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# JUSTIFICATION AND EXCUSE, LAW AND MORALITY

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ABSTRACT

*Anglo-American theorists of the criminal law have concentrated on—one is tempted to say "obsessed over"—the distinction between justification and excuse for a good quarter-century and the scholarly attention has purchased unusually widespread agreement. Justification defenses are said to apply when the actor's conduct was not morally wrongful; excuse defenses lie when the actor did engage in wrongful conduct but is not morally blameworthy. A near-consensus thus achieved, theorists have turned to subordinate matters, joining issue most notably on the question of whether justifications are "subjective"—turning upon the actor's reasons for acting—or "objective"—involving only facts independent of the actor's beliefs and motives.*

*This Article seeks to demonstrate that the prevailing understanding is wrong. Drawing on the well-known distinction between conduct*

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*rules and decision rules, it argues that the distinction between justification and excuse, for purposes of a criminal law taxonomy, is only this: A justified action is not criminal, whereas an excused defendant has committed a criminal act but is not punishable. To readers only marginally acquainted with the relevant literature, this claim may seem far from extravagant, for occasional statements to the same effect can be found in the case law and commentary. In fact, however, theorists have not appreciated just how this articulation of the distinction differs from the orthodox one, nor what consequences follow. This Article attempts to remedy that defect.*

*One lesson of a systematic investigation into these competing formulations is that the long-running debate over whether justifications, properly understood, are "subjective" or "objective" is misconceived. This is a debate over policy broadly conceived, not (as it so often purports to be) a matter of conceptual analysis. More generally, this Article's examination of justification and excuse constitutes a case study in the complex relationship between legal and moral reasoning, and highlights the importance of distinguishing arguments that advance substantive value judgments from those that purport to analyze our conceptual apparatus. It may be that conceptual analysis is no less contestable or value-laden than is substantive normative argument (though perhaps it is). In any event, they are not the very same enterprise and a first step to clear thinking—in the criminal law and elsewhere—is to keep them distinct.*

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## INTRODUCTION

Scholarship, like all human artifacts, has its fashions. In the field of Anglo-American criminal law theory perhaps no subject has been more in vogue the past twenty-odd years than the distinction between justification and excuse. Most responsible for this upsurge in scholarly interest are Professors George Fletcher and Paul Robinson, who debated the subject in 1975,[1] and who have written repeatedly on the topic ever since. But Fletcher and Robinson are now in crowded company. Indeed, the full list of contributors to the topic reads like a Who's Who of contemporary criminal law theorists on both sides of the Atlantic.[2]

This outpouring of scholarly attention has appeared to pay dividends, as the distinction between justification and excuse has become one of the rare subjects on which scholars have reached wide agreement, essentially echoing Fletcher's view that "[a] justification negates an assertion of wrongful conduct. An excuse negates a charge that the particular defendant is personally to blame for the wrongful

1. *Compare* Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266 (1975) (defending a purely objective theory of justification), *with* George Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. REV. 293 (1975) (arguing that full justifications must be both subjective and objective). Fletcher in particular is widely credited for having put the justification/excuse distinction on the contemporary scholarly agenda. *See* Joshua Dressler, *Justifications and Excuses: A Brief Overview of the Concepts in the Literature*, 33 WAYNE L. REV. 1155, 1159 & n.13 (1987) (citing authorities).

2. The list of Anglo-American scholars who have written on the subject includes (though is hardly limited to) Larry Alexander, Joshua Dressler, John Gardner, Kent Greenawalt, Jeremy Horder, Heidi Hurd, Douglas Husak, Sanford Kadish, Michael Moore, J.C. Smith, and Jeremy Waldron. Relevant works are cited *infra passim*. This Article does not explore continental approaches to the justification/excuse distinction.

conduct."[3] In fact, at a recent meeting of the Criminal Law Section of the American Association of Law Schools, Joshua Dressler cited theorists' resolution of the justification/excuse problem as the leading illustration of the successes that criminal law theory has achieved over the past couple of decades.[4] The solidity of this consensus has freed theorists to focus on subordinate questions, joining issue most notably on the question of whether justifications are "subjective"—turning upon the actor's reasons for acting—or "objective"—involving only facts independent of the actor's beliefs and motives.[5]

I believe that the prevailing consensus is wrong. Instead, I argue, the distinction between justification and excuse for purposes of taxonomizing criminal law defenses is only this: A justified action is not *criminal*, whereas an excused defendant has committed a crime but is not *punishable*. To readers only marginally acquainted with the relevant literature, this claim might seem far from extravagant, for occasional statements to the same effect can be found in the case law and commentary.[6] Despite such statements, however, this view has wanted for systematic development. Indeed, theorists have seemingly not appreciated just how this formulation of the distinction differs from the orthodox one, nor what consequences follow.

This Article attempts to remedy that defect. It proceeds as follows. Part I first presents the prevailing conceptualization of the justification/excuse distinction in contemporary criminal law scholarship—what I term the "substantive equivalence thesis." It then criticizes this view by showing that persons who engage in morally justified conduct may not be justified in law, and that criminal defenses most plausibly denominated as justifications extend to morally unjustified conduct.

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3. George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 958 (1985); *see also, e.g.*, GEORGE FLETCHER, RETHINKING CRIMINAL LAW 759 (1978) ("Claims of justification concede that the definition of the offense is satisfied, but challenge whether the act is wrongful; claims of excuse concede that the act is wrongful, but seek to avoid the attribution of the act to the actor.").

4. Joshua Dressler, What is the Point of Teaching and Scholarship in Criminal Law and Procedure?, Presentation at the American Association of Law Schools Conference on Criminal Justice, Washington, D.C. (June 11, 2000); *cf.* Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 218 n.19 (2002) (describing the justification/excuse distinction as constituting "a vital strain of the scholarly literature").

5. For a sound overview of the subjective/objective debate, see Russell L. Christopher, *Mistake of Fact in the Objective Theory of Justification: Do Two Rights Make Two Wrongs Make Two Rights . . . ?*, 85 J. CRIM. L. & CRIMINOLOGY 295, 295–303 (1994).

6. *See infra* notes 38–40 and accompanying text.

Part II introduces and defends a competing account—the "structural equivalence thesis"—pursuant to which justifications and excuses play the same role in the structural logic of moral and legal reasoning, even though their substantive content may differ. Specifically, a justification serves to qualify a norm of behavior by providing that one who is justified does not violate the governing norm; an excuse serves to release one who has violated a norm from some or all of the consequences that ordinarily attach to the norm violation. One question this conceptualization raises is how to determine whether any given defense is more properly categorized as conferring permission (thus serving as a "justification") or as making an offender unpunishable (thus serving as an "excuse"). This Part argues that the language of the governing statute is not conclusive and that the answer is instead a sociological fact (potentially difficult to discover and inherently contestable) about that particular criminal law regime.

The question of whether there exist any intrinsic or natural substantive constraints on the classification of defenses as justifications or excuses is further pursued in Part III, which takes up the long-running debate over whether justifications must be "subjective" or "objective." I argue that this is principally a debate over policy broadly conceived, not—as it so often purports to be—a matter of conceptual analysis. In developing this argument, this Part pays particular, and critical, attention to the most important and theoretically ambitious proposal for comprehensive criminal law reform of recent years—Paul Robinson's draft codes.[7]

Part IV explores two further implications of the structural equivalence thesis. It shows, contrary to prevailing wisdom, that proper conceptualization of the justification/excuse distinction by itself generates no particular consequences for the permissibility of assistance or interference by third parties. It also argues that trying to classify existing defenses—like self-defense and protection of property—is a perilous enterprise insofar as these putative defenses are really defense *clusters*, not discrete defenses. With this caveat in mind, the final Part nonetheless offers some thoughts about the proper classification of duress and provocation.

All of this is in service of a broader ambition. That ambition is not, however, to demonstrate just how important the

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7. *See generally* PAUL H. ROBINSON, STRUCTURE AND FUNCTION IN THE CRIMINAL LAW (1997).

justification/excuse distinction is for purposes of marking legal, as distinct from moral, categories. To be sure, so long as scholars are going to employ it, it's important that they get the distinction right. But whether they should employ it at all is a separate question, one about which I'm frankly skeptical. Rather, by highlighting the difference between conceptual and normative reasoning in this one heavily mined context, I hope to focus scholars' attention on the importance of distinguishing their substantive, normative arguments from their conceptual or logical ones. This lesson—which does not presuppose that arguments of the latter sort are purely "factual," and thus does not depend upon a strong version of the fact/value distinction—can pay dividends not just for theorists of the criminal law, but across domains of legal scholarship.

## I. MORAL THEORY AND THE SUBSTANTIVE EQUIVALENCE THESIS

Contemporary criminal law scholarship commonly sorts defenses into three broad classes: justifications, excuses, and a third category variously termed defenses of law enforcement policy, or "nonexculpatory defenses," or the like.[8] Although core instances of each category are readily identified without the need for an explicitly agreed-upon definition—necessity is a justification, insanity is an excuse, the statute of limitations is a policy defense—scholars have struggled to fine-tune these distinctions.[9] In particular, a vast

8. *See, e.g.*, Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 229–32 (1982) (terming the third category of defenses "nonexculpatory defenses"); *cf.* SANFORD H. KADISH, BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 82 (1987) (categorizing defenses as based on law enforcement policy or culpability, with culpability defenses including the two subcategories of justification and excuse); MICHAEL S. MOORE, PLACING BLAME 482 (1997) (dividing defenses, first, "between extrinsic policy defences and culpability defences," and then subdividing the latter into justifications and excuses).

9. Any general comments about common doctrinal defenses like "necessity" risk miscommunication because the term is familiar to all criminal lawyers but differs in precise content across jurisdictions. When speaking of necessity, I will be referring to the "lesser evils" defense, no matter the source of the danger. *See, e.g.*, MODEL PENAL CODE § 3.02(1)(a) (1962) ("Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that . . . the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged."). I use "duress" in a generic sense to refer to situations in which the defendant acted in the face of substantial pressures but did *not* choose the lesser evil. The precise extent and manner in which this sense of duress is realized in actual doctrine—such as whether it extends to "duress of circumstances" as well as to do-it-or-else commands issued by another person, and whether it is available in homicide cases—are matters of positive law with regard to which my references to "duress" *simpliciter* are intended to remain flexible.

literature has developed concerning justification and excuse, exploring such questions as the practical implications of the distinction, and which doctrinal defenses belong in which category. However, the chief concern of contributors—and the logically prior one—has been to identify the conceptual difference between these two categories of defense.

### *A. The Standard Account*

A first cut at the difference between justification and excuse starts by recognizing that, unlike the third category of nonexculpatory policy defenses, "justification" and "excuse" are not uniquely legal terms. According to the standard account in ethics, justified action is not wrongful whereas excused action is wrongful conduct for which the actor is not "morally responsible,"[10] in the particular sense of not being blameworthy.[11] It is not surprising therefore that the standard

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10. "Responsible" is a notoriously ambiguous term in normative discourse. (For the classic taxonomy, see generally H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 211–30 (1968). An important recent examination, in part critical of Hart's account, is PETER CANE, RESPONSIBILITY IN LAW AND MORALITY (2002).) Thus, I cannot exclude the possibility that I have misinterpreted some authors' unqualified or unelaborated references to "responsibility" or "moral responsibility." Nonetheless, I am reasonably confident that the statement in text fairly represents what authors mean by "responsible" in this context.

11. The *locus classicus* of this distinction (albeit of modern vintage) is J.L. Austin, *A Plea for Excuses*, *in* 57 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 1 (1956–57). *See, e.g.*, *id.* at 2 ("In the one defence, briefly, we accept responsibility but deny that it was bad: in the other, we admit that it was bad but don't accept full, or even any, responsibility."). For a recent exploration of some of the philosophical issues concerning justification and excuse, see SUZANNE UNIACKE, PERMISSIBLE KILLING: THE SELF-DEFENSE JUSTIFICATION OF HOMICIDE 9–30 (1994).

On the view described in the text, to reiterate, no conduct is all-things-considered wrongful, yet justified because the presence of a justification renders presumptively or seemingly wrongful conduct not wrongful. *See* John Gardner, *In Defence of Defences*, *in* FLORES JURIS ET LEGUM: FESTSKRIFT TILL NILS JAREBORG 1 (Uppsala: Iustus Forlag 2002), *available at* http://users.ox.ac.uk/~lawf0081/defences.pdf (last visited Sept. 9, 2003) (on file with the *Duke Law Journal*) ("According to the 'closure' view, no action is wrong unless it is wrong *all things considered*, i.e. taking account of both the reasons in favour of performing it (the pros) and the reasons against performing it (the cons)."). On a minority view powerfully developed by Martha Nussbaum and recently endorsed by John Gardner, a justification qualifies wrongdoing but does not extinguish it: wrongful but justified conduct remains wrongful (albeit far preferable to wrongful and unjustified conduct). *See* MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 25–50 (1986); Gardner, *supra*, at 3. Because the former view—what Gardner dubs "the closure view"—is so predominant, and because to attempt an even minimally adequate defense of it would significantly expand an already long Article, I will assume it here without giving the competing position the attention it doubtlessly deserves.

account among criminal law theorists follows identical lines: A defense is a justification if it renders the actor's conduct not morally wrongful, whereas it is an excuse if it renders morally wrongful conduct not blameworthy.[12] (See Figure 1.) This view is captured also,

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Two quick points, though. First, although Gardner is surely right that some duties—most especially the duty to show regret—arise from justified actions, *id.* at 7–8, this is not, I think, because the justified action remains *wrongful*. Rather, it's because the justified action has produced some unfortunate state of affairs (such as injury to another person) about which it is a mark of decency, and perhaps a duty of empathy, to feel regret. Tellingly, this duty to express regret arises even from conduct that (on most accounts) is not wrongful at all—such as nonnegligently causing injury to a negligent victim. Precisely for this reason, I think, Nussbaum takes pains to argue that justified wrongdoing is "occasion not only for regret but for an emotion more like remorse." NUSSBAUM, *supra*, at 27. Presumably, that is, a duty to feel and show remorse tracks wrongdoing: it does not exist absent wrongdoing and it cannot be mooted by justification. *See id.* at 43 (stating that the expression of remorse, unlike mere regret, is an admission of a defective action). I am just not persuaded that Nussbaum proves out either component of this two-part claim. What Nussbaum's subtle analysis does show, it seems to me, is that one's failure to experience appropriate emotions and attitudes when faced with a moral conflict can make one blameworthy. *See, e.g.*, *id.* at 33 (describing, as "the central theme in the Chorus's blame of Agamemnon," that "he adopted an inappropriate attitude towards his conflict, killing a human child with no more agony, no more revulsion of feeling, than if she had indeed been an animal of a different species"). Of course, this does not entail that the killing, if justified, remained wrong.

Second, I do not believe that the central claims of this Article depend upon acceptance of the "closure" conception of wrongdoing and justification. Although I defend a different conception of the justification/excuse distinction than does Gardner, *see infra* note 124 and accompanying text, it seems to me that his rejection of the closure view of justification does not, *by itself*, threaten either the structural equivalence thesis set forth in Part II of this Article, or the implications of that thesis spelled out in Parts III and IV. Again, however, I acknowledge that this contention is asserted but not defended.

12. *See, e.g.*, MODEL PENAL CODE, Introduction to Art. 3, at 2–3 (1985) (observing that "the Code makes a rough analytical distinction between excuse and justification as defenses to a criminal prosecution," seeming to map that distinction onto the "ordinar[y]" view that justified conduct "is thought to be right, or at least not undesirable" and that excused conduct "is thought to be undesirable but that for some reason the actor is not to be blamed for it," and expressing "skepticism that any fine line between excuse and justification can sensibly be drawn" due to the presence of "troublesome borderline cases"); MOORE, *supra* note 8, at 483:

> [J]ustifications answer a different moral question than do excuses. . . .
>
> . . . When an action is justified, any prima facie wrongfulness is eliminated by the other (and good) attributes of the action; when an action is excused, it is still wrongful but the actor cannot be held responsible for it because she is not culpable.

ALAN NORRIE, CRIME, REASON, AND HISTORY 154 (1993) ("[A]s a justification . . . . no wrong act has been done. . . . As an excuse . . . the focus moves from the question of the value of the act to the position, condition or circumstances of the actor and their effect on his culpability."); Laurence A. Alexander, *Justification and Innocent Aggressors*, 33 WAYNE L. REV. 1177, 1177 (1987) (stating excuse lies when the actor is "absolve[d] . . . of responsibility," while justification lies when the actor engaged in "the morally correct action"); Burke, *supra* note 4, at 242–43 ("Justification defenses operate when the defendant's act is the morally preferred option. . . . In contrast, excuse defenses apply when the act itself is harmful, but when something about the actor relieves her of moral culpability for the wrongful act."); Joshua Dressler, *New Thoughts*

if imperfectly, by the maxim that criminal justifications speak to the *act*, whereas excuses speak to the *actor*.[13]

**Figure 1**

| The Standard Account | | |
|---|---|---|
| | **Morality** | **Criminal Law** |
| **Justification** | Act not wrongful | Act not wrongful |
| **Excuse** | Act wrongful but Actor not blameworthy | Act wrongful but Actor not blameworthy |

*About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and* Rethinking, 32 UCLA L. REV. 61, 66 (1984) ("[A] justified act indicates at least that the conduct is not wrongful; an excuse concedes the wrongfulness of the act, but asserts that the actor should not be punished for her wrongful behavior, primarily because of psychological or situational involuntariness." (footnotes omitted)); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1897 (1984) ("If A's claim is that what he did was fully warranted . . . A offers a justification; if A acknowledges he acted wrongfully but claims he was not to blame . . . he offers an excuse."); Heidi M. Hurd, *Justification and Excuse, Wrongdoing and Culpability*, 74 NOTRE DAME L. REV. 1551, 1558 (1999) ("Justified actions should be conceived of as right actions, while excused actions should be conceived of as wrong actions done nonculpably."); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 318–19 (1996) ("Justifications are said to identify acts that produce morally preferred states of affairs. . . . Excuses, in contrast, are said to identify circumstances in which an act is wrongful but the actor blameless." (footnotes omitted)); David A.J. Richards, *Self-Defense and Relations of Domination: Moral and Legal Perspectives on Battered Women Who Kill: Introduction*, 57 U. PITT. L. REV. 461, 462 (1996) ("[A] person entitled to the defense [of justification], otherwise guilty of legal wrongdoing, has done nothing wrong. In contrast, a defense of excuse . . . does not negative the wrongdoing of the act, but focuses on the lack of culpability of the offender . . . .").

The "not blameworthy" formulation applies, of course, to "full excuses." In cases of partial excuse, the actor is deemed (merely) "less blameworthy"—i.e., less blameworthy than is supposed paradigmatic for that offense.

13. *See, e.g.*, 1 PAUL ROBINSON, CRIMINAL LAW DEFENSES 100–01 (1984):

> Justified conduct is correct behavior that is encouraged or at least tolerated. In determining whether conduct is justified, the focus is on the *act*, not the actor. An excuse represents a legal conclusion that the conduct is wrong, undesirable, but that criminal liability is inappropriate because some characteristic of the actor vitiates society's desire to punish him. . . . The focus in excuses is on the *actor*.

Michael D. Bayles, *Reconceptualizing Necessity and Duress*, 33 WAYNE L. REV. 1191, 1203 (1987):

> Generally, justifications admit that conduct satisfies the definition of an offense but the conduct is not wrongful since such conduct is justifiable in the totality of circumstances. Justifications focus on acts. . . .
>
> Excuses, on the other hand, admit that an actor's conduct is wrongful but we can not properly hold the actor responsible for his behavior. Excuses focus on the actor.

FLETCHER, RETHINKING CRIMINAL LAW, *supra* note 3, at 458–59.

This supposed distinction has provoked criminal law scholars to investigate nice moral questions. Two questions have predominated in the literature. First, is wrongfulness determined "subjectively" in terms of the actor's reasons for acting, or "objectively" in terms of facts independent of the actor's beliefs and motives—usually such facts as whether her deed in fact produces a net societal benefit or at least produces no socially recognized loss? Put another way, does wrongfulness depend upon "reasons" or "deeds"?[14] Second, if wrongfulness is determined subjectively, is it true that actions are "justified" when the act is merely *permissible*, or must it be morally *right*?[15]

These are, to be sure, interesting questions of moral theory. But, precisely for that reason, they do not speak to the logically prior issue with which we are here interested—namely, the nature of the conceptual distinction between justification and excuse for purposes of the criminal law. Insofar as that is our interest, we can safely bracket these much-debated questions of ethics. For, I shall argue, the distinction between justification and excuse, as concepts relevant to

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14. This opposition has been couched in a variety of ways. Most frequently, the line is drawn between subjective and objective theories of justification, *e.g.*, Greenawalt, *supra* note 12, at 1915–18, or reasons versus deeds, Paul H. Robinson, *Competing Theories of Justification: Deeds vs. Reasons*, *in* HARM AND CULPABILITY 45 (A.P. Simester & A.T.H. Smith eds., 1996). Other theorists speak in terms of agent-perspectival and objective theories, UNIACKE, *supra* note 11, at 17 & n.16; epistemic and non-epistemic theories, Hurd, *supra* note 12; and approaches based on explanatory reasons or guiding reasons, John Gardner, *Justifications and Reasons*, *in* HARM AND CULPABILITY, *supra*, at 103–06.

