

# Truth in Codification

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## INTRODUCTION

Some men think that the earth is round, others think it flat; it is a matter capable of question. But if it is flat, will the King's command make it round? And if it is round, will the King's command flatten it?<sup>1</sup>

These are the words of Thomas More as interpreted by Robert Bolt in his play *A Man for All Seasons*. More invokes the issue of scientific truth to question Parliament's authority to determine whether King Henry VIII should be recognized as the head of the Church of England. The point is well taken. When the issue is scientific truth, those with lawmaking authority cannot decide. Yet More's insight is not limited to empirical truths about the natural world. Philosophical truths are also beyond the competence of the legislature. There is something ridiculous

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<sup>1</sup> See ROBERT BOLT, *A MAN FOR ALL SEASONS* 133 (1990).

about a legislature intermeddling in a philosophical dispute — say, by deciding whether Immanuel Kant’s moral theory is superior to Jeremy Bentham’s. The point is so obvious that one wonders how any legislature could think differently. Yet some do. Some codes legislate the basic philosophical concepts on which they depend. Others function in a more subtle collaboration with the creative output of scholars and courts.

### I. PHILOSOPHICAL TRUTHS AND LEGISLATURES

American legislatures invade the domain of philosophical truth on a regular basis. The Model Penal Code (“MPC”),<sup>2</sup> originally drafted by the American Law Institute in 1962, offers itself as a stellar example. The MPC ventures numerous definitions on matters that nevertheless remain open to philosophical dispute.

For example, section 2.01(2) of the MPC defines a voluntary act by excluding any “bodily movement that . . . is not a product of the effort or determination of the actor, either conscious or habitual.”<sup>3</sup> By implicitly defining action as a product of the will, the code takes a stand on a highly controversial philosophical issue, one that generated heated debate among German scholars for several decades after World War II. Perhaps without realizing it, the MPC’s drafters committed themselves to a causal as opposed to a teleological theory of action.<sup>4</sup> The teleological theory holds that action must be defined relative to the actor’s intentionality;<sup>5</sup> the causal theory insists that willed bodily movements are sufficient to constitute action.<sup>6</sup>

What was the great utility of tackling this philosophical conundrum? In those cases where the issue might arise, say, whether sleepwalking was or was not a voluntary act, the courts have no trouble consulting the case law or the scholarly literature on the subject. Even with the MPC’s definition, case law and scholarly

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<sup>2</sup> MODEL PENAL CODE (1985).

<sup>3</sup> *See id.* § 2.01(2)(d).

<sup>4</sup> *See* GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 435-39 (1978) (explaining difference between causal and teleological theories of action).

<sup>5</sup> *See id.* at 439-48.

<sup>6</sup> *See id.* at 433-35. *See generally* MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* (1993) (providing current example and defending view that “willed bodily movements” are sufficient for action).

literature remain indispensable — the terms of the code's definition require interpretation and elaboration. The point is that the question "What is a voluntary act?" is a philosophical question for which there is a truth of the matter — one's view might be true or false. Thus, legislatures exceed their competence when they try to resolve such issues.

Causation is no less troublesome a philosophical problem than that of voluntary acts. We seek the best account of causation on the assumption that some accounts are closer to the truth than others. One wonders, then, whether the MPC's definition of causation is of any real use:

Conduct is the cause of a result when:

- (a) it is an antecedent but for which the result in question would not have occurred; and
- (b) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense.<sup>7</sup>

This provision, of course, does not tell you much because the problems of proximate cause are deferred to other code provisions.<sup>8</sup> While the remaining subdivisions of section 2.03 provide more detailed solutions for the problem of remote damage in cases pitched to particular modes of culpability, all of the stipulations end with the proviso that the defendant should be criminally liable for remote harm only if the harm is not too remote "to have a [just] bearing on the actor's liability or on the gravity of his offense."<sup>9</sup> Including the word "just," however, leaves all the difficult problems unresolved; therefore, the attempted verbal compassing of the concept turns out to be words with little constraining effect. The philosophical problem of causation turns out not to be easily disciplined. Thus, legislators enter these minefields at their peril.

The hazard of legislating philosophical truths is again illustrated in the problem of distinguishing intentional from negligent wrongdoing. This is a matter that legal theorists have pondered for centuries. Characteristically, the MPC's drafters thought they had it all resolved. Indeed, many scholars concur that section

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<sup>7</sup> MODEL PENAL CODE § 2.03(1).

<sup>8</sup> See, e.g., *id.* § 2.03(3).

