard to see why we should say that it is right and proper for one person to live and the other to die."<sup>33</sup> Fletcher finds "inadequate" the view that "the life of the insane aggressor is worth less than the life of the defendant standing his ground."<sup>34</sup> Fletcher concludes that "[t]he better way to solve the problem of the psychotic aggressor is to recognize that the aggression against which self-defense is directed must be wrongful but not necessarily culpable aggression."<sup>35</sup> Thus, if the life of an innocent (victim of aggression by a psychotic) does not outweigh the life of the psychotic aggressor, then presumably the life of the innocent (victim of an attack by the faultless, mistaken aggressor) does not outweigh the life of *MA*. This is because both *MA*, the aggressor who makes a reasonable and unavoidable mistake, and the psychotic aggressor are faultless. And the victims of their faultless aggression are no less innocent and faultless.

So, to the extent that the case of the reasonably and unavoidably mistaken aggressor is analogous to the case of the psychotic aggressor, the victim should not receive the defense of necessity. The victim's life does not substantially outweigh *MA*'s life. Thus, the possibility of the victim receiving a necessity defense does not provide a solution to the problem incurred by analyzing mens rea in the first stage.

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<sup>31</sup> The German Code provision on the defense of necessity is as follows:

Whoever engages in action in order to thwart an imminent risk, to himself or another, to Life, Limb, Liberty, Honor, Property or other Legally protected Interest, acts not wrongfully, provided that in comparing the two conflicting interests, the interest protected substantially outweighs the interest invaded. This provision applies only so far as the action is an appropriate means to thwart the risk.

Strafgesetzbuch [StGB] [Penal Code] § 34, translated in FLETCHER, BASIC CONCEPTS, *supra* note 26, at 141.

<sup>32</sup> *Id.*

<sup>33</sup> FLETCHER, BASIC CONCEPTS, *supra* note 26, at 143.

<sup>34</sup> *Id.* at 144.

<sup>35</sup> *Id.*

Even if applicable, the necessity defense does not resolve all the problems for this version of the tripartite structure. That is, suppose *arguendo* that the victim's life did substantially outweigh *MA*'s life and that the victim's defensive force was justified under the necessity defense. While avoiding the problem of barring the innocent victim from being justified in the use of defensive force, this resolution fails to harmonize the similar cases of psychotic and mistaken aggression. Even under this resolution, the version of the tripartite structure analyzing *mens rea* in the first stage still treats similar cases dissimilarly. Both innocent victims face attacks by faultless aggressors, but one victim is eligible for the defense of self-defense and the other is not. That the victim not eligible for self-defense may be eligible for a different defense—necessity—fails to address the tripartite structure's inconsistency.

## ii. Defensive Necessity

As discussed above, the traditional defense of necessity requires that the interest protected substantially outweigh the interest harmed. In contrast, the distinct defense of defensive necessity is said to be a defense to conduct that harms an interest not significantly greater than the interest protected.<sup>36</sup> As a result, it might provide a defense to the innocent victim of *MA*'s attack. Even if the victim's defensive force against *MA* is not protecting a significantly greater interest than it is harming, the victim's force is protecting an interest not significantly disproportionate to the interest that it is harming. That is, since the victim's life is approximately equivalent to *MA*'s life, the defense of defensive necessity might provide the defense that the innocent victim deserves, but which is unavailable under the traditional defenses of self-defense and necessity.

Although a promising basis for a defense of the victim's use of defensive force against *MA*, the applicability of the justification defense of defensive necessity is unclear. Consider Sharon Byrd's formulation of the defense:

An actor is justified in causing harm to another individual if

- 1) the harm is necessary to protect the actor or any other party from imminent danger unjustifiably caused by the individual harmed,
- 2) the harm caused by the act is not (considerably) greater than the harm avoided thereby, and
- 3) the harm avoided was not avoidable through otherwise available

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<sup>36</sup> I am grateful to Luis Chiesa for pointing out the possible applicability of this defense.

