

CHARACTERS ON TRIAL: THE THEATER OF CRIMINAL LAW AND THE PRINCIPLE OF CULPABILITY (*)

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1. Offense Definitions as Bonsai Stories.

Offense definitions tell stories. We usually approach them as legal commands, logical structures, or sets of elements that define a crime. But they are also narratives. When the law defines murder, theft, robbery, or bribery, it tells a short story. It brings together people, actions, objects, events, and intentions. It gives shape to a human event, selecting certain features and leaving everything else out.

These stories are very short. They usually have no names, dates, places, or many of the details we normally associate with storytelling. I like to think of offense definitions as bonsai stories.¹

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¹ For a broader development of the idea of the criminal offense definition as a narrative form and as a “bonsai story,” see M. Papa, *Fantastic Voyage. Attraverso la specialità del diritto penale*, 2nd ed., Turin, 2019, also available in French (Iris, Paris, 2020), Spanish (Tirant Lo Blanch, Valencia, 2021), and Romanian (UJ, Bucharest, 2022).

For a broader discussion of some of the themes addressed in this paper, I refer to my previous work on the subject, particularly to my publications in English, French, and Spanish, for the benefit of readers who do not read Italian: Id., *The Offense Definition as a Screenplay of Evil: The Rise and Fall of Visual Criminal Law*, *Católica Law Review*, 2020, 4, 3, 145 ff.; Id., *Appearance in Criminal Law. Illusion and Reality in the Description of Evil*, in *Aparenta in Drept. In Honorem Flavius Antoniu Baias*, Bucharest, 2021, 682 ff.; Id., *La créativité imaginante du droit pénal*, in *Cheminer avec Mireille Delmas-Marty. Mélanges ouverts en l'honneur de Mireille Delmas-Marty*, Le Kremlin-Bicêtre, 2022, 83 ff.; Id., *La définition de l'infraction comme “forme symbolique”*, *L'Inscible*, 2022, 259 ff.; Id., *La fuerza imaginante del derecho penal*, *Revista Ius Criminale*, 2025, 2, 10.

Among my recent works in Italian, see also, for further bibliographical references: Id., *La fattispecie come “forma simbolica”*, *Criminalia* 2024, 2025, 113 ff.; Id., *Guardare altrove per comprendere sé stessi: La comparazione come lampada magica per ripensare la legalità penale*, www.sistemapenale.it, August 3, 2026.

A bonsai is not simply a small tree. It is a real tree whose form results from an extraordinary process of selection, reduction, and compression. Something similar happens in an offense definition. Real human events are infinitely rich; they contain gestures, words, relationships, intentions, emotions, places, objects, prior events, and consequences. Criminal law cannot reproduce the world in its entirety, and it would make no sense to try. It selects pieces of perceptible reality, combines them with psychological features and with certain conceptual notions, legal and nonlegal, and then arranges them into a narrative relation: it tells a story, the story of each crime. These are short stories - bonsai stories, as I have said - and most of them have the character of horror stories: they tell of murder, sexual violence, human trafficking, robbery, corruption.

The narrative defines what criminal lawyers call the “type”: the paradigm of wrongdoing that describes the prohibited conduct. The “type” - in Italian, *fattispecie*; in German, *Tatbestand*; in Spanish “*Tipo*” - described by the criminal prohibition is the communicative vehicle through which citizens and judges understand what the crime consists in: citizens so that they know which rules of conduct to follow, judges so that they know when they may exercise the power to punish.

For our purposes, let us focus on a particularly revealing offense: larceny, the traditional common-law form of theft. Larceny expresses the wrongfulness of the conduct with particular clarity, because it describes the criminal action in dynamic, graphic, almost visual terms. Starting from the morphology of this offense and its metamorphosis, George Fletcher famously identified one of the basic patterns of criminal wrongdoing: the “pattern of manifest criminality.”²

The description of larceny offers an excellent example of normative storytelling: the wrongful conduct is narrated by referring to someone who *trespassorily takes and carries away the personal property of another, with the intent permanently to deprive the owner of it*. Someone acts. There is an object. The object belongs to another person and lies within a space, a sphere of dominion, where that person exercises control. The actor violates that space, crosses its boundary, takes the object, and then removes it from the other person’s sphere of control. He does so not for the pleasure of temporary use, but with the purpose of permanently depriving the owner of the thing.