<sup>9</sup> See *id.* § 2.03(2)(b) (alteration in original).

2.02(2) — defining the four mental states of purpose, knowledge, recklessness, and negligence — is one of the achievements of the MPC worthy of celebration.<sup>10</sup> In fact, however, the distinction between purposely and knowingly causing harm is hard to master. Lawyers and judges have grasped the distinctions only with great difficulty. Though the structuring of recklessness and negligence has much to commend it, they also are probably too convoluted for busy practicing lawyers. Even if these definitions could be easily committed to memory, however, my objection is still worth repeating: Are these matters really within the province of legislative wisdom and authority? After all, is the MPC's distinction between intentional and negligent conduct subject to being found true or false? Is there a truth of the matter? If there is, then the search for the truth is appropriately left to the tentative explorations of scholars and judges.

Consider one final instance of the MPC's drive to reduce enduring philosophical problems to black letter rules: the approach to unlawful force in section 3.11(1). The term "unlawful force" proves to be pivotal in a number of provisions on the justified use of force. In particular, self-defense requires that the actor reasonably believe that the use of force is immediately necessary to counter the use of unlawful force.<sup>11</sup>

As the concept is used in the continental legal traditions, unlawful force describes the unjustified, though possibly excused, use of force.<sup>12</sup> To make sense of this definition one needs to understand the concepts of justification and excuse. Yet these are not concepts that can be effectively reduced to black letter rules. Once explained, however, the concepts are fairly easy to grasp and apply.

Compare the simplicity of this continental approach with the prolix outpouring of words in section 3.11(1) of the MPC:

- (1) "unlawful force" means force, including confinement, that is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or actionable tort or would

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<sup>10</sup> See *id.* § 2.02(2).

<sup>11</sup> See *id.* § 3.04(1).

<sup>12</sup> See Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 708-09 (1988) (discussing concepts of unlawful force and justifiable force in terms of duress).

constitute such offense or tort except for a defense (such as the absence of intent, negligence, or mental capacity; duress; youth; or diplomatic status) not amounting to a privilege to use the force. Assent constitutes consent, within the meaning of this Section, whether or not it otherwise is legally effective, except assent to the infliction of death or serious bodily injury.<sup>13</sup>

The fact is that this convoluted section says exactly the same thing as, for instance, the German formula — unlawful force is unjustified but possibly excused force. The only difference is that the continental tradition relies heavily on the work of scholars whereas, in the late 1950s, the MPC's drafters could not call upon a comparable body of theoretical literature in English that would have explained these elementary points to them. Furthermore, the idea of looking abroad for guidance presumably would have been an insult to the assumed wisdom of the drafting committee.

Comparative law has the great advantage of enabling us to realize that things might be different. There might be an approach to codification that differs from the MPC. Indeed, my thoughts about the definitional presumptuousness of the MPC are nourished by the 1975 German Criminal Code.<sup>14</sup> The German statute makes no comparable effort to define any of these basic building blocks of criminal liability — action, causation, intention, negligence, justification, or excuse — although each plays a similar role in deciding criminal liability. For instance, German criminal liability presupposes and requires a voluntary action just as American law does.<sup>15</sup> But the German Code drafters saw no need for a definition on a matter so obviously subject to philosophical controversy, just as they did not see a point in addressing the concepts of causation, intention, and negligence. Similarly, the concepts of justification and excuse are indispensable for working with the Code, but the Code makes no effort to capture the concepts in lapidary legislative language.

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<sup>13</sup> See MODEL PENAL CODE § 3.11(1).

<sup>14</sup> See generally STRAFGESETZBUCH [StGB] (F.R.G.).

<sup>15</sup> See Heribert Schumann, *Criminal Law*, in INTRODUCTION TO GERMAN LAW 383, 388 (Werner F. Ebke & Matthew W. Finkin eds., 1996) (explaining that German Civil Law presumes offender acts voluntarily in committing crime).

Thus, while the German Code relies on all these foundational concepts, the text offers no definition of them.

Why, then, might the MPC venture where the German drafters are loathe to tread? The simple explanation is that the American approach to code drafting proceeds on the assumption that the code must stand on its own. American codes are not embedded in a theoretical literature that elaborates the essential concepts necessary for working with the code. A code of this sort is “imperialistic” — it seeks to displace not only the encrustation of the case law but also the teachings of scholars. Imperialistic codes propose to be comprehensive guides to the solution of particular problems. Of course, the courts must still apply the codes and resolve the interstitial problems of their provisions. The point is, however, that under such imperialistic codes, scholars are left only with the residual task of writing commentary on the codes and case law.