I take all these formulations to aim at roughly the same distinction, namely that justifications could depend either on an actor's reasons for engaging in a prima facie wrong (even if those reasons are based on mistaken beliefs about the relevant facts), or on the actual state of affairs that the actor brings about. It is true that, by their plain terms, some of the pairings appear to contrast objective facts with the actor's *beliefs*, whereas others contrast objective facts with the actor's *motives*. This is a difference because even if *A* shoots *B* actually believing that if she does not then *B* will shoot *C*, it is possible that such a belief plays no part in motivating or explaining her decision to shoot *B*. But I assume that those non-objective approaches which formally turn on an actor's beliefs and not on her reasons recognize that her explanatory reasons are what matter and speak in terms of beliefs only because it's a more easily administered proxy. To signal that the conception of justification I defend can turn upon beliefs, reasons, objective facts, or on some combination of the three, I will generally refer interchangeably to "subjective" and "reasons" approaches on the one hand, and to "objective" and "deeds" theories on the other. To simplify, subjective and reasons theories of justification care about an actor's beliefs; objective and deeds theories do not.

15. *See, e.g.*, UNIACKE, *supra* note 11, at 9–56, 130–55 (contrasting permissible self-defense with permissible and moral self-defense); Dressler, *supra* note 12, at 81–87 (arguing that justifiable conduct is not just tolerable, but right in a moral sense); Greenawalt, *supra* note 12, at 1904 (discussing the moral difficulty in claiming that less than ideal but still permissible acts are justified).

the criminal law, cannot simply replicate or mirror the distinction that obtains in moral theory: the categories of morally and criminally justified conduct constitute overlapping but distinct sets.

### *B. The Standard Account Rebutted*

Rebuttal of the standard account is straightforward. First, it is empirically false that the categories of morally and criminally justified conduct are extensionally identical. Second, there appears no basis for concluding that the extensional divergence is produced by any sort of conceptual error. Naturally, it remains open for one to argue that, for reasons of policy broadly construed, the substantive criminal law *should* be structured in such a way as to extend justification defenses to all, and to only, such conduct as is morally justified. Likewise, one could reasonably argue that the law should extend excuse defenses to all, and to only, such conduct as is morally excused. But any such arguments would be wholly normative; they provide no guidance for understanding the conceptual framework of defenses in those jurisdictions (probably all of them) that resist this advice.

1. *Not All Morally Justified Conduct Is Criminally Justified*. Consider some familiar candidates for morally justified civil disobedience—say, the civil rights sit-ins, or medically indicated use of marijuana by severely ill persons, or distribution of hypodermic needles to drug addicts in order to combat the spread of AIDS, or the disruption of abortion clinics.[16] In none of these cases is the defendant likely to have a valid legal defense. When the legislature can be understood to have already anticipated such possible claims of necessity, and nonetheless to have adopted, or refused to modify, a criminal ban, the necessity defense does not lie.[17] And with good reason. As the commentary to the Model Penal Code (MPC) explains, the necessity defense carves out an across-the-board exception for those unanticipated circumstances in which the legislature would not want a general prohibition to apply.[18] It is

16. Actual cases involving these situations are discussed in SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 865–67 (6th ed. 1995).

17. *See, e.g.*, MODEL PENAL CODE § 3.02(1)(c) (1962) (extending the necessity defense only so long as "a legislative purpose to exclude the justification claimed does not . . . plainly appear").

18. *Id.* § 3.02(1) cmt. at 13; *see also* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001) ("Under any conception of legal necessity, one principle is clear: The

therefore implicitly rejected for those circumstances that might have been more specifically accommodated, but were not. Consequently, in any of the above circumstances, a defendant's only hope for exculpation lies formally outside the doctrinal parameters of the substantive criminal law, as through the exercise of prosecutorial discretion or jury nullification. At least some morally justified conduct, it seems, is not criminally justified.[19]

Advocates of the standard conceptualization of justifications could perhaps respond as follows: Even if many unlawful acts (perhaps or perhaps not including any of those listed above) are morally justified absent a legal prohibition, such acts cannot be morally justified in the face of a legal ban, given the moral imperative to obey the criminal law.

Yet this response fails. First, the theory of political obligation upon which this attempt to save the substantive equivalence thesis rests is implausible. Let us suppose that, in any morally legitimate political system, criminal rules assume some moral force simply by virtue of their adoption, and that the mere existence of a criminal ban is therefore a consideration to be taken into account in the overall moral calculus. Nonetheless, very few legal or political theorists believe that the mere existence of a legal ban necessarily renders morally unjustified all action that would be morally justified in the strong sense absent the legal prohibition.[20] Even if the existence of a criminal ban on given conduct always provides a reason not to engage in that conduct, and even if it would often constitute a reason of overriding force not to engage in it, for purposes of moral *as opposed to legal* analysis, it does not provide a necessarily decisive reason not to engage in it.

Furthermore, the response fares no better even were we to adopt an account of political obligation pursuant to which disobedience to law is always and necessarily morally wrongful. True, this account

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defense cannot succeed when the legislature itself has made a 'determination of values.'" (quoting 1 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 5.4, at 629 (1986))).

19. I hope it is obvious that I am taking no position on which, if any, of the offered *candidates* for moral justification are actually morally justified under the best moral theory. If you think that none of these actions would be morally justified, feel free to supply your own favorite example of what you consider to be morally justified civil disobedience. The point will remain the same.

20. For a clear and concise recent summary of the debate, see Leslie Green, *Law and Obligations*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 514 (Jules Coleman & Scott Shapiro eds., 2001).

would seem to nullify the set of morally justified action that is criminal and not justified in law. But it does so as a mere tautology; it tells us nothing about the nature of justification defenses in the criminal law, which is precisely what criminal law theorists who mine this terrain are purporting to explore. Consequently, even if we are prepared to accept the strong version of political obligation, I think that criminal law theorists who equate justifications of morality with justifications of criminal law must be understood to be referring to what morality commands or permits as a pre-legal matter. They are not referring to what morality permits as a function of a substantive theory of political obligation married to the contingencies of what defenses the criminal law happens to confer. Contrary to the standard account, then, there can be morally justified actions that are not legally justified.[21]

2. *Not All Criminally Justified Conduct Is Morally Justified*. A simple hypothetical demonstrates that the converse is true as well: Not all criminally justified conduct is morally justified.

Imagine an actor, Albert, who employs deadly force in self-defense in circumstances in which completely safe retreat would have been easy. (To make matters more stark, assume if you like that the assailant, Bushrod, was old, deranged, and physically disabled, and

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21. As Austin put the point:

> Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God . . . . the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity.

JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED, Lecture V, at 133–34 (David Campbell and Philip Thomas eds., 1995) (1832).

To be sure, the principle "*lex injusta non est lex*" (an unjust law is not a law) would seemingly entail that the putative law which denies a defense in cases of moral justification is not a "law" at all. Obviously, I cannot in this space seek to rebut this particular sort of natural law theory. But an extended discussion is probably unnecessary given the very real doubt that *any* modern theorist of natural law accepts this maxim. *See generally* Brian H. Bix, *Natural Law: The Modern Tradition*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, *supra* note 20, at 61. And even if that's not so, I am unaware of any proponent of the standard account of the justification/excuse distinction who defends that view as nothing more than a corollary of the *lex injusta* principle. Perhaps this is in part because the principle, even were it sound, would still not be quite enough to maintain the standard account; its adherents would still have to confront the challenge to be discussed in the immediately following subsection. That is, they would have to explain either why a criminal law that extends a defense in cases of morally unjustified conduct is also not a "law," or why such defenses cannot count as a "justification" even as a matter of *legal* taxonomy. *See infra* notes 22–29 and accompanying text.

that Albert concedes after the fact that he was aware of the opportunity for safe retreat at the time.)[22] If this occurred in one of the many jurisdictions that does not require retreat (especially from the actor's own home),[23] Albert has a valid defense in law. On a consequentialist rationale, however, Albert's action was very probably not the right thing to do as retreat would have produced a net social benefit. If this is so, then Albert is not likely to be justified on an objective (or deeds) theory.[24] A justification will be hard to support on a subjective (reasons) theory as well, for surely few nonconsequentialist moral theories would conclude that Albert acted rightly in choosing not to retreat. Indeed, it is at least arguable that he did not even act morally permissibly, in which case he would not even have a moral justification in the weak sense. It is very possible, in short, that Albert's perfect legal defense is not, morally speaking, a justification.[25]

Of course, one can argue that Albert should not be granted a defense. But then we're engaged in substantive argument, not conceptual analysis. If we agree that the mere existence of the defense raises no logical or conceptual problem (regardless of whether it's good policy), it seems again that legal justifications are not identical to moral justifications.

To recap, this brief argument against the substantive equivalence thesis has proceeded as follows: (1) The criminal law might grant a defense to someone who uses deadly force in self-defense even under

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22. The rudiments of this hypothetical are presented in Kent Greenawalt, *Justifications, Excuses, and a Model Penal Code for Democratic Societies*, 17 CRIM. JUST. ETHICS 14, 25 (1998).

23. The Model Penal Code, for instance, imposes no duty on actors to retreat from their own homes, even when the assailant is a co-occupant. MODEL PENAL CODE § 3.04(2)(b)(ii)(A) (1962).

24. I assume here that objective theories of moral justification are likely to be consequentialist and subjective theories nonconsequentialist. My argument, however, does not depend upon this assumption.

25. Another piece of evidence suggesting that conduct can be legally justified but not morally justified emerges from the facial difference between the "subjective" and "reasons" theories of justification. *See supra* note 14. Actual criminal codes often draft justification defenses to refer only to actors' beliefs, not to their motivation. *See, e.g.*, MODEL PENAL CODE § 3.02(1) (requiring that the actor believe his conduct to be necessary to qualify for justification). But a moral theory that evaluates conduct on the basis of something other than objective facts is almost certain to care about the actor's explanatory reasons, not only her beliefs. Paul Robinson takes this fact as some evidence of the conceptual poverty or confusion besetting current subjective approaches to justification, and thus as indirect support for a deeds theory. ROBINSON, *supra* note 13, at 49–50. It might instead be taken to reinforce the revised conception of criminal justifications introduced *infra* Part II.

circumstances in which he could easily have retreated; (2) such a defense, if granted, would be, legally speaking, a justification; but (3) on most plausible moral theories, such conduct would not be morally justified; therefore (4) not all legal justifications are moral justifications. But perhaps this conclusion is too hasty. If it is, the error seems most likely to lie with premise (2). That is, maybe if the criminal law recognizes a defense under the circumstances specified, that defense is not, as a matter of legal taxonomy, a justification. Maybe it is something else. And if it is something else, then this mundane example would not support the conclusion drawn.

Now, if our supposed defense is not, legally, a justification, what else could it be? Recall that standard taxonomies of criminal law defenses endorsed by proponents of the substantive equivalence thesis contain three broad classes: justifications, excuses, and "nonexculpatory" defenses of law enforcement policy.[26] Under this taxonomy, if Albert is not legally justified, then he is either legally excused or the beneficiary of a nonexculpatory defense. Let's consider these possibilities in turn.

Unfortunately, the suggestion that Albert's defense is, legally, an excuse will not avail proponents of the substantive equivalence thesis. If Albert is *legally* excused, then, according to substantive equivalence, he must be *morally* excused too. But the assertion that Albert is excused as a moral matter—hence that his criminal defense is also, taxonomically, an excuse—is easily resisted. Why, after all, should those who believe that Albert's action was not morally justified—even in the weak sense of being morally permissible—agree that he is not morally blameworthy for the killing? It can't be because the criminal law permitted him to act as he did, for criminal law permissions surely do not *confer* moral blamelessness. Lots of blameworthy acts—lying, promise-breaking, many forms of gratuitous cruelty to animals—are criminally permissible. It is very plausible, therefore, to adjudge Albert blameworthy for sitting calmly in his chair, waiting patiently to kill the slowly advancing Bushrod. Furthermore, members of the community and legislators alike could unanimously agree that Albert's conduct was not morally justified in either strong or weak senses and that he was morally blameworthy, and nonetheless rationally continue to favor extending a defense in circumstances like Albert's. Decisionmakers could reasonably believe, for example, that most people will retreat if they can, no

26. *See supra* note 8 and accompanying text.

matter what the law allows, and fear that ex post adjudications of whether safe retreat would have been possible are too likely to produce false positives (thus resulting in punishment of morally and legally innocent persons) and to put excessive pressure on law-abiding folk to attempt retreats that are in fact unsafe.[27]

So, if premise (2) fails, it must be because Albert's defense is a non-exculpatory defense of law enforcement policy.[28] This possibility cannot be absolutely ruled out. But it comes at the cost of trivializing the very taxonomy of criminal law defenses that theorists of the justification/excuse distinction seem to think is so important. Defenses respond to, and are shaped by, a variety of considerations—such as whether the conduct is not morally wrongful; whether the actor, albeit engaged in morally wrongful conduct, is not likely to be morally blameworthy; and whether there exist reasons, apart from considerations of moral wrongfulness and moral blameworthiness, for not punishing the actor. This is clearly true. But so what? If this is all we can say, the enterprise of trying to categorize defenses becomes puzzling. A taxonomy should be more revealing than a bare list of reasons. Yet if the standard tripartite taxonomy of criminal law defenses is conceptually sound, and if Albert's defense[29] falls within the nonexculpatory taxon as opposed to the justificatory taxon, the illuminating power of the taxonomy seems lost. It adds no apparent value to a mere laundry list of the diverse reasons for allowing any particular conduct or circumstances to serve as a defense to a criminal charge.

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27. These points are made in Greenawalt, *supra* note 22, at 25.

28. Strictly speaking, this statement is too strong. If Albert's defense is, legally speaking, neither justification nor excuse, then it "must" be a nonexculpatory defense of law enforcement policy only so long as those three categories exhaust the relevant taxa. But it is always open for a proponent of substantive equivalence to avoid having to grant any proffered example of legally justified conduct that is not morally justified by simply multiplying the proposed categories of legal defenses. The response to such a move, though, would not be to demonstrate that the example *cannot* fall within any of the newly proposed taxa. This is a futile way to attack a moving target. The better response is to articulate and defend an alternative and more satisfying way to conceive of legal justification which covers the example in question. That is the task for Part II.

29. Notice that the fact that Albert could have safely retreated and chose not to is not a necessary condition for satisfaction of the nominal legal defense that Albert will invoke—self-defense. Had Albert been inclined to retreat but then (accurately) determined that safe retreat would have been impossible, he would still be exculpated on grounds of self-defense. And in that circumstance, he probably would be morally justified. So to treat Albert's defense as nonexculpatory is implicitly to maintain that self-defense is sometimes a legal justification and sometimes a nonexculpatory defense, depending upon the facts of the individual case.

Furthermore, Albert's defense just doesn't look very much like the other defenses customarily placed in the third category—e.g., statute of limitations, diplomatic immunity, double jeopardy. These latter defenses appear united by a family of systemic concerns of a different character than the sorts of worries that might support extending self-defense to protect Albert in his killing of Bushrod. This is highly impressionistic, to be sure. But if there is truth to it, then to clump all these varied sorts of defenses under one heading threatens to turn this third category into a shapeless residual category, drained of whatever coherence it might otherwise possess. These two considerations, perhaps among others, may help explain why no theorist of whom I am aware has proposed that any part of self-defense be classified as something other than either justification or excuse.

In sum, then, Albert has a valid criminal defense, even though, very possibly, his conduct is neither morally justified (strongly or weakly, objectively or subjectively), nor morally excusable. At the risk of belaboring the point: Because the particular reasons why it might be morally appropriate for the state to recognize a legal justification are so heavily dependent upon such considerations as the supposed inferior epistemic access enjoyed by post hoc factfinders relative to the actor herself, they simply need not bear upon the moral character of the actor's conduct. And the supposition that this defense is not a justification, but rather falls within the third category of defenses involving "law enforcement policy," threatens to divest the proposed taxonomy of criminal law defenses of conceptual as well as practical interest. The most likely possibility is simply that Albert's defense is, legally speaking, a justification, and therefore that justification defenses need not be limited to morally justified conduct.

3. *Summary*. These brief examples demonstrate two things, neither of which should surprise. First, conduct that is morally justified on most theories of moral justification can lack any defense under the criminal law. Second, a legal defense that seems most intuitively classified as a justification can cover conduct that is not morally justified on any plausible theory of moral justification. It follows that, if there exists any sound and coherent distinction between justification and excuse for purposes of the criminal law, it cannot simply mimic the distinction conventionally supposed to exist in ethics. The standard account is wrong.

## II. MORAL THEORY AND THE STRUCTURAL EQUIVALENCE THESIS

Happily, there is an obvious response. Morality and criminal law are both normative systems. In each, it is true that a claim of justification defeats the prima facie judgment that the actor has violated a norm, and that a claim of excuse defeats the presumption that the actor is normatively responsible for the violation of a norm. Thus justification and excuse are generic concepts in normative reasoning, serving the same logical function in law and in morals. But if so, they necessarily have different meanings in the two systems to the extent of the substantive differences between the two systems in terms of, respectively, the content of the prohibitory norms, and the principles of ascription.

Section A introduces what it means for justifications and excuses to serve structurally or logically equivalent functions within the normative systems of conventional morality and positive criminal law, while differing in substantive content. Section B briefly elaborates upon the structural equivalence thesis by situating this revised account in the justification/excuse literature. In doing so, it sketches a rough taxonomy of existing criminal law defenses. Section C confronts one important question that the revised account raises—namely, how we can determine whether a given defense is better understood as qualifying a prima facie norm (hence is conceptually a justification) or as foreclosing punishment for violation of a norm (hence is conceptually an excuse).

### *A. The Revised Account Introduced*

The conventional view in moral theory holds that a justification serves to qualify a moral norm so as to provide moral permission for conduct that would be presumptively wrongful.[30] According to what I will call "the structural equivalence thesis," then, a justification within the criminal law means that conduct which appears at first blush to be criminal does not, all things considered, violate the law. In contrast, an excuse means that it is criminal but not punishable. (See Figure 2.) Under this view, justifications serve to qualify the norm for purposes both of ex post evaluation and ex ante direction. They supplement the prima facie norm so as to instruct the addressees regarding what conduct the discourse allows. Excuses serve, only ex post, to relieve

30. *See supra* note 11 and accompanying text.

an actor of responsibility—in the one system, moral responsibility, in the other, criminal responsibility—for having violated a norm.[31]

**Figure 2**

| The Revised Account | | | |
|---|---|---|---|
| | | **Meaning Within Normative System** | |
| **Claim** | **Normative Significance** | **Morality** | **Criminal Law** |
| **Justification** | Defeats norm violation | Not wrongful | Not criminal |
| **Excuse** | Defeats responsibility | Wrongful, but not blameworthy | Criminal, but not punishable |

That the distinction between "not criminal" (i.e., justified) and "criminal but not punishable" (i.e., excused) is not purely nominal is well illustrated by the storied case of *Dudley and Stephens*.[32] Charged with murder for killing and eating the cabin boy while shipwrecked, the defendants had claimed that their conduct was necessary to avoid starvation.[33] The court denied the defense. As Lord Coleridge explained:

> We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime.[34]

Although the *Dudley and Stephens* court famously did not distinguish between justification and excuse,[35] once these terms are distinguished

31. *See, e.g.*, MOORE, *supra* note 8, at 405 (remarking on the conceptual priority of forward-looking norms of wrongdoing over the backward-looking judgments of culpability).

32. The Queen v. Dudley & Stephens, 14 Q.B.D. 273 (1884).

33. *Id.* at 273.

34. *Id.* at 288.

35. The court had posed the issue thus:

> Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be *justified* by some well-recognised *excuse* admitted by the law. It is further admitted that there was in this case no such *excuse*, unless the killing was *justified* by what has been called "necessity." . . .
>
> It must not be supposed that in refusing to admit temptation to be an *excuse* for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in

and the issue of justification is explored, the question becomes whether the criminal law should permit (or should be interpreted to permit) killing under the circumstances of the case.[36] Affirmative and negative answers could each be supported. But even if we accept *arguendo* the court's judgment that Dudley and Stephens *did* violate the criminal law, the question remains whether the court should refrain from punishing them out of "compassion for the criminal" on the grounds that they are not deserving of blame. To be sure, the granting of an excuse (criminal but not punishable) would, as a practical matter, "weaken" the criminal ban. But it would not, as a logical or conceptual matter, "change . . . the legal definition." It would have been perfectly coherent for the court to have determined that Dudley and Stephens did violate the law (i.e., were not legally justified) but nonetheless should not be punished because they were not blameworthy (i.e., were legally excused). This would not have been identical, in either logic or social meaning, to a judgment that the defendants did not violate the criminal law, even though the most salient practical consequence—the defendants' exculpation—would have been the same in both cases.[37]

### *B. The Revised Account Situated*

I expect this distinction is neither unclear nor controversial. Indeed, I readily acknowledge that the revised conceptualization here advanced—what I have termed the "structural equivalence" thesis—is not a radical innovation. Remarks to similar effect can be found

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> such trials to keep the judgment straight and the conduct pure. . . . But a man has no right to declare temptation to be an *excuse*, though he might himself have yielded to it . . . . It is therefore our duty to declare that the prisoners' act in this case was willful murder, that the facts as stated in the verdict are no legal *justification* of the homicide.

