

HOLISTIC CULPABILITY

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INTRODUCTION

There are two seemingly conflicting ambitions in Professor Fletcher's new work, *The Grammar of Criminal Law*.¹ The first project is a parsing of the parts of criminal law systems. That is, Fletcher aims "to elucidate the deep structure, both the syntax and the semantics, of defining and punishing crime."² Simultaneously, Fletcher presents an argument for the analysis of the whole—a holistic approach wherein none of the elements of criminal liability "is subject to analysis in isolation from the others."³

These two enterprises can be reconciled. Indeed, I believe that there is much promise to a view of criminal law that recognizes that we must attend to both the individual parts, and to the entirety of criminal law. We must attend to criminal law's grammar *and* to criminal law's meaning.

This article seeks to apply Fletcher's approach—a focus on the parts and a focus on the whole—to one aspect of criminal liability: criminal culpability. In my view, the debate among criminal law theorists as to how best to capture an agent's culpability reflects the tension between a focus on grammar and a focus on meaning. An emphasis on particular mental state terms, such as intention or belief, values the individual parts of an agent's decision-making. This grammatical focus leads to descriptive *mens rea* terminology. In contrast, those who focus upon the overall blameworthiness of an

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¹ GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, INTERNATIONAL* (forthcoming 2007) (manuscript on file with the Cardozo Law Review) [hereinafter *GRAMMAR MANUSCRIPT*].

² *Id.* at 9.

³ *Id.* at 85.

actor's choice—its wickedness, indifference, and the like—focus upon the meaning of the actor's choice. From this perspective, our *mens rea* terminology is decidedly normative. The question of whether to focus on descriptive *mens rea* or normative *mens rea* is a debate about whether to focus on the parts or whether to focus on the whole.

Professor Fletcher first identified the tension between descriptive and normative terminology more than twenty-five years ago.⁴ In this essay, I aim to dissolve it. That is, my holistic argument seeks to argue from the wings that the others have misunderstood what the entire play is about.⁵ I begin with Professor Fletcher's discussion of the conflict between descriptive and normative *mens rea*, and his clear preference for normative terminology. I then turn to analyze the subject of the debate—an agent's culpable choice, and argue that there are several different aspects of that choice. Next, I argue that in assessing culpability, we do not focus upon one aspect; rather the grammar gives meaning to the whole. Although I argue that descriptive and normative culpability can be reconciled, I claim there is a more unified conception of culpability, which simplifies, but does not distort, how the parts give meaning to the whole. In the final part of this essay, I discuss negligence, which admittedly cannot be explained by my theory. I argue, however, that liability for negligence presents problems within the grammar of criminal law as Professor Fletcher finds it.

I. FLETCHER ON CULPABILITY

Fletcher's sweeping comparative analysis reveals that focusing on the grammar of the criminal law necessarily includes an analysis of wrongdoing and culpability.⁶ Whether jurisdictions employ bipartite, tripartite, or quadripartite systems of offenses, offenses will inevitably include both an act and a mental state.⁷ We cannot discuss a crime without looking both to what the defendant must do, and the defendant's culpability (or as Fletcher calls it "guilt") with respect to that act.

⁴ See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 396 (1978).

⁵ Cf. GRAMMAR MANUSCRIPT, *supra* note 1, at 34 (presenting a "holistic challenge" that "argues from the wings that the primary three on stage have misunderstood what the play is about").

⁶ *Id.* chs. 7-8.

⁷ *Id.* at 66-85. Bipartite systems contain *actus reus* and *mens rea* requirements. *Id.* at 67. "The quadripartite system neatly classifies elements into the following categories: (1) the subject of the offense, (2) the subjective side of liability, (3) the object of the offense, and (4) the objective side of liability." *Id.* at 72. The tripartite system focuses on definition, wrongdoing, and culpability. *Id.* at 77.

Despite the consensus that crimes include both an *actus reus* and a *mens rea*, deep questions remain. In *Grammar*, Fletcher challenges the view that an act is a “willed bodily movement.”⁸ He questions the wisdom of dividing act and mental state, arguing that this perpetuates dualistic understandings of mind and body.⁹ In addition, he advocates a normative conception of *mens rea*.¹⁰

It is the grammar and meaning of *mens rea* that I intend to address here. There are two competing conceptions of *mens rea*. The first conception is descriptive. We look to a person’s mental state to determine if the mental state element is satisfied. This is a question of fact.¹¹ Alternatively, there is the normative conception of *mens rea*. This is question of whether the defendant is blameworthy.¹² The term, *mens rea*, or “culpability,” can therefore refer to the descriptive usage (did the defendant have the requisite mental state?) or to the normative usage (is the defendant blameworthy?).

According to Fletcher, the tension between normative and descriptive *mens rea* runs through the history of the common law.¹³ As Professor Fletcher observes, “[o]ne of the persistent tensions in legal terminology runs between the descriptive and the normative uses of the same terms.”¹⁴ In his current work, Fletcher echoes his earlier complaint that “[t]he confusion between normative and descriptive language is so pervasive in Anglo-American criminal law that it affects the entire language of discourse.”¹⁵

Fletcher claims:

The language of the general part suffers distortion and manipulation, because the contemporary state of criminal theory is ambivalent about the role of blame and condemnatory judgment in the criminal law. Descriptive theorists seek to minimize the normative content of the criminal law in order to render it, in their view, precise and free from the passions of subjective moral judgment. On the other hand, normative theorists . . . seek to keep the language of the criminal law close to the daily problems of assessment and blame that infuse the criminal process.¹⁶

⁸ *Id.* at 391-96.

⁹ *Id.* at 85-86.

¹⁰ *Id.* at 477.

¹¹ *Id.* at 418.

¹² *Id.*

¹³ *Id.* at 67.

¹⁴ FLETCHER, *supra* note 4, at 396.

¹⁵ *Id.* at 397; *see also* GRAMMAR MANUSCRIPT, *supra* note 1, at 418.