By contrast, a “deferential” code is less ambitious. It endorses a theoretical structure for solving problems and may contain some detailed provisions on specific areas, but it proceeds on the assumption of partnership with both the courts and the theoretical community.<sup>16</sup> A deferential code, therefore, has a proper sense of its own limits. To be sure, it avoids trying to solve controverted philosophical issues.

To illustrate, the German Criminal Code is a deferential code, as is the Bürgerliches Gesetzbuch (“BGB”),<sup>17</sup> the German Civil Code. The approach to private transactions in the BGB is based on the concept of the *willenserklärung* — the declaration of the will.<sup>18</sup> The concept is as critical as that of voluntary acts in the field of criminal law, yet the BGB sees no need to define one of its most basic concepts. That task is left to the scholarly literature.<sup>19</sup>

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<sup>16</sup> See Bruce W. Frier, *Interpreting Codes*, 89 MICH. L. REV. 2201, 2205 (1991) (stating that in Europe courts and academics work together to develop law).

<sup>17</sup> See StGB (F.R.G.); BÜRGERLICHES GESETZBUCH [BGB] (F.R.G.); see also Joachim Zekoll, *Kant and Comparative Law — Some Reflections on a Reform Effort*, 70 TUL. L. REV. 2719, 2745-46 (1996) (discussing permissive nature of German law).

<sup>18</sup> See William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 2091 (1995) (discussing how drafters of BGB believed “declaration of will” to be sole basis for contract).

<sup>19</sup> See generally JOHN P. DAWSON, ORACLES OF THE LAW 450-61 (1968) (discussing Pandektenschule).

The U.S. Constitution is a good example of the deferential style because it leaves its key concepts for elaboration by case law. For example, the Fourteenth Amendment is implicitly limited to action by the states, but the Constitution offers no definition of state action.<sup>20</sup> The sparse words of the Bill of Rights, including the provisions of free speech, freedom of religion, and search and seizure, require conceptual structures for their elaboration. The student of American constitutional law may find these structures partly in the case law.<sup>21</sup> Without recourse to the leading articles and scholarly books in the field, however, the student would be hard pressed to formulate a comprehensive view of free speech, freedom of religion, equal protection law, search and seizure, or, indeed, any field of constitutional law anchored in the country's original charter.

These examples suffice to make the general point that some codes seek to legislate the basic philosophical concepts on which they depend while others function in a subtle collaboration with the creative output of scholars and courts. Arguably, the point that legislatures should refrain from meddling in the area of philosophical truths lends itself to the *reductio ad absurdum*: every provision in a code is potentially a matter of truth; therefore, if legislatures abstained from legislating in such areas of philosophical controversy, they would not legislate at all. After all, is there not a philosophical truth about the meaning of theft, the role of negligence in tort law, or the criteria for forming a valid contract? Some people indeed think there might be, yet these are matters on which legislative competence is generally assumed.

We need, therefore, to account for the shared assumption that legislative will may indeed bind courts in certain areas of human interaction. I suggest that we divide the world of possible legislation into three categories. First, legislative acts may concern matters of philosophical truth on which legislatures should defer to the work of theorists and the tentative judgments of the

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<sup>20</sup> See U.S. CONST. amend. XIV, § 1 (illustrating how Constitution contains no definition for "state action").

<sup>21</sup> See *California v. Hodari D.*, 499 U.S. 621, 624-28 (1991) (elaborating on search and seizure doctrine); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777-80 (1986) (elaborating on freedom of speech doctrine); *Follett v. Town of McCormick, SC*, 321 U.S. 573, 577 (1944) (expanding on definition of freedom of religion).

courts. Typical examples are those discussed in this Article: voluntary acts and causation. Second, legislation may regard matters on which there is no truth of the matter, the point of legislation being to coordinate behavior and, thus, avoid needless conflict. Typical examples are rules of the road and rules of civil and criminal procedure. In this area it is far more important to get the matter settled than to get it right. Finally, legislative acts may fall into the vast middle area between the first two categories where the very question whether there is a philosophical truth of the matter is open to dispute.

To illustrate, consider the definitions of larceny and embezzlement. The criminal law does not seek to penalize all possible instances of dishonest acquisition. Rather, the crime of larceny is limited, in most codified definitions, to taking and carrying away specific objects with the intent to permanently deprive the owner of the use of the object.<sup>22</sup> The dishonest use of electricity or the dishonest capture of electronic signals might be just as bad as surreptitiously taking a concrete object, but the acquisition of intangibles is generally not regarded as satisfying the standard legislative definition of theft. The point of defining larceny is not, therefore, to discover and express the truth, but to establish a rule for guiding our behavior.