We know almost nothing else. We do not know who these people are, where they are, whether the object is a diamond, a bicycle, a wallet, or a book. Almost everything that would belong to the full story of a real historical event has disappeared. Yet something happens. There is one person, another person, an object, a relation among them, an action, a movement through space, and an intention projected into the future. It is a radically compressed story, but it is still a story.

² G.P. Fletcher, *The Metamorphosis of Larceny*, Harvard Law Review, Vol. 89, 1976, 469 ff.; Id., *Rethinking Criminal Law* (1978), reprint, Oxford, Oxford University Press, 2000, 115 ff. See D.W. Denno, *When Two Become One: Views on Fletcher’s “Two Patterns of Criminality”*, Tulsa Law Review, Vol. 39, 2004, 781-801.

2. Narrative, Selection, and Form.

To say that the offense definition tells a story requires a clarification. By speaking of a “story” and of a “narrative” style, I am pointing to a property of textual form: the text selects entities, assigns them roles, arranges actions and transformations according to temporal and causal relations, directs attention toward certain elements, and leaves others in the background. A prescriptive text, then, can have a narrative structure without ceasing to be prescriptive.

This is where the dialogue with Law and Literature becomes useful. One part of that tradition has studied law in literature; another has used the tools of literary criticism to read law as text. I am interested mainly in the second movement. James Boyd White emphasized the compositional and rhetorical character of legal language;³ Robert Cover showed that norms live within narrative universes that give them meaning.⁴ My claim is narrower: we can view the individual criminal offense definition as a kind of textual machine designed to represent conduct and, more broadly, the criminal event. The offense definition is a distinctive and highly effective device of representation. With the same words, it speaks both to citizens and to judges: to the former it communicates rules of conduct, telling them what they must not do; to the latter it communicates rules of judgment, telling them under what conditions they may punish.

The offense definition does not photograph an event already given. It requires a process of imagining and modeling the fact to be prohibited. It requires giving form to wrongdoing. Law makes perceptible a wrong that, without normative configuration, would remain dispersed within the infinitely complex continuity of life. In drafting an offense definition, the legislature decides what must become visible so that a given wrong can be recognized: a subject, a conduct, a victim, an object, a relation, a result, sometimes an intention or a particular mode of acting. Everything else is excluded from the representation.

This selection and reduction of the reality represented in the offense definition is neither a defect nor a limit of criminal law. On the contrary, it is one of its essential virtues. The strong selectivity of the represented fact gives criminal law its “pointillist” structure: broad spaces of freedom must remain between one offense and another. At the same time, typification reduces the normative representation to its salient features, making the abstract character of the offense definition possible. Only by separating the salient wrong from the undifferentiated flow of life, and by constructing it through typical features, can legality and equality be protected. The singular richness of the historical event must be dried out and simplified so that it can be compared with other historical events and so that similar cases can be judged coherently.

The text of the offense definition is therefore the product of imaginative, creative, and compositional work. We can examine that text with the usual tools of legal analysis,

³ J.B. White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression*, Boston, Little, Brown, 1973.

⁴ R.M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 *Harvard Law Review* 4 (1983), especially 4 ff.

focusing on the individual elements of the offense. But we can also try other paths, including the path of aesthetics, treating the offense definition as if it were a fragment of literature or a miniature theatrical script. Of course, I am not interested in judging its beauty or readability. I am interested in its formal choices, its representational style, the particular poetics through which the fact is constructed and made perceptible.

In short, what matters is the text's capacity to produce, through narrative, a sensible and recognizable form of wrongdoing. The aesthetics at stake here is therefore, essentially, an aesthetics of form and representation.

3. The Perpetrator as a Legal Character.

Let me suggest a very simple experiment. Forget for a moment that you are lawyers. If I say, "someone is taking and carrying away the movable property of another," what happens in your mind? You probably do not see an abstract diagram. You see, however vaguely, a person taking an object that is not his. Perhaps you see a hand, a pocket, a bag, a movement away. The details will differ from one person to another, but the legal formula has already begun to organize an image.