¹⁶ FLETCHER, *supra* note 4, at 400. As he explains:

The energy fueling this systematic ambiguity comes from diverse sources. Some theorists may think that using moral terms in the law lacks rigor and destroys the neutrality of the legal system. Others may think that moral issues are relevant to legal liability, but that these issues ought to be suppressed in the statement of the law to the

Fletcher endorses normative *mens rea*, arguing that it is “inherently superior.”¹⁷ He argues that “guilt” cannot be reduced to subjective mental states.¹⁸ In Fletcher’s view, the focus on subjective mental states leads to four problems. The first is the failure to recognize the relationship between excuses and culpability. According to Fletcher, excuses negate culpability, but a focus solely on descriptive mental states cannot account for this phenomenon.¹⁹ In other words, if we claim that an individual is culpable for committing a crime intentionally, we have no way of accounting for nonculpable conduct such as duress, where the conduct is both intentional and excused. The second two problems concern negligence. Fletcher believes that a focus on the subjective leads to theorists concluding that negligence is not culpable because it is not a “real” mental state.²⁰ Fletcher claims that negligence is culpable because one’s actions can signify disrespect for others even when one is not consciously aware of what one is doing.²¹ Fletcher also claims that theorists wrongly assume that recklessness is always more culpable than negligence.²² The final problem with a preference for descriptive terminology is that it leads to confusion about the lexical ordering of wrongdoing and guilt.²³ By this, Fletcher means that theorists advocate punishing attempts and completed crimes equally, a view Fletcher sees as deeply mistaken.²⁴

According to Fletcher, the correct normative approach to culpability is to be found in the Model Penal Code’s (MPC) definitions of recklessness and negligence. In both definitions, the MPC asks first whether there was a substantial and unjustifiable risk, and second, whether that risk represented a gross deviation from what we should expect from the actor. Thus, the “critical perspective in both cases inheres in the process of comparing the actual risk-taking with a normative ideal and finding that the former is wanting and subject to censure.”²⁵

jury. Others may sincerely think that moral issues are either too subjective and personal for serious consideration in a social discipline like the law. These are some factors that may impel courts and theorists toward value-free rules and concepts; the reality of judgment, blame and punishment in the criminal process generates the contrary pressure and insures that the quest for a value-free science of law cannot succeed in the process as we know it.

Id. at 400-01.

¹⁷ GRAMMAR MANUSCRIPT, *supra* note 1, at 156-57, 477.

¹⁸ *Id.* at 446.

¹⁹ *Id.* § 8.3.1.

²⁰ *Id.* § 8.3.2.

²¹ *Id.* at 453.

²² *Id.* § 8.3.3.

²³ *Id.* at 447.

²⁴ *Id.* § 8.3.4.

²⁵ *Id.* at 473.

Indeed, Fletcher's endorsement of these Model Penal Code provisions does not stop there. Rather, he claims that these provisions contain the entire tripartite structure of criminal law. The tripartite structure, the one Fletcher clearly views to be superior, consists in an offense definition, wrongdoing, and culpability.²⁶ According to Fletcher, negligence and recklessness reflect this structure. The offense definition is whether the defendant took a substantial risk of causing harm; the wrongfulness is that the risk was not justified by its benefit to society; and the culpability is that the substantial and unjustifiable risk ran afoul of the reasonable person standard and no excusing conditions existed (and with recklessness, that the actor consciously disregarded the risk).²⁷

Fletcher thus endorses the Model Penal Code's definitions of negligence and recklessness because they contain all of the necessary elements of criminal liability. Because both definitions require a comparison of the defendant to the "reasonable person," culpability attaches for having failed to live up to a normative standard. In Fletcher's view, this normative assessment is the correct conception of criminal culpability.

II. ASPECTS OF CHOICE

As presented by Fletcher, we must choose between normative and descriptive conceptions of culpability. I disagree. Normative and descriptive *mens rea* definitions are just different sides of the same coin. When an actor makes a choice to engage in a criminal action, we can describe his choice in different ways; these descriptions can focus on the actor's subjective mental states or on our ascriptions of blame.

In my view, Fletcher's analysis seeks to find meaning without grammar. But for us to decide that an actor's choice is blameworthy—that what he did falls below what we may reasonably expect of him—we must have something to assess. And what we must assess is the underlying mechanics of the actor's practical reasoning.

Admittedly, my analysis focuses on those instances in which the defendant makes a conscious decision to harm or risk harming others. This approach may seem to stack the deck against negligence liability. However, I believe that we should first look to paradigmatic instances of culpable choice to see if normative and descriptive understandings can be reconciled. Only after we understand how these two supposedly

²⁶ *Id.* at 77, 78 & 84.

²⁷ *Id.* at 474-75.

competing conceptions relate can we then turn to the borderlines of culpability.²⁸

Consider the following variation of a familiar hypothetical:

David decides to break his friend, Pete, out of prison. He knows that the most accessible wall is on the east side of the prison. He wants to plant a bomb there and then free Pete. David knows that the bomb will kill anyone who is standing on the other side of the wall. He also knows that Vic, a prison guard, works directly on the other side of the wall. David likes Vic a great deal. He thinks that Vic is a very fair-minded prison guard. He also knows that Vic is extremely diligent and never leaves his post between 1 and 5 a.m. Unfortunately, David also believes that the only time when he can gain access to the east wall is between 2 and 3 a.m. when Gary, the exterior prison guard, is slacking off on his duties and napping. One night, David slips past Gary and plants the bomb on the east side of the prison at 2 a.m. The bomb explodes, killing Vic and freeing Pete.

What can we say about David's choice to kill Vic? I submit that there are four different aspects of this choice.

Consider the mechanics first. We look to David's practical reasoning. That is, we look to David's beliefs, desires, and intentions that yielded his action of planting the bomb and killing Vic. Thus, we might say that David desired to free Pete, and he believed that to do so he had to plant a bomb on the east wall. Moreover and importantly, David was aware (believed or knew) that Vic was on the other side of the wall, and David believed to a practical certainty that Vic would die as a result of the blast. The obvious conclusion: David *knowingly* killed Vic.

But there is a different way to look at this same choice. We can look at David's psychological feeling about his own choice. David really likes Vic, but he wants to free Pete more, and thus, he has resigned himself; he has acquiesced; he has accepted that Vic's death must occur.²⁹ Notice that in telling this story we do not look to an underlying desire state (the desire that Vic not die) but to the way in which David assesses the entirety of his choice and resigns himself to the possibility that Vic will die.