The purpose of the special part of the criminal code, then, is not to teach people the difference between right and wrong as a philosophical inquiry might endeavor, but to simply advise citizens about the liability risks implicit in their conduct. In fact, the nearly universal principle of modern criminal justice, *nulla poena sine lege* (no punishment without prior legislative warning), requires that a democratically elected legislature specify the contours of liability.<sup>23</sup> Thus, regardless of the question of truth, legislatures have the competence and indeed the duty to lay down the rules defining particular offenses. Citizens need to know what is prohibited in the special part of the code in order to avoid the risk of liability.

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<sup>22</sup> See 10 U.S.C. § 921 (1994); N.Y. PENAL LAW § 155.05 (McKinney 1997).

<sup>23</sup> See GLANVILLE L. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 575-76 (2d. ed. 1961) (requiring fixed, predetermined law to have crime or punishment); Jermoe Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 165 (1937) (noting maxim *nulla poena sine lege* requires strict construction of penal statutes that are not given retroactive effect).

In contrast, citizens need not ponder the mysteries of action, causation, and the subtle differences between purposeful, knowing, and reckless conduct. Many of the issues of the general part are philosophical conundrums that are irrelevant to citizens' planning of liability-free conduct. Thus, the role of legislation in the general part of the criminal law is more subtle and complicated.

The primary purpose of legislation in the general part of a criminal code is distinguished from the purpose of the special part in that it may not be to guide citizens, but rather to generate consistency in judging. The audience may be primarily judges rather than citizens. Definitions of excusing conditions, such as duress, insanity, and mistakes of law, are needed not so much to advise citizens about how to avoid liability for harmful conduct, but rather to channel the decisions of the judges into predictable patterns. These are the rules that Meir Dan-Cohen describes as decision rules for judges rather than conduct rules addressed to citizens.<sup>24</sup> However, it would be difficult to say this is the exclusive function served by the norms of the general part. For example, norms about the justifiable use of deadly force, also in the general part, serve to advise citizens about when and under what circumstances they can shoot to kill.

These are but a few suggested guidelines to the problem of addressing philosophical truth in legislation. There is obviously more reflection required, particularly in the private law fields of contracts and torts, about when it is appropriate to legislate and when it is necessary to defer to reflective wisdom of the academic profession. About one thing, however, I am sure: the question whether a matter is properly reserved to philosophical reflection is itself a matter capable of conceptual analysis that can be true or false. The legislature cannot determine, as a matter of will, its own jurisdiction over the range of ideas that represent claims of philosophical truth. Not even the King's command that the earth is flat will change its globular nature.

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<sup>24</sup> See generally Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

## II. DIADIC AND TRIADIC LEGAL THINKING

That certain issues should be reserved to the reflective thinking of the theoretical community enables us to understand one of the fundamental cleavages between common-law and continental civil-law systems. In common-law systems, the official sources of law are often limited to statutes and judicial precedents — statutes establish the general norms, and cases work out the details. I shall refer to this mode of thinking about law as diadic, wherein two poles, statutes and cases, determine what the law is.

Today, it would be hard to find a developed monadic legal system that relied either exclusively on statutes or on the precedents of the case law. In fact, virtually all Western legal systems today are at least diadic. In addition to legislative promulgations, case law — *jurisprudence constante* — has become an indispensable part of understanding the terrain of any particular field of law.

The distinctive feature of continental civil-law systems is that they have historically relied upon the contribution of scholarly teachings and doctrine in the evolution and definition of the law. This third dimension renders these continental systems triadic. In triadic systems, statutes and case law must accommodate the interpretation and theories offered in the scholarly literature.<sup>25</sup> Of course, no single scholar shapes the law the way the United States Supreme Court or Congress rules from on high. Scholarly opinion on conceptual and philosophical matters becomes influential only when it finds support in the community of scholars or when it becomes, as the Germans say, *die herrschende Lehre* (the dominant teaching).

Understandably, codes in triadic legal cultures are deferential. They respect the role of scholarly teachings in shaping the law. In diadic legal cultures, by contrast, codes are imperialistic — the drafters see no reason to defer to the supposed philosophical wisdom of scholars. Imperialistic codemakers think they are just as capable as anyone else to decide what is a voluntary act,

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<sup>25</sup> See MATHIAS REIMANN, CONFLICT OF LAWS IN WESTERN EUROPE: A GUIDE THROUGH THE JUNGLE 8-9, 95-96 (1995) (discussing how civil law has been developed by academic writings).

when one event causes another, or what the nature of intentionality is. It is worth noting, however, that in the modern world, legal cultures are no longer entirely diadic or triadic.<sup>26</sup> At the same time that case law becomes ever more important in continental jurisdictions, common-law courts increasingly defer to scholarly authorities.