Stories produce characters. Criminal law does not first invent "the thief" and then tell us what thieves usually do. It works the other way around. It tells the story of a taking, and from that action a character emerges: the thief. The legal character is generated by the action described in the offense definition. If the action changes, the character changes. Add force or threat to the taking, and the scene becomes different. We are no longer looking at the same offense, and we are no longer looking at the same legal character.

But what kind of subjectivity does this character possess? It would be inaccurate to say that the offense definition constructs him only through outward action. The criminal prohibition does describe conduct, but it also incorporates, directly or indirectly, subjective elements. It may require that the subject know, will, pursue a particular purpose, or foresee an event; or it may characterize the conduct through the breach of duties of care and the further elements that belong to negligence. Intent and negligence therefore participate, depending on the structure of the offense, in defining the normative figure of the actor - what I am calling here the "character."

The presence of intent or negligence in the offense definition does not eliminate the distance between character and person. It makes that distance more interesting. The subjectivity described by the offense definition is itself selected, reduced, and typified. Just as it does with conduct, law describes and gives legal value only to those aspects of inner life that are needed to shape a particular figure of wrongdoing. The subject who acts intentionally, who knows, who wills, who foresees, or who pursues a purpose is still a normative character. He has a mind, we might say, but it is the mind the text assigns to him so that he can perform his part in the story of the offense definition. The offense definition can thus construct its character along two axes: through conduct and through whatever subjective features contribute to his legal profile. Both still belong to the normative construction of the character, not to the concrete individuality of the person.

Here the comparison with literature becomes more precise. The characters in a novel are not defined only by what they do. The text can attribute to them intentions, knowledge, desires, expectations, and can allow us, to a greater or lesser extent, to enter their interior life. Think of the inner complexity of Rodion Raskolnikov, the protagonist of Dostoevsky's *Crime and Punishment*, or of Molly Bloom's stream of consciousness in Joyce's *Ulysses*.

Criminal law, too, as I have said, can construct the character of the offense definition both by narrating his action and by analyzing his inner life. The difference lies in the particular selectivity of the legal construction. We often know the history, character, and deep psychology of literary characters in great detail; we know far less about the characters of offense definitions, especially with respect to their psychology. Apart from the relatively rare cases in which aspects of *mens rea* are expressly described - in federal criminal law, for example, through adverbs such as *maliciously*, *fraudulently*, *corruptly*, *wrongfully*, or *deliberately* - what matters is only the subject's particular psychological relation to the typical fact. In intentional crimes, the character represents and wills the wrongful fact; in negligent offenses, we know only that his conduct must be marked by negligence, recklessness, or lack of skill.

Everything else about his interior life remains outside the normative scene.

4. From Narrative to Theater: Characters, Actors, and Persons

To understand the next step, we must distinguish several ways of constructing subjectivity. In the literary novel, at least analytically, we can distinguish the author, the narrative voice, the focalizer - the point of view through which events are selected and shown - and the characters. Characters may be observed from the outside or followed in their inner life; a protagonist, for example, may be described through what he does, but also through what he knows, wants, fears, or imagines. In a novel, however, all these levels remain within the textual universe: however complex the character may be, he remains a figure produced by the text.

Theater changes this architecture. Theater preserves an author, a text, a plot, and characters, but it introduces further subjectivities: the director's, and, for my purposes, above all the actor's. Hamlet already has actions, intentions, knowledge, doubts, and desires in Shakespeare's text; he therefore possesses his own subjectivity as a character. Yet for Hamlet to appear on stage, a human being must lend him body, voice, gesture, presence, and time. The subjectivity of the character does not coincide with the subjectivity of the actor who embodies him.

The distinction is elementary and, precisely for that reason, powerful. No one confuses the actor with the character. Hamlet can kill Polonius every night, but the actor who plays him can go home after the performance without attracting police attention. Even when the performance is perfect, correspondence does not erase the distance between the two subjects. The character possesses the traits the text assigns to him; the actor remains a human being: his identity, biography, and subjectivity radically exceed the role.

This is where theater becomes more useful for us than a simple literary analogy. Like a dramatic text, the criminal offense definition prepares roles, conduct, and, when necessary, subjective features, without knowing which concrete person will one day realize them. When that happens, the correspondence may concern not only outward behavior but also intent, purpose, or the other subjective elements required by the text. And yet the person is not exhausted by the character he has embodied. It is precisely this excess of the real human being over the fictional character that opens the space of culpability. The judgment of culpability creates the possibility of attending to the human person, freeing her from the constraining structure of the character.