²⁸ Some may reject my claim that intentional states are paradigmatic of fault. See, e.g., Kyron Huigens, *On Aristotelian Criminal Law: A Reply to Duff*, 18 NOTRE DAME J. L. ETHICS & PUB. POL'Y 465, 473-75 (2004). While Huigens lists a myriad of potential prescriptive implications of my view, I cannot address those here. Further explication of my view can be found in Larry Alexander, Kimberly Ferzan & Stephen Morse, *A Culpability-Based Theory of Criminal Law* (unpublished manuscript, on file with author).

²⁹ See generally Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953 (1998).

We can also tell a third story. We can talk about the way in which David deliberates. Indeed, although we most often think about premeditated killings as purposeful killings, there is a significant degree of premeditation in this case of knowledge. David spends time planning his action, and calmly and coolly reaches the conclusion to act in a way that will result in Vic's death.

Finally, we might criticize David for being indifferent to Vic. In saying this, we do not care that David actually liked Vic (or sent flowers to the funeral, or cried). We say that given the choice that he made, we *normatively* judge him to be indifferent.

Thus, there are four different ways in which we might look at this one choice that David makes. We might look to the mechanical content of the choice—the practical reasoning that led to the prohibited action. In short, David knew he would kill Vic. We might also look to how the defendant feels about the prohibited action or result. Here, David accepts that his action will result in Vic's death. A third approach is to assess the quality of the actor's reasoning—David calmly, coolly, and over a period of time, decided to engage in this action. Finally, there is our normative evaluation of what David did—he was indifferent to Vic—he cared less about Vic than he *should have*.

Even if we believe that it is *action*, not choice, that is the proper object of evaluation, this action may be described in light of any of these differing aspects.³⁰ That is, when we see David plant the bomb, and Vic die, we call this action culpable because of 1) the belief/desire practical syllogism that prompted it; 2) David's feeling about the harm he knows he will cause; 3) the degree of planning that led to the action; and/or 4) the way we normatively judge this action as manifesting indifference.

It is not just that we can explain David's choice in light of these different aspects, but that we currently do so. All four of these different aspects exist within our current mental state terminology. First, some *mens rea* terms focus on the mechanical practical reasoning account. The Model Penal Code's definitions of purpose, requiring a result to be the actor's "conscious object," and of knowledge, requiring that the actor be "practically certain" the result will occur, are instances of the mechanical type.³¹ The Model Penal Code's definition of willful blindness—focusing on belief to a "high probability" is also

³⁰ In *Grammar*, Fletcher argues against a "dualist" approach to action and mental states. GRAMMAR MANUSCRIPT, *supra* note 1, at 85. I think it is relatively clear, though, that we cannot ascertain the meaning of an action without understanding the reasons that prompted it and the reasons that the actor deemed insufficient to merit abstention. See Kimberly Kessler Ferzan, *Opaque Recklessness*, 91 J. CRIM. L. & CRIMINOLOGY 597, 611-18 (2001) (critiquing a similar argument by Antony Duff).

³¹ MODEL PENAL CODE §§ 2.02(2)(a)-(b).

mechanical,³² as is the common law's willful blindness definition, focusing on whether the actor's "conscious purpose" was to avoid knowledge.³³

Second, some *mens rea* terms are evaluative concepts. Both the Model Penal Code and the common law deem sufficiently heinous reckless homicides to constitute murder because they manifest "extreme indifference" to human life or a "depraved heart." The best understanding of these terms is not to say that we look inside the defendant's heart for the characteristic of "depravity," but rather, we look to the *nature* of the defendant's choice and maintain that it manifests depravity. Negligence is also defined by a normative conduct standard. One's conduct must be a gross deviation from what a reasonable person would believe or do.³⁴

Some *mens rea* terms entail both mechanical and evaluative assessments. Consider the Model Penal Code's definition of recklessness.³⁵ The actor must *consciously disregard* a "substantial" and "unjustifiable" risk. This seems to be a mechanical account.³⁶ On the other hand, we must decide whether this risk is a gross deviation from what a law-abiding person would do. This question is evaluative.

In addition, Continental jurisdictions rely upon the psychological aspect of the defendant's decision-making. The concept of *dolus eventualis* focuses upon this feature. As Fletcher illuminates, *dolus eventualis* is "a particular subjective posture toward the result."³⁷ These are instances where the defendant is reconciled to (or at least indifferent to) a result.³⁸

Finally, some culpability provisions do not focus on the content of the choice, but the quality of that choice. Premeditation and provocation focus (at least partially) on whether the quality of the defendant's practical reasoning was focused and thoughtful or impulsive and emotionally fraught.

³² *Id.* § 2.02(7).

³³ *See, e.g.,* United States v. Jewell, 532 F.2d 697 (1976).

³⁴ Although, if we focus on the defendant's *lack of belief*, negligence might be viewed from a mechanical perspective. *Cf.* Kenneth W. Simons, *Does Punishment for "Culpable Indifference" Simply Punish for "Bad Character"?* *Examining the Requisite Connection Between Mens Rea and Actus Reus*, 6 BUFF. CRIM. L. REV. 219, 257-58 (2002).

³⁵ MODEL PENAL CODE § 2.02(2)(c).

³⁶ Recklessness certainly entails looking at the risk the defendant believes he is imposing and his reasons for doing so, but the determination of whether the risk is justifiable is an objective determination.

³⁷ FLETCHER, *supra* note 4, at 445.

³⁸ *Id.* at 446; *see also* Albin Eser, *Mental Elements—Mistake of Fact and Mistake of Law*, in II THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 932 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones, eds., 2002) ("*dolus eventualis* . . . may be characterized as the perpetrator being aware of the risk that might occur and additionally being prepared to accept it should it in fact occur").