*Id.* at 286–88 (emphases added).

36. Those circumstances could be defined, variously, as those in which there existed *objective* necessity, or in which the actors *actually believed* there to be necessity, or in which they *actually* and *reasonably believed* there to be necessity. For present purposes, the distinctions are of no moment. Notwithstanding some efforts by the court to problematize the issue, it seems fairly clear that all three conditions were satisfied.

37. J.C. Smith is therefore mistaken to charge that "[i]t is begging the question to declare that [the Lordships] cannot 'allow compassion for *the criminal* to change or weaken in any manner *the definition of crime*,' when the very issue before them is whether the person charged is a criminal and whether the definition of crime extends to his case." J.C. SMITH, JUSTIFICATION AND EXCUSE IN THE CRIMINAL LAW 93 (1989). "The very issue" is, rather, two separate issues that must be teased apart. A holding that the defendants were not justified amounts to a conclusion that their conduct falls within the (complete) definition of the crime. But such a judgment would not be inconsistent with a further judgment that compassion for them warrants not labeling either "a criminal."

scattered throughout the literature. Perhaps most notably, H.L.A. Hart explained that "[i]n the case of 'justification' what is done is regarded as something which the law does not condemn, or even welcomes," whereas excuses lie when "the psychological state of the agent . . . exemplified one or more of a variety of conditions which are held to rule out the public condemnation and punishment of individuals."[38] And as one respected American casebook puts it: "Justification defenses state exceptions to the prohibitions laid down by specific offenses. . . . They qualify and refine the proscriptions of the penal law. . . . [D]octrines of excuse . . . recognize claims that particular individuals cannot fairly be blamed for admittedly wrongful conduct."[39] Several points need be made, though.

First, mere recitation of this view is no guarantee of understanding. One California court, for instance, succinctly stated: "Justification declares the allegedly criminal *act* legal; excuse admits the act's criminality but declares the allegedly criminal *actor* not to be worthy of blame."[40] But it immediately proceeded to conclude: "Therefore, justification requires an objective evaluation of the allegedly criminal *act*; excuse requires only a subjective evaluation of the allegedly criminal *state of mind*."[41] As I will explain in detail below, this is a non sequitur.[42] More generally, it is not uncommon for

38. HART, *supra* note 10, at 13–14 (footnotes omitted).

39. RICHARD J. BONNIE ET AL., CRIMINAL LAW 324 (1997).

40. People v. Aris, 264 Cal. Rptr. 167, 179 (Cal. Ct. App. 1989).

41. *Id*.

42. *See infra* Part III. For another illustration, see DOUGLAS N. HUSAK, PHILOSOPHY OF CRIMINAL LAW 187–223 (1987). Husak begins with a clear and, to my mind, seemingly accurate statement of justification: "A defendant who alleges a justification contends that his conduct was not legally wrongful in his particular circumstances, even though it may (or may not) have satisfied each of the elements of a criminal offense." *Id.* at 189. Later, though, he concludes that because "[j]ustifications . . . show conduct not to be wrongful . . . there is no reason why they cannot be shared by confederates." *Id.* at 205. Strictly speaking this is true. But nobody suggests that justifications "cannot" be shared by confederates; the disputed question, I think, is only whether it can be the case that justifications "are not" shared by confederates. It is this that I take Husak to be denying. Put otherwise, Husak seems to be contending that because "[j]ustifications . . . show conduct not to be wrongful," they *must* be shared by confederates. However, the simple claim that justifications must be shared by confederates is false. *See* Part IV.A.

Perhaps Husak's conclusion (as I have recharacterized it) would follow from his premise were we to assume an objective theory of justification. That is, the "conduct" that a defendant who alleges a justification defense contends was "not legally wrongful" may be limited, in Husak's view, to aspects of behavior not including the actor's mental states. *See, e.g.*, Douglas N. Husak, *Justifications and the Criminal Liability of Accessories*, 80 J. CRIM. L. & CRIMINOLOGY 491, 496 (1989) ("Justifications are defenses that arise from properties or characteristics of acts; excuses are defenses that arise from properties or characteristics of actors."). But, of course, this

an author to define justification in both legal and moral terms, in which event the whole significance of the shift from the standard to the revised conception is lost.[43]

Second, even those who appear to adopt what I have called the revised view and might understand its implications (on which, more shortly) generally appear not to recognize that it is far from the prevailing understanding in the scholarly community.[44] As a

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is not how "conduct" must be understood. *See, e.g.*, MODEL PENAL CODE § 1.13(5) (1962) (defining "conduct" to mean "an action or omission and its accompanying state of mind"). Moreover, as Part III endeavors to show, it is not how *justifications* must be understood. Notice this, then: What appears on first or even second glance to be a straightforward articulation of what I have labeled the revised account of justification ("A defendant who alleges a justification contends that his conduct was not legally wrongful in his particular circumstances . . .") may, instead, be intended to incorporate within it, as a definitional matter, contestable and contested substantive claims.

43. Consider in this respect the influential work of Kent Greenawalt, whose writing on the distinction between justification and excuse is especially subtle and insightful. In his much praised 1984 article, Greenawalt observed that, "[i]f the law's central distinction between justification and excuse is to follow ordinary usage, it will be drawn in terms of warranted and unwarranted behavior." Greenawalt, *supra* note 12, at 1903. Although it's not clear on its face whether this refers to *morally* warranted and unwarranted behavior (per the substantive equivalence thesis) or *legally* warranted and unwarranted behavior, the context strongly conveys the former. This is certainly how Greenawalt is often understood. *See, e.g.*, Garrett Epps, *Any Which Way But Loose: Interpretive Strategies and Attitudes Toward Violence in the Evolution of the Anglo-American "Retreat Rule"*, 55 LAW & CONTEMP. PROBS. 303, 305 (Winter 1992) ("Professor Greenawalt argues that a justified action is 'warranted' and 'morally appropriate,' while an excusable action is merely 'not blameworthy' because the person who commits it is not 'fully responsible.'" (footnote omitted)); Hurd, *supra* note 12, at 1563–64 (reading Greenawalt to endorse a subjective theory of moral justification). Fourteen years later, Greenawalt reiterated his central claims in a shorter article, now writing that, for purposes of the criminal law, "[a] claim of justification is a claim that one's act was warranted, that what one did was right, or was within a legally permissible range of behavior." Greenawalt, *supra* note 22, at 16 (footnote omitted). Unfortunately, the notoriously ambiguous "or" makes this sentence susceptible to a range of interpretations. Least plausibly, the passage could be suggesting a three-part disjunction, such that a justification defense lies when one's action is "warranted" or *morally* right or *legally* permissible. Alternatively, it could mean that, for purposes of criminal law, "warranted" is synonymous with *legally* right, which is synonymous with "within a legally permissible range of behavior." But surely the most natural reading holds that an action is "warranted"—hence legally justified—if it is *either* "right" or "legally permissible," in which case *right* must mean something *other* than *legally permissible*—hence, presumably, *morally* right. For Greenawalt to define legal justifications explicitly in terms of *legal* permissibility is, in sum, a welcome advance. However, in my view, his definition will remain imprecise and misleading so long as it includes reference (however veiled) to *moral* rightness. Better to follow Donald Horowitz's advice that we "begin the discussion of exculpation" by "ban[ning] words like *warranted*." Donald Horowitz, *Justification and Excuse in the Program of Criminal Law*, 49 LAW & CONTEMP. PROBS. 109, 110 (Summer 1986).

44. One possible exception is B. Sharon Byrd, *Wrongdoing and Attribution: Implications Beyond the Justification-Excuse Distinction*, 33 WAYNE L. REV. 1289 (1987), a largely astute analysis that warrants more attention than it has apparently received.

consequence, we find a great many commentators observing simply that justifications mean that the conduct is "not wrongful"—with most apparently intending "not *morally* wrongful," a small minority perhaps thinking "not *criminally* wrongful," and the great majority, I suspect, reading other unqualified references (without an eye for their ambiguity) as conveying whatever meaning the author herself favors.[45] My objective, therefore, is to identify these two views, to argue for the second, and to demonstrate why it matters.[46]

Third and relatedly, even those who correctly define criminal law justifications as defeating criminality, as distinct from moral wrongfulness, most often also define criminal law excuses as defeating blameworthiness.[47] This suggests a conception of the justification/excuse distinction that operates as a middle ground between the standard formulation we have rejected and the revised view just put forward. (See Figure 3.) This is intuitively sensible. And yet, if true, it might seem to throw into doubt my earlier claim that justification and excuse are generic concepts of normative reasoning, serving the same logical function in morality and criminal law. It is easy enough to appreciate either substantive equivalence (per the standard account) or structural equivalence (per the revised account). But this third matrix has the air of compromise about it. And where compromise can so easily reign, strong claims of conceptual logic often stand on shaky footing. How can we be so sure that justification defenses in the criminal law have no necessary relationship to notions of moral wrongfulness if excuse defenses under the same system mean nothing other than that the defendant is morally blameless? Some thoughts about this issue might enable us to understand more clearly the relationship between legal and moral categories.

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45. Compare the ambiguity that the traditional M'Naghten rule of legal insanity produces in providing that the defendant must be exculpated if he did not know the nature of his act or did not know that it was wrong. Many courts and commentators have noted the question whether this means morally wrong or legally wrong. *See, e.g.*, 2 JAMES F. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 167 (1883). Surely, though, many others have simply failed to notice a difficulty.

46. I do not mean to imply that there exist *only* two versions of the justification/excuse distinction. Quite the contrary. Indeed, the leading English criminal law casebook offers this third view: "An act is justified when we positively approve of it. It is merely excused when we disapprove of it but think it is not right to treat it as a crime." SMITH & HOGAN, CRIMINAL LAW 189 (9th ed. 1999).

47. *See, e.g.*, *supra* notes 39 and 40 and accompanying text.

**Figure 3**

| **The Compromise Account** | | | |
|---|---|---|---|
| | | **Meaning Within Normative System** | |
| **Claim** | **Normative Significance** | **Morality** | **Criminal Law** |
| **Justification** | Defeats norm violation | Not wrongful | Not criminal |
| **Excuse** | Defeats responsibiliy | Wrongful but not blameworthy | Criminal but not blameworthy |

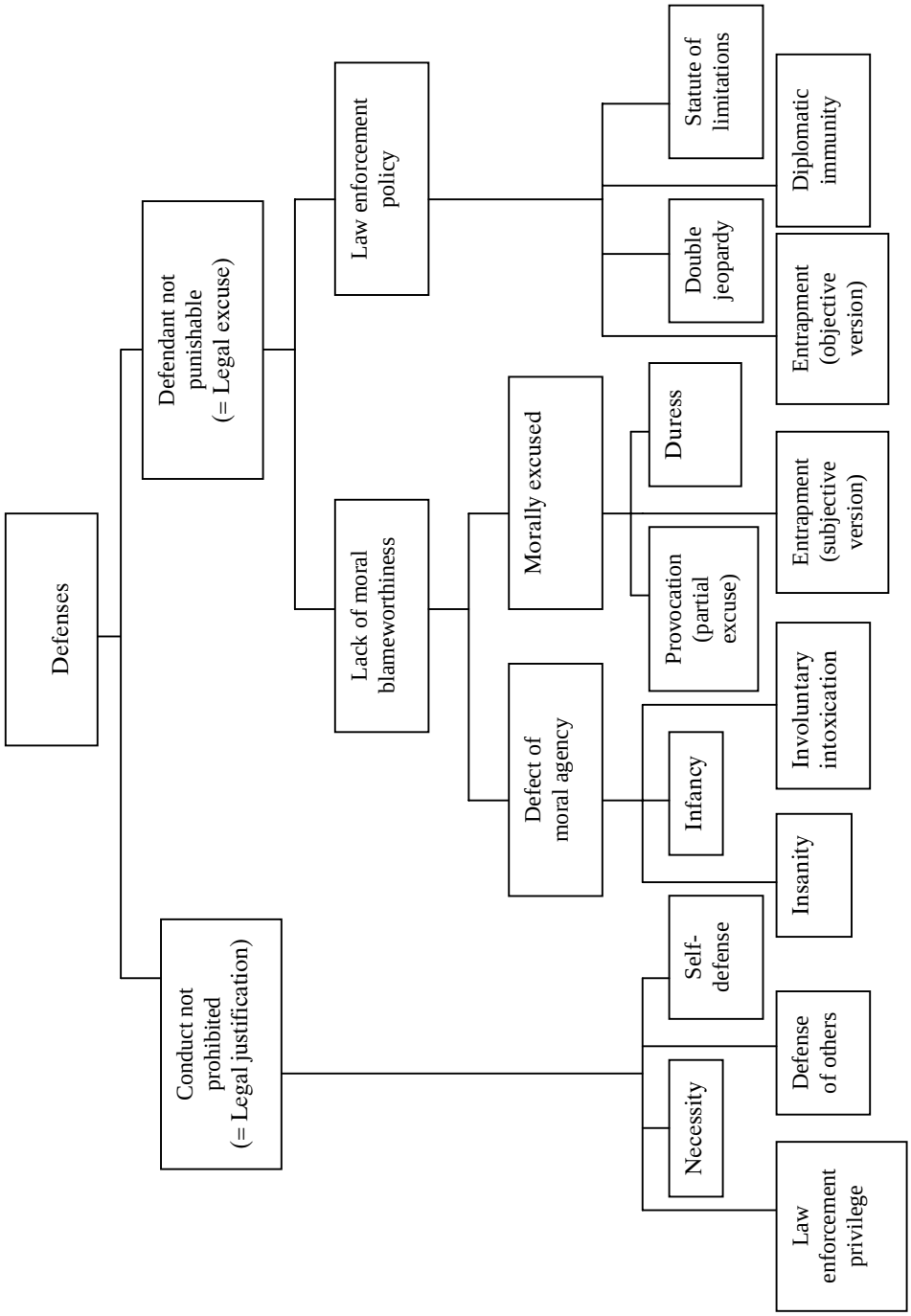
Let me start by proposing a rough, incomplete, and tentative taxonomy of defenses under the criminal law, one that distinguishes conduct that is "not prohibited" from prohibited conduct for which the defendant is "not punishable," and then subdivides the latter category into defenses stemming from the defendant's supposed "lack of moral blameworthiness," and those based on other reasons of "law enforcement policy." (See Figure 4.) Two aspects of the diagram are immediately striking.[48] First, in contrast to the prevailing three-part schema of justification, excuse, and law enforcement (or "nonexculpatory") defenses,[49] my taxonomy divides the relevant universe into just two broad classes. Second, the concept of "excuse" appears at two discrete levels in the hierarchy—corresponding to moral excuse and legal excuse.[50]

48. A third feature that is worth remarking upon concerns the subject being taxonomized. What is a "defense," and how does one compare to a claim that serves to rebut elements of the offense? Now, there may indeed be strong conceptual or normative bases upon which to sort given elements into one category or the other. But the perspective reflected in the diagram is purely positive: a defense, on this view, is a claim that arises after the commission of the offense has been established, which is to say that it concedes (at least *arguendo*) a prima facie violation—i.e., an "infringement"—of the criminal law. *See infra* note 117.

49. *See supra* note 8 and accompanying text.

50. I should here acknowledge an alternative taxonomy, pursuant to which the first level of the hierarchy—for purposes of ethics and the criminal law—would be divided into *three* categories: justified (not prohibited), excused (not punishable), and not responsible (for reason of lack of moral/legal agency). Put another way, agency defects could be reconceived as standing on the first level of the hierarchy rather than the third. Both schemata are plausible. The critical point advanced in text remains valid under either.

**Figure 4**


Defenses
Defendant not punishable (= Legal excuse)
Conduct not prohibited (= Legal justification)
Law enforcement policy
Lack of moral blameworthiness
Morally excused
Defect of moral agency
Statute of limitations
Double jeopardy
Duress
Provocation (partial excuse)
Infancy
Self-defense
Necessity
Diplomatic immunity
Entrapment (objective version)
Entrapment (subjective version)
Involuntary intoxication
Insanity
Defense of others
Law enforcement privilege

The lesson to be drawn is just how complexly moral concepts play out in the criminal law. Insofar as concepts used in moral discourse really signify generic features of the structure or logic of normative reasoning, those same concepts are likely to reappear in the criminal law. In both systems, the concepts will share logical meaning but differ in substantive content. (As already intimated, the term "wrongful" supplies a prime example. Unmodified, it is generally taken to mean "morally wrongful." But the mere fact that it could be thus qualified without redundancy indicates that it is really a generic normative concept that exists across normative discourses—hence "criminally wrongful."[51]) However, the criminal law is not only a normative system analogous to the system of ethics. It also, in diverse and complicated manners, incorporates or operates upon the substantive judgments made within the system of ethics. I will not try to sort out the variety of ways this occurs. At the least, and very generally, it is enough to understand that moral concepts serve both as *analogues* to legal concepts (performing the same function within the logic of the respective normative systems) and as the *content* or *substance* of legal rules. The standard negative retributivist account of the criminal law holds that individuals should be legally excused when they are not morally blameworthy.[52] This is a substantive position. It

51. I have argued elsewhere that the same could be said about the term "coercive." *See* Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 LEGAL THEORY 45, 53–55 (2002). It bears emphasis that to recognize that concepts like "wrongful," "right," and "coercive" serve analogous functions within the logics of criminal law and morality is not simply to reiterate the commonplace that "law and morals share a vocabulary so that there are both legal and moral obligations, duties, and rights." H.L.A. HART, THE CONCEPT OF LAW 7 (2d ed. 1994); *see also* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459–60 (1897):

> The law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds. The law talks about rights, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into fallacy.

52. The term "negative retributivism" is introduced in J.L. Mackie, *Morality and the Retributive Emotions*, 1 CRIM. JUST. ETHICS 3, 4 (1982). It is distinguished from what is often considered retributivism *simpliciter* (but might with greater precision be divided into "permissive retributivism" and "positive retributivism") in not claiming that the moral blameworthiness that attaches to antisocial conduct either provides a sufficient justification for instituting a system of criminal punishment or provides an affirmative reason of any sort for imposing punishment in a given case. *Id*. Perhaps better termed "side-constraint retributivism," it says only that an offender's lack of blameworthiness renders it unjust to punish him (and may also claim that it is unjust to punish an offender in excess of his desert).

is not one that can be advanced by conceptual argumentation about what it *means* to have a legal excuse.

Put otherwise, the compromise account of justification and excuse (reflected in Figure 3) is accurate only because, and to the extent that, the criminal law decides as a substantive matter to restrict punishment to persons who are morally blameworthy for their criminal acts, in the dual sense that they were the types of agents who are proper bearers of moral ascriptions and that they were morally culpable for acting as they did.[53] That is, insofar as excuses bear the same meaning under the criminal law as they do in moral theory, that is for substantive, contingent reasons, not for conceptual ones. For those—H.L.A. Hart most famously[54]—who deny that imposition of criminal punishment must be limited to persons who are morally blameworthy, it remains true that a criminal law excuse denotes non-punishability, not non-blameworthiness. It follows that even negative retributivists do better to recognize that criminal law excuses *mean* only that the defendant should not be punished, although absence of blameworthiness might well constitute a principal, perhaps sufficient, *reason* why he should not be punished.

Similar remarks apply to justification. It is perfectly appropriate to argue about such matters as whether an actor should be legally justified whenever his conduct is morally justified (in a strong or weak sense), and whether legal justification should be withheld from actors whose conduct is not morally justified even in the weak sense of being morally permissible. The important thing to understand is that such positions are advanced, and resisted, by substantive moral argument and by practical reasoning, *not* by conceptual analysis.[55] So, even if we

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53. This distinction between moral agency and culpability is succinctly put in MOORE, *supra* note 8, at 403. For an apparently comparable distinction, see Stephen Shute et al., *Introduction: The Logic of Criminal Law*, *in* ACTION AND VALUE IN CRIMINAL LAW 1, 16 (Stephen Shute et al. eds., 1993) (distinguishing prima facie responsibility from all-things-considered responsibility).

54. *See* HART, *supra* note 10, at 28–53 (arguing that voluntary action, but not moral blameworthiness, should be a precondition for imposition of criminal punishment).