5. The Iconography of Wrongdoing.

As I have already emphasized, the small stories told by offense definitions have a strong iconographic dimension. They do not merely tell us what happens. In a sense, they let us see it. This is a further reason to deepen the parallel with theater.

Return to larceny. We can visualize the movable thing passing from one person's sphere to another's. Robbery makes the image stronger by adding force or threat. Burglary introduces entry into a protected space. Kidnapping shows us two human bodies whose spatial relation has been radically altered because one person has deprived another of liberty.

The norm contains no images, yet its language has great iconographic power. It creates something like an icon of wrongdoing: a simplified but recognizable image of human action. It gives wrongdoing a recognizable form. The story organizes persons, objects, movements, and spaces; for that very reason, it tends to become a theatrical scene.

6. When Characters Find Their Actors.

As I have said, the offense definition writes a bonsai story. It is a small script, a miniature scenography of wrongdoing. It describes conduct and event; it states any subjective elements that qualify the dramatic action. But the offense definition does not merely describe what happens: it stages someone who acts.

His name is often the most indeterminate of names: "whoever." And yet that pronoun opens, within the text, the place reserved for the protagonist of the normative event. The character is defined by what he does and, when the offense definition requires it, by what he knows, wills, foresees, or pursues. Action and thought, then, are not added to a character already given; they are the elements through which the text constructs him.

We do not need to call him "thief" or "murderer" for him to become a character. The character already exists in the text. "Whoever causes the death of a human being" is the protagonist of a story of the offense definition even before anyone calls him a murderer. In the same way, in theft, the "whoever" who appropriates another's movable

thing by taking it from the person who possesses it is already a character defined by conduct, by the relations the event establishes, and, where required, by the subjective direction of the action.

In this sense, the offense definition is also a kind of prophecy: a prophecy that, unfortunately, is destined to come true. Sooner or later, something happens in the real world. A human being acts and realizes that very script: he causes the death of another, sexually assaults a nonconsenting victim, takes and carries away another person's movable property. A crime has been committed; the trial begins.

Criminal law, in the trial, then asks a series of questions. The first concerns typicity: does the concrete conduct, including the subjective features required by law, correspond to the figure described in the offense definition? In the language I have been using: has the human being brought to judgment embodied the character written by the norm? Does what he actually did coincide with the dramatic action described in the script - that is, in the text of the criminal prohibition?

With the finding of typicity, the character has found his actor. The concrete person has realized the conduct described by law, in the circumstances and with the subjective elements required by the text. From this point of view, the correspondence may be perfect.

And that is exactly where the problem begins.

7. When Character and Person Become One.

The more complete the correspondence between the concrete person and the character of the offense definition, the stronger the temptation to superimpose them. The risk is that what we know about the character will exhaust what we think we need to know about the person.

Sometimes this slippage already appears in language. We do not merely say that Tizio caused the death of a human being under the conditions set out in the offense definition; we say that he is a murderer. We do not merely say that he took another's movable property; we say that he is a thief. A name that summarizes the role performed in the normative event thus tends to migrate onto the person. A predicate of action risks becoming a predicate of being.

But the decisive point is not the label. It is that perfect correspondence between concrete behavior and normative character can lead us to think that nothing more needs to be known. As if determining what the person did were already the same thing as judging the person who did it.

Theater makes the difference immediately perceptible. An actor can embody Hamlet perfectly: speak his words, perform his gestures, express his intentions. Yet no one thinks the actor is exhausted by the character. A visible distance remains between the two. In criminal law, by contrast, that distance shrinks dramatically: the character of the offense definition is not merely represented; it is realized in real life through the conduct of a concrete person. For that very reason, once the correspondence between

fact and offense definition has been recognized, the risk that the person will collapse into the character becomes stronger.

What remains of the human being, the person in flesh and blood, after she has perfectly performed the script of the character? Must she necessarily share the fate of the character, or does she have the right to be judged individually and personally? These questions are asked in a very different theater from the one in which Hamlet, Macbeth, or *The Merchant of Venice* are performed. We are now in a courthouse, and the theater is the criminal trial.