Proposals for reform sometimes conflate these different aspects. Although his position has shifted,³⁹ Ken Simons' work in rethinking mental states is instructive.⁴⁰ Ken Simons primarily focuses on the mechanics of practical reasoning. Simons advocates for more parts in the form of discrete belief and desire culpability hierarchies.⁴¹ But Simons ultimately conflates normative and descriptive terminology. The most important mental state term that Simons introduces is "culpable indifference" which he places within a desire-state hierarchy.⁴² However, as I have argued previously, Simons' definition of culpable indifference as "not caring as much as one should" is a normative assessment of the actor's choice and not a discrete desire state that enters into the mechanics of the actor's practical reasoning.⁴³

Alan Michaels argues for "acceptance" as "the missing mental state."⁴⁴ He begins by claiming that actors who knowingly harm others (as David does Vic) accept the harm.⁴⁵ He then claims that the reason why we deem knowing actors to be morally blameworthy is because of this psychological state of acceptance.⁴⁶ From here, he seeks to extrapolate to instances of recklessness. He claims that if an actor has this same psychological state (acceptance) even if she is not certain that she will cause harm (and thus does not act knowingly), she is as culpable as the knowing actor.⁴⁷ He claims that recognizing that some

³⁹ Simons has refined many of his views on culpable indifference. See generally Simons, *supra* note 34. However, even his most recent work defines indifference in two different ways — an "idealized" criterion and a "cognitive counterfactual" criterion (mechanical). See *id.* at 262-67. The former, as a normative assessment of the actor's choice is not objectionable, but the latter, focusing on what the defendant would have done had the facts been otherwise, is. See Ferzan, *supra* note 30, at 622-24.

⁴⁰ Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463 (1992).

⁴¹ *Id.* at 476-77.

⁴² *Id.* at 466-67.

⁴³ Kimberly Kessler Ferzan, *Don't Abandon the Model Penal Code Yet! Thinking Through Simons's Rethinking*, 6 BUFF. CRIM. L. REV. 185, 204-07 (2002).

⁴⁴ See Michaels, *supra* note 29.

⁴⁵ *Id.* at 957 ("Those who act with knowledge or purpose by definition always act with acceptance.").

⁴⁶ *Id.* at 967.

⁴⁷ *Id.* at 961, 964-65. We determine whether someone has accepted a result by asking whether she would have so acted had she been certain the harm would occur. *Id.* at 961. Importantly, this counterfactual does not seek to punish the actor for what she would have done had the facts been otherwise, but rather seeks to determine the existence of an already existing "mental state." It is thus equivalent to a litmus test: would the strip have turned pink if the substance had not been an acid? I must admit to having initially misread Michaels as advocating counterfactual culpability. See Ferzan, *supra* note 30, at 622-23 n.87. I have since confirmed with Michaels that the latter interpretation is the correct one. E-mail from Alan Michaels to the author (February 14, 2006) (on file with author); see also Ferzan, *supra* note 43, at 215-17 (2002) (elaborating on this interpretation of Michaels' view).

cases of recklessness can be as culpable as some cases of knowledge unravels the problems of willful blindness and extreme indifference.⁴⁸

What Michaels' proposal does is to introduce a psychological culpability term within the Model Penal Code's hierarchy. But this simply places a band-aid on a larger problem. If acceptance is the root of culpability for knowledge, we should also dispense with knowledge as a culpability term. We should not just insert acceptance within the current schema. But then we should re-evaluate the question of which aspect of an agent's choice is the appropriate focus of our culpability schema. What we need is a reason to privilege one aspect over others, or a way to understand how the parts relate to the whole.

In summary, there are four different perspectives from which we can describe an agent's choice. Our current mental state terminology and the proposals for reform conflate these different aspects, focusing sometimes on mechanical accounts and sometimes on evaluative ones. The natural question, then, is which aspect is the appropriate perspective for culpability determinations.

III. CULPABILITY HOLISM

From the last section, it appears that we have to make a choice—a choice about which aspect of an agent's choice determines culpability. But it is here that I wish to present my own “holistic challenge.” In my view, there is a constitutive relationship between the internal states of the actor and our assessment of moral blameworthiness. Our evaluation that someone is culpable is a determination that that person's action revealed insufficient concern for the interests of others, and to make this assessment we need to know the mechanics and the quality of the agent's reasoning.

Ultimately, it is an error to believe that one aspect of this choice captures what we find morally condemnatory about culpable action. They all matter. Consider first why we need to know the content of the actor's practical reasoning. If we saw David plant a bomb, the wall blew up, and Vic died, we would not have sufficient information to condemn David. Our assessment of David's culpability depends upon the risk that he understood himself to be imposing. That is, we judge David to be more or less culpable depending upon whether he knew Vic was there, thought there was a chance Vic might be there, or believed Vic was not there. Without knowing the risks David understood his action to be imposing, we cannot attribute meaning to that action.

⁴⁸ Michaels, *supra* note 29, at 976-1019.

Indeed, the risks that David saw himself as imposing are only a portion of what we need to know. We also need to know *why* David imposed these risks. David may have wanted to kill Vic. Or David may have regretted this unfortunate side-effect. Moreover, David may have viewed himself as freeing a guilty man or saving one hundred innocent prisoners.

The action description “David killed Vic” is not sufficient for the criminal law. After all, our actions can be re-described to include results that we did not (or even could not) foresee. But the meaning of the action, the way that the defendant communicates respect or disrespect for others, cannot be assessed without looking to the mechanics of the actor’s reasoning. It is our capacity for reason that makes us moral agents, and it is this reasoning that lies at the heart of our responsibility.⁴⁹

Fletcher seems, at least at one point, to disagree. He claims, “one can tell from the context whether the actor intends to engage in harmful behavior and, specifically, what kind of harmful behavior is envisioned.”⁵⁰ “We *can intuit* whether the person with whom we are in physical contact intends a friendly hug, a sexual pass, or a malicious assault.”⁵¹

Certainly, there are many times that we can infer an action’s meaning from the way in which (and the context in which) it is performed. But the critical question is what authoritatively determines the meaning of an action in cases of disagreement. The answer is that we must first know why the actor did what she did, and only after we know this can we normatively attribute meaning to her action.

Looking to the actor’s practical reasoning is thus the first step in finding meaning in another’s action. Fletcher admits that there are borderline cases, but claims that looking to the actor’s intention is an “unreliable method” as “[t]hat inquiry presupposes that [the defendant has] firm, clearly-understood intentions.”⁵² In the context of the *Goetz* case, Fletcher argues, “[i]t is entirely possible that the intention of the four youths to harass Goetz and take his money depended in subtle ways on how he would respond to them.”⁵³

While I do not doubt that there are times when we do not know what we want, I hardly think the situations are sufficiently pervasive to undermine our reliance on the subjective mental states of the actor. The Goetz “victims” had intentions that were arguably internally and

⁴⁹ See Stephen J. Morse, *Inevitable Mens Rea*, 27 HARV. J.L. & PUB. POL’Y 51, 52-53 (2003).