55. It is this point that Jeremy Horder's proposed taxonomy, *see* Jeremy Horder, *Self-Defence, Necessity, and Duress: Understanding the Relationship*, 11 CANADIAN J.L. & JURISPRUDENCE 143 (1998), by which the defenses of necessity, duress, and self-defense are associated with, or identified by, a particular principle or "key issue"—respectively, the *moral imperative* to act, the *personal sacrifice* demanded of the actor, and the *legal permission* to act, *id.* at 143—threatens to obscure. If my account here is correct, then the legal permission to act is what defines *all* defenses that fall under the more general conceptual rubric of justification. Within the broad category of justifications, there are then different (yet potentially overlapping) reasons of policy for recognizing particular defenses. Defenses of necessity are recognized, as

find it more convenient to reserve the label of "excuse" for those defenses that signal the defendant's lack of moral responsibility (in the twin senses of lack of moral agency and lack of moral blameworthiness), that does not throw into doubt my claim that criminal law justifications signal only absence of criminality, not absence of moral wrongfulness, which is the point I most want to insist upon.[56]

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Horder says, because of the "overriding reasons" that support acting in cases of necessity. *Id.* at 155. Defenses involving use of force against attackers might then be recognized for a host of reasons, including the presence of overriding reasons, and because refusing to do so could threaten to undermine popular support for the law. As we have seen, actions that are driven by moral imperative might nonetheless fall outside the scope of any legal defense. In these cases, the absence of legal permission entails the absence of a necessity defense notwithstanding the actual (or arguable) moral imperative.

56. Another way to appreciate this claim is to examine George Fletcher's reasons for concluding otherwise. Fletcher starts by arguing that legal norms should approximate moral norms. *See, e.g.*, GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 93–110 (1998). However, if this is not a conceptual claim about the criminal law, but rather a normative argument to be pressed to legislators, then no matter how closely justifications under the criminal law *should* conform to moral justifications, all that can be said as a conceptual matter is this: "If the legislature has authority to define the 'elements of the offense', then it should have the same authority over the negative elements we call claims of justification." George P. Fletcher, *The Nature of Justification*, *in* ACTION AND VALUE IN CRIMINAL LAW, *supra* note 53, at 176. To understand why Fletcher resists this conclusion, one need recognize the depth of his commitment to a particular jurisprudential position about the proper structure of legal reasoning. He explains:

> Flat legal discourse proceeds in a single stage, marked by the application of a legal norm that invokes all of the criteria relevant to the resolution of a dispute. Structured legal discourse proceeds in two stages: first, an absolute norm is asserted; and second, qualifications enter to restrict the scope of the supposedly dispositive norm.

Fletcher, *The Right and the Reasonable*, *supra* note 3, at 951. *See generally* George P. Fletcher, *Two Modes of Legal Thought*, 90 YALE L.J. 970 (1981). Structured legal reasoning, Fletcher argues, is superior to flat. Flat reasoning, which would view a justification defense as merely negating the offense is, Fletcher says, to treat killing a human in self-defense like killing a fly. *See, e.g.*, FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW, *supra*, at 80; Fletcher, *The Nature of Justification*, *supra*, at 183; Fletcher, *The Right and the Reasonable*, *supra* note 3, at 977. That, of course, is not faithful to meaningful aspects of our experience. A "positivist" conception of justification that divorces justification defenses from any necessary relation to moral wrongfulness "holds that there is no conceptual structure in the criminal law at all." Fletcher, *The Nature of Justification*, *supra*, at 176. And because there is a conceptual structure, he concludes, the positivist account must be wrong. *See id.* at 176–77 (criticizing "positivists" for being unable to "concede the existence of distinctions immanent in the law").

The problem, I think, is that Fletcher is conflating two separate points. The first is that the logic of the criminal law should distinguish between (prima facie) "infringements" and (all-things-considered) "violations," the second being that infringements are prevented from becoming violations by the presence of a moral justification. *See* Judith Jarvis Thomson, *Some Ruminations on Rights*, 19 ARIZ. L. REV. 45, 47 (1977). Yet there is no necessary connection between them. That there may be "a structural distinction between elements of the offence and claims of justification" which "acquire[s] [its] appeal . . . from [its] intrinsic plausibility,"

### *C. Identifying Permissions*

I have argued to this point that a justification defense within the criminal law has no necessary connection to the substantive claims of morality but, instead, constitutes an exception to the criminal law offenses in the sense of permitting conduct that an offense by its terms prohibits. To some extent, though, this argument has merely shifted the inquiry. If a given defense of positive law is a justification if and only if it confers all-things-considered legal permission, and an excuse if and only if it establishes that an actor is not punishable notwithstanding that her behavior was not legally permitted, then a successful classification depends upon our ability to determine when a defense does in fact qualify a prohibition so as to confer legal permission. That is to say, for example: Is the defendant who is exculpated on grounds of self-defense exculpated because her conduct was legally permissible (hence justified) or because she is not punishable (hence excused) for engaging in conduct that was legally impermissible? Precisely how such a determination should proceed is not quite so obvious as one might suppose.

1. *Of Form and Substance*. The central question is this: Are the contours of a legal norm determined formally or substantively? If formally, then a permission is whatever the penal code says it is. Thus, if a defense is drafted to provide that "it is not an offense if . . . ." or "however, an actor shall be permitted to . . . ." or something similar, then that defense qualifies the norm, hence is a justification. In contrast, a defense which specifies "however, an actor shall not be punished if . . . ." confers an excuse.

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Fletcher, *The Nature of Justification*, *supra*, at 176, does not entail—what is the present question—that elements and justifications in the criminal law must have some particular substantive content. One can acknowledge that there exists a conceptual structure, or logic, underlying the law by which a prima facie norm (the offense) is qualified by justification defenses which establish that, all-things-considered, the norm is not violated, and still deny both that "[a] statutory definition should be understood as an approximation, by rule, of a principled understanding of wrongful conduct," *id.* at 177, and that moral justification need defeat the prima facie offense. The first claim is incorrect because the conceptual structure of the criminal law allows for *mala prohibita*, and the second is incorrect because, given the inescapable over- and underinclusiveness of articulated rules (among other reasons), a legislature could reasonably decide to restrict the scope of moral justifications that serve as legal justifications. Simply put, the revised conception of justification defenses need not deny the conceptual distinction between infringement and violation, but only that the content of legal infringement and violation need track the content of moral infringement and violation.

The obvious problem confronting the formal solution is that few defenses are written in a fashion that resolves the problem. Most say simply that "it shall be a defense that . . . ." Such language provides no help at all. Many modern codes, it is true, explicitly classify their defenses under the headings of justification or excuse, or incorporate this terminology into the formulation of individual defenses: "an actor shall be justified [or excused] if . . . ." But this too cannot always be *dispositive* of the question whether the defense is indeed a justification or excuse, lest the conceptual inquiry be displaced by a wholly empirical one. For these reasons, a purely formal solution to the classificatory question seems unpromising.

The alternative, then, must be that there exists some sort of substantive metric that determines the contours of the prohibitory norms that comprise the criminal law. That is not to contradict the observation in Part I that the criminal law need not, and does not, incorporate the substantive judgments supplied by the realm of morals. Instead, we look to a substantive metric that derives from the criminal law's challenge of regulating conduct by means of punishment against a background of fallible institutions. Only by understanding the judgments of right, wrong, and permissible that particular jurisdictions make—assuming that the criminal law in a given jurisdiction satisfies some minimal standards of internal coherence or integrity—can we determine whether or not a defense is intended to function as a permission even if the language of the defense provides no guidance. This is an approach, then, that owes more to sociology and empirical political science than to moral or legal theory. To take our earlier example, anyone with a passing understanding of our legal culture is likely to interpret the substantive criminal law as intended to permit persons to use (nondeadly) force as necessary to ward off a mugger or rapist. If so, then at least these core instances of self-defense are, in our criminal law, justifications.

But are these judgments merely interstitial or defeasible, enabling judgments only unless or until a defense is written in terms that specifically grant permission or except conduct from the reach of the criminal law? Suppose a provision of the penal code says: "For purposes of the criminal law, it is permissible for a child under the age of seven to engage in an act that would be a criminal offense were the child over the age of 18."[57] Does the fact that the defense assumes the

57. I am indebted to Peter Westen both for this example and for challenging me on this issue.

form of a permission necessarily determine that it's a justification rather than an excuse?

I think not. We can test our intuitions by imagining that we carefully explained the distinction between (a) an exception from a prohibitory norm and (b) a constraint on application of punishment (including the censure that a judgment of norm-violation brings) to the drafters. Would they have reason to consider it (a) rather than (b)? Surely they *could*. They could, for example, believe it advantageous for the full flowering of human individuality that young children experiment with conduct that the law prohibits of them later in life. If so, then the defense really is a permission, hence a justification rather than an excuse. But absent this or a similarly unlikely story, we would probably conclude that the substantive principles of this particular normative regime do disallow this conduct. Notwithstanding its somewhat unfortunate language, we would suppose, the nominal permission *really* grants an excuse—an excuse grounded, most likely, on the judgment that young children are (at best) only imperfect moral agents.

More generally, this sociologically informed alternative differs from a purely formalistic effort to tell us just what are the justifications and what are the excuses in the criminal law of any given jurisdiction precisely in its being subject to the demand of reason-giving in this way. Moving from formalism to what is a form of sociological jurisprudence has the consequence that whether a particular defense is a justification, or, instead, is an excuse no longer depends solely upon the vagaries of statutory drafting. Instead, where a particular defense fits within this conceptual structure becomes something that can be interrogated. Further, this feature does impose constraints, because the creators and conservators of the legal system being investigated must be able to give *reasons* in support of one or another understanding of the functional role that a given defense plays. This critically distinguishes the formalist approach, which takes the language of the statutory scheme at face value and imposes no demand of intelligible reason-giving. Because of this distinction, sociological jurisprudence leaves the content of particular penal codes open-ended, but, unlike formalism, not *completely* so.[58]

58. In emphasizing the difference between a substantive, sociologically informed understanding of the criminal law's norms and a merely formal one, I should not be understood to be collapsing the difference between structural and substantive equivalence. To undertake an empirical inquiry into the content of the substantive norms of a given criminal law regime is

2. *Conduct Rules, Decision Rules, and Acoustic Separation*. I have just argued that permissions are determined substantively, not formally, even though the substantive metric is one generated within the criminal law rather than supplied extrinsically by the realm of morals. Additionally, I have maintained that the actual language that a given penal code employs may be probative, but not conclusive, evidence of the substantive norms that the legal regime aims to promulgate. Even if I am right, we may want a more concise principle, shortcut, or test for identifying what is substantively a permission (or, put another way, what are the true contours of the substantive norm) than I have yet supplied. Can we find one?

Perhaps. After all, the basic distinction that the structural equivalence thesis draws between judgments of "not criminal" and "criminal but not punishable," would seem to map onto the familiar Benthamite distinction between rules addressed to the public commanding or prohibiting some behavior and rules directing judges what to do if the first sort of rule is violated. "*Let no man steal*," offered Bentham by way of illustration; "and, *Let the judge cause whoever is convicted of stealing to be hanged*."[59] In recent years, the distinction has been recovered and refined by Meir Dan-Cohen, who terms the first sort of rule a conduct rule and the second sort a decision rule.[60]

The relevance of Dan-Cohen's conduct rule/decision rule distinction for the justification/excuse debate might seem obvious. Because justification defenses grant permissions, it would appear to follow that they are supposed to be understood by the public at large and, therefore, are within the conduct rules. In its core applications, for example, self-defense would seem both justificatory and a quintessential conduct rule: "You may cause the death of another

much like asking what are a particular community's substantive norms of etiquette, subject to a couple of qualifications. First, the substantive norms of a criminal law regime are likely to be more deeply influenced by the society's moral judgments (without being reducible to them) than are the norms of etiquette. Second, an Anglo-American criminal theorist asking this sort of question about Anglo-American criminal law generally, or about a particular Anglo-American jurisdiction, is perhaps more likely to find her answer to the empirical question influenced by her own substantive moral views.

59. JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 430 (Wilfred Harrison ed., 1948) (1789).

60. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 626–30 (1984) (demonstrating, against Bentham, Kelsen, and others, that the two sorts of rules cannot be collapsed into one another, i.e., that neither is a mere implication of the other).

human being if doing so is necessary to protect yourself from his imminent and unprovoked use of deadly force against you." Excuses don't grant permissions. They tell judges when persons who have acted without permission ought not to be punished. "Don't punish someone who is insane" would therefore seem like an excuse and a decision rule. In short, one might suppose that justifications simply are those defenses that fall within the system's conduct rules, while excuses are the defenses residing in the decision rules.

I think this is precisely right. Indeed, the conceptual distinction between justification as a conduct rule and excuse as a decision rule—the first declaring that some conduct presumptively criminal is legally permissible, the second instructing judges not to punish offenders despite their conduct having been impermissible—is so intuitively sensible that the greater question is not whether it's sound, but why it has not already been widely embraced.[61] While a full answer is impossible here, the puzzle is sufficiently robust as to warrant something more than rhetorical treatment.

A first step toward an answer may begin by looking closely at Dan-Cohen's notion of "acoustic separation." Imagine, he proposes, that the addressees of a system's conduct rules had no knowledge of the existence or application of its decision rules.[62] Under a hypothetical regime of "acoustic separation" between the two sets of rules, individuals truly are guided only by the conduct rules,[63] even if they might benefit from decision rules ex post for reasons (paradigmatically, but not exclusively) of fairness to the individual. In this regime, unlike in the real world, the awaiting decision rules could not influence the behavior of persons subjected only to the conduct

61. One explanation can be quickly dispensed with. It might be objected that, even if this distinction is conceptually sound, the fact that acoustic separation is actually a fiction means that distinguishing justification defenses from excuse defenses cannot have practical significance. But this is no objection at all. Perhaps the distinction is *not* useful—a matter about which the present argument can remain agnostic. I claim only that there exists a conceptual distinction between the two, one that scholars have spilled a great deal of ink trying to articulate with precision. For skepticism regarding its practical utility, see Eric Colvin, *Exculpatory Defenses in Criminal Law*, 10 OXFORD J. LEG. STUD. 381, 383–91 (1990), and Greenawalt, *supra* note 12. *Cf.* Dan-Cohen, *supra* note 60, at 636–37 (purporting only to show "the logical independence of decision rules and conduct rules and the *potential* utility of this independence").

62. Dan-Cohen, *supra* note 60, at 630–34.

63. Although conduct rules are sometimes described as "guiding" public conduct, this is potentially misleading for reasons John Gardner has pointed out. Very simply, "the law does not provide any reasons for one to do what the law holds to be justified." Gardner, *supra* note 14, at 124. At least for purposes of the criminal law, therefore, conduct rules should be understood merely as specifying the circumstances under which conduct is, or is not, criminal.

rules. Not surprisingly, Dan-Cohen offers the defense of duress[64] as exhibit A of a decision rule:

> [I]n the imaginary world of acoustic separation . . . . it becomes obvious that the policies advanced by the defense would lead to its use as a decision rule—an instruction to the judge that defendants who under duress committed acts that would otherwise amount to offenses should not be punished. Just as obviously, no comparable rule would be included among the conduct rules of the system: knowledge of the existence of the defense of duress would not be permitted to shape individual conduct; conduct would be guided exclusively by the relevant criminal proscriptions.[65]

Just so. It is the smallest of steps to generalize from this discussion of duress to the broader claim I suggested earlier—namely, that the distinction between justification defenses (exemplified by necessity) and excuse defenses (exemplified by duress) *just is* the distinction between those defenses that reside among the conduct rules and those that are part of the decision rules.

Importantly, though, Dan-Cohen himself does not draw this conclusion. Instead, when addressing the supposition that "the necessity norm would be included not only among the imaginary legal system's decision rules, but also among its conduct rules," he concludes that "this would not necessarily be so."[66] "[W]hen the source of the necessity is the actor's self-interest," he explains, "[t]he prospect of a defense to a future criminal charge is likely to enhance the tendency to exaggerate the sense of necessity of protecting one's own interests."[67] So it may be more prudent not to let persons facing exigencies know that a necessity defense will be available. "At least in some cases, the test of necessity should be the actor's willingness to face, as an alternative to the ill consequences of abiding by the law, the threat of criminal punishment unmitigated by the prospect of

64. I emphasize, especially for the benefit of British lawyers, that "duress" for Dan-Cohen apparently refers to action undertaken in the face of threats, but not amounting to the choice of a lesser evil. So, for instance, if *B* robs a store in response to *A*'s threat to kill him, *B*'s defense is necessity, not duress. (Technically, under the Model Penal Code, *B* would have both defenses. *See* MODEL PENAL CODE § 2.09(4) (1962) (specifying that a duress defense is not precluded solely because the conduct would also be justifiable). Still, to understand Dan-Cohen's point, one should focus on that subcategory of duress that does not also constitute necessity.) *See also supra* note 9.

65. Dan-Cohen, *supra* note 60, at 633; *see also id.* at 632–34.

66. *Id.* at 638.

67. *Id.*

legal reprieve."[68] Some types of necessity defenses, therefore, should be known only to the ex post decisionmakers; they are better thought of as decision rules.

Dan-Cohen is right in this sense: necessity (or some subset thereof) might well be a decision rule *in a hypothetical world of acoustic separation*. But that is not quite the same as establishing that necessity is a decision rule *in our real world of acoustic integration*. Imagine a prisoner who escapes to avoid being raped and murdered by his cellmate. After securing a lawyer, he surrenders to authorities, is charged with the felony of escaping from prison, and pleads necessity in defense. If the jurisdiction recognizes the defense of necessity when a defendant chose the lesser evil, and if it does not disallow the defense in escape cases, the prisoner should probably be exculpated. And according to Dan-Cohen, the defense falls within the decision rules. We don't want to punish this particular escapee because he did what the norms embodied in, and realized by, this criminal law regime consider the right thing to have done. At the same time, though, we don't want other prisoners to know about his exculpation because those in truly dire straits will try to escape no matter what they believe the conduct rules provide, and because publicizing the defense would risk encouraging prisoners to escape even absent true necessity.

Of course, this analysis establishes at the same time that the defense is a justification in the sense advocated by the structural equivalence thesis: the substantive norms of the system do in fact permit this particular prisoner to act as he did even if he didn't know it. To put it another way, the prisoner who escapes under conditions of true necessity simply does not violate any substantive norm of the criminal law regime. It would not be appropriate to criticize him. One can permit something, after all, even without announcing that one permits it. Perhaps, we may even say, "permitting" is not the same as "giving permission." Thus, under Dan-Cohen's hypothetical regime of acoustic separation, authorities who announced in the conduct rules that necessity is no defense to prison escape, but who then placed precisely such a defense within the decision rules, would be doing something different than concealing merely an exemption from punishment for the violation of a norm. They would be strategically concealing a true permission. That is, the defense that they have

68. *Id.*

hidden within the decision rules would remain, conceptually, a justification.

In short, although Dan-Cohen rejects the implication of the revised view that the justification/excuse distinction maps cleanly onto the distinction between conduct rules and decision rules, that is only because conduct rules and decision rules become subtly transformed by the acoustic separation gloss. Acoustic separation is designed to help distinguish conduct rules from decision rules. Yet the thought experiment it invites is not a sure guide. We don't really live in a world of acoustic separation. Dan-Cohen asks us to imagine that the conceptual distinction between conduct and decision rules are manifested in positive law. However because strategic considerations would then be afoot, some things that "really" are conduct rules—"really" in the sense of reflecting the actual substantive norms that the particular criminal law system takes itself to be embodying—would be placed within the decision rules—and perhaps vice versa.[69] Put another way, the acoustic separation device partly bolsters our intuitive sense of what are conduct rules and what are decision rules, but partly distorts it as well. Justifications are those defenses that exist, conceptually, within the conduct rules, while excuses are those defenses that exist, conceptually, within the decision rules. It does not follow that this mapping would survive a transition to the hypothetical world of acoustic separation. The influence of Dan-Cohen's two-decades-old device might therefore help explain why the straightforward conceptualization of justifications as the conduct rule defenses and excuses as the decision

69. Recall Peter Westen's hypothetical of a law that declares it permissible for a child under seven to engage in conduct that is made criminal for adults. *See supra* note 57 and accompanying text. I suggested that, even though we could imagine circumstances under which this defense qualifies the substantive norms, hence is a justification, this is probably best conceptualized as an excuse notwithstanding the somewhat infelicitous statutory language. If we choose to conceptualize the criminal laws as divided into conduct rules and decision rules, this would be a decision rule. And it would probably remain a decision rule even in a world of acoustic separation: precocious six-year-olds who read the penal code would learn that they must not kill, steal, or vandalize; only the judges would know not to punish the very young transgressor.