Even though the U.S. Constitution provides an example of a deferential code, with theoretical scholarship playing a major role in the development of the law, common-law lawyers still tend to brand scholarly writing as secondary authority. It is hard for English speaking lawyers to think of the input of learned writers as primary authority for moving the law forward or, indeed, for preserving traditional values under-appreciated at the moment.

Thus, the challenge for lawyers in the common-law tradition is to understand the nature of triadic legal thinking under deferential codes. To better understand triadic legal cultures, it helps to grasp the humanistic nature of law. From this perspective, legal studies consist primarily of elaborating meanings and values that further the aims of a just legal order. Conceived of in this way, the law is more akin to theology and philosophy than it is to the social sciences. Though it makes sense for the reflective wisdom of respected scholars to play a major role in the shaping of the law, we have trouble finding the right words in English to capture this humanistic dimension of scholarship. The terms "doctrine" and "dogma," though respectable in theological circles, carry excessively authoritarian connotations. It is better to use the all-purpose term "theory" to capture the third dimension of the law.

The function of theoretical work in law is to prove the basic concepts that bear on legal analysis, order these concepts in some kind of structure, and elaborate the values and principles that lie behind the structure of liability. Philosophical reflections on the nature of action, declarations of the will, fault, reliance, causation, wrongdoing, excuses, and responsibility all fall within the bailiwick of theory in criminal and private law. As lawyers in triadic legal cultures understand the concept of law, the best theoretical teachings become constitutive elements of the law.<sup>27</sup>

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<sup>26</sup> There are triadic arenas of American law, however, such as constitutional law.

<sup>27</sup> See George P. Fletcher, *Two Modes of Legal Thought*, 90 YALE L.J. 970, 984-87 (1981)

When they are suitably drafted, deferential codes invariably invite triadic thinking. A body of theory underlies the code and informs its style of drafting. For students, the critical feature of a deferential code is the necessity of mastering the whole before addressing the parts. You cannot understand or work with the provisions of the BGB or the 1975 German Criminal Code without first understanding the system of thought that implicitly provides the foundation for the code. For instance, the German tripartite structure on unlawful force — definition, unlawfulness, and culpability — 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. That which is not expressed in deferential codes, and which resides in the theoretical infrastructure, might even be more relevant than that which is actually laid down in black letter rules.

The structure of a deferential code is typically revealed in its general part, which contains the provisions applicable across the fields of obligations, property, family law, and inheritance. The principles of the general part typically rely on undefined concepts, much as the BGB relies on the concept of “declaration of will” as the unifying principle of private law.<sup>28</sup> Significantly, the 1804 French Civil Code<sup>29</sup> lacks a general part, which reveals the relatively early date of its adoption and suggests a lower stage of evolution in the art of codification.

In contrast to codes, constitutions seem never to contain a formal general part. It is clear, however, that certain provisions come to stand out and confer a structure on the rest of the document. In the case of the U.S. Constitution, the Due Process Clauses,<sup>30</sup> the Necessary and Proper Clause,<sup>31</sup> and the primacy of the first ten amendments<sup>32</sup> all provide a unifying structure to

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(discussing effect of legal theory on law).

<sup>28</sup> See Ewald, *supra* note 18, at 2091 (discussing how drafters of BGB believed “declaration of will” to be basis for contract law).

<sup>29</sup> CODE CIVIL [C. CIV.] (1804) (Fr.).

<sup>30</sup> U.S. CONST. amend. V; *id.* amend. XIV, § 1.

<sup>31</sup> *Id.* art. I, § 8, cl. 18.

<sup>32</sup> *Id.* amends. I-X.

the entire document. In the case of the Canadian Charter of Rights and Freedoms, the unifying structure inheres in the first section, which establishes the following order of constitutional arguments: first, an analysis of rights and, second, an assessment whether the right should be trumped by the interests of a free and democratic society.<sup>33</sup>

So while scholarly theory has a role to play in criticizing and elaborating legislative promulgations, it must also have a synthesizing effect in order to have an influence on the contours of the law. It must generate a comprehensive structure for understanding the particular provisions of a code.<sup>34</sup> While the synthetic scholarship of triadic legal cultures generates a certain commitment to the ideas that constitute the grammar of legal analysis, adherence to these grammatical rules often strikes common-law lawyers as rigid and unpragmatic. I turn now to the common source of misunderstanding between lawyers in the common- and civil-law traditions: a misunderstanding about the role of "systemic" thinking in the law.