⁵⁰ GRAMMAR MANUSCRIPT, *supra* note 1, at 412.

⁵¹ *Id.* (emphasis added).

⁵² *Id.* at 413.

⁵³ *Id.*

externally conditional.⁵⁴ But let us take the more run of the mill case: I see your leg come into contact with a dog. I say, “Why did you kick him?” You reply, “Geez. I’m sorry. I didn’t see the dog.” It is readily apparent that your claim that you did not see the dog changes the description of your behavior from being a kick to being a stumble. Mental states are essential ingredients in meaning.

This still leaves a second stage for our attribution of meaning. We may still criticize an actor even after we know why she did what she did. Once we know the actor’s reasons and the risk the actor perceived, we decide—not the actor—whether the action is culpable. Thus, to the extent that we normatively judge the action, we determine its meaning as well, but we cannot make this determination until after we understand the actor’s reasons for performing the action.

In attributing this meaning, we need to know more than the just the mechanics of the agent’s reasoning. A second constitutive aspect of an actor’s culpability is her psychological feeling about the harm she is imposing. This is perhaps clearest in the case of knowledge. The basis for our condemnation of David’s killing Vic is not simply David’s *belief* that Vic would die as a result of his action but David’s failure to be sufficiently moved by this fact. As Alan Michaels has argued, an actor who knows that a harm will occur *accepts* this fact. The actor is willing to tolerate the harm’s occurrence.⁵⁵

Indeed, the belief that reasons and risks should move us to act or to abstain lies at the heart of the argument that psychopaths lack sufficient affective capacity to be morally accountable agents.⁵⁶ If they do not appreciate the harm that they can do to others, then they cannot respond appropriately to these reasons. Moral agents are not merely prudential risk and reason calculators. They are persons who appreciate what hurting other people means and are generally moved by these considerations. Thus, when someone who can appreciate a moral norm fails to be moved by it, the actor’s decision is a culpable one.

Hence, while we can describe risks and reasons in mechanical terms, we should not ignore the affective aspect of practical reasoning. Beliefs, goals, and desires do normative work because an agent *should* be moved to avoid harming others. Part of what makes an agent

⁵⁴ See generally Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138 (1997).

⁵⁵ See Michaels, *supra* note 29, at 967 (“What makes the knowing actor morally culpable is her action *connected with* her knowledge. It is the action in spite of the knowledge. The fact that she caused the harm, *and* that knowledge that she would cause the harm was not sufficient to stop her from acting, render the action culpable.”).

⁵⁶ See generally Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511 (1992).

culpable is that she has the capacity to be moved by moral reasons, but is not so moved. Her culpability has an affective component.

Finally, the quality of the actor's deliberation also informs our culpability assessment. Even if an agent's decision-making abilities are not sufficiently degraded to excuse her conduct, she may still be entitled to mitigation.⁵⁷ Conversely, we may think that an agent who makes a decision under ideal decision-making conditions, with more time and ability to be moved by moral reasons, is more culpable for having the time to deliberate and weigh moral reasons and still choosing to harm or risk harming others.

Notice now how all of these factors relate to normative culpability. Whether the normative judgment is described as "indifference," "insufficient concern," or a "gross deviation from the actions of a law abiding person," this normative judgment is an assessment of the underlying quality and mechanics of the actor's practical reasoning. It is all of these factors as a whole that lead to our determination that an actor is culpable. In my view, Fletcher is incorrect in claiming that the descriptive theorist wishes to eliminate blame and condemnation from the criminal law. Rather, the descriptive theorist focuses on grammar. But even if we wish to turn to meaning—meaning must come from the grammar of culpability.

IV. TOWARD A MORE UNIFIED CONCEPTION

At this point, it may seem that the conceptual rubber hits the normative road: how is it that we determine whether one actor is more culpable than another? How is it that we can unify all of these aspects?

I believe there is a bit more conceptual work to be done before we get to this normative question, and that once we do the conceptual work, the normative question becomes much simpler to resolve. In this section, I make three arguments. First, subjective culpability assessments all entail judging the actor's risks against his reasons for acting. That is, I agree with Larry Alexander that purpose and knowledge collapse into recklessness.⁵⁸ After arguing for this single conception of culpability, I will explain how questions of justification and excuse are also part of this single assessment. That is, our culpability assessments necessarily include the reasons that justify the defendant's action, and the instances that excuse the defendant's action.

⁵⁷ See generally Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289 (2003).

⁵⁸ Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931 (2000).

My final claim will be that the Model Penal Code's definition of recklessness currently embodies this entire culpability assessment.

An agent is culpable when her reasons for acting do not justify the risks she believes herself to be imposing.⁵⁹ To determine whether an agent is morally blameworthy, we must know both the risk that she viewed herself as imposing, and the reasons for which she imposed that risk. This is nothing short of the recklessness calculation.⁶⁰

Purpose and knowledge are mere species of this recklessness assessment. As currently understood, purpose represents just an extreme case on the reasons' side of the calculation, where the reason is presumptively unjustifying, while knowledge represents the extreme on the risk side of the axis, where certainty that harm will occur is presumptively unjustifying.⁶¹ Appearances are deceiving, however. For a purposeful or knowing act to be culpable, it must be unjustified, and thus, even for purpose and knowledge, we must know about both the risk and the reason. While instances of purpose and knowledge require "defenses" of justification, recklessness includes the justifiability assessment within the mental state term.⁶² However, all three ultimately turn on the same assessment of whether the reasons the actor perceived justified the risks the agent viewed himself as imposing.⁶³

Recognizing that all culpability calculations entail this single balancing explains why some acts that are supposedly performed at a "lower" level of culpability seem to be just as (if not more) culpable than acts performed at a "higher" level of culpability.⁶⁴ Imagine that Alice swings her arms around wildly, recognizing but not caring that

⁵⁹ *Id.* at 938-39; see also ALEXANDER, FERZAN, & MORSE, *supra* note 28, ch. 2.