Imagine, though, that these same six-year-olds read news reports of other children who commit crimes and are prosecuted. As a consequence, they experience withering anxiety that they too will be prosecuted—not because they anticipate committing crimes, but only because they fear being apprehended on cases of mistaken identity. If confronted by a nation of depressed kindergartners, the authorities could be moved to alleviate the children's fears by publishing the infancy defense among the regime's conduct rules. I submit that the defense would nonetheless remain both an excuse and, conceptually speaking, a decision rule.

rule defenses is so rarely appreciated today. Indeed, even George Fletcher, the dean of justification and excuse scholars,[70] has explicitly identified justification as a decision rule, not a conduct rule.[71]

3. *Summary*. The structural equivalence thesis holds that a justification in the criminal law is simply an exception to, or permission grafted upon, a criminal offense; an excuse defense obtains when a defendant is exempted from punishment for committing a criminal offense. This is not to say that whether a given defense is a justification or an excuse depends solely on how the governing statute happens to classify the defense, or whether a defense is drafted with magic words like "permitted to . . . ." or "shall not be punished if . . . ." To the contrary, whether a given defense is a justification depends upon substantive judgments about the precise

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70. By my count, Fletcher has addressed the subject on at least eighteen occasions. *E.g.*, BASIC CONCEPTS OF CRIMINAL LAW, *supra* note 56, at 74–170; BASIC CONCEPTS OF LEGAL THOUGHT 104–08 (1996); A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL (1988); RETHINKING CRIMINAL LAW, *supra* note 3, at 759–875; *Dogmas of the Model Penal Code*, 2 BUFF. CRIM. L. REV. 3, 12–24 (1998); *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553 (1996); *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 556–64 (1972); *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269 (1974); *Mistake in the Model Penal Code: A False False Problem*, 19 RUTG. L.J. 649, 656–70 (1988); *The Nature and Function of Criminal Theory*, 88 CAL. L. REV. 687, 697, 701–02 (2000); *The Nature of Justification*, *supra* note 56, at 175; *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISR. L. REV. 367 (1973); *The Right and the Reasonable*, *supra* note 3; *The Right Deed for the Wrong Reason*, *supra* note 1; *The Right to Life*, 13 GA. L. REV. 1371, 1376–94 (1979); *Rights and Excuses*, CRIM. JUST. ETHICS, Summer-Fall 1984, at 17; *Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?*, 26 UCLA L. REV. 1355 (1979); *The Unmet Challenge of Criminal Theory*, 33 WAYNE L. REV. 1439 (1987).

71. Fletcher, *The Nature of Justification*, *supra* note 56, at 180. Strikingly, he had asserted nearly a decade earlier that "the criteria of justification are supposed to function not only ex post as decision rules, but ex ante as conduct rules." Fletcher, *The Right and the Reasonable*, *supra* note 3, at 976. It is perhaps not surprising, then, that he should concede that his more recent characterization of justification as a decision rule "is by no means obvious." Fletcher, *The Nature of Justification*, *supra* note 56, at 180 n.8. Unfortunately, the explanation he gives for the uncertainty is confusing. "Claims of justification do enter into debates between individuals about whether their conduct is right or wrong," Fletcher acknowledges. *Id.* "The question is whether it is the legislative language as such, or rather the general principles of justification, that enter into these debates." *Id.* But what makes *this* "the question" is unclear. If he means that legislative language is not dispositive of whether a defense is a justification, I agree. But this point is not sufficient to drive justifications out of the realm of conduct rules. *See also* Shute et al., *supra* note 53, at 12–13 (intimating that justifications are better viewed as conduct rules); Colvin, *supra* note 61, at 385 ("A defence of justification modifies the rules of conduct to which it applies . . . . A defence of excuse, on the other hand, supposedly leaves the prohibitory rule intact.").

contours of the norms that the criminal regime can best be understood to promulgate.

Another way to capture this point is that a justification exists within the conduct rules, while an excuse exists within the decision rules. Unfortunately, this way of putting things provides little guidance in determining whether any given defense is a justification or an excuse. For one thing, no real Anglo-American penal codes are explicitly divided into conduct rules and decision rules. Furthermore, even if they were, we would still be confronted by the problem that the precise form of a penal code is an unreliable indication of its true substantive normativity. Persons who are frustrated by the rejection of the formalist solution to the problem of distinguishing justifications from excuses might be drawn to Dan-Cohen's acoustic-separation thought experiment, seeing in it a somewhat more mechanical way than otherwise seems to exist for determining which defenses fall within the regime's conduct rules, hence are justifications, and which fall within the decision rules, hence are excuses. Acoustic separation is in many ways an illuminating device. But it can be misleading: some defenses that a crafty legislature might place within the decision rules under such a hypothetical regime might nonetheless really be justifications, and some defenses placed within the conduct rules might really be excuses.

## III. THE SUBJECTIVE/OBJECTIVE DEBATE

I have argued that the roles that justifications and excuses play in the criminal law are structurally equivalent, but not substantively equivalent, to the roles they play in moral reasoning. But I have also argued that the metric for determining whether a given criminal law defense is one of justification or of excuse is substantive, not formal. That is, the precise language of the penal code is only evidence of how a given defense is best classified. It is possible that a defense denominated as a permission could be more sensibly understood as an excuse, and vice versa. Lastly, I argued that Dan-Cohen's thought experiment—how the statutes would be crafted in a hypothetical regime of acoustic separation—is not a sure guide for distinguishing justifications from excuses. If all this is correct, we are left with the view that identifying the precise contours of a given criminal law norm—that is, determining whether a given defense qualifies the norm or excepts the offender from punishment for violating the norm—is a contestable matter of sociological jurisprudence.

A major challenge to this view is presented in the literature addressing whether justifications are "subjective" or "objective." Partisans to this debate argue that at least some general jurisprudential things *can* be said about justifications and excuses—claims that are true by virtue of the nature of justifications and excuses as concepts relevant to the criminal law and do not depend upon the substantive normativity of a particular criminal law regime. Roughly, the subjectivists argue that an actor who believes that circumstances exist which would confer a justification is legally justified (at least if the belief is reasonable, and perhaps even if not), whereas one who acts in ignorance of potentially justificatory circumstances that do exist is fully inculpated. Objectivists, in contrast, contend that the actor who mistakenly believes his conduct justified is, at most, excused, and that one who commits an offense unaware of circumstances sufficient to confer a justification is at least partially exculpated. As a trans-jurisdictional matter, that is, justifications just are objective or just are subjective.

I believe that both of these views are mistaken. This Part argues that conceiving of a criminal justification defense as meaning only that the conduct was not criminal, and an excuse defense as meaning that the conduct was criminal but the actor is not punishable, entails no necessary position on the question of whether justifications should be objective or subjective. Section A develops this claim in the context of "mistaken justifications." Section B addresses the converse situation, "unknowing justifications."

### *A. Mistaken Justification*

Suppose that Agnes employs force against Barnaby, erroneously but reasonably believing that such use of force is necessary to protect herself, or some third party Clive, from Barnaby's imminent exercise of unlawful force. Apparently all commentators agree that Agnes should be exculpated if subsequently prosecuted for assault or homicide. (This, of course, is a moral claim about the shape that a just criminal law ought to take.) On a subjective (or "reasons") theory, Agnes has a justification, but not on an objective ("deeds") theory.[72] Because her use of force was not "objectively" the right thing to have

72. *See supra* note 14 and accompanying text (discussing the relationship between subjective and reasons theories on the one hand, and between objective and deeds theories on the other).

done, the deeds theory of justification leaves Agnes only with an excuse.

Now, it is apparent that criminal defenses could be drafted so as nominally to comply with either the subjective or the objective vision. That is, the criminal law could provide on its face that persons are permitted to use force in self-defense or defense of others either (a) when they believe that it's necessary, or (b) when, from a God's-eye perspective, it actually is necessary.[73] Of course, given my earlier rejection of the purely formalist approach to divining what is or is not a true exception to a criminal prohibition,[74] the fact that a permission could be couched in either subjective or objective terms is not conclusive with respect to the question of whether the form is faithful to the reality. Still, the possibility that the nominal norm does indeed reflect the substantive norm should not be dismissed out of hand. If we can imagine a legislature drafting a permission in either subjective or objective terms, we can also imagine the legislators defending that choice on substantive grounds. Accordingly, the argumentative burden fairly falls on one who would insist that, whatever form a given statutory regime might take, a justification, rightly understood, *just is* subjective or *just is* objective. This Section argues that the burden has not been met.

1. *Arguments from Logic*. One approach in the literature has been to argue that we are compelled to conceptualize justifications either as objective or as subjective to avoid the unacceptable consequences of either a *reductio ad absurdum* or a logical contradiction.

*a. The objectivist* reductio ad absurdum. The *reductio* favored by objectivists is simple to state. In fairly unusual (though by no means extraordinary) circumstances, they have sometimes argued the reasons theory fails to allow any defense (whether of justification or excuse) for persons who, according to our intuitions, should be

73. These are not the only choices. Conceivably, a justification defense could lie when either condition is satisfied, or only if both are. Furthermore, the law could distinguish between actual unreasonable beliefs and actual reasonable beliefs. For instance, the law could be drafted along these lines: You may use force in self-defense to the extent you believe necessary . . . but only if you have taken all reasonable steps under the circumstances to ascertain the need. Or, a reasons approach could mitigate punishment for actors who make unreasonable mistakes about the need to use force.

74. *See supra* Part II.C.1.

exculpated.[75] In the hypothetical above, recall, Agnes's belief in the need to use force against Barnaby is mistaken. Perhaps, say, Barnaby is actually an actor in a play, or the knife he appears to be wielding is actually a corn dog. Unfortunately, let us suppose, Barnaby can avoid injury or death at Agnes's hands only by using preemptive force against her. If he does so, does he have a defense? Presumably most people think so (at least where Barnaby was not negligent in inducing Agnes's false belief in the first place). And it's easy enough to reach that conclusion under the objective theory of justification: Barnaby is objectively justified in defending himself against Agnes's unlawful (albeit excused) use of force. But, the argument continues, he is not justified on a subjective theory. Therefore, unless we are to deny Barnaby any defense at all, we are logically compelled to define justification objectively.

To address this argument, we must first understand precisely why Barnaby is supposed to lack a valid defense if, as the subjectivists would have it, Agnes herself has a defense of justification. The argument starts by identifying the candidate defenses—self-defense, duress, and necessity—and proceeds by process of elimination. Self-defense and duress are unavailable, it is said, because (among other things)[76] they apply only in response to "unlawful force,"[77] and force is lawful if justified. Necessity is said to be unavailable on the grounds that it is logically impossible for two actors each to be "justified" in assaulting the other,[78] and, furthermore, because Barnaby would not

75. *See, e.g.*, Robinson, *supra* note 14, at 51–54 (arguing that the reasons theory does not protect third parties who forcibly prevent an actor from using force against another in a reasonable but mistaken belief in that actor's right to self-defense).

76. It might be added that under the common law, and in many contemporary statutory formulations, the duress defense is unavailable in homicide cases. *See, e.g.*, WAYNE R. LAFAVE, CRIMINAL LAW § 5.3(b), at 468–69 & nn.12–13 (3d ed. 2000) (citing authorities). Of course, this is purely contingent.

77. *See, e.g.*, MODEL PENAL CODE § 3.04(1) (1962) (providing that "the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion"); *id.* § 2.09(1) (extending a defense if "the actor engaged in the conduct charged . . . because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist").

78. *E.g.*, Fletcher, *The Right and the Reasonable*, *supra* note 3, at 975 (claiming "that in any situation of physical conflict, where only one party can prevail, logic prohibits us from recognizing that more than one of the parties could be justified in using force").

be avoiding the "greater" evil in, say, killing Agnes to save his own life.[79]

But none of this is convincing. As many commentators have noted, the "incompatibility thesis"—i.e., the claim that mutually contending parties cannot each be legally justified—is without logical support.[80] Whatever may be the case in morals,[81] it is not "paradoxical"[82] for two parties each to be legally justified in using force against the other if, as I have argued, legal justification means only legal permission. And all the other arguments are solely appeals to contingent positive law, not at all in the nature of logical or necessary truths. Take the legal defense that a non-lawyer is most likely to think apt for Barnaby—self-defense. There is not the slightest reason to take as a given that it cannot lie in response to justified force. To the contrary, subjectivists, who would treat Agnes as legally justified if prosecuted for the killing of Barnaby, could easily draft a statute that would exculpate Barnaby if he beat her to the punch. Indeed, such a statute could be drafted so as to suggest that Barnaby is himself legally justified, not merely excused, as follows: An actor may use force (including deadly force) when he believes it necessary to protect himself or another either from unlawful force *or* from lawful force that the actor believes would be unlawful were it not for a mistake on the part of the person against whom the actor employs force.[83] This is essentially (but not precisely)

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79. *See, e.g.*, MODEL PENAL CODE § 3.02(1)(a) ("Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that . . . the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged . . . .").

80. *E.g.*, Dressler, *supra* note 12, at 87–91; Greenawalt, *supra* note 12, at 1921–25; David Dolinko, Note, *Intolerable Conditions as a Defense to Prison Escapes*, 26 UCLA L. REV. 1126, 1177–81 (1979).

81. For one detailed argument that valid moral justifcations cannot oppose one another in this way, see HEIDI M. HURD, MORAL COMBAT (1999).

82. *See* Jeremy Waldron, *Self-Defense: Agent-Neutral and Agent-Relative Accounts*, 88 CAL. L. REV. 711, 726 (2000) (contending that "the paradox exists so long as the exculpation is thought of in terms of justification").

83. The Model Penal Code—which drafts justification defenses in terms of the actor's actual and reasonable beliefs, *see generally* MODEL PENAL CODE art. 3—tries to reach this same result. But the fact that it does so through a more cumbersome and even unclear methodology has fooled Robinson into concluding that the MPC "concedes the primary tenet of the 'deeds' theory of justification: that the *nature of the deed* must be taken as determinative, no matter what the actor's *reasons* for the deed." Robinson, *supra* note 14, at 54. This is doubly mistaken. First, no matter what the MPC's approach, the provision proposed in the text demonstrates that a legislature *could* reach the (presumptively) substantively correct result in cases of this sort without taking the nature of the deed, independent of the actor's beliefs, to be determinative.

the approach taken by the Model Penal Code.[84] Such a defense—call it "Justification$_1$"—is still "subjective" through and through.

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Second, as it happens, the MPC's approach does not take the nature of the deed as determinative. To the contrary, it adopts essentially the same solution as just suggested in the text. *See infra* note 84.

84. In reaching his conclusion that the MPC resorts to a deeds theory to exculpate those who employ force against persons who act under conditions of mistaken justification, Robinson considers the following hypothetical: *A* is about to assault *B* under the mistaken belief that it is necessary in self-defense. Aware that *A* is mistaken, *C* assaults *A* just in time to prevent him from harming *B*. Under a subjective theory, *A*'s use of force is justified, hence presumably "lawful," seeming to bar *C*'s use of force against him. According to Robinson, the MPC avoids this plainly improper outcome through a three-step process. First, the MPC provides that *C* "is not justified in interfering to defend [*B*] unless [*B*] would be justified in using the same force in defence of himself." *Id.* at 52 (citing MODEL PENAL CODE § 3.05(1)). Second, *B*'s use of self-defense is justified only against "unlawful force." *Id.* at 52–53 (citing MODEL PENAL CODE § 3.04(1)). Third, subjectively justified force is "unlawful" if it is not "privileged"—a term that the MPC does not define but which the commentary suggests "is borrowed from tort law and is intended to mean objectively justified." *Id.* at 53 (citing MODEL PENAL CODE § 3.11(1) & cmt. 1, at 159 (1985)). In Robinson's view, this third step is the key: the MPC is compelled to employ the concept of objective justification to yield the intuitively proper result that *C* has a valid defense. "This practice of the Model Penal Code of defining 'unlawful force' that lawfully may be resisted as 'privileged force,'" Robinson concludes, "makes it difficult to describe that Code and the many like it as adopting a 'reasons' theory, as they first appeared to do." *Id.* at 54.

I don't think so. The first problem with Robinson's analysis is that he misreads the MPC. Step one under the MPC approach actually directs that *C*'s use of force "is justifiable to protect a third person [here, *B*] when . . . under the circumstances *as the actor [C] believes them to be*, the person whom he seeks to protect would be justified in using such protective force." MODEL PENAL CODE § 3.05(1)(b) (emphasis added). (To be more precise, and to accommodate situations in which *C* believes both that *B* is imperiled and that *B* is unaware of that peril, the Code should have added: " . . . were that person aware of the circumstances that the actor believes to obtain." But that slight oversight is not directly relevant to the instant hypothetical and can be safely ignored.) This has important consequences. To see that, consider these four possibilities: (1) *A* mistakenly believes that *B* is an aggressor, and *C* correctly believes that *B* is not; (2) *A* and *C* both mistakenly believe that *B* is an aggressor; (3) *A* correctly believes that *B* is not an aggressor, while *C* mistakenly believes that he is; and (4) *A* and *C* both correctly believe that *B* is not an aggressor. Were *C* prosecuted for assault under the MPC, in each of these four cases it will be *C*'s beliefs that are determinative of his criminal liability: he has a valid justificatory defense in those cases and only in those cases where he believes that *B* is not an aggressor—i.e., cases (1) and (4), but not (2) or (3). One might disagree with any of these outcomes as a matter of policy. But the descriptive claim that, under the MPC, objective facts, not subjective beliefs are determinative, is false. A defendant's actual beliefs, not objective facts, determine outcomes under the MPC, though such beliefs must be reasonable to afford complete exculpation. *See id.* § 3.09(2) (making the defense unavailable in prosecutions for offenses for which liability is predicated on negligence or recklessness if the actor negligently or recklessly believed in his right to use self-defense).

In light of all this, how could Robinson conclude that the MPC's "approach to mistake as to a justification ought to be termed one of only a 'reasons' *terminology* rather than a 'reasons' *theory*'"? Robinson, *supra* note 14, at 54. To answer this question, a slight digression will be required. Notice that the last sentence of the preceding paragraph refers to *a defendant's* actual beliefs; it does not say "actual beliefs," full stop. There's a reason for that. Let's be clear about what a subjective or reasons theory is a theory *about*. It's a theory about the circumstances that

> to turn the pistol on his captor he (the terrorist) will kill him instantly. . . .
>
> [Thus arrayed, the terrorist and hostage start to leave the building and immediately encounter a police officer.] All three individuals grasp the situation in a flash, and all three begin firing: the terrorist and his hostage firing at the officer, the officer firing at and through the hostage. Each of them is shooting to kill. None of them is under any misapprehension of fact.[85]

Waldron takes for granted that the police officer would be justified, and that the terrorist would not. But what about the hostage? Supposing he knows that the officer is perfectly justified in firing at him,[86] does he have a defense if he proves the quicker shot and is later brought up on charges of homicide or assault?

Under $\text{Justification}_1$ proposed above, he is not justified. The officer's force is lawful, and the hostage cannot believe that its lawfulness depends upon any mistake of fact. I'm disposed to think that outcome sound, though it might remain sensible and just for the hostage to be adjudged excused. This result could be realized, for example, by extending the defense of duress to an actor who succumbs to pressures (not amounting to the use or threatened use of unlawful force) that a person of reasonable firmness in his situation could not have resisted.[87] It hardly bears mention, I hope, that there is no inconsistency in concluding that the hostage should not be justified but should be exculpated on grounds of excuse. When the law accords the hostage an excuse, but not a justification, the state is purporting to command persons in such situations not to defend themselves. And although such a demand might appear only nominal in light of the awaiting excuse, in theory it could produce different outcomes in a world of committed rule-followers, which (in our actual world of acoustic integration) is at least some of the gist of the difference between conduct rules and decision rules.

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85. Waldron, *supra* note 82, at 714 (adapting the hypothetical from one proposed in KADISH, *supra* note 8, at 122–23).

86. To be more precise, you need suppose only that the hostage knows the facts that make out the officer's justification; it is not important that the hostage knows as well that, on those facts, the officer has a justification in law.

87. *Cf.* MODEL PENAL CODE § 2.09(1) (providing the defense of duress to an actor who accedes to threats of unlawful force "which a person of reasonable firmness in his situation would have been unable to resist").

But perhaps you disagree. You might agree that the hostage is not blameworthy and does not deserve the stigma of a criminal conviction. However if you anticipate that few hostages would be influenced by the criminal law in such circumstances, you might believe that even a merely ostensible command not to fire is foolish and risks bringing the criminal law into disrepute. For these reasons (or others) you might conclude that the law should grant the hostage a justification and not merely an excuse. Because (as we have just seen) $\text{Justification}_1$ does not grant the hostage a justification defense, you might conclude further that a subjective approach to justifications (which $\text{Justification}_1$ exemplifies) commits one to an unduly restrictive conception of justification. This would be a mistake. Even if $\text{Justification}_1$ does not cover the hostage, there is no reason why it could not be supplemented. For example, the legislature could provide—codified, say, as "$\text{Justification}_2$"—that an actor is justified in using force in self-defense when he is the non-aggressor and believes it necessary to protect himself against another's use of force.