### III. HARD AND SOFT DISTINCTIONS

When continental lawyers, educated on a heavy dose of synthetic scholarly theory, confront the pragmatic common law, they are apt to say something like, "American law has no system" or "American law, with its case method, is chaotic." What precisely do continental lawyers mean when they complain of the lack of system in the common law? In fact, most distinctions and categories developed in civilian jurisprudence have their counterparts in the structure of common law.<sup>35</sup> The issue is not whether common-law lawyers have a set of categories and distinctions for analyzing legal problems but rather how seriously

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<sup>33</sup> See Robert A. Sedler, *Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms*, 59 NOTRE DAME L. REV. 1191, 1223-26 (1984) (discussing how § 1 unifies Charter).

<sup>34</sup> See Schumann, *supra* note 15, at 386-406 (explaining example of individual elements of German tripartite structure for analyzing criminal responsibility: "definition," "unlawfulness," and "culpability," so German lawyers can assess structural implications of all issues bearing on criminal liability).

<sup>35</sup> Cf. FLETCHER, *supra* note 4, at 454-55 (discussing analogues between Anglo-American legal system and German law).

common-law lawyers take their categories when they prove difficult to apply.

Consider the problem of classifying duress as either a justification or an excuse. Lawyers influenced by the German tradition begin their analysis by assuming that there are only two basic reasons for recognizing a defense — either it negates the wrongdoing of the offense (justification) or it negates the personal culpability of the actor (excuse).<sup>36</sup> The problem with duress is that in many cases the assertion of the defense has the effect of negating the wrongdoing, such as, for example, when an actor engages in a minor wrong for the sake of sparing a much greater interest.<sup>37</sup> In other cases, particularly those where the actor commits a great wrong such as homicide for the sake of his interests or those of his family, the assertion of duress as a defense has the effect of negating the actor's personal culpability.<sup>38</sup>

Whether duress has primarily one effect or the other is of great moment, for the classification of the defense determines its systemic effects. If duress is merely an excuse rather than a justification, then the use of force under duress is itself wrongful and may properly be resisted by those threatened by it.<sup>39</sup> Attaching the systemic implications requires resolving the question of classification. If scholars have trouble deciding one way or the other, they cannot simply throw up their hands and create a third category — a mixed defense, partly justification and partly excuse. The problem is that if duress were a mixed category, one would not know whether the person acting under duress were using lawful or unlawful force. It would be impossible, therefore, to determine whether the victim of the coerced use of force could in turn use force in self-defense to thwart the unlawful use of force.<sup>40</sup>

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<sup>36</sup> See *id.* at 455-56. German legal thinking structures liability and places acts such as duress into categories. See *id.*; see also Thomas Morawetz, *Reconstructing the Criminal Defenses: The Significance of Justification*, 77 J. CRIM. L. & CRIMINOLOGY 277, 279 n.7 (1986) (discussing clarity of German structured liability with respect to criminal defenses).

<sup>37</sup> See FLETCHER, *supra* note 4, at 829-33 (explaining duress as excuse to wrongdoing).

<sup>38</sup> See *id.* at 831.

<sup>39</sup> See *id.*

<sup>40</sup> See *id.* at 832; see also George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 979-80 (1985) (stating that American common-law thinking based on reasonableness leads to blurring of distinctions as opposed to German-structured liability). The prob-

Common-law thinkers are more inclined than their civilian counterparts to ignore such systemic implications of classifications. The common-law approach might be that first we should decide how to classify duress and then decide what pragmatic implications are desired from this classification. The idea that the implications are embedded in the classification strikes common-law thinkers as logical rigidity.<sup>41</sup> It ignores the famous maxim of Oliver Wendell Holmes, Jr., "The life of the law has not been logic; it has been experience."<sup>42</sup>

It is surprising, then, that common-law thinkers rarely appreciate the architectonic significance of moral and legal distinctions. A good example surfaced recently in the debate about the relevance of the act/omission distinction as applied to the problem of assisted suicide.<sup>43</sup> Without the distinction between intervening in the rights of others (acts) and failing to allocate benefits (omissions), it would be impossible to articulate a general theory of freedom. Consider, for example, John Rawls's first principle of justice, which accords to every citizen "the most extensive basic liberty compatible with a similar liberty for others."<sup>44</sup> Could basic liberty in this sense include the right to be assisted in time of emergency, say, the right to receive aid at the scene of an accident? If it did, then this aspect of liberty would conflict with the freedom of passersby to carry on their own business. We would be put in the position of having to weigh the