⁶⁰ Alexander also argues, and I concur, that the substantiality prong does not operate independently of the justifiability prong. Alexander, *supra* note 58, at 933-36. The only purpose of the substantiality prong, I believe, is to limit the reach of the criminal law to the truly culpable and not the marginally so, but this limitation can be imposed by requiring that the choice represent a gross deviation from the decision a law-abiding person would make. See ALEXANDER, FERZAN, & MORSE, *supra* note 28, ch. 2; Joshua Dressler, *Does One Mens Rea Fit All? Thoughts on Alexander's Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 955, 957-58 (2000) (suggesting this alternative interpretation of the substantiality requirement).

⁶¹ Alexander, *supra* note 58, at 939-45; see also ALEXANDER, FERZAN & MORSE, *supra* note 28, ch. 2.

⁶² GRAMMAR MANUSCRIPT, *supra* note 1, at 474.

⁶³ One question I will not address here is whether the reasons the actor perceives must motivate him to act, or whether it is sufficient that he is aware of these justifying reasons. Thus, if the Terror Bomber wants to bomb to kill the school children, but recognizes that the Strategic Bomber may permissibly perform the same bombing run to wipe out the munitions factory, we must know whether the Terror Bomber may avail himself of the Strategic Bomber's reasons. While I believe that awareness is sufficient, I will not argue for it here. For a full defense, see ALEXANDER, FERZAN, & MORSE, *supra* note 28, ch. 2.

⁶⁴ Cf. Douglas N. Husak, *The Sequential Principle of Relative Culpability*, 1 LEGAL THEORY 493 (1995) (questioning whether there is a culpability "hierarchy" within the Model Penal Code).

she might hit Betty. Alice then strikes Betty in the nose. Carla, in contrast, is told by David that if she does not punch Betty in those nose, David will kill Carla and her entire family. In these cases, it is readily apparent that Alice is more culpable than Carla, despite the fact that Carla has *purposefully* injured Betty; whereas, Alice has only *recklessly* injured Betty. Carla's justification will ultimately absolve her from culpability, but as our culpability hierarchy is currently formulated, *prima facie*, Carla is more culpable than Alice.

Unifying culpability within the concept of recklessness also resolves the dispute as to whether purpose is always more culpable than knowledge. Some theorists argue that intending to cause a harm is more culpable than foreseeing that one will cause a harm because intentions are central to the actor's agency. Identifying with, and aiming at evil, is said to be more culpable than tolerating evil.⁶⁵ Other theorists object, claiming that being indifferent to others can be just as culpable:⁶⁶ why distinguish between the bomber who bombs the plane to kill the pilot and the bomber who bombs the plane to destroy the plane, knowing the pilot is aboard?

The answer to this question lies in seeing that other goals may be just as telling of the agent's culpability as is the goal of causing the prohibited harm. All culpability questions are about risks and reasons. If the bomber wants to kill this pilot, this is a deplorable reason for acting. If a second bomber knows he will kill the pilot, but wants to get the insurance money on the plane, this is also a deplorable reason for acting. Both cases reveal that the actor does not value human life. Indeed, we might think that the agent who aims to kill another human being values life more. The intentional actor takes human life seriously, even if she seeks to end it. Or, in another context, we might agree with Harry Frankfurt, who argues that the bullshitter is more of an enemy to the truth than the liar.⁶⁷ As Frankfurt claims, while the liar stands opposed to truth, he must know it to lie about it. On the other hand, the bullshitter does not care about the truth. He does not care if he gets the facts right, or if he gets the facts wrong, he just goes on bullshitting.

This is not to say that purposeful conduct is not extremely culpable. Often it is. But the determination requires nuance. Sometimes purposeful conduct will be justified, or even if not justified, only mildly unjustified. In contrast, when an agent sees a risk as a side-

⁶⁵ See, e.g., MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 409 (1997) ("We are the authors of evil when we aim to achieve it in a way we are not if we merely anticipate that evil coming about as a result of our actions.").

⁶⁶ See, e.g., Claire Finkelstein, *The Irrelevance of the Intended to Prima Facie Culpability: Comment on Moore*, 76 B.U. L. REV. 335 (1996).

⁶⁷ HARRY G. FRANKFURT, *ON BULLSHIT* (2005).

effect of achieving an otherwise abhorrent goal, this agent, too, is extremely culpable for taking the risk.

In summary, I agree with Larry Alexander that there is a unified conception of culpability. Purpose, knowledge, and recklessness ultimately turn on the same mechanics—the risks the defendant believes herself to be imposing and the reasons the defendant has for acting.

Once we recognize that we are always weighing risks against reasons, we also see that we are always making an assessment of whether the agent was justified. It is certainly true that questions about justification exist outside our assessment of the actor's culpability. That is, we need a theory of what reasons outweigh which risks; whether an actor may be justified even if she is unaware of the existence of potentially justifying reasons; how third parties should react in instances of mistaken justification; and the like. Nevertheless, because our culpability determination necessarily entails deciding whether it is permissible for an agent to take *this risk* for *these reasons*, every culpability assessment requires an assessment of justification.

In addition, to determine whether an agent is ultimately culpable, we must, as Fletcher claims, take excuses into account. Excuses negate culpability in two ways. First, sometimes the actor's excuse shows that he has lived up to the reasonable person standard, and thus, although he has caused harm, he has done so under conditions that do not render him blameworthy (duress, for example). This comparison of the actor to the reasonable person can be found in both negligence and recklessness definitions. However, the second way that excuses negate culpability entails an assessment of the actor's reasoning. Our assessment of whether someone has "consciously disregarded" an unjustifiable risk must assess the quality of that reasoning, and whether it was sufficiently degraded to entitle the defendant either to an excuse or to mitigation. That is, automatism and insanity are questions about the agent's rationality and reasoning. Therefore, in assessing whether an agent has "consciously disregarded" an unjustifiable risk, implicit in this determination is a qualitative evaluation of the agent's decision-making abilities.