So it does not appear that $\text{Justification}_1$ commits the subjectivist to an unduly restrictive permission for self-defense. But does it commit her to an overly generous formulation? Suppose that Constable is on his way to arrest Outlaw, who is known to be armed and dangerous. Doppelganger, an innocent man who just happens to be a dead ringer for Outlaw, sees Constable coming. Because Outlaw has killed other officers attempting arrest, Constable is lawfully authorized to subdue Outlaw by, say, firing a painful, but not lethal, electric stun gun. Doppelganger has been listening in on a police radio, and he understands the situation perfectly. Unfortunately, because his jaw happens to be wired shut, he can't communicate his innocence to Constable. Can he shoot Constable with his own stun gun to avoid being stunned himself?[88] $\text{Justification}_1$ would provide Doppelganger with a defense. Although Constable's force might be lawful, Doppelganger believes (correctly, in fact) that it would be unlawful but for Constable's mistake regarding Doppelganger's identity. But such an outcome is not at all compelled. If the legislature thinks this bad policy, it could amend $\text{Justification}_1$ to specify, say, that the use of force in self-protection "is not justifiable . . . to resist an arrest that the actor knows is being made by a peace officer,

88. This hypothetical is adapted from one supplied in SMITH, *supra* note 37, at 20–21. I have altered it to make clear that Doppelganger is not threatened with deadly force.

although the arrest is unlawful."[89] Call this amended version of Justification$_1$, "Justification$_3$."

The point of this lengthy exploration into hypothetical subjective justification defenses is simple. Complex cases like these raise issues of policy to be addressed by careful legislative drafting, not issues of conceptual understanding.[90]

*b. The subjectivist logical contradiction*. Although it is generally the objectivists who have urged that we are somehow compelled to accept one particular conceptualization of justifications, Russell Christopher has argued in a clever and original paper that objective theories of justification lead to logical contradiction.[91] In brief, Christopher argues that when *A*, *B*, and *C* are shooting at one another "around in a circle"—*A* at *B*, *B* at *C*, *C* at *A*—each unaware that his intended victim is threatening the third person (who in turn threatens the actor himself), Paul Robinson's objective approach is internally contradictory. As Christopher explains:

> If C's threat is unjustified, then B's threat is justified in defense of A. Therefore, A's threat is unjustified in defense of C. Consequently, C's threat is justified in defense of B. But if C's threat is justified, B's threat is unjustified. Therefore, A's threat is justified. Consequently, C's threat is unjustified. The resulting contradiction is that if C's threat is unjustified, it is justified; but if C's threat is justified, it is unjustified.[92]

Although I am personally sympathetic to subjective articulations of the justification defense, I nonetheless think Christopher's argument is ultimately flawed. Whether any given actor has an objective justification reduces, on Robinson's account, to whether the net societal consequences would have been worse had he not acted as he did.[93] Given this standard, it should be clear that none of the parties is justified if each shoots and kills his victim: The outcome would not have been worse (taking the circle as a closed system) had

89. This is the Model Penal Code's solution. MODEL PENAL CODE § 3.04(2)(a)(i).

90. *See* Greenawalt, *supra* note 22, at 20 (arguing that legislative resolution of the subjective/objective debate—and all its possible variations—"requires delicate judgments about fairness and desirable criminal policy, not merely wooden conceptualization").

91. Russell L. Christopher, *Self-Defense and Defense of Others*, 27 PHIL. & PUB. AFF. 123 (1998).

92. *Id.* at 129–30.

93. *E.g.*, 2 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 13, at 46.

any one of the three not fired.[94] In contrast, all parties are justified if each actor's threat deters the next from firing, with the net result that nobody is harmed. Indeed, no contradiction need ensue even for the intermediate cases in which at least one, but not all, actors fire. For just one example, imagine that *A* shoots *B* in time to moderately injure *B*, sufficient to disable *B* from shooting *C*, and *C* shoots and grievously injures *A*. *C* is justified on a deeds approach if and only if, had he not shot *A*, (1) *A* would have reloaded and finished off *B*, and (2) the death of *B* is worse (on the deeds theorists' metric) than the sum of moderate injury to *B* plus grievous injury of *A*. *A* is justified if and only if, from a God's-eye perspective, had *A* not shot *B*, *B* would have shot and killed *C*, but not in time to have prevented *C* from shooting and injuring *A*. Evaluation depends upon counterfactual reasoning, of course. But an objective theory, like Robinson's, that does not rely upon notions of "moral forfeiture," does not seem to generate logical contradiction—at least so long as it does not also adhere to the "incompatibility thesis" discussed earlier.[95]

2. *On the Nature of Norms*. There is a second way to rebut the implication of the structural equivalence thesis that criminal law justifications could be either subjective or objective, depending upon the values, needs, and goals of a particular criminal regime. That way is to establish that something about the nature of normative reasoning either requires or forbids that norms be sensitive to beliefs as against objective facts. Put otherwise, one could argue that the nature of normativity itself entails that justifications must be subjective or must be objective.

Paul Robinson, one of most productive and creative criminal theorists of the day, is perhaps the chief proponent of this view. At first blush one might expect to count him among the scholars most receptive to the claims, first, that the distinction between justification and excuse just is the distinction between defenses that defeat

94. I do recognize that the question of justification might be thought moot in this example, as each of the actors ends up dead. But if you don't mind entertaining the sometimes outlandish sorts of hypotheticals that are the staples of this literature, I suspect that you won't mind putting this complication aside.

95. *See supra* notes 80–82 and accompanying text. Robinson himself has expressly stated that he does not endorse the incompatibility thesis. *See* Paul H. Robinson, *The Bomb Thief and the Theory of Justification Defenses*, 8 CRIM. L.F. 387, 407 n.44 (1997) (rejecting the argument that two actors engaged in combat cannot both be justified). *But see* 1 ROBINSON, *supra* note 13, at 165 ("Where an aggressor has a justification defense, the proper rule is clear: justified aggression should never be lawfully subject to resistance or interference.").

criminality and those that concede criminality but defeat punishability and, second, that the significance of this distinction is captured by the distinction between conduct rules and decision rules. After all, the radical draft criminal code Robinson recently proposed is divided into a Code of Conduct and a Code of Adjudication,[96] a framework nearly mirroring Dan-Cohen's distinction between Conduct Rules and Decision Rules—though without the "acoustic separation" device.[97] And Robinson takes pains to place justification defenses among the former, and excuse defenses among the latter.[98] Moreover, he observed even a quarter century ago that, "[t]hough justification is often considered a 'defense', it is more properly viewed as an 'element' of an offense in the sense that no crime can be said to have occurred if the act is justified or, in other words, *unless* the act was *non*-justified."[99] Yet Robinson does not draw the lesson that any further exploration is either in the nature of policy prescription—arguments that for reasons of sound policy, efficiency, fairness, or what-have-you, the state should or should not criminalize certain sorts of conduct[100]—or of sociology—efforts to determine whether particular defenses that already exist within a given criminal regime are best understood internally as exceptions to the prima facie norms or as exemptions from punishability. Instead, he seems to insist that, rightly understood, justifications just *are* objective.[101]

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96. *See* ROBINSON, *supra* note 7, at 183–239.

97. *See id.* at 207–09 (rejecting Dan-Cohen's acoustic separation system). Acoustic separation is discussed *supra* Section II.C.2.

98. Part IV of his proposed Code of Conduct concerns "Justified Violations of the Criminal Law"; Article 22 of his Code of Adjudication addresses "Excuses." *Id.* at 218–20, 226–29.

99. Robinson, *supra* note 1, at 273 n.32 (citation omitted). This is the type of comment that provokes Fletcher's concerns about "flat" reasoning. *See supra* note 71. But it needn't. Despite his perhaps unfortunate reference here to offense elements, I take Robinson to view non-justification as an element in a finding of a criminal *violation*, though presumably not to a finding of a criminal *infringement*. For the difference, see *supra* note 71.

100. This remains true even where criminal law defenses are still in the hands of judges, not the legislature, with the caveat that judges might face additional institutional constraints on the types of considerations that they can properly take into account.

101. At points, Robinson could be read as intimating that there exist several possible conceptualizations of justification, none of which is inherently more valid than the others, all of which can be argued for or against based on practical considerations. *See, e.g.*, Robinson, *supra* note 14, at 62:

> It is possible to conceptualize current criminal law rules in any number of ways. Presumably, the preferred conceptualization is the one that best advances the reason for having a conceptual scheme, and that reason, I would argue, is to help us think most clearly about the issues and to give us the greatest insight into their proper formulation and application.

Robinson's insistence on a deeds theory of justifications stems most directly from his substantive view that offenses should be limited to non-mental components. Put another way, he believes that, with few and unusual exceptions that need not concern us here, the Code of Conduct should be crafted to exclude reference to intentional and cognitive states of the actor.[102] And that view derives in turn from his bedrock belief that every verdict in a criminal case sends a moral message to the community, and therefore that the law

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*See also id.* at 48, 70 (presenting reasons to prefer the deeds theory). Under this view, he should be understood as arguing only that the objective theory is to be preferred as more *useful*, in better serving sound policy goals, including realizing the more just results, and more effectively educating the public. But this is not, I think, the fairer reading of his work. More often he seems to assert that the objective construction of justification does have a greater claim to *truth*, even in an ideal or nonpragmatic sense. This is reflected in his repeated assertion that the deeds theory better captures the relevant distinctions, *see, e.g.*, *id.* at 48, 61—distinctions that, as far as I can tell, are thought to exist just in the nature of things. So, for example, Robinson criticizes the Model Penal Code's conceptual scheme as "odd and misleading" for treating "a mistaken belief in a justification" as justified, even though it "is identical in character to excuses." *Id.* at 62. That is, he explains, "[l]abelling the mistake-as-to-a-justification defence an 'unprivileged justification' suggests that it is conceptually similar to the defences of the 'privileged justification' group, yet *in fact* it is conceptually analogous to—indeed, more than that, it is conceptually indistinguishable from—the defences of the excuses group." *Id.* (emphases omitted; emphasis added). But, of course, *whether* mistaken justification is "identical in character to excuses,"—i.e., whether they are "conceptually indistinguishable"—is precisely the matter over which he and his opponents disagree. In light of these potentially conflicting strands in Robinson's characterization of the nature of the justification/excuse distinction, his recent and intriguing work with Princeton social psychologist John Darley might signal an increasing willingness to de-naturalize his preferred conceptualization. *See, e.g.*, PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME (1995) (comparing societal views on the principles of criminal law with the actual provisions in legal code).

Having thus charged Robinson with sending some conflicting signals on this issue, it is only fair that I make clear that I am myself coherentist or pragmatist regarding the truth status of the particular conceptualization between justification and excuse for which I have been arguing. As Grant Lamond has usefully put it, conceptual arguments are properly measured by

> how convincing and illuminating an account they provide in each case—whether what they deliver is still recognizable as an account of the phenomenon in question, how well it succeeds in systematically linking the phenomenon to related aspects of our understanding, and whether it deepens our comprehension of the phenomenon.

Grant Lamond, *The Coerciveness of Law*, 20 OXFORD J. LEGAL STUD. 39, 47 (2000). In saying this, I do not mean to enter into the debate lately raging among legal philosophers regarding whether conceptual analysis of law depends upon substantive moral evaluation. *See generally* JULIE DICKSON, EVALUATION AND LEGAL THEORY (2001) (summarizing the debate and advocating analysis of the law "as is" before direct moral evaluation). It seems to me that not even an affirmative answer to that question would entail that we need recourse to more than the epistemic values of simplicity, coherence, clarity, and the like, in order to evaluate competing accounts of the concepts that law employs.

102. *See* ROBINSON, *supra* note 7, at 129–37, 185–86 (proposing to eliminate culpability requirements from the definitions of most offenses).

should be structured so as to make that message as clear and accurate as possible.[103]

To this end, Robinson envisions five distinct jury verdicts in an ideal system of criminal law: (1) not guilty because no violation; (2) not guilty because justified violation; (3) not guilty by blameless violation; (4) not punishable; and (5) guilty.[104] No violation exists when the state has not proven the objective/external elements of the offense—for example, that the defendant assaulted another person, or was in possession of cocaine, or committed an unlawful entry. A justified violation occurs when the defendant has committed the objective elements of an offense, but satisfies conditions of objective justification. An unjustified violation is blameless when any one of a number of conditions are present—that the defendant lacked culpability because of a reasonable mistake of fact, or committed the offense involuntarily (as by convulsion or sleepwalking), or acted under duress or when insane.[105] A blameworthy violation is nonetheless "not punishable" when nonexculpatory defenses like the statute of limitations or diplomatic immunity apply. In all other cases, the defendant is guilty.

Focus on the distinctions among the first three verdicts.[106] Bracketing any doubts about the value of differentiating between "no

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103. *See, e.g.*, *id.* at 204–05 (discussing the need to distinguish "no violation" acquittals from "blameless violation" and "justified violation" acquittals).

104. *Id.* app. B §§ 410–14.

105. Curiously, the verdict forms don't distinguish among these, but the language of the Code of Adjudication does. When the defendant is not at least reckless as to each element of the violation (or, in some few situations, negligent), his "violation" is deemed "not criminal." *Id.* app. B § 200(1). When the defendant had the requisite culpability but can claim, for instance, insanity, duress, or involuntariness, his "violation" is "excused." *Id.* app. B §§ 220–28. Robinson does not explain why the distinction between "not criminal" and "excused"—which seemingly carries some normative flavor—is not reflected in the available verdicts, although he does note that "there seems little benefit" in requiring the jury to specify the particular ground of excuse—involuntariness, duress, mistake as to justification, etc.—because it would "require[] that the jurors come to agreement on the ground of exculpation." *Id.* at 146 n.3.

106. This is not to suggest that the fourth verdict—"not punishable"—is wholly unproblematic. Although it has obvious merit, it worrisomely risks implying that the defendant "really is" guilty but for the presence of some lawyerly type defense. (Tellingly, when Robinson first introduces this possible verdict, he proposes to call it "guilty but not punishable." *Id.* at 73. Although it has morphed into the sparer "not punishable" by the time it is produced in Appendix B, *see id.* app. B § 413, the transformation is never explained.) And that might not be a fair inference. The ban against double jeopardy, for instance, rests partly on the judgment that individuals should be spared the trouble and hazard of defending themselves from subsequent criminal prosecutions, as Robinson himself recognizes. *See* Robinson, *supra* note 8, at 232 n.124. But an "actually innocent" defendant who could avail himself of such a defense must be aware of the message that it would send. *Cf.* ROBINSON, *supra* note 7, at 70 (describing "a logical

violation" and "justified violation,"[107] the most critical line is plainly drawn between verdicts 1 and 2 on the one hand, and verdict 3 on the other. *Something* of importance—presumably some distinct normative message—turns upon the distinction between finding that the defendant (a) committed no unjustified violation, or (b) is blameless for committing an unjustified violation. Now, I am skeptical that it makes sense even to try to use the criminal law to make such fine-tuned moral judgments. To elaborate on a question raised by Kent Greenawalt, what should a jury do when all jurors agree that the defendant is not guilty—i.e., should be acquitted—but differ among themselves regarding whether there was no violation, or a justified violation, or a noncriminal violation, or an excused violation?[108] Robinson offers no response.[109]

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hierarchy" among justification, excuse, and nonexculpatory defenses). The "not punishable" verdict therefore pressures him to submit to all the evils that the defense is designed to protect him from. It is no answer that, even under existing systems, a defendant who pleads and prevails upon a nonexculpatory defense takes the same risks. A basic premise underlying Robinson's enterprise is that the existing system does not send such messages clearly enough. *See supra* note 103 and accompanying text.

107. Robinson does not explain precisely what evaluative coloration this distinction is intended to capture. By intimating that there exists some normative difference between the two, however, he seems to ally himself with the minority view that a justification *qualifies* wrongfulness without *negating* it. *See supra* note 11.

108. *See, e.g.*, Greenawalt, *supra* note 12, at 1900–01 (observing that, except in cases of acquittal on the basis of mental disease, juries are generally not obliged to explain the grounds for acquittal, and arguing that introducing such a practice would confront substantial obstacles); Greenawalt, *supra* note 22, at 17–18 (same).

109. In an argument that deserves to be quoted at length, Robinson exploits precisely this problem in an effort to tarnish the subjective approach to justification. Under the Model Penal Code, Robinson explains:

> An actor's conduct is 'justifiable' if it is within the rules of conduct ('privileged') or if it violates the rules of conduct under the actual facts (unprivileged) but the actor mistakenly believes that it is justified. Because of this formulation of justification defences, a jury is never asked to determine whether the conduct is objectively proper. The jury need only determine whether the actor's conduct was *either* in fact proper, or improper but he believed that it was proper. (Note that the members of the jury need not even agree among themselves as to which of these two alternatives is true. Thus, even the members of the jury, then, may not be able to clarify an ambiguous acquittal.) The ultimate effect of this is that, even if a more refined verdict system were in place, the Code's subjective formulation of justification defences leaves it unclear whether a jury should select a no-violation or a blameless-violation verdict.

ROBINSON, *supra* note 7, at 147–48 (footnote omitted). But Robinson does not seem to fully appreciate the force of his parenthetical note. When jurors disagree among themselves about underlying facts, the jury will always find it unclear which form of exculpatory verdict to select *no matter how the justification defenses are formulated*. Put otherwise, Robinson's assertion that, "[w]ith proper organization, a *code* of adjudication easily can" distinguish among these types of acquittals, *id.* at 204 (emphasis added), misses the point: the actual *adjudications* often can't.

Even supposing that such fine-tuning is possible and desirable, the content of the different categories is more than dubious. To start, as Jeremy Horder has cogently argued, it seems morally senseless to include involuntariness on the disfavored side of this divide.[110] Suppose Lisa is charged with having "cause[d] bodily injury . . . to another person" (in violation of § 3 of Robinson's Code of Conduct).[111] If a jury determines that she did so only because forcibly (and maliciously) propelled by her older brother Bart, it is ridiculous for the legal system to seek to transmit a message that Lisa is entitled to anything less than top-drawer exculpation.

Or, imagine matters before the incident. Picture the hypothetical public education classes of which Robinson is fond.[112] Suppose the students are collectively reading the Code of Conduct, and precocious Lisa asks: What would happen if my brother Bart were to pick me up and throw me into Milhouse? Consistent with Robinson's vision, the teacher would have to answer that Lisa would be found to have violated the Criminal Code (tsk, tsk!), but (not to worry!) would be adjudged "blameless" for this violation. Wouldn't the children think that crazily unfair? And wouldn't they be right? If so, the upshot is not trivial. It reveals that Robinson's mapping of the Codes of Conduct and Adjudication onto the distinction between ex ante and ex post perspectives is too facile. Even from an ex ante perspective, citizens are imagining the ex post situation. And one fundamental question in which they'll be interested is this: Will I be found to have violated the criminal law or not?[113]

If the above is true, then perhaps more than a requirement of voluntariness ought to be moved into the Code of Conduct. For the same is arguably true about culpability determinations. Again, Lisa might wonder: What if I cause structural damage to the school by

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110. *See* Jeremy Horder, *Criminal Law and Legal Positivism*, 8 LEGAL THEORY 221, 229 (2002) (criticizing Robinson for placing involuntariness among the excuses "because only wrongdoing needs excuse, and the involuntariness of conduct actually undermines the wrongfulness . . . of conduct. . . . because what is wrong is something there is reason not to do, and involuntary conduct is not sensitive to the guiding influence of reason").

111. *See* ROBINSON, *supra* note 7, app. A § 3 (Draft Code of Conduct, "Injury to a Person").

112. *See, e.g.*, *id.* at 156 (advocating the promulgation of simple rules of conduct to be discussed in school children's "citizenship classes").

113. *Cf.* CANE, *supra* note 10, at 93:

> [T]he criminal law is as much concerned with telling us what our responsibilities are as with deciding whether, in particular cases, we should be subject to sanctions for not performing those responsibilities. The law gives us goals to aim at, while at the same time offering reassurance that failure to meet those goals will not necessarily attract legal sanctions.

inadvertently carrying in an explosive device that Bart has secreted in my lunch box? And, again, the Robinsonian answer would be that Lisa will have violated the Code of Conduct,[114] but will be adjudged "Not Guilty by Reason of Blameless Violation."[115] Yet if, as Horder has argued, it is senseless to conceive of involuntary action as violating the Code of Conduct, the very same is arguably true of non-culpable voluntary conduct.[116] If Lisa did not suspect—indeed (if it matters) where *nobody* would have suspected—that her lunch box contained a bomb, it may be thought normatively obtuse to saddle her with the relative stigma that must attach to anything less than the most robust form of exculpation the system makes available.[117] Even if

114. *See* ROBINSON, *supra* note 7, app. A § 24 (Draft Code of Conduct, "Damage to or Theft of Property").

115. *See id.* app. B § 220 (Draft Code of Conduct, "Disability Excuse: Involuntary Conduct"); *id.* app. B § 412 (Draft Code of Adjudication, "Verdict Form: Blameless Violation").

116. I leave open whether non-reckless conduct is non-culpable, or whether, in order not to be culpable, the conduct must be nonnegligent as well.