Here we must proceed with great care, recalling the stages that must logically structure the judgment. First, we must verify the correspondence between the concrete fact and the fact described by the offense definition - in our terms, the correspondence between the person's conduct and the character's conduct. This is the judgment of typicity, and it is only the first step in a much more articulated and complex evaluation. The judgment of typicity establishes only that the person's conduct corresponds to that of the character in the offense definition. The human person has embodied the character described by the criminal prohibition. But once this is true, we still have to determine the overall meaning of the conduct; above all, we still have to determine whether that person can be personally blamed for having embodied the character of the offense definition.

Before reaching culpability, we must verify whether the overlap between character and person that follows from typicity also holds at the level of unlawfulness. Conduct may correspond perfectly to the offense definition - someone has caused the death of a human being - and yet be authorized or permitted by the legal order, as in self-defense. The embodiment of the character, then, is not yet enough to constitute a criminal wrong.

8. Beyond Typicity: The Characters of Justification.

Causes of justification, too, can be read through the relation between character and person. Self-defense, for example, does not merely correct from the outside a scene already described by the offense definition. The person who acts in lawful self-defense is another character of substantive criminal law, a character with his own script, one that sets conditions, limits, and the development of the dramatic action.

A concrete person may therefore embody the character described by the offense definition and, at the same time, "hook onto" and identify with another character: the one outlined by the justification, for example the character of the person authorized to defend himself. At the level of typicity, homicide remains the killing of a human being; but someone who kills an aggressor under the conditions established by self-defense occupies a different position in the theater of criminal law. He embodies a second role that changes the overall legal meaning of the scene.

In short, the theater of the offense definition is not a monologue, and the "character of the offense definition" does not necessarily coincide only with the offender. Criminal norms give form to scenes in which multiple subjects, roles, and relations

appear. For now, we can leave this plurality in the background and focus on the point that matters here: law constructs not only figures of wrongdoing, but also figures that justify conduct that has already passed the test of typicality.

9. The Limits of the Justifying Character: The Roggero Case.

The relation between person and justifying character becomes especially visible when correspondence fails. It is not enough for the person to wish to play the role of the one who defends himself. The concrete situation must correspond, in the terms required by the legal order, to the normative figure of self-defense. One may respond too early or too late; one may exceed what the role authorizes; one may mistakenly believe that its conditions are present.

A recent Italian case makes this structure almost visible. Mario Roggero, a jeweler who had been robbed in his own store, pursued the robbers outside and fired when, according to the judicial reconstruction, the assault had ended and the perpetrators were leaving. Self-defense was rejected, among other reasons, because the danger was no longer present. In the language I am building, we might put it this way: the person who, only moments before, had truly been attacked did not, at the moment of the shots, manage to “hook onto” the normative character of the person who lawfully defends himself. That character no longer covered the conduct performed.

The image of “hooking onto” the character is useful because it makes clear the temporal and relational dimension of justification. A person may initially be in the situation described by the justifying norm and then leave it. The normative role does not accompany indefinitely someone who has been the victim of an aggression. It exists only so long as the conditions that constitute it exist. Every character has his own stage time, and the stage time of lawful defense is intense, concise, and brief.

But the failure to connect with the justifying character does not end the inquiry. Even when the fact is typical and no justification applies, there may still be no basis for a judgment of blame. It is precisely in this space that the problem of culpability opens.

10. From Wrongdoing to Personal Blame.

As I just said, correspondence between person and character is not yet enough to ground blame. One thing is to impute to a person the character of wrongdoing; another is to say that this person is blameworthy for having embodied that character. Here lies the importance of culpability, both as a principle and as a category.

Before going further, let us recall that culpability does not introduce subjectivity into a framework that, until then, has been merely objective. We have already seen that the offense definition can construct its character through intentions, knowledge, purposes, foresight, negligence, recklessness, and lack of skill. Nor does culpability mark the passage from substantive criminal law to procedure. Typicality, unlawfulness, and culpability all belong to the substantive structure of crime, and all must be established

at trial. Culpability performs a different operation: within substantive criminal law, it opens a space; it marks the distance between the character of wrongdoing and the person who embodied him. In a sense, it frees the person from the cage of the character.

The question then becomes: what must emerge about the person so that - as with the actor who plays Hamlet - we can establish a distance between the person and the character?

