Criminal Law Theory: Doctrines of the General Part. Edited by STEPHEN SHUTE and A.P. SIMESTER. [Oxford: Oxford University Press. 2002. x + 333 pp. Hardback: £00]

The general part of the criminal law consists of those doctrines of the criminal law that cross the boundaries between different families of criminal offences. It includes various legal *concepts* that can be used more or less "off the shelf" in defining crimes (e.g. intention, possession, lawful excuse), as well as various legal *principles* that regulate the shape that definitions of crimes should take (e.g. *actus non facit reum nisi mens sit rea*), and various *mechanisms* to automate the creation of auxiliary crimes (e.g. the law of attempts and the law of complicity). The contributors to this collection are mainly interested in the first two aspects. Some of them set out to study important general part concepts, while others explore important general part principles.

Of course the two projects are not sharply distinct. That is because of a curious feature of legal life. Within limits, legal officials can behave like Humpty Dumpty and make what they say mean whatever they choose it to mean. As well as tailoring the principle to suit the concepts, in other words, they can tailor the concepts to suit the principle. They can create criminal liability for some omissions, for example, either by creating some exceptions to the principle that criminal liability requires a positive act, or by continuing to assert that criminal liability requires a positive act but ruling that some omissions count in law as positive acts rather than omissions. Outside the law, for instance in moral argument, the second move would be called cheating. At the very least quotation marks would need to be used to indicate that a word was being used in a technical sense. But in law the technical often becomes the vernacular, and the quotation marks are quietly dropped. The result is that, in law, arguments of principle (about how the law should be) are often disguised as arguments about the application of concepts.

In this collection, the highly informative exchange between Stephen Shute and G.R. Sullivan about the twin *mens rea* concepts of knowledge and belief brings the point out nicely. It is tempting to say, on reading Shute's fascinating catalogue of asymmetries between the criminal-law concepts of knowledge and belief on the one hand and their non-legal counterparts on the other, that many judges are guilty of elementary errors of analysis. But while Shute and Sullivan do each of them expose some philosophical errors in the assumptions of judges (e.g. about the structure of consciousness) the main achievement of their papers is to remind us how exceptionally skillful judges can be in filleting what they need from everyday concepts, and throwing the rest away as surplus (or inimical) to the law's needs. And just occasionally, one might add, in spotting logical possibilities - such as that of "wilful blindness" - that philosophers have tended to neglect. Between them, Shute and Sullivan do a tremendous job of bringing order and intelligibility to the *mêlée* of case law on knowledge and belief as *mens rea* elements, making these by far the most legally sophisticated essays in the volume. Shute also performs a valuable service for lawyers in digesting a vast body of philosophical writing. But in this volume neither author fares so well as critic. When, occasionally, they break from conceptual analysis and use the principles of the general part to evaluate legal developments, they both tend to shift from fine- to coarse-grained mode. Shute, for example, makes a slightly melodramatic complaint against the judicial expansion of knowledge to embrace wilful blindness (p. 198), and Sullivan invokes without argument a rather immodest version of the *actus non facit* principle (p. 215).

The dialectic of concept and principle is exhibited, rather than explored, in Claire Finkelstein's study of the principle that an *actus reus* has to be voluntary. Commonly the doctrine of "prior fault" – applicable, for example, to those who commit crimes while obliviously drunk – is regarded as an exception to this principle. A lawyer might equally say, however, that legally

speaking an involuntary act with prior fault *counts as* voluntary, so that the principle *needs* no exception. Finkelstein longs for a way of giving philosophical integrity to this reconceptualisation. She aspires to find a way in which the prior fault cases are non-anomalous. She does a great job of criticising previous attempts to do the same. But in disparaging the rival anomaly view for dealing with prior fault cases "on the basis of stipulation, rather than on the basis of existing doctrine," (p. 160), she neglects the obvious riposte that existing doctrine depends on stipulation. Voluntary acts in law include not only voluntary acts but also acts that the law deems voluntary for its own purposes. What purposes? Finkelstein observes that the prior fault cases "reflect a more fundamental moral problem with the notion of voluntariness" (p. 160). Exactly. The law's main purpose in manipulating the concept is to bracket the moral problem.

It may be thought that every time judges invoke judgments about guilt and innocence in giving shape to a concept used in the law, they are manipulating the concept for legal purposes. Victor Tadros's essay on recklessness as a *mens rea* concept shows that things are not so simple. Some concepts are judgmental even outside the law. Tadros's main question is whether the same judgment that is built into the concept of recklessness outside the law can be carried over into the eponymous legal concept, or whether the judgment has to be, so to speak, thinned out for legal purposes. In short, is the criminal law properly interested in the personal faults we exhibit as well as the wrongs we do and our responsibility for them? In a wide-ranging essay Tadros defends a positive, but qualified, answer, and in the process puts paid to some oversimplified blanket complaints about the criminal law's resort to "objective" (impersonal) standards for judging people's reactions to risk. He replaces the blanket complaints with tailored objections to a narrow class of objective tests that test for the wrong kind of faults. There are many intriguing thoughts in this essay, more perhaps than in any of the others in this collection. One marvels at the fecundity of Tadros's

philosophical imagination. Yet one also regrets it. Too many intriguing thoughts have been compressed into too short a space, so that full justice is done to none of them.