117. I suspect that those who believe that voluntariness is necessarily a component of a norm violation but that awareness is not might be misled by the confession-and-avoidance character of excuses such as mistake of fact. Some pleas of confession and avoidance do confess something of normative significance. Duress is the prime example: I acknowledge that I did wrong (morally or criminally), but I'm not to blame. But not all such pleas are like that. When Lisa confesses to having caused the school's destruction, but pleads ignorance of the critical facts in avoidance, she is denying not her blameworthiness, or not only this, but also the logically prior fact of wrongfulness. Here, I think, *confession and avoidance reflects only a dialectical structure*, *not a normative one*. The dialectical structure is created by the fact that the accuser will naturally speak first in terms of objective or external facts, leaving it to the accused to fill in details about her mental states and the like about which she has privileged access. That the accuser does not, in one breath as it were, charge that the accused did *x*, *and* that she knew she was doing *x*, is really a matter only of dialectical convenience; there is no normative import.

My treatment of defenses (see Figure 4) therefore relies somewhat on convention. Conceptually, ex post normative or ascriptive assessment tends to proceed in this order: (1) are the external requirements satisfied (e.g., did the actor trespass on another's land; did she cause another's death)?; (2) if so, did she act with any of the proscribed "mental states" of purpose, knowledge, recklessness, or negligence (i.e., can the actor claim any mistakes or accidents)?; (3) if not, was the actor justified?; and (4) if not, was she excused? This hierarchy is familiar. What is perhaps not familiar is that there exist significant differences in the way that one step relates to the one preceding it. A fairly important conceptual distinction separates the latter two questions, tracking the distinction between wrongfulness and blameworthiness. But no consideration of comparable force separates culpability determinations from justifications (steps (2) and (3)). Thus, once we determine (which we need not) that justifications should be treated as defenses and associated closely with excuses, there is no reason in principle that culpability determinations could not join them. Put another way, the distinction between infringement and violation—culpability determinations going to the former, justifications going to the latter—may be supported more by intuitive, largely unarticulated, notions of statistical ordinariness, and by simple convention, than by anything of greater normative substance. This truth is reflected in

no stigma is thought to apply, a rule that does not presuppose the actor's awareness of the preconditions for its applicability might be thought either confused or otiose.

Ironically, Robinson himself can be read as lending support to this view:

> To say 'do not use force against another unless you *think* the other is attacking you' may sound like a rule of conduct but is simply a compression of two distinct points. The rule of conduct says 'do not use force unless another is attacking you'; but we understand that in application *you can only act on what you know or believe*. That second issue, of belief, is not an issue that one must deal with in stating the rule of conduct; it only becomes relevant in adjudicating failures to follow the rule (to satisfy the ideal).[118]

This is an important passage. If we understand (as we should) that one can only be expected to act on what she believes (which is not inconsistent with imposing a duty, itself triggered by what the actor believes, to gather more information under specified circumstances), then the reason that one need not deal with issues of belief "in stating the rule of conduct" is only because such issues are already implied. So, it's not that issues of belief aren't incorporated into the conduct rules (the statement of the norms), but rather that they need not be incorporated *explicitly* because the implication of their inclusion is already so strong. Issues of belief do, as Robinson acknowledges, become relevant at the stage of adjudication.[119] But that is not through the application of any ancillary rule; it is from attending to the primary norm's necessary implication.

The bottom line, I suggest, is this. It may make sense to fine-tune verdicts so as to distinguish exculpations based on the absence of violation from exculpations for reason of blamelessness. But even if so, want of the minimum requisite culpability (usually recklessness or negligence) should probably make out the former if, as Robinson insists, the criminal law's educative function is so critical.[120] When an

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the still-incomplete historical transition of issue (2) from defenses (under the guise of "mistakes of fact") to offense elements (as per Model Penal Code-style kinds of culpability).

118. Robinson, *supra* note 14, at 64–65.

119. *See supra* note 118 and accompanying text.

120. Over a decade ago, Robinson acknowledged his critics' suggestion that some mental components should go within the rules of conduct, *see* Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729, 736 n.9 (1990), but demurred largely on the ground that "[t]he harmfulness of conduct does not always depend on the actor's subjective state of mind," *id.* at 738.

actor makes mistakes (at least nonnegligent ones) about elements, the criminal law should not be deemed violated. And that conclusion has major implications for the construction of justification defenses. Even if "every case adjudication" should be viewed as a vehicle "to tell the community which conduct is approved ('justified') and which conduct is disapproved even though the offender at hand may not be punished for it ('excused')),"[121] it is very doubtful that a pure "deeds theory" does it accurately.

In thus denying Robinson's claim that justifications must be objective, I do not mean, however, to assert the more nearly opposite position that they must be subjective, i.e., that it is part of the nature of a prescriptive norm that it must assume the world as perceived by the norm's addressee. I have endeavored merely to highlight some reasons why a culture might want to understand its norms in such a way. I have tried to explain, in other words, why any nonnegligent mistakes about justification that the society's criminal law in fact codifies as defenses might be better understood as themselves justifications, not excuses. It does not follow, though, that there exist no reasons why a culture would want its norms to hold subjects to a higher standard of conduct, one predicated upon an idealization of their epistemic situation.[122] Trade-offs, after all, are unavoidable. Whereas a radically subjective construction of norms is most sympathetic to the regime's subjects, a radically objective construction is more aspirational. It is hard to see what it would be about the nature of normativity that would fix as necessary one or another position with regard to this trade-off.[123]

In short, it seems perfectly coherent for a norm to accommodate the actual or reasonable beliefs, even if mistaken, of its addressees in

121. ROBINSON, *supra* note 7, at 123–24.

122. Strictly speaking, this would not run afoul of the maxim that "ought implies can," for an actor *could* act in accord with guiding reasons even if she does not apprehend the facts that make those reasons applicable to her situation. Of course, the proximity with which the objective vision of norms comes to violating that bedrock principle of normative reasoning might persuade many against that vision. On the other hand, objectivists could take that same proximity as weighing against ought-implies-can itself.

123. As Joshua Dressler puts it, "[a] society realistically cannot ask more of people than to act in conformity with reasonable appearances." Dressler, *supra* note 12, at 93. This could be quibbled with. Perhaps it is more accurate to say that a society cannot realistically ask more of people than to act in conformity with their *actual* perceptions, after having made appropriate (reasonable?) efforts to verify whether those perceptions are accurate. In any event, the qualifier *realistically* is doing a lot of work. The nub of the disagreement between subjectivists and objectivists, I suggest, precisely concerns how realistic a normative system must, or should, be.

directing behavior, or to hold addressees to a higher idealized standard. A particular normative regime could develop with either orientation without violating anything essential to normativity. If so, whether a given society and its norm entrepreneurs (such as the legal elites responsible for its criminal law) should conceive of its criminal law in subjective or objective terms should depend upon arguments of political morality and practicality. It will be easier for all contributors—Robinson included—to focus on the merits of his argument if it is more clearly detached from arguments about conceptual or logical necessity. Those are red herrings.[124]

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124. This position—that the subjectivists and objectivists are engaged in a debate over what legal prohibitions should look like and how norms should be understood, and not about the inherent meaning or nature of justification—contradicts John Gardner's claim in a provocative recent article that, as a matter of practical reasoning, a justification exists only when subjective and objective requirements are both satisfied. *See* Gardner, *supra* note 14, at 106. Although a complete response cannot be attempted here, some remarks are in order.

Gardner holds, in brief, that "from whatever point of view one claims justification for one's actions or beliefs, one claims justification only if one claims *both* that there were, from that point of view, reasons for one to act or believe as one did *and* that one's reasons for performing the act or holding the belief were among these reasons." *Id*. Effectively anticipating my suggestion that a justification *could* lie under the criminal law when supported by guiding reasons but not explanatory ones, or conversely, Gardner responds that

> even if English criminal law were found to use the word 'justification' in some different, technical sense, that would be a matter of little concern for present purposes. Our interest is not in the legal meaning of the word 'justification'. Our interest is in the ordinary phenomenon, that of justification, which still plays a major role in the thinking of most criminal courts, and indeed in evaluative thinking at large, whatever the local lawyers and legal commentators may choose to call it.

*Id*. I am skeptical, however, that the prospect that justifications need not require the conjunction of objective and subjective considerations can be waved away quite so easily.

Gardner is surely correct that the relevant question is not how criminal law practitioners use the word "justification." (For one thing, if the concept of *legal* justification does not loom large for them, they may use the word, unreflectively, as referring only to *moral* justification.) But nor is it, as Gardner apparently would have it, what justification means in some ideal sense abstracted from the context of the criminal law. In my view, the question that animates the literature to which Gardner purports to respond concerns how to describe the conceptual structure or logic that already shapes extant criminal law. And insofar as *this* is our interest, then Gardner's assertion that a legal system which drafts or conceives justifications in wholly objective (or, one might add, wholly subjective) terms is "a legal system which, strictly speaking, does not care about justification at all," *id.* at 118, seems nonresponsive. More precisely, it responds only by denying the underlying intuition that such a system, just by virtue of being a normative system, necessarily "cares about" justification in at least some sense. Therefore, before accepting Gardner's answer, it behooves us at least to search for a sense of justification that accommodates the intuition. The revised conception here advanced—pursuant to which a justification defense defeats the presumption that given conduct is criminal—meets that need. We have, then, two competing conceptions of justifications under the criminal law. And before we can claim that one is not "strictly speaking" faithful to the meaning of justification, I should think we need some explicit criteria for choosing between conceptual schemata. While I could

### *B. Unknowing Justification*

The converse of the mistaken (or "putative") justification problem arises when an actor assaults another person under circumstances that would allow the actor a justification had he known of the relevant facts,[125] but he did not. This situation of "unknowing justification" is often called the "*Dadson* problem" after the famous 1850 case in which a police officer was prosecuted for shooting a man in flight from the commission of a petty theft.[126] The criminal code authorized officers to shoot escaping felons, but this minor larceny wasn't classified as a felony unless the thief was a third-time offender. It turns out that, unbeknownst to Constable Dadson at the time, the thief did have several prior felony convictions, and so was committing a felony. The claimed justification was held unavailable, however, and Dadson was convicted of shooting with intent to cause grievous bodily harm.[127]

Again, whether this was the proper outcome represents a straightforward question of criminal law policy (broadly understood): Is it worth criminal law resources, and is it consistent with our principles of criminal justice, to require actual belief in the circumstances that, if believed, would justify harm-causing conduct?[128]

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not hope to do justice to the issue here, it does seem to me that, insofar as we can appeal only to intuition and utility, the more catholic account here presented stacks up well.

125. A reasons approach would require, in addition, that such knowledge constitute the motivation or explanatory reason for the actor's conduct. *See supra* note 14.

126. Regina v. Dadson, 4 Cox C.C. 360 (Crim. App. 1850).

127. *Id.* at 361. In a much more recent instance of unknowing justification, an Israeli thief stole an innocent-looking backpack left in public only to discover that it contained a terrorist bomb, which he subsequently reported to the police. The thief was thought to have saved many lives and was not prosecuted, thereby saving the Israeli courts from having to confront the *Dadson* problem themselves. *See generally* Robinson, *supra* note 95.

128. As J.C. Smith argued, the question "was whether the defence on which Dadson relied requires . . . knowledge of the facts which justify the arrest and the use of force to effect it. This, I suggest, is a matter of policy. There is no rule of logic which requires it to be answered one way or the other." SMITH, *supra* note 37, at 31; *see also id.* at 32 ("Whether knowledge of the facts should be required to found a defence, be it justification or excuse, is . . . a matter of policy."). I think Smith entirely correct, although it seems to me that things become muddied a bit when Smith responds to a *reductio* advanced by Glanville Williams. Williams had declared the result in *Dadson* absurd on the ground that it would follow that "a British soldier who kills an enemy in action, believing himself to be killing his own drill-sergeant, is guilty of murder." GLANVILLE WILLIAMS, CRIMINAL LAW 25 (2d ed. 1961). In response, Smith agreed that a murder conviction in the latter case would be preposterous, but distinguished the two cases on the grounds that "[m]urder has for centuries been defined as the killing of a person 'under the Queen's peace,'" and that "[a]n enemy soldier making war against the Queen is not under the

It is easy enough to draft a statute that provides for either of these outcomes. Ruminations about the inherent meaning or true nature of justification would not seem to advance the debate.[129]

But again, Robinson offers a hypothetical designed to show that the subjective view—which withholds justification when the defendant is unaware of facts that, if known, would make out a justification—gives "improper results."[130] Imagine, he proposes, that *B* is poised to attack *A*, thereby conferring upon *A* a justification defense under the deeds approach. *A* is unaware of this danger. Coincidentally, however, and for his own bad reasons, *A* decides to assault *B*. Bystander *C* knows all of the foregoing. He knows, that is, that *A* is an "unknowingly justified actor."[131] Nonetheless, because *C* prefers *B* to *A*, he assaults *A* to prevent *A*'s assault upon *B*. Does *C* have a defense? Robinson thinks it obvious that he shouldn't.[132] But, he says, the reasons theory would confer one: Because *A* doesn't know that he would be justified in assaulting *B*, his force upon *B* is unlawful, thereby permitting *C* to resist it—even though *C* knows that *B* is an assailant.[133]

There is much to say in response. First, why *A* is objectively justified, rather than *B*, is not transparently obvious. It has been doubted that this conclusion reflects an underlying fact of the matter, rather than mere narrative thrust.[134] But even if we accept Robinson's

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Queen's peace so an element in the definition of the crime of murder is missing." SMITH, *supra* note 37, at 30–31.

Instead of deferring to this contingent definition of murder in a manner that would seem to naturalize it, Smith would have done better, it seems to me, to make clear that the absurdity of convicting the soldier of murder—if absurd it be—would arise simply from bad policy, not conceptual error. This would be more consistent with his apt conclusion that

> "[p]olicy" should surely determine whether this person is guilty of a crime, or of no crime. If, as a matter of policy, we think he was truly "justified" in doing what he did, it should be no crime. But if policy requires him to be convicted, it should surely be of the consummated crime [rather than of an attempt].

*Id.* at 44.

129. *Cf.* Anthony M. Dillof, *Unraveling Unknowing Justification*, 77 NOTRE DAME L. REV. 1547, 1556–58, 1599 (2002) (criticizing what he calls "definitional arguments" in favor of another approach, called the "harm theory," to the unknowing justification problem).

130. Robinson, *supra* note 14, at 59.

131. *Id.*

132. *Id.*

133. *Id.*

134. For an intriguing argument that the deeds theory produces logical contradiction in *Dadson*-type cases, see Russell L. Christopher, *Unknowing Justification and the Logical Necessity of the* Dadson *Principle in Self-Defence*, 15 OXFORD J. LEGAL STUD. 229, 239–45 (1995). Again, I think Christopher's inventive argument is flawed. Very briefly, it seems to me

premise that *A* and not *B* is objectively justified, it is still unclear that *C* is not permitted to interfere with *A*'s (subjectively unjustified) efforts to kill *B*. I should think it depends mightily upon the nature of *C*'s interference. It is perhaps telling, therefore, that while Robinson says that *B* "intends to kill" *A*, and that *A* "draws a gun to shoot" *B*, he consistently refers to *C*'s action only in terms of "resistance" and "interference."[135] It would seem that an objective theory of justification that purports to turn on the realization of net societal benefits *would* find *C* justified if his interference inflicts less harm on *A* than *A* would otherwise have inflicted upon *B*.[136]

Finally and most importantly, even supposing that *C* kills *A* to protect *B*, there is not the slightest reason why a subjective approach to justification need provide *C* with a defense. A penal code could provide, for instance, that an actor may not use force against a person in response to force that the actor believes would be lawful were it not for that other person's mistaken beliefs about the circumstances in which he acts. That the Model Penal Code appears not to reach this same result is, at most, a criticism of that particular code;[137] it does not tell against subjective constructions of justification defenses more generally.

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that, contrary to Christopher's assertions, *id.* at 244, an objectivist has access to a perfectly coherent notion of the initial aggressor, one that turns on the particular point in time at which an actor consciously determines to employ force. Still, because adequate development of this argument would require more space than is here warranted, I am satisfied to leave this as a partly open question.

135. Robinson, *supra* note 14, at 59.

136. Bear in mind that the law would not permit *C* to allow *B* to inflict any further injury upon *A* after *C* has successfully nullified *A*'s threat to *B*. Both tort law and criminal law would impose upon *C* an affirmative duty to try to protect *A* from *B* if *C*'s interference leaves *A* unable to protect himself against *B*.

137. Robinson is probably right that, under the MPC, *C* could be exculpated even if he employs deadly force. But that outcome is not for the reasons he gives. Robinson claims that, under the MPC, *C* "lawfully can interfere with conduct that is 'unlawful'." Robinson, *supra* note 14, at 59 (citing MODEL PENAL CODE § 3.06). Assuming that this citation reflects a typographical error (section 3.06 concerns the use of force for the protection of property), and that the intended citation is to section 3.05, we have already seen that this is not so. *See supra* note 83. Section 3.05 provides that *C* lawfully can protect *B* against unlawful force only if, under the circumstances as *C* believes them to be, *B* "would be justified in using such protective force." MODEL PENAL CODE § 3.05(1)(b) (1962). And *B* would not be justified in using deadly force against *A* if his intent to kill *A* is deemed to have "provoked the use of force against himself in the same encounter." *Id.* § 3.04(2)(b)(i). I'd be inclined to say that *A*'s lack of awareness of the potentially provocative circumstances prevents satisfaction of this provision, which is why I believe that Robinson's bottom-line judgment about the Model Penal Code is correct. But it could be easily corrected without having to resort to an objective conceptualization of the defense.

Even were Robinson to become convinced that no desired outcome in complex unknowing-justification cases is beyond the reach of a subjectivist approach, that would be unlikely to give him pause. For even in those contexts (of mistaken justification), where he already does recognize that purely subjective approaches can be modified to reach the outcomes he deems substantively proper, he disparages such approaches by emphasizing that they require "fancy dancing"[138] or "complicated manoeuvres."[139] In fact, Robinson too must resort to some fairly recondite legal drafting to ensure that the objective approach produces the intuitively correct outcomes.[140] But that, to my mind, is no criticism of the objective approach generally, nor of Robinson's proposal in particular. Because it's no easier in the

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138. Paul H. Robinson & John M. Darley, *Testing Competing Theories of Justification*, 76 N.C. L. REV. 1095, 1102 (1998).

139. Robinson, *supra* note 14, at 60.

140. This is best exemplified by a straightforward case of unknowing justification. Although the actor is objectively justified, Robinson has recognized that full exculpation would be inappropriate and has therefore argued repeatedly that the actor should be convicted of an attempted offense. *See, e.g.*, Robinson, *supra* note 14, at 57–58; Robinson, *supra* note 1, at 291; Robinson & Darley, *supra* note 138, at 1101. Remarkably, however, his own proposed Codes of Conduct and Adjudication appear not to produce that result. Most persons who are objectively but unknowingly justified would be fully exculpated under Part IV of the Code of Conduct, which makes actual necessity the touchstone for the valid use of defensive force. *See* ROBINSON, *supra* note 7, app A. Part IV (Draft Code of Conduct, "Justified Violations of the Criminal Law"). To realize his desired outcome, then, Robinson would have to rely upon something like the Model Penal Code's impossible attempt provision, which provides that an actor "is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be." MODEL PENAL CODE § 501(1)(a); *see, e.g.*, Robinson, *supra* note 14, at 57 (citing this provision favorably for resolving cases of unknowing justification). But as persons who have taught this provision know, it is hardly free of "gyrations," *id.* at 53, and nonetheless remains far from pellucid. Most particularly, it raises all the uncertainties that attend identification of "attendant circumstances."

For another illustration, consider this hypothetical proposed by Kent Greenawalt: "Imagine that David, wishing to die as an apparent victim, has cleverly set things up so that Vicki will think David is trying to shoot her and will shoot him in return." Greenawalt, *supra* note 12, at 1924. If Evelyn, who had known of David's plan, happens upon the scene immediately after Vicki has drawn her gun, may Evelyn shoot Vicki? If David himself changes his mind after Vicki draws her gun, and decides he wants to live, should he be legally permitted to shoot her dead? *See also* Greenawalt, *supra* note 22, at 23 (advancing a similar hypothetical). A deeds theory would appear to answer both questions in the affirmative, given that Vicki's threatened use of force is only "excused" and thus "unlawful." But I should think it absurd to acquit either Vicki or David. As best I can tell, though, Robinson's Rules of Conduct and Adjudication lead to precisely that result in the case of Vicki. What result would obtain in David's case, especially in light of Section 240 ("Causing the Conditions of One's Own Justification or Excuse"), I leave for the intrepid reader to determine. *See* ROBINSON, *supra* note 7, app. B § 240 (Draft Code of Adjudication, "Causing the Conditions of One's Own Justification or Excuse").

criminal law than elsewhere to draft a statute adequate for all contingencies, only a peculiarly naïve vision of law would take statutory complexity as a signal either of conceptual poverty or disingenuousness.

In sum, a desire to reach certain intuitively proper results—in situations of mistaken justification and unknowing justification alike—does not logically compel adoption of subjective or objective conceptions of legal justification. This is one of the principal lessons of the revised conception of the justification/excuse distinction.