less harmful alternatives.<sup>37</sup>

The formulation requires that the danger to the actor be “unjustifiably caused by the individual harmed.” Therefore, in order for the victim to be eligible for the defense, *MA*’s attack must have been unjustified. But was *MA*’s attack unjustified? Perhaps not. Since *MA*’s attack was not wrongful because it failed to satisfy the definition of the offense at the first stage, the analysis under the tripartite structure terminates. The second stage—whether conduct is justified or not—only applies with respect to conduct that satisfies the definition of an offense and is thereby presumptively wrongful. Thus, under the tripartite structure we do not inquire of conduct that fails to satisfy the definition of an offense whether or not it is justified. As a result, not wrongful conduct is neither justified nor unjustified. Since *MA*’s attack fails to constitute the requisite unjustified attack, the innocent victim fails to satisfy Byrd’s formulation of the defense of defensive necessity.

Even if a suitable formulation of the defense of defensive necessity would apply to the victim’s force against *MA*, other problems remain. First, the defense is not clearly part of the criminal law of Germany and other civil law jurisdictions. True, a number of theoretical accounts of the criminal law in civil law jurisdictions by leading scholars support its recognition.<sup>38</sup> And while it is claimed to enjoy a foundation in statutes governing tort law,<sup>39</sup> it nonetheless has not been codified as part of the criminal law.<sup>40</sup> Second, George Fletcher himself seems to have either ignored or dismissed the defense.<sup>41</sup> Third, this resolution of the issue under the tripartite approach fails to harmonize the similar cases of defensive force against psychotic and mistaken aggression. Although both innocent victims face attacks by faultless aggressors, one victim is eligible for the defense of self-defense and one victim is not. Justifying one victim’s force under self-defense and the other victim’s force under defensive necessity treats similar cases dissimilarly. And fourth, if the resolution requires going so far afield as invoking the merely theoretical defense of defensive necessity, the tripartite structure’s claim of superiority and conceptual elegance over the bipartite structure is

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<sup>37</sup> B. Sharon Byrd, *Till Death Do Us Part: A Comparative Law Approach to Justifying Lethal Self-Defense by Battered Women*, 1991 DUKE J. COMP. & INT’L L. 169, 209-10.

<sup>38</sup> *Id.* at 197 (noting that “‘defensive necessity,’ has found its way into the leading theoretical literature on criminal law”). For a sampling of theoreticians discussing defensive necessity, see *id.* at 199 n.115.

<sup>39</sup> GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 776-79 (1978) [hereinafter FLETCHER, *RETHINKING*]; Byrd, *supra* note 37, at 197-99.

<sup>40</sup> Though not formally part of the codified criminal law, Byrd notes that defensive necessity “has become part of the leading theory in Germany.” Byrd, *supra* note 37, at 199.

<sup>41</sup> FLETCHER, *RETHINKING*, *supra* note 39, at 778 (criticizing defensive necessity for deemphasizing the “criteria of responsibility”). Elsewhere in Fletcher’s writings the defense of defensive necessity is largely if not entirely ignored.

undermined. This is especially so since it is the tripartite structure's placement of mens rea in the first stage that creates this very difficulty.

### iii. Declaring Force Wrongful and Not Wrongful

Another possible resolution of the unfortunate outcome of the victim's ineligibility for justified self-defense would be *MA*'s not wrongful conduct somehow being deemed wrongful. If *MA*'s conduct was wrongful then the victim would be eligible to be justified in using self-defense force against *MA*. But since *MA*'s mistake was reasonable and unavoidable, thereby negating the mental state element of the offense, *MA*'s conduct does not satisfy the definition of the offense and thus, on this basis, cannot be wrongful. If *MA*'s conduct was deemed wrongful, *MA* would not be able to escape criminal liability because *MA* lacks both a justification defense and an excuse defense. So if *MA*'s conduct was deemed wrongful, then *MA* would unfairly and inappropriately be criminally liable.

Could *MA*'s conduct remain non-wrongful for purposes of assessing *MA*'s criminal liability but be deemed wrongful for purposes of assessing the justifiability of the victim's self-defense force?<sup>42</sup> If so, then *MA* would properly avoid criminal liability and the victim would properly be allowed to use justified self-defense force against *MA*. This would be a quite convenient resolution except for one possible problem—wrongfulness would have two different meanings at one and the same time.