Ultimately, the Model Penal Code's definition of recklessness entails this holistic assessment of the actor's culpability. To determine whether an actor is culpable, we must always evaluate the reasons she has for acting and weigh them against the risks she sees herself as imposing. We must assess whether the risks she perceives herself as creating are justified. Moreover, as is currently reflected in the Code's recklessness standard, the criminal law should not concern itself with every culpable action but only those actions that represent a gross deviation from the behavior of a law-abiding citizen.

The other elements of culpability can also be folded within this broad evaluative standard. Just as decision-making impairments might entitle an agent to mitigation or to an excuse, planning and coolness of reflection reveal a higher quality of decision making, and thus, a slightly greater culpability. Finally, our theory of moral agency must presuppose that the actor is moved by moral reasons. Thus, we can assume that the actor who knows a harm will occur, accepts it, because our view of moral personhood requires that the agent be able to respond to moral reasons.

This approach is completely in accord with Fletcher's holistic legal thinking. Although Fletcher once criticized views of "reasonable" over "right" or "flat" versus "structured," he has now come to view "flat" reasoning as holistic—it is "the use of a single rule to resolve a complex legal problem."⁶⁸ There is little doubt that although this culpability assessment can be boiled down to one standard, it entails a variety of complex determinations. But it is the sum of these different parts that gives meaning to the defendant's action. With this one rule, we can assess the entirety of the defendant's culpability.

V. NEGLIGENCE

In my view, a more holistic assessment of culpability—one that assesses the actor's reasons and the risks that he takes against the reasonable person standard—is all that is required. With this standard in mind, we should return to Fletcher's four complaints about focusing on subjective mental states: the failure to recognize the relationship between excuses and culpability; a disdainful attitude toward negligence; a misperception of the moral gravity of recklessness and negligence; and a confusion about the lexical ordering of wrongdoing and guilt.⁶⁹

I reject the first and fourth objections. As to the failure to explain the relationship between culpability and excuses, I have argued above that the definition of recklessness can be understood to include an assessment of whether the agent should be excused. Indeed, the definition of recklessness is preferable to that of negligence because negligence cannot fully account for our theory of excuses. A negligence inquiry only asks whether the defendant created the risk, whether it was unjustified, and whether it was a gross deviation from the actions of a reasonable person (culpability and excuse). But under such a standard there is no reason to excuse automatism and insanity.

⁶⁸ GRAMMAR MANUSCRIPT, *supra* note 1, at 208.

⁶⁹ *Id.* at 447.

Both cases are deviations from the reasonable person. The reason why such cases are excused is because they consist of defects in *reasoning*, but reasoning is not part of the negligence analysis as explicated by Fletcher.⁷⁰ Thus, we need an understanding of culpability that entails reasoning to make sense of those excuses that are premised upon defects in reasoning.

Fletcher's fourth objection is that it leads theorists to abandon the wrongdoing in favor of culpability-based conceptions of criminal law. In my view, the criminal law should be culpability-based so I am willing to accept this result. In addition, Fletcher's own endorsement of the Model Penal Code's definitions of negligence and recklessness leads to the same result. As Fletcher notes, viewing the definition of a crime as including the "risk" reifies risk.⁷¹ But from an objective (God's eye) standpoint, risks are either 0 or 1; it is only at the level of the individual actor, with epistemic limitations, that we can assess risk. Thus, when Fletcher endorses "creating a risk" as constituting an offense definition, he is adopting a view that is itself a culpability-based conception of criminal law.⁷² Fletcher must either reject this definition or accept the primacy of culpability, but he cannot have it both ways.

This leaves us with Fletcher's second and third objections. Both of these objections are premised upon Fletcher's defense of negligence liability. Under my model, negligence cannot be explained. Negligence is a preference for the external over the internal. There is meaning without grammar. I believe that negligence being an outlier is not a problem for my theory but a challenge for the grammar of criminal law as Fletcher finds it. While I will not fully defend my position here, I will attempt, at least, to shift the burden of persuasion. I shall present my challenge on conceptual, structural, normative, political, and comparative grounds, as these are the foundations of criminal law according to Fletcher.

The first question is conceptual. Fletcher argues that intentional misconduct and negligent conduct have the same shared grammar. He

⁷⁰ I owe this point to discussions with Larry Alexander.

⁷¹ GRAMMAR MANUSCRIPT, *supra* note 1, at 474 n.90. He defends by claiming that "this manner of speaking has become well accepted in law." *Id.* This strikes me as neither a justification nor an excuse for his usage. There is simply no reason to perpetuate conceptual confusion.

⁷² For example, Heidi Hurd and Michael Moore argue:

[T]o see that risk is an epistemic notion is to see its ineligibility to serve as the touchstone of wrongdoing, duty-violation, or rights-violation. Epistemic failure by persons is the locus of their culpability, not of their wrongdoing. Since to 'hit another with a risk' is literally to hit the other with nothing at all, we cannot regard risks as harms or risking as wrongdoing. There is blame to unreasonable risk-taking, but it is the blame of being culpable, not the blame of rights-violation or wrongdoing.

Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, in 3 THEORETICAL INQUIRIES IN LAW 333, 351 (2002).

thus attempts to shift the burden of persuasion to those who do not believe that negligence is culpable.⁷³ In Fletcher's view, the definition is the risk imposed; the wrongdoing is causing the risk; and the culpability is our normative assessment that the actor deviated from the risk. Thus, there is no intrinsic difference between an intentional harm and a negligently caused one.

I demur. First, as noted above, viewing the definition as including the "risk" reifies risk. Causing harm is an objective determination; creating a risk is subjective. This is a significant distinction. Intentional conduct and negligent conduct do not have the same definitions under Fletcher's view, and thus, he cannot claim that they share the same grammar.

Fletcher is also mistaken in his conceptual claim that the culpability assessment we make for subjectively culpable states is the same assessment we make for negligence. It is true that in both situations, we judge whether the actor has lived up to our normative standard. But the object of that assessment is different. In the first case, we look to the perceived risks and reasons. In the second case, there are no risks or reasons to judge; we judge the conduct alone. Here, too, negligence and intentional conduct do not share the same grammar.