These essays focusing on key general part concepts form a cluster at the centre of the volume. Ranged to either side we find a number of contributions dealing with the justifications and implications of key general part principles. An exchange between Joshua Dressler and Jeremy Horder purports to be about the defences available to victims of domestic abuse who kill their sleeping tormentors. At first sight, this doesn't really look like a general part topic at all, so much as a topic local to the law of homicide. In reality, however, both authors are primarily concerned with a problem, clearly belonging to the general part, about the criminal law's fidelity to the ideal of the rule of law. According to the ideal of the rule of law, legally regulated conduct should be reliably guided and judged by the law that regulates it. One implication is that people accused of wrongs recognised by law should be dealt with under the law, not handed over to their victims. The issue about responses to domestic violence becomes, in Dressler's hands, a question about the range of cases in which the law should nevertheless permit self-help remedies to victims. We may agree, says Dressler, that the 'monsters' who torment their spouses with repeated violence should be dealt with harshly. But that is not the question. The question is: Who is justified in doing the dealing – the law or the victim? In emergencies perhaps the victim. But otherwise, argues Dressler, the law must continue to assert its monopoly. So, even if the execution of wife-batterers is justified in the law's eyes, in law the victim who kills her sleeping tormentor cannot be justified but at most excused, and should accordingly benefit from an excusatory defence such as provocation or duress rather than a justificatory defence such as self-defence or necessity. Horder replies, I think correctly, that while Dressler is right to think that rule of law permits self-help only in emergencies, the real problem lies in understanding what would count as an

emergency for these purposes. "Situations where the danger was imminent present one – but only one – way in which this requirement can be met," says Horder (p. 290). As he says, hostage situations in which the law cannot reasonably be expected to extricate the victim safely from a life-threatening situation may represent another. So the case against giving a justificatory plea to victims who take pre-emptive action while their tormentors are asleep is not so open-and-shut.

The same focus on the principles of the rule of law extends to several other essays in the collection. Towards the beginning there is a three-way debate between Paul Robinson, Antony Duff and Peter Alldridge about the criminal lawyer's favourite rule of law requirement: the requirement that the criminal law communicate itself clearly to those who are bound by it. According to Robinson's well-known view – one of several well-known views that he presents afresh in his characteristically lively contribution – the only answer to problems of clarity is codification of everything in a way that minimizes scope for official discretion and splits conduct rules from adjudication rules. With his usual philosophical panache, Duff rejects Robinson's answer as offering the wrong kind of clarity. A Robinsonian code lays down "prohibitions" to be "obeyed" as opposed to "declar[ing] and defin[ing] 'public' wrongs, from which citizens should refrain because they recognise them as wrongs" (p. 74). Is this objection sound? Although I think Robinson's codifying would tend to destroy as much clarity as it creates, and although I sympathise with Duff's view that the criminal law must address us as moral agents, so that we can grasp not only *what* is wrong but *why* (i.e. it must also have moral clarity), Duff's argument strikes me as mistaken in its reliance on an ideal of citizenship to support that view. Alldridge's comment, by contrast, concedes the citizenship proposal but tries to show that Robinson's project does not conflict with it. The three essays are individually exemplary, but even better as a trio.

There is also reliance on an ideal of citizenship in Andrew Ashworth's rule of law adventure at the back of the book, a timely and beautifully-executed investigation of the Diceyan principle that the criminal law also binds those who administer and enforce it. The problem, as Ashworth presents it, is double-edged. On the one hand, people (officials or non-officials) sometimes participate in criminal activity in order to detect and prosecute it. Should they benefit from defences based on their law-enforcement aims, assuming that in the process they act with the requisite *mens rea*? On the other hand officials sometimes give advice or encouragement that lead people to perform criminal acts in the legally mistaken belief that they are non-criminal. Should these non-officials benefit from special mistake of law defences based on the fact that the advice or encouragement was official? Ashworth tends to think that, subject to strict limits, the answer to both of these questions is "yes" on rule of law grounds. Whereas I tend to think that the answer to both questions is "no" on rule of law grounds. In Ashworth's hands the rule of law emerges as the doctrine that "legal values" should be protected, and that "good citizenship" in the service of legal values (seeking official advice, preventing crime) should therefore be encouraged. Whereas I have always understood the rule of law to be the ideal according to which legally regulated conduct should be reliably guided and judged by the law that regulates it (as opposed to concessionary standards designed to serve the legal system or other parts of government).

The rule of law is the *leitmotif* of this collection. It figures most prominently in the essays by Ashworth, Robinson and Dressler, as well as Larry Alexander's deceptively self-effacing essay on criminal omissions. But it also lurks in the background of the essays by Shute, Finkelstein and Tadros. A very common reason why the law gerrymanders its concepts is to make them more clear-cut than they would be apart from the law. Of course philosophers too are concerned with conceptual clarification. But it is one thing to clarify concepts in the sense of *exposing* their

grey areas and borderline cases, and quite another to clarify concepts in the sense of *attempting to abolish* their grey areas and borderline cases. The ideal of the rule of law tends to put pressure on for the latter kind of clarification, and some of the conceptual asymmetries identified by Shute, Finkelstein and Tadros reflect this pressure, as do some of their own responses.

So here is a question that is raised but not answered by this volume. Why do considerations about the maintenance of legality – the maintenance of the law's ability to serve as reliable guide and judge – typically loom so large in both the construction and the criticism of the criminal law's general part? Although there can be no doubt about their moral importance, these considerations surely have to wait their turn. There are many arguments to be had about the general values and objectives of the criminal law before one gets round to the rather inward looking, self-regulatory value of legality itself. In this volume, only the strikingly independent-minded first essay by Douglas Husak (on the use of the general part to set substantive limits to criminalization) shakes us convincingly loose from what might be called the rule of law agenda. This is not a criticism of the collection. On the contrary, the emphasis on the rule of law lends a certain unplanned unity to what might otherwise be a rather miscellaneous compilation of individually excellent essays. Yet it is also a source of curiosity.