Could such a definition be tolerated in the tripartite approach? Consider Fletcher's following account:

[T]he German tripartite structure . . . represents a claim about the way things are and about the inherent structure of criminal liability. This is not simply a matter of opinion for how best to organize our thinking about criminal liability. It is rather a claim about the world, much as a scientific claim about the structure of atoms is an assertion of truth about a physical phenomenon.<sup>43</sup>

Is it really true that a single, particular instance of conduct being both wrongful and non-wrongful at one and the same time is just "the way things are?" Is this really an assertion of truth about the world—that both *X* and *not X* obtain at the same time? Since such ambiguity—and ad hoc ambiguity at that—is to be avoided in criminal theory, especially for a structure which claims conceptual elegance and superiority, this

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<sup>42</sup> I am grateful to George Fletcher for pointing out that this possible resolution was advanced and considered by some German theoreticians.

<sup>43</sup> George P. Fletcher, *Truth in Codification*, 31 U.C. DAVIS L. REV. 745, 756 (1998).

resolution is far from ideal. Fletcher's rhetorical questions posed to the drafters of the Model Penal Code for their codifying that which is a matter of philosophical truth would seem to apply to a tripartite structure relying on such a conception of wrongfulness: "[If the earth] is flat, will the King's command make it round? And if it is round, will the King's command flatten it?"<sup>44</sup>

Even if an actor's force could be wrongful and not wrongful at the same time under this version of the tripartite structure, this possible resolution fails to solve all the problems. True, the resolution would both allow an innocent victim to use justified self-defense against an aggressor and harmonize the treatment of innocent victims facing faultless aggression. But even so, this version of the tripartite structure would be treating similar cases dissimilarly. Even under this proposed resolution, for purposes of assessing each aggressor's criminal liability, *PA*'s conduct is wrongful and *MA*'s conduct is not wrongful. As a result, even under this resolution, this version of the tripartite structure treats similar cases dissimilarly.

## 2. Splitting Mens Rea Between the First and Third Stages

The analysis of the cases of faultless aggression under the tripartite structure with mens rea entirely in the first stage does not change with mens rea split between the first and third stages. The factual, descriptive portion of mens rea—intention—would be a part of the definition of the offense. But the mistaken aggressor's reasonable and unavoidable mistake negates the inculpatory dimension of definition of the offense and thus the conduct is not wrongful. As against this not wrongful force, the victim is ineligible to justifiably use force in self-defense. The psychotic aggressor's attack is wrongful, making the victim eligible to justifiably use force in self-defense. As a result, the twin problems stemming from analyzing mens rea in the first stage reoccur when splitting mens rea between the first and third stages. This version of the tripartite structure splitting mens rea would both (i) treat the similar cases of faultless aggression dissimilarly, and (ii) inappropriately bar an innocent victim of aggression from being eligible to justifiably use force in self-defense.

## 3. Mens Rea Within the Third Stage—Culpability

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<sup>44</sup> *Id.* at 745 (quoting ROBERT BOLT, *A MAN FOR ALL SEASONS* 133 (1990)).

Perhaps the above problems may be avoided by analyzing mens rea within the third stage, the culpability stage. Again, in order to determine whether the victim is eligible for a self-defense justification for force used against *MA*, *MA*'s force must be wrongful. Since *MA*'s mens rea and mistake of fact is no longer analyzed in the first stage, the presumptive determination that *MA* satisfies the definition of the offense may no longer be negated by *MA*'s mistake of fact. This satisfaction of the first stage generates a presumptive determination that *MA*'s conduct is wrongful. Since *MA*'s wrongful conduct cannot be negated by a justification defense, *MA*'s conduct is wrongful. Since *MA*'s conduct is wrongful, the victim is eligible for a self-defense justification for using force against *MA*'s wrongful attack. This version of the tripartite approach yields the correct result of the victim being eligible to justifiably use force in self-defense against *MA*.