The different grounds that exclude culpability test, from different angles, the conditions of personal blame. Leaving aside here the many rules and classifications found in different legal systems, we can organize them around three basic questions. Was the person capable of understanding and governing her relation to the fact? In Italy we would ask: was she imputable?

Second: could she know the legal command she was violating? Was she unaware of the very existence of the script? Was her ignorance or mistake unavoidable and excusable?

Finally, and more generally: was she in conditions under which law could demand conforming conduct from her?

Capacity for criminal responsibility (Schuldfähigkeit), accessibility of the legal command, and the fairness of demanding compliance (Zumutbarkeit) do not necessarily form, across legal systems, three symmetrical doctrinal categories, nor do they exhaust every possible construction of culpability. I use them here as three dimensions of the same problem: before transforming the imputation of wrongdoing into personal blame, law must determine whether the distance between character and person can be reaffirmed, allowing the person to be judged not only as a character but also as a unique and unrepeatable human being.

11. Three Questions Before Blame.

Before criminal law may blame a person, it must ask at least three questions: Was the person capable of criminal responsibility? Could the person know and understand the legal command? And, in the circumstances, could the law fairly demand compliance?

A) The first dimension of blame concerns the person's capacity to understand and control her conduct—the problem that German criminal law calls *Schuldfähigkeit*, and that common-law systems usually approach through doctrines of insanity or mental incapacity. Consider the famous case of Daniel M'Naghten. In January 1843, in London, M'Naghten approached Edward Drummond, private secretary to Prime Minister Robert Peel, and shot him from behind. Drummond died a few days later. M'Naghten apparently intended to shoot Peel, believing that Peel was persecuting him. At the level of the external scene, the character of the author of a homicide seems perfectly drawn, and no justification appears available. But the jury found Daniel M'Naghten "not guilty by reason of insanity," and the case led to the formulation of the famous M'Naghten Rules. What becomes decisive is no longer only what the person did or intended, but

what cognitive or volitional capacities she possessed when she embodied the character of the killer.

M’Naghten makes the gap visible. Even a perfect correspondence with the character of the offense definition does not allow blame if the concrete person lacks the capacity required for criminal responsibility — what some systems, including the Italian system, call imputability. The typified subjectivity of the character and the concrete mental capacity of the person belong to different planes. The will to kill is one thing; the capacity to understand and control one’s conduct within the scene in which one acts is something else.

B) The second dimension of blame concerns access to the legal command: knowledge of the criminal law, or the possibility of knowing it. The problem is traditionally discussed as *error iuris*, or mistake of law; in German terms, *Verbotsirrtum*. It shows with particular clarity that one may know and will the factual elements of the offense and nevertheless not be personally blameworthy for violating the norm. Many systems recognize cases in which mistake or ignorance of law may be excusable. In Italian law, after Constitutional Court decision no. 364 of 1988, unavoidable ignorance of the criminal law excludes culpability. The theoretical point is clear: the character of wrongdoing may have been fully embodied, including its subjective elements, but blame presupposes that the violated legal command was accessible to the person in terms that made it possible to perceive and understand it.

C) The third dimension concerns the fairness of demanding compliance—the issue German doctrine captures with the term *Zumutbarkeit*, and, negatively, *Unzumutbarkeit*. It is a category with flexible boundaries, controversial in its operational reach, especially in systems strongly tied to formal legality. Leaving aside the limits of its direct operation, I use the fairness of demanding compliance as a general way to group those cases in which a legal order excuses an actor because she is not blameworthy.

Imagine, then, a person who is fully capable and aware of both the fact and its legal meaning, but who commits an offense because someone threatens to kill her child if she does not. Intent may be complete. The character of wrongdoing may be perfectly embodied. And yet a different question remains: could law, under those conditions, demand that this person act otherwise?

The idea that compliance may not be fairly demandable — *Unzumutbarkeit* — has particular explanatory force. As I have said, its status as a general clause is not the same in different systems, and in Italian law its operation beyond the situations provided by statute remains highly controversial. But as a principle for reading excuses, it makes visible an essential feature of culpability: blame depends not only on what the person did and knew, but also on the conditions under which law demanded a conforming choice.