Another problem is whether negligence fits within Fletcher's structure of the criminal law. One model Fletcher proposes envisions criminal law as constructed around the concepts of aggression, consent, self-defense, and punishment. But whether negligence fits within this model is completely dependent upon one's theory of aggression. While one may certainly kill a culpable aggressor, the question of whether an innocent aggressor is a permissible target of justified self-defense is hotly contested.⁷⁴ Indeed, one might argue that there is something missing from the concept of aggression when we extend it beyond intentional (or at least reckless) attacks.

Beyond the conceptual and structural challenges lies the normative one. I cannot do justice to the writings against punishment for negligence here. I will only argue that Fletcher has not shifted the burden of persuasion. One of Fletcher's normative points is the use of a hypothetical modification of the Ford Pinto case.⁷⁵ Fletcher imagines two companies: the first does not even bother to check the safety of the car's construction and the second researches the safety of the car, and comes to a conclusion that the benefits outweigh the risks. Unfortunately for this second company, a jury disagrees. Under current

⁷³ GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 126-27 (1998).

⁷⁴ For the view that self-defense is not justified against innocent "aggressors," see Kimberly Kessler Ferzan, *Justifying Self-Defense*, 24 LAW & PHIL. 711 (2005).

⁷⁵ GRAMMAR MANUSCRIPT, *supra* note 1, at 455.

law, Fletcher maintains that the first company is negligent and the second company is reckless. Fletcher maintains that the first company is more culpable than the second.⁷⁶

While I concur that the first company appears more culpable than the second, I do not believe that this hypothetical reveals that negligence is more culpable than recklessness. The first company's failure to investigate seems to reveal the "fault of not knowing." But the particular fault here is more than simply failing to investigate—it is that of being a major car manufacturer that has a continuing duty to investigate safety and chooses not to do so. A car company cannot just forget about safety in the way that I can forget to pick up my dry cleaning. What does all the work here is our assumption that the car manufacturer must *choose* not to investigate.

Now look at the second company. There are two possibilities here, only one of which makes the company reckless. The jury either disagreed with the risks and reasons the company had or the jury disagreed with the balancing. If it is the former, then the company is only negligent not reckless. Indeed, if the risks and reasons as the company perceived them did justify its action, the company is not culpable. That is, if the company mistakenly believed that there was only a slight chance of injury and that chance would have justified its action, then the company is only negligent because it did not *consciously disregard* an unjustified risk.

On the other hand, we will deem the company to be culpable if its balancing is different from the jury's. Fletcher seems to imply that this would be unfair or wrong.⁷⁷ But why? If the company gets the facts right but the balancing wrong then it is not giving appropriate moral weight to lives versus money: That is what it means to have insufficient concern for others. There is no unfairness here. Secondly, if this balance is only slightly askew, the company is not criminally reckless because the balance must be so skewed as to represent a *gross deviation* from what a law-abiding company would do. In summary, Fletcher's hypothetical does not support the view that negligence can be more culpable than recklessness.

Then there is the political question. According to Fletcher, "the political precedes the moral."⁷⁸ We need to have a theory of the state

⁷⁶ Although Fletcher makes this argument in *Grammar*, it is more fully explicated in *Basic Concepts*. See FLETCHER, *supra* note 73, at 116 ("The two cases exhibit the difference between sloppiness and indifference on the one hand, and good faith but slightly callous risk-running, on the other.").

⁷⁷ *Id.* ("Still one wonders whether the sloppy and indifferent company is not in fact worse than the company that acts in good faith but comes to the 'wrong' decision about the costs and benefits of its risk-taking conduct.").

⁷⁸ GRAMMAR MANUSCRIPT, *supra* note 1, at 229.

before we can determine what the state may punish. We might question, therefore, whether the fault inherent in negligence is different from the culpability inherent in conscious risk-taking, and whether negligence, in fact, requires a different theory of the state.

A liberal theory of the state can embrace the criminalization of conscious risk-creation (even in the absence of causing harm). If the state wishes to prevent harm to legally protected interests, it can inform citizens that they may not risk such harms for bad reasons. When actors ignore this norm, then they are culpable. They have chosen to risk hurting other people for morally and legally insufficient reasons.

On the other hand, consider Walter and Bernice Williams, who failed to recognize that their child needed medical treatment.⁷⁹ The parents mistakenly believed that their child had a mere toothache, but in fact, the child had an infection that turned gangrenous, and when the child then contracted pneumonia, he died. The parents were convicted of involuntary manslaughter because they failed to live up to the reasonable person standard. When we punish these defendants, is this punishment also consistent with a liberal theory of the state? Or, rather, is it a move toward perfectionism? When we say they *should* have known, what precisely do we mean?

A final question is how negligence should be understood within Fletcher's comparative project. As Fletcher notes, the United States uses tort liability in situations in which Continental jurisdictions criminally punish negligent acts.⁸⁰ From a comparative perspective, is negligence liability foundational across jurisdictions, or is our understanding far more fractured?

In summary, Fletcher's project seeks to reveal the grammar of the criminal law. But from conceptual, structural, normative, political, and comparative perspectives, it is not clear that liability for negligence is part of our shared grammar. Given that descriptive and normative culpability can be reconciled with regard to subjective mental states, the burden lies on those who wish to punish for negligence to show that it is foundational and should be accommodated.

CONCLUSION

The grammar of the criminal law gives meaning to the whole. Likewise, the structure of our culpability assessments—our factual analysis—provides the basis from which we can derive the meaning of another's actions. Our assessments of culpability are holistic, requiring

⁷⁹ State v. Williams, 484 P.2d 1167 (Wash. Ct. App. 1971).

⁸⁰ GRAMMAR MANUSCRIPT, *supra* note 1, at 234, 381.

an analysis of risks, reasons, and decision-making conditions, and it is the sum of these parts that gives rise to our normative judgment about whether the actor's reasoning gave due regard to the interests of others. Ultimately, we must assess whether the choice manifests indifference, wickedness, or malice. We give meaning to the whole.

Thus, we need not choose between descriptive and normative *mens rea*. Our judgments ultimately entail both. Grammar is required for meaning.

My view, which requires both the subjective and the objective, fails to account for negligence. However, those who wish to punish negligent misconduct must explain how its grammar fits within the criminal law structure as a whole. As Professor Fletcher's project aims to show the conceptual, structural, normative, political, and comparative foundations of our shared grammar, negligence remains a fractured and disjointed piece of that puzzle.