And this version of the tripartite approach harmonizes the treatment of the faultless aggression cases. Both the reasonably and unavoidably mistaken aggressor's conduct and the psychotic aggressor's conduct are wrongful. Therefore, both victims of faultless aggression are eligible to be justified in self-defense.

Although this version of the tripartite structure that places the actor's mens rea in the third stage avoids the difficulties incurred by treating the actor's mens rea as part of the first stage, it nonetheless incurs difficulties as applied to another issue.

## B. *Attempt Offenses*

### 1. Mens Rea Within the Third Stage

One consequence of placing the analysis of mens rea in the third stage, the culpability stage, is a comparatively minimalistic definition of the elements of the offense. With the issue of mens rea removed to the third stage, the remaining components comprising the elements of the offense stage are the actor's voluntary act or omission as well as the possible elements of a prohibited result and causation. Additionally, some offenses might include attendant circumstances such as the presence of night (in a burglary offense) or the age of the victim (in statutory rape) as elements.

With mens rea removed, does such a minimalist definition of the elements of the offense describe conduct that may plausibly be understood as wrongful and criminal? Presumably yes, at least for some offenses. Consider, for example, a homicide. The definitional elements would include (i) a voluntary act or omission (ii) that caused

(iii) the prohibited result of a dead human being. These elements seem to comprise a plausible description of conduct that could intelligibly be declared as a criminal offense and wrongful.

The more minimalistic definitions of inchoate offenses, however, pose a challenge to this version of the tripartite approach. Since the elements of a prohibited result and causation are inapplicable in an attempt offense, the definition of the elements of the offense may be as minimal as a single element—a voluntary act or omission. Is a single element sufficient to plausibly describe a criminal offense?

Consider Glanville Williams' example of an actor pausing before a haystack and lighting a match.<sup>45</sup> If we know that the actor's intent is to set fire to the haystack in order to burn the barn, the actor's conduct is clearly sufficiently close to consummating arson to count as attempted arson.<sup>46</sup> But that is *if* we know the actor's intent. The actor's intent might equally be to light a pipe. And then obviously the actor is neither criminally liable for attempted arson nor any crime. Williams' point is that for some attempts, the mens rea is the essence of the offense.<sup>47</sup> It is the mens rea of intent to commit arson which makes the act of lighting a match before a haystack a plausibly criminal act.<sup>48</sup>

Similarly, the essence of many impossible attempts is the intent to commit the crime.<sup>49</sup> Without knowledge of the intent of the actor, innocuous acts like putting sugar into another's coffee hardly seem to plausibly and intelligibly describe a criminal offense or wrongful conduct.

By separating an actor's voluntary act or omission from his mens rea, this version of the tripartite approach is implausible for attempt offenses. Merely innocuous and lawful acts like lighting a match or putting sugar into another's coffee satisfy the definitions of the offenses of attempted arson and attempted murder, respectively. In addition, such innocuous and lawful acts would satisfy the inculpatory dimension

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<sup>45</sup> GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 630 (2d ed. 1961).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 631 (“[John] Austin put forward the interesting view that in attempt the party is really punished for his intention, the act being required as evidence of a *firm* intention. There is much to be said for this.”).

<sup>48</sup> *Id.* at 630.

<sup>49</sup> See FLETCHER, *BASIC CONCEPTS*, *supra* note 26, at 178 (noting that the subjectivist view of attempts places “[t]he emphasis on intention as the core of the crime”). In contrast, under the objectivist theory of attempts, the focus is on the conduct itself and that the conduct must manifest danger. *Id.* at 177; George P. Fletcher, *Constructing a Theory of Impossible Attempts*, 5 *CRIM. JUST. ETHICS* 53, 55 (1986) [hereinafter Fletcher, *Impossible Attempts*] (explaining that under the objectivist view, “criminal liability should require an act that, in some sense, is objectively criminal”). Although Fletcher himself would favor an objectivist view of attempts, he acknowledges that the subjectivist view prevails. FLETCHER, *BASIC CONCEPTS*, *supra* note 26, at 181 (lamenting “the subjectivist bias now dominant in German and American law”). And, as a result, a tripartite structure would need to be compatible with the subjectivist view.

of the second stage and be declared presumptively wrongful. While no doubt such acts are wrongful if coupled with the intent to commit the crime, it is difficult to conceive of them as wrongful in isolation from their actor's mens rea. Fletcher maintains that "a criminal intent, acted out in an 'objectively innocent' way, should not be enough."<sup>50</sup> If so, then *a fortiori* an objectively innocent act alone (without criminal intent) should not be sufficient to generate a presumption of wrongfulness.