Excess in self-defense makes the boundary between justification and excuse tangible. A person may fail to remain within the limits of the justifying character: the action is no longer fully covered by self-defense. But the loss of justification does not

automatically produce responsibility. Law may still ask whether, in the concrete situation of fear, distress, or agitation, it was fair to demand that the person keep her conduct within the exact limits of the authorized or permitted role. Section 33 of the German *Strafgesetzbuch* makes this structure especially clear when it excludes punishment for a person who exceeds the limits of self-defense because of confusion, fear, or fright.

The sequence matters. First we ask whether the conduct was authorized or permitted; if it was not, we ask whether its author is truly personally blameworthy. In short, the exit of the justifying character from the scene does not necessarily coincide with the beginning of the scene in which the person is declared guilty and punished. Between the two acts, the space of excuse may open - the space governed by the principle of culpability.

12. Behind the Character: Fumiko Kimura and the World of Meanings.

This construction allows us to discuss a truly singular case: that of Fumiko Kimura.⁵ In 1985, Fumiko Kimura, a Japanese woman living in California, threw herself into the Pacific Ocean near Santa Monica with her two children. Her aim was to kill herself, a decision she had made after discovering her husband's infidelity. But, as she understood it, suicide also required killing her children. According to what she took to be an ancient Japanese code of honor, nothing was more morally reprehensible than abandoning one's children to pain and misery. If one decides to end one's own life, it is better to take them too, through the practice known as *oyako-shinjū*: parent-child joint suicide.

In Fumiko's case, the children died; she survived.

Let us analyze the case by first observing the scene. A mother throws herself into the ocean with her two very young children, with the precise intention of carrying out a suicide-homicide. But things do not go as planned: the mother survives, and her children die. If we stop the camera here, the story seems tragically simple. But if we move closer to Fumiko and try to understand her as a person, the scene fills with elements that the character of the offense definition could not contain: personal history, mental condition, family relations, social expectations, cultural meanings.

After the tragic death of her children, Kimura was initially charged with murder. Psychiatric evaluations became central, and the case sparked an intense debate that extended to Japanese cultural understandings of *oyako-shinjū*, the joint suicide already mentioned, which developed originally in relation to lovers' suicide.

Kimura did not benefit from a formal cultural defense, nor would it be correct to say that the killing of children is culturally or legally accepted in Japan. Rather, it is an ancient and subcultural practice, certainly foreign to the values of contemporary Japan.

⁵ People v. Kimura, No. A-09113 (L.A. Sup. Ct. 1985). See D. Lambelet Coleman, Individualizing Justice through Multiculturalism: the Liberal's Dilemma, *Columbia Law Review*, Vol. 96, 1996, 1109; D. Woo, The People v. Fumiko Kimura: But Which People?, *International Journal of the Sociology of Law*, 1989, 415.

The tradition of lovers' *shinjū* was powerfully amplified in the early eighteenth century by the theater of Chikamatsu Monzaemon, to the point that performances of these particular suicides were later banned in an effort to counter their imitative effects.⁶

The Kimura case did not end in an acquittal. Fumiko Kimura, initially charged with murder, never formally pleaded guilty. Instead, she entered a plea of *nolo contendere*, accepting a reduction of the charge and a conviction for a mitigated form of homicide, voluntary manslaughter. She was sentenced to five years' probation, with psychiatric treatment, and to one year in jail, substantially covered by the time she had already spent in pretrial custody. The outcome shows that, in such an unusual case, attention to Fumiko as a person - to her cultural and psychological context - did not call into question the typicality of the fact and did not justify it. Rather, it helped reshape the degree of personal blame.

The case therefore does not introduce a fourth category alongside capacity for criminal responsibility, access to the legal command, and the fairness of demanding compliance. It performs a different function: it tests the capacity of the categories of culpability to judge a person situated within a concrete world of meanings. Biography, culture, and context are not, as such, excuses. They become legally relevant only insofar as they bear on the conditions through which the legal order constructs personal blame.

Here, precisely, the theatrical metaphor shows both its limit and its usefulness. The actor always brings onto the stage something the written character does not contain. In criminal law, however, we cannot simply note this excess of the person over the character. We must determine which parts of that excess can acquire legal meaning within the judgment of culpability.