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lem of deciding the nature of duress resembles the problem of grammatical classifications. Gerunds like "arguing," "writing," and "judging" look like the verbs, but they function like nouns; for example, they serve as the subject of sentences such as, "Writing is difficult." Could we say that because gerunds look like verbs that we should create a third mixed category lodged between the distinct poles of noun and verb? No, because the mixed category would have no systemic implications. We would not know, for example, whether it could satisfy the grammatical rule that every sentence must have a subject, either express or implied. Cf. Dan M. Kahan and Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 311 (1996) (discussing tendency to abandon problem of classification).

<sup>41</sup> See Fletcher, *supra* note 4, at 949-54 (discussing tendency of common-law thinkers to utilize all available defenses regardless of crime alleged in pursuit of what is reasonable in comparison to civil law, which does not rely on "reasonableness").

<sup>42</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW AND OTHER WRITINGS* 1 (1982).

<sup>43</sup> See Yale Kamisar, *When Is There a Constitutional "Right to Die"? When Is There No Constitutional "Right to Live"?* 25 GA. L. REV. 1203, 1215-16 (1991) (suggesting concept of act/omission distinction is necessary for moral freedom).

<sup>44</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 60 (1971).

liberty of one against the liberty of another, and we could no longer speak of the most extensive distribution of the same basic liberty. The freedom of which Rawls speaks does not imply a right to be aided by the acts of others; rather, it refers solely to the liberty from noninterference by others in the exercise of free speech, freedom of religion, and other rights that can be exercised without interfering with the liberty of others.

This distinction between rendering assistance and being free from interference is fundamental to a philosophical system based on freedom as its central value. This is precisely the distinction between omissions (not rendering aid) and actions (interfering with the interests of others).<sup>45</sup> Therefore, so far as one's theory of law or justice begins with a commitment to freedom or basic liberty in the Rawlsian sense, one must respect the systemic difference between failing to render aid and interfering with the interests of others.

This fundamental distinction in legal thought finds expression as well in the doctrine of state action under the Fourteenth Amendment. When the amendment says that "no State shall . . . deprive any person of life, liberty, or property, without due process of law,"<sup>46</sup> the active verb "deprive" implies that to violate the Constitution, a state official must have actively intervened in the interests of its citizens. The failure to rescue a child in need will not, to the dismay of many, satisfy the requirement of state action.<sup>47</sup> The fact is that the entire edifice of American constitutional law rests on the distinction between state action and inaction — between the acts and the omissions of the state.

Let us recognize, then, that the distinction between act and omission lies at the foundation of our legal culture. It does not follow, however, that the distinction is easy to apply. Returning

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<sup>45</sup> The distinction sometimes gets confused with the theory of action. It is common to argue that omissions represent the absence of action. For a critique of this view, see George P. Fletcher, *On the Moral Irrelevance of Bodily Movements*, 142 U. PA. L. REV. 1443, 1443 (1994).

<sup>46</sup> See U.S. CONST. amend. XIV, § 1; Kamisar, *supra* note 43, at 1215-16 (suggesting concept of act/omission distinction is necessary for moral freedom).

<sup>47</sup> See *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 202 (1989) (holding that failure to protect minor from violent father does not violate minor's rights under Due Process Clause).

to the example of assisted suicide, the conventional view of a physician's prescribing pills to enable a patient to commit suicide is that the physician is acting to facilitate death.<sup>48</sup> Without the intervention of the physician, the patient would not be able to take an overdose to commit suicide. The question whether this intervention is justified differs fundamentally from disputes about whether the patient may refuse life-sustaining therapy. If a terminal patient wishes to permit the onset of death, the law clearly permits the patient to refuse further treatment.<sup>49</sup> The refusal is regarded as an omission that affects no one except the patient; therefore, refusal is located squarely within the domain of the patient's constitutionally protected autonomy.