Fletcher explains that "[t]he minimal demand on the definition of an offense is that it reflect a morally coherent norm in a given society at a given time."<sup>51</sup> Fletcher considers the offense of reckless driving:

Logically, one could claim that the norm was directed against all driving. . . . [However,] if recklessness were an element of the definition, non-reckless or safe driving would not violate the norm. . . . In our society, under normal circumstances, it would be incoherent to prohibit driving altogether. No one would know what to make of the norm. The only morally coherent norm would be one that prohibited reckless driving. It follows that "recklessly" is an element of the definition.<sup>52</sup>

Apparently, under Fletcher's analysis, when the definition of an offense would reflect a morally incoherent prohibitory norm without a mens rea element, the mens rea element must be part of the definition. As a result, at least with respect to the offense of reckless driving, the mens rea cannot be placed in the third stage.<sup>53</sup> The definition of attempt offenses would similarly reflect a morally incoherent norm, at least in some cases, without a mens rea element. As a result, placing mens rea in the third stage results in a definition of the offense that fails to meet Fletcher's minimum condition for the definition of an offense—that it reflect a morally coherent prohibitory norm.

Just as Fletcher explains that the mens rea element of recklessness must be part of the definition of the offense of reckless driving, so also intent to kill (or some mens rea element) must be part of the definition of attempted murder. To see why, compare two actors who each put sugar into the coffee of another. Kim Killer, with the intent to kill, puts what she believes is poison, but is actually sugar, into another's coffee. Under the tripartite structure placing mens rea in the third stage, Killer satisfies the definition of the offense merely by the act of putting sugar into another's coffee. Since Killer has no justification and no excuse,

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<sup>50</sup> Fletcher, *Impossible Attempts*, *supra* note 49, at 55.

<sup>51</sup> FLETCHER, *RETHINKING*, *supra* note 39, at 567; *id.* at 575 ("The contours of the definition are set by the prohibitory norm. The prohibitory norm, in turn, must be cast so as to state a morally coherent imperative in the particular society.").

<sup>52</sup> *Id.* at 567.

<sup>53</sup> See *supra* text accompanying note 46.

Killer will be criminally liable for attempted murder. Sam Sweetener puts sugar into his companion's coffee with the intent to make his companion's coffee taste better. By committing the same act as Killer (putting sugar into another's coffee), Sweetener, no less than Killer, satisfies the definition of the offense of attempted murder. As a result, Sweetener's conduct is presumptively wrongful and, by lacking a justification, wrongful. It will not be until the third stage that Sweetener's lack of intent to kill will negate culpability and preclude criminal liability. Therefore, under this version of the tripartite approach, thousands of innocent, law-abiding, loving couples are committing wrongful conduct and satisfying the definitional elements of the offense of attempted murder every morning over breakfast.

## 2. Mens Rea Within the First Stage

Perhaps to avoid the unfortunate and counter-intuitive results discussed above, the tripartite structure should place mens rea in the first stage. Under that version, the definition of the offense would plausibly and intelligibly describe a criminal offense and wrongful conduct. The definition of the offense of attempt would reflect a morally coherent norm. The conduct of the actor lighting a match before a haystack would only be found to satisfy the definition of the offense of attempted arson and be engaging in wrongfulness if she had the intent to commit arson. And Sam Sweetener, lacking the intent to kill, would neither be found to have satisfied the definition of the offense of attempted murder nor have engaged in wrongful conduct.

## 3. Splitting Mens Rea Between the First and Third Stages

The version of the tripartite structure splitting mens rea between the first and third stages similarly avoids the problems incurred by placing mens rea in the third stage when the tripartite structure is applied to attempts. The factual, descriptive portion of the mens rea of attempt—intention—would be part of the definition of the offense. As a result, the conduct satisfying the definition of the offense would be more than an innocuous act and would thereby reflect a morally coherent norm.