13. Decontextualizing and Recontextualizing.

We can now see more precisely the double movement of substantive criminal law. The offense definition necessarily decontextualizes: it takes an infinitely complex human event and selects certain features, constructing recognizable scenes and characters. Causes of justification expand the scene in order to determine whether typical conduct fits within an authorized normative figure. Culpability performs a further movement: without dissolving legal form into individual biography, it reopens the distance between the character of wrongdoing and the person, in order to determine whether that wrong can be personally blamed on her.

The trial is the place where all these levels are established in the concrete case. It determines the correspondence with the characters of the offense definition, the possible operation of a justification, and the conditions of personal blame. It does not introduce

⁶ Chikamatsu Monzaemon (1653-1725) was one of the major Japanese dramatists of the Edo period, often compared to Shakespeare for his importance within the Japanese theatrical tradition. He wrote primarily for bunraku, the puppet theater, and also for kabuki. He is famous especially for *shinjūmono*, plays about lovers' suicides, in which couples blocked by social, family, or economic obligations choose death together. Fear of possible imitative acts led, as noted in the text, to the prohibition of this type of drama.

the person into a substantive criminal law that would otherwise know only abstract types. Substantive criminal law itself, through culpability and excuses, determines which dimensions of the person must become legally relevant again.

Decontextualizing and recontextualizing are therefore not operations that belong, respectively, to legal theory and to procedure. They are movements internal to the structure of criminal responsibility. The first makes legality possible through general forms; the second prevents those forms, once embodied, from erasing the person on whom blame must fall.

14. From Legal Characters to the Person on Trial.

We can now put the pieces together. The offense definition tells a bonsai story. Through conduct, events, relations, and, when the structure of the offense requires it, certain subjective features, that story constructs characters of the offense definition. The plural matters: the normative scene does not necessarily contain a single protagonist. It distributes roles and relations, and the character of the offender emerges within that structure.

The concrete person may embody one of these characters. But criminal responsibility is not exhausted by the finding of this correspondence. Unlawfulness asks whether the conduct, though typical, is covered by a normative figure that authorizes it. Only when that possibility is excluded can we speak, in the full sense in which I am using the term, of a character of wrongdoing.

Even then, however, the judgment is not complete. Culpability prevents the imputation of the character of wrongdoing from turning automatically into the imputation of the person as culpable. It poses a second question of imputation: no longer only whether this person embodied that character, but whether she can be blamed for having embodied it.

Capacity for criminal responsibility, access to the legal command, and the fairness of demanding compliance show three dimensions of this second question. They are not scattered episodes at the margins of the structure of crime. They are ways in which law verifies whether the person could understand the meaning of her conduct, whether the command could reach her, and whether, in the concrete situation, it was fair to demand compliance. Excuses thus make visible a fundamental function of culpability: preserving, precisely at the moment of the severest judgment, the distance between the normative role and the human being.

There is a paradox at the heart of criminal law. It cannot function without reducing reality. It needs types, categories, forms, and characters. Without these constructions, there would be neither legality nor equality before the law. But precisely because punishment falls not on characters but on persons, law must know how to reopen the distance that it has itself reduced.

15. When the Curtain Falls.

Let me close by returning to theater. A dramatic text does not contain a single figure. It constructs characters, distributes roles, organizes relations, and assigns actions, intentions, and words. When the text is performed, concrete human beings embody those characters. But even in the most perfect performance, the actor is not exhausted by the role. He does not lose his identity as a person.

Something analogous must occur in light of the criminal-law principle of culpability. Offense definitions give form to scenes and characters. Causes of justification determine whether typical conduct may be brought within an authorized or permitted role, which itself evokes a character. Culpability operates differently: it intervenes to prevent the fiction of characters from becoming the only dimension of the judgment. It prevents the embodiment of the character from being, by itself, enough to ground blame of the person. Culpability opens the judgment onto the person, asking whether she was capable of understanding and willing, whether she could be reached by the legal command, and whether she was in conditions under which compliance with the norm could fairly be demanded.

Theater invites us to see the character through the human being who interprets him: we recognize Hamlet through the many actors who have played him. The principle of culpability pushes us in the opposite direction. It asks us to return from the character to the human being; from the abstract normative figure to the person concretely accused of the crime; and to ask whether the blame that legitimates the infliction of criminal punishment can truly be addressed to that person.