This conventional application of the act/omission distinction now strikes many observers as simply arbitrary. Indeed, some lower and appellate courts have ruled that distinguishing between these two classes of patients, one who wishes to refuse treatment and the other who wishes assistance toward committing suicide, violates the Equal Protection Clause of the Fourteenth Amendment.<sup>50</sup> Skeptics balk at applying the act/omission distinction in this context.<sup>51</sup> With leading philosophers joining him, Ronald Dworkin recently submitted a philosopher's brief in the Supreme Court hearing on the constitutionality of prohibiting assisted suicide.<sup>52</sup> The brief explicitly rejects the moral relevance of the distinction between the patient's refusing medical care and the physician's acts facilitating death.<sup>53</sup> The only relevant issue, Dworkin argues, is whether the action or inaction "aim[s] at death."<sup>54</sup> The Supreme Court

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<sup>48</sup> See FLETCHER, *supra* note 4, at 332-34 (discussing traditional views on prescriptions by physicians to facilitate suicide).

<sup>49</sup> See *Cruzan v. Missouri Dept. of Health*, 497 U.S. 261, 277 (1990) (stating competent individual may refuse medical treatment).

<sup>50</sup> See *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1467 (W.D. Wash. 1994), *rev'd* 49 F.3d 586, 590 (9th Cir. 1995), *rev'd en banc* 79 F.3d 790, 798 (9th Cir. 1996), *rev'd* *Washington v. Glucksberg*, 117 S. Ct. 2258, 2275 (1997).

<sup>51</sup> See Jonathan R. Rosenn, *The Constitutionality of Statutes Prohibiting and Permitting Physician-Assisted Suicide*, 51 U. MIAMI L. REV. 875, 890 (1997) (arguing that act/omission distinction should be discarded in physician assisted suicide context).

<sup>52</sup> See Ronald Dworkin et al., *Assisted Suicide: The Philosophers' brief*, NEW YORK REVIEW OF BOOKS Mar. 27, 1997, at 41.

<sup>53</sup> See *id.* at 42.

<sup>54</sup> See George P. Fletcher, *Letter to the Editor*, NEW YORK REVIEW OF BOOKS May 29, 1997, at 45 (responding to Dworkin's brief).

ruled nine to zero that the lower courts, as well as the philosophers, were wrong.<sup>55</sup>

The merits of the Supreme Court case to one side, the intriguing question is why some people maintain faith in the architectonic distinctions of the law, and others seem prepared to abandon them as soon as their application becomes difficult. Continental thinkers are more likely than common-law judges and commentators to remain committed to the hard systemic distinctions of the law. In the continental view, there is more at stake than just resolving a particular problem. If a fundamental distinction, like that between justification and excuse or between acts and omissions, is abandoned for the sake of solving a particular borderline question, then the entire system of thought suffers. For those who keep faith with the system, the right response in the face of difficulty is to ponder the values expressed in the distinction more deeply in order to figure out how they should shape the outcome of a particular case.

Common-law lawyers are quick to abandon their categories in the face of such hard cases. Their distinctions turn out to be soft — willingly jettisoned in the face of uncertainty. This is part of what common-law lawyers mean, I believe, by approaching legal problems pragmatically or with a sense for the situation.<sup>56</sup> Adhering too closely to traditional rules and distinctions earns the reproof of forcing cases into the “bed of Procrustes” or trying to fit “square pegs into round holes.”<sup>57</sup>

Those who appreciate hard distinctions will be more likely to sympathize with my thesis that legislatures should not encroach upon the domain of these philosophical distinctions. If the distinctions are too soft, then those who use them are less likely to sense that they represent compelling truths about the deep structure of the law. If the claims of truth are weak, then it

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<sup>55</sup> See *Glucksburg*, 117 S. Ct. at 2275 (reversing decision of en banc Ninth Circuit decision).

<sup>56</sup> See KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 59-61 (1960). Karl Llewellyn introduced the term “situation sense” as his solution to the problem of common-law judging. See *id.* at 60. Ironically, the term was first coined by a German scholar, Levin Goldschmidt. See *id.* at 122, 127.

<sup>57</sup> This metaphor — fitting “a square peg into a round hole” — has been used over 300 times to describe difficult problems of legal classification. Search of WESTLAW, ALLCASES, TP-ALL (May 3, 1998).

seems more appropriate for legislatures to enter the field and to bring clarity with black letter rules. One can see, then, that a culture of soft distinctions breeds legislation and, therefore, encourages the move from a triadic to a diadic legal culture.

#### CONCLUSION

This is not the place to decide whether continental fidelity to systemic thinking is better or worse than common-law skepticism and pragmatism. My aim for the moment is to engender greater cross-cultural understanding of these divergent legal styles. As we move toward a world of greater legal and cultural interdependence, we need to appreciate the differences between reliance on hard and soft distinctions and on the related divergence between diadic and triadic legal thinking. Comparative law can proceed only after we first become clear about the merits of both ways of thinking.