### C. *Assessing Tripartite and Bipartite Structures*

#### 1. Each Version of the Tripartite Structure Avoids One Problem but Incurs Another Problem

Each of the three versions of the tripartite structure is problematic. Placing mens rea either in the first stage or splitting mens rea between the first and third stages incurs difficulties with analyzing defensive force against faultless aggressors. Both versions treat the similar cases of the psychotic and mistaken aggressors dissimilarly and incorrectly bar an innocent victim of aggression from eligibility for justified defensive force. Placing mens rea in the third stage avoids these difficulties, but incurs a problem as applied to attempt offenses. Innocuous and lawful conduct satisfies the definition of the offense. The definition of attempt offenses fails to meet the minimum requisite condition—reflecting a morally coherent norm. The tripartite structure may avoid this problem by either placing mens rea in the first stage or splitting mens rea between the first and third stages. But this brings us back full circle. No single version of the tripartite structure satisfactorily analyzes the issues of both faultless aggression and attempts.

#### 2. Bipartite Structure Avoids the Problems of Tripartite Structure

The bipartite structure avoids the problems besetting the various versions of the tripartite structure. Applying the bipartite structure to the faultless aggressor issue, the innocent victim, by intentionally using force against *MA* and/or *PA*, satisfies the definition of the elements of some crime of force—assault, battery, or attempted murder. The victim commits a prohibited actus reus with the requisite mens rea. Under Anglo-American law, the victim is eligible for the justification defense of self-defense if he honestly and reasonably believed that *MA*'s and/or *PA*'s force posed an unlawful threat.<sup>54</sup> Unlike the versions of the tripartite structure placing mens rea either partially or completely in the first stage, the bipartite structure both (i) renders the victim eligible to be justified in self-defense against the mistaken aggressor, and (ii) treats the similar cases of faultless aggression similarly.

Let us now analyze attempt offenses under the bipartite structure. The actor who lights a match before a haystack or puts sugar into

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<sup>54</sup> See FLETCHER, BASIC CONCEPTS, *supra* note 26, at 161.

another's coffee, based on his actions alone with no consideration of his mens rea, fails to satisfy the elements of an offense. But if the same conduct is coupled with the requisite intent, the actor does satisfy the elements of the offenses of attempted arson or attempted murder, respectively. Unlike the tripartite structure, which places the issue of mens rea in the third stage, the bipartite structure appropriately only treats a union of the actus reus and mens rea as satisfying the elements of a criminal offense and as conduct deserving the appellation "wrongful."

Neither version of the tripartite structure satisfactorily analyzes both issues of defensive force against faultless aggressors and attempt offenses. In contrast, the bipartite structure satisfactorily analyzes both issues. Of course, merely the comparative analysis of these two issues is an insufficient basis upon which to claim that one structure of criminal law is superior to another. That the bipartite structure seems preferable on these two narrow bases may be sufficient, however, to cast some doubt on the broadly claimed superiority of the tripartite structure.

#### CONCLUSION

Versions of the tripartite structure differ as to whether mens rea belongs in the first stage (definition of the offense), in the third stage (culpability), or split between the first and third stages. Two possible interpretations are considered, but found unsatisfactory. First, all three versions of the tripartite structure are correct and preferable to the bipartite structure. This interpretation is problematic by generating a contradiction that an actor's degree of wrongdoing is simultaneously greater than, the same as, and less than another actor's conduct. The other possible interpretation is that only one of the versions of the tripartite structure is correct and preferable to the bipartite structure. This interpretation is also problematic. By placing mens rea either partially or completely within the first stage, similar cases of faultless aggression are treated dissimilarly and innocent victims are barred from eligibility for justified defensive force against mistaken aggressors. And by placing mens rea in the third stage, the resulting minimalist definition of the elements of attempt offenses fails to reflect a morally coherent norm. Thus, each of the three versions of the tripartite structure is unsatisfactory. The difficulties in analyzing mens rea render the claimed superiority of the tripartite structure unclear.