## IV. FURTHER IMPLICATIONS

Although much of the literature on justification and excuse focuses on the subjective/objective debate, that question does not exhaust commentators' interest. This Part scrutinizes two other often-discussed issues. Section A demonstrates that, on the revised account, classifying a particular defense as justification or excuse entails no necessary consequences for the treatment of third parties. Section B returns to issues of taxonomy. After cautioning against efforts to classify existing defenses like "self-defense" and "defense of property," it turns attention to two defenses the proper classification of which has consumed substantial scholarly attention—the quasi-defense of provocation that reduces murder to voluntary manslaughter, and the true defense of duress that affords full exculpation. This Section provides reasons to conclude that each is better classified as an excuse.

### *A. Third Parties*

One frequent claim about the essential or logical relationship between justification and excuse goes like this: When conduct is protected by a justification defense, third parties may help the actor, and may not hinder her; when conduct is excused, third parties may hinder, and may not help.[141] Of course, the analysis of Part III demonstrates that this is not necessarily so when the actor and the third party have different factual beliefs. If we are now to confront new issues worth additional comment, the claim at issue must be that where an actor (*A*) and a third party (*C*) share the same perceptions about a given situation, then if *A* is justified, *C* may help him and may

141. *See, e.g.*, LEO KATZ, BAD ACTS AND GUILTY MINDS 65 (1987); Dressler, *supra* note 12, at 77; Greenawalt, *supra* note 12, at 1918.

not hinder him, and if *A* is only excused, then *C* may not help him and may hinder him. If *A* is neither justified nor excused, of course, *C* also may not help, and may hinder. Call this (multi-part) claim the "necessary implication" thesis. Is it true? If so, what does that reveal?

Whether it is true depends upon the strength and nature of the reasons for giving the primary actor legal permission to act. In necessity cases, where *A*'s action is thought to produce greater good, *C* should of course be permitted to help, and not to hinder. Take Robinson's example of the firebreak: *A* ignites *B*'s farm to save an adjoining town from a raging forest fire. Surely, if *A* is justified, then *C* must be allowed to assist. But this is due not to any necessary logic of justifications, but rather to the specific reasons that support granting *A* legal permission in the first place. If we think this is a good thing for *A* to do, then we would need a reason for prohibiting *C* from helping or for allowing *C* to hinder, and that there could be any such reason deserving solicitude seems highly unlikely.[142] In short, we should be thinking in terms of reasons for treating the primary and third party differently, and not for conceptual truths.

This point is best illustrated by self-defense cases. Recall Albert who shoots and kills Bushrod in self-defense, but in circumstances in which Albert knows he could have safely retreated.[143] Let us suppose that Albert was in his own home. One could reasonably believe both that most people will retreat if they can, no matter what the law allows, and that ex post adjudications of whether safe retreat would have been possible are too likely either to produce false positives (thus resulting in punishment of morally and legally innocent persons) or to put excessive pressure on law-abiding folk to attempt retreats that are in fact unsafe. For these reasons, I argued, a rational law might refrain from imposing a duty of retreat in one's own home (though I should add that a contrary rule would also be defensible). If the law takes that approach, Albert has a valid defense of self-defense and is, legally speaking, justified.

Suppose now that Clarisse, Albert's neighbor, happens to be over for coffee, and that both parties realize that Bushrod has it out only for Albert, not Clarisse. If Albert's gun jams, and he asks

142. Of course, it would not be illogical to allow *B* (the *second* party) to try to stop *A*, though it might be bad policy. And even if *B* is not allowed (i.e., would not be justified) to stop *A*, she might still warrant an excuse if she did. But to focus on *B*'s status is essentially to reprise the human shield hypothetical discussed earlier. *See supra* note 85 and accompanying text.

143. *See supra* notes 22–25 and accompanying text.

Clarisse to hand over the sidearm she's packing, the law's internal coherence would not be challenged were Clarisse criminally prohibited from doing so. Whatever concerns may militate against requiring the threatened victims of an assault to try to assess whether safe retreat is possible before protecting themselves with defensive force do not also apply to bystanders who could be expected to be able more coolly to assess the situation. Or so lawmakers may reasonably conclude. So the fact that Albert has a justification defense does not necessarily imply that Clarisse would also be legally justified were she to aid him in assaulting Bushrod. Perhaps her legal duty should be to encourage Albert to make use of the safe retreat that they both realize exists.

Of course, this might be seen as evidence that Albert's defense is only an excuse, and not a justification as I had earlier claimed. If Albert is only excused, then Clarisse's lack of a defense would only confirm the necessary implication thesis. The problem is that although Clarisse *might* be denied a defense, she needn't be. A criminal code that permitted all third parties to assist persons who are themselves permitted to resist unlawful force would hardly be unintelligible or internally contradictory. So the necessary implication thesis is still shown to be invalid. Again, this is a drafting issue, not a conceptual one. Policy judgments about what should be done with third parties have no bearing on the conceptual distinction between justification and excuse.

### *B. Classifying the Defenses*

It is a common move among criminal law theorists—especially those advancing arguments for law reform—to try to demonstrate that a particular defense is properly classified either as a justification or as an excuse. To take just one example, a major symposium on "battered women who kill" was explicitly shaped by the premise that we can best determine how such women should fare under the criminal law only after we first make clear whether self-defense is a justification or an excuse.[144] This last Section explores how this enterprise should proceed if the revised conception of justification and excuse I've proposed is correct. How ought we to categorize the standard defenses such as necessity, duress, duress of circumstances,

144. *See* Symposium, *Self Defense and Relations of Domination: Moral and Legal Perspectives on Battered Women Who Kill*, 57 U. PITT. L. REV. 461 (1996).

defense of self, defense of others, and defense of property? Which are justifications, and which are excuses?

1. *Some Cautionary Notes*. A classificatory enterprise of this sort is risky, for the unarticulated assumption that all the particular rules that fall within one of the broad doctrinal categories must be classified alike is simply false. I have already indicated that the categories of justification and excuse are straddled by statutes that do not preclude use of the duress defense when the defendant who is confronted with a powerful threat actually chooses the lesser evil.[145] When the actor commits a lesser evil than the evil that would have resulted (by natural forces or by human agency) were he to have acted otherwise, then he is presumably justified. When, even though he selected the greater evil, he is granted a defense because a person of reasonable firmness could not have been expected to have done otherwise, then he is most likely excused.[146] Furthermore, the defenses involving defensive force are likely to be complex amalgams of justifications and excuses.[147] Perhaps, for instance, use of deadly force to protect oneself from physical attack is justified, but to protect oneself from robbery is only excused. Or use of force is excused when retreat is possible, but justified where retreat is impossible. Or, unavoidable mistakes are justified, whereas (merely) reasonable mistakes are excused.

To see this point more clearly, it might be useful first to identify the different defenses. Quick: How many are there? Although the precise number will vary from code to code, I'd predict that many people would guess around a dozen. Here, for example, is a list of defenses one might generate from a glance at the Model Penal Code: (involuntary) intoxication, duress, military orders, consent (by the victim), *de minimis* infraction, entrapment, choice of (lesser) evils, execution of public duty, use of force in self-protection, use of force for the protection of other persons, use of force for the protection of property, use of force in law enforcement, use of force by persons

145. *See supra* note 64; *see also* Greenawalt, *supra* note 22, at 16 (identifying duress as an example of a defense that "reach[es] instances of both justification and excuse").

146. More precisely, whether he is justified or excused in this latter event depends upon one's view of what the criminal law should (nominally) demand of members of the public. For elaboration of this issue see *infra* notes 172–76 and accompanying text.

147. This is not to agree with those who say that all defenses contain elements of justification and excuse. *See, e.g.*, Gardner, *supra* note 14, at 122. As I have conceived justifications and excuses, this is not so.

with special responsibility for care, discipline or safety of others, mental disease or defect, and immaturity. That's fifteen.[148]

If we look more carefully at any one of these provisions, however, the picture changes. Take, for instance, Model Penal Code section 3.06, "Use of Force for Protection of Property." This lengthy section expressly distinguishes among a large number of variables: whether the property protected is movable, real, or a dwelling; whether the force used is deadly, nondeadly, consists of confinement, or is executed by "device"; whether the actor did or did not request desistance before employing force; and (because it is expressly made subject to a separate provision, section 3.09) whether the actor behaved reasonably, negligently, or recklessly.[149] This one section, then, could be seen actually to consist of scores of discrete rules.[150] For example:

- An actor may use nondeadly force against the person of another when the actor reasonably believes that such force is immediately necessary to prevent or terminate the unlawful carrying away of tangible, movable property, provided that such movable property is in his possession and the actor first requests the person against whom such force is used to desist from his interference with the property.[151]
- In any prosecution for which negligence does not suffice to establish culpability, an actor may use nondeadly force against the person of another, without first requesting the person against whom such force is used to desist from his interference with the property in question, when the actor nonrecklessly believes that such force is immediately necessary to prevent or terminate the unlawful carrying away of tangible, movable property, that the property is in the

148. These are the personal (i.e., non-systemic) defenses of the general part. The list would be greatly expanded were we to include (a) "defenses" that merely negative the prosecution's prima facie case (e.g., alibi or somnambulism), or (b) defenses particular to specific offenses (e.g., "the spousal defense" recognized in some jurisdictions to sexual assaults). For a much longer list that includes these sorts of defenses, see 1 ROBINSON, *supra* note 13, at 70.

149. MODEL PENAL CODE § 3.09 (1962).

150. On the difficulties of rule individualization, see, for example, A.M. Honoré, *Real Laws*, *in* LAW, MORALITY, AND SOCIETY 99, 111 (P.M.S. Hacker & J. Raz eds., 1977) (raising the possibility that "every prima-facie universal proposition of law which may be the subject of debate is a separate rule").

151. MODEL PENAL CODE §§ 3.06(1)(a), (3)(a)(ii).

possession of another person for whose protection he acts, and that such request would be useless.[152]

- In any prosecution for which recklessness does not suffice to establish culpability, an actor may use deadly force against the person of another if he believes that the other person is attempting to dispossess him of his dwelling otherwise than under a claim of right to its possession.[153]

If these are "rules," however, so too could each be called a "defense"—respectively, the defenses of, say, "Reasonable use of nondeadly force for the prevention of interference with movable property belonging to oneself," "Non-reckless use of nondeadly force for the prevention of interference with movable property belonging to another, prior request thought useless," and "Use of deadly force for protection against dispossession of dwelling." And if sections are carved up into more granular defenses in this fashion, the total number of defenses recognized by the Model Penal Code would easily reach into the hundreds.

Of course, it would be foolish for any penal code to list each such defense separately. Some sort of groupings are called for. However, no single way to organize the defenses is natural or transparently correct. The code drafters could, for example, group defenses under such headings as "Defenses involving use of deadly force," "Defenses involving use of nondeadly force," and "Defenses not involving use of force." Or perhaps the hundreds of defenses could be classified according to the relationship between the actor's beliefs and objective reality made relevant by the offense under which he is charged. Here we might have five separate categories of defenses: "Defenses that do not rely upon factual error," "Defenses relying upon nonnegligent error," "Defenses relying upon negligence," "Defenses relying upon recklessness," and "Defenses entailing substantial divergence from reality."

As we have seen, the drafters of the Model Penal Code chose the mostly familiar categories mentioned above—duress, entrapment, choice of lesser evils, use of force in self-protection, use of force for the protection of property, and the like. And, all in all, it seems like a sensible enough decision. What is not sensible, though, is for theorists to then expect that these groupings of defenses would be wholly subsumable under the different categorizing scheme of justification

152. *Id.*

153. *Id.* § 3.06(3)(d)(i).

and excuse. In fact, it may be impossible to authoritatively classify even individual discrete defenses as justification or excuse, partly because classification is itself an interpretive act, not purely an inquiry into historical facts,[154] and partly because, more mundanely, a defense might exist because some legislators deemed it a justification and others thought it an excuse.[155] But even if each granular defense could be identified as either a justification or an excuse, to expect larger groupings of defenses to line up neatly under the headings of justification and excuse—to suppose, in other words, that existing defense categories (such as duress or self-defense) relate to the conceptual categories of justification and excuse as token to type, or as species to genus[156]—is bizarre. This is something like inventorying all the items in your house, classifying them by color, and then expecting each category of items to be classifiable as a unit within a distinct taxonomic scheme. It could happen, say, that all your reds are edible and all your yellows inedible, but it would be nothing short of marvelous.

Take the above defenses culled from the Model Penal Code's omnibus protection-of-property defense, MPC section 3.06. What I've labeled "Reasonable use of nondeadly force for the prevention of interference with movable property belonging to oneself" sure looks like a justification: the state is probably intending to permit individuals to use nondeadly force when they reasonably believe it necessary in such circumstances. But whether the same is true for "Non-reckless use of nondeadly force for the prevention of interference with movable property belonging to another, prior request thought useless" is less certain. Perhaps the MPC drafters would have liked to prohibit individuals from protecting movable property with force before requesting desistance, except where the actor believes that such a request "would be dangerous to himself or

154. *See* Dan-Cohen, *supra* note 60, at 631 n.13:

> The taxonomic distinction between conduct rules and decision rules should not be taken to imply the existence of a single identifiable source of legal norms, a source whose actual intentions determine the segregation of the norms into the two categories. Rather, the classification of legal rules is a scheme of interpretation based on the values and policies that the interpreter ascribes to the legal system . . . . That a legislature in fact entertained certain intentions may, but need not, be reason to ascribe particular values to the legislation.

155. *See, e.g.*, Greenawalt, *supra* note 22, at 18–19.

156. Douglas N. Husak, *The Serial View of Criminal Law Defenses*, 3 CRIM. L.F. 369, 371 n.11 (1992).

another person,"[157] but also believed it unjust or unwise to punish those who didn't first request desistance simply because they thought it useless. Were that the case, the defense might more properly be deemed an excuse.

In short, the justification/excuse taxonomy and the taxonomy created by existing doctrinal categories operate on different principles of organization. One operates at a fairly high level of conceptual abstraction, the other turns upon factors closer to actual human experience. There is thus little reason to suspect that either is subsumed under the other. Any single taxonomy that mixes these two types of organizing rubrics (like that sketched in Figure 4), therefore, is at best no more than suggestive. At worst, it must be conceded, such a taxonomy threatens to confuse.[158]

2. *Duress and Provocation*. Notwithstanding these caveats, we can hazard some classificatory remarks. On the account here presented, for instance, duress looks like a paradigmatic excuse. Dan-Cohen explains the rationale clearly, deeming it

> obvious that the policies advanced by the defense would lead to its use as a decision rule—an instruction to the judge that defendants who under duress committed acts that would otherwise amount to offenses should not be punished. Just as obviously, no comparable rule would be included among the conduct rules of the system: knowledge of the existence of the defense of duress would not be permitted to shape individual conduct; conduct would be guided exclusively by the relevant criminal proscriptions.[159]

On this account, and for other reasons that are assimilable to it, that duress is an excuse has become common wisdom. In a provocative recent article, however, Peter Westen and James

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157. MODEL PENAL CODE § 3.06(3)(a)(ii). Subsection (3)(a)(i), recall, extends the defense to persons who do not first request desistance for the seemingly less compelling reason that they believe "such request would be useless."

158. This is to take issue with the "premise . . . that a single legal doctrine, especially one in the criminal arena, should be justified in terms of a single philosophical rationale." Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251, 252 (1995). The premise would be plausible (though I am not myself convinced) when applied to a truly granular doctrine, one that cannot be sensibly subdivided into identifiably distinct rules. But even that plausibility is lost, I think, once we recognize that what is generally taken to be "a single legal doctrine"—like self-defense—may encompass more than one discrete legal rule.

159. Dan-Cohen, *supra* note 60, at 633.

Mangiafico contend that duress is actually a justification.[160] Their subtle argument arises in response to what they deem "[t]he central challenge" of being able "to explain why defenses of duress . . . provide actors with greater protection against *manmade* threats than defenses of necessity provide against *natural* threats."[161] If, for example, a driver runs over and kills two people asleep on the road because a gunman sitting beside her threatens to kill her unless she proceeds straight ahead, the driver may win exculpation on grounds of duress.[162] In contrast, the driver has no defense if she runs over the same two people because hazardous road conditions left her with the only alternative under the circumstances of driving off the road and over a precipice to her certain death. Necessity is unavailable in this latter case because in killing two to save just herself she did not choose "the lesser evil." Duress is unavailable because it ordinarily extends only to manmade threats.[163]

Almost all commentators, Westen and Mangiafico observe, both view duress as an excuse and maintain that this disparity is indefensible.[164] "Conservatives" would deny the defense in the gunman case; "liberals" would extend it to the hazardous road case.[165] But maybe, the authors argue, the law is wiser than we are. Perhaps criticisms of the disparate treatment that duress law affords manmade and natural threats

> on the part of conservative and liberal commentators are the product of a common fallacy—a fallacy concerning the standard by which "evils" are measured for purposes of the choice-of-evils defense. The standard by which evils are measured is not one that places evils in a single ranked order for all purposes. Rather, the

160. Peter Westen & James Mangiafico, *The Defense of Criminal Duress: A Justification, Not an Excuse—and Why it Matters*, 6 BUFF. CRIM. L. REV. (forthcoming 2003) (manuscript at 103, on file with the *Duke Law Journal*).

161. *Id*. (manuscript at 101).

162. This assumes that the jurisdiction does not categorically disallow duress as a defense in cases of homicide. Obviously, the disparity between manmade and natural threats that this and the following hypothetical together exemplify does not depend upon the defendant's being charged with a homicidal offense. These examples were introduced in SANFORD H. KADISH & MONROE G. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 570–71 (3d ed. 1975). I have discussed them in Berman, *supra* note 51, at 63–64.

163. *See, e.g.*, *supra* note 77 (quoting MPC § 2.09(1)).

164. *See* Westen & Mangiafico, *supra* note 160 (manuscript at 102–03).

165. *See id*. (manuscript at 130) ("Conservatives wish to confine the defense to an actor's response to unlawful manmade threats . . . . Liberals in turn wish to expand the defense . . . to natural threats that persons of reasonable firmness would be unable to resist.").

> appropriate standard is a moralized or "contextualized" one that is capable of ranking the same evils differently, depending upon the relationships among the parties and the causal nature of resulting harms.[166]

Because evils are contextualized in this way, Westen and Mangiafico contend, when the law affords the driver a valid duress defense in the gunman case, it is because the driver has in fact chosen the lesser of two evils.[167] And if so, then duress is a justification, not an excuse.[168] At the same time, contextualization also means that the law is not committed to agreeing that the driver chose the lesser evil, hence should be entitled to a defense, in the road hazard case.[169]

The first thing to notice about this argument is that the contextualization hypothesis does not itself defeat the view that there exists some subset of the duress defense that is an excuse. Suppose, as the contextualization hypothesis would hold, that the scope of the (justificatory) necessity defense is broader in cases of responses to manmade threats than in response to natural threats. At some point, however, a defendant will commit a criminal wrong in response to a manmade threat that the law deems not sufficient to make his conduct the choice of a lesser evil, but in which the pressure was substantial. The duress-as-an-excuse crowd will say that there exists a non-null set of cases within this space in which a defense should be granted. It is *this* set of cases that we mean by duress. When characterizing duress as an excuse, that is to say, we have in mind that extension of the defense which does not also qualify as choosing the lesser evil.

To this, Westen and Mangiafico have two responses. The first returns us to the "central challenge"[170] of justifying the disparate treatment in duress law for manmade and natural threats. According to Westen and Mangiafico, (1) defenders of the excuse characterization of duress cannot justify this disparity, and (2) the disparity is appropriate.[171] But each of these claims is vulnerable.

With respect, it's not clear from the Westen and Mangiafico article what supports proposition (2) beyond the authors' own

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166. *Id*. (manuscript at 103).
167. *Id*. (manuscript at 102–03).
168. *Id*. (manuscript at 103).
169. *Id*. (manuscript at 103–04).
170. *Id*. (manuscript at 101).
171. *Id*. (manuscript at 103–04).

intuitions, supported by faith in the immanent logic of the common law. Furthermore, even if the law has gotten things right, those who characterize duress as an excuse can rely on fairly common second-order considerations to both explain and justify the existing disparity. The argument, in a small nutshell, is that notwithstanding first-order "liberal" sorts of reasons to codify a defense of situational duress that would cover some set of cases in which the defendant did *not* choose the lesser evil, systemic worries about the potential for abuse of the defense, false negatives, judicial efficiency, and the like, militate against it. For example, a defense of situational duress might threaten to allow every poor defendant charged with a property offense to reach a jury on his argument that life circumstances—of a force that reasonable people might find irresistible—"pressed" or "compelled" or "coerced" him into committing his criminal act. Surely the law might reasonably conclude that this would be intolerable notwithstanding the force of the "liberal" logic.

This leads to Westen and Mangiafico's remaining argument. A defendant should be excused on grounds of duress, they observe, only if she has acted in some sense reasonably.[172] Moreover, this standard of reasonableness must be somehow moralized, not purely statistical.[173] But if a defendant has acted in a morally reasonable way in acceding to a given threat, they conclude, then her conduct must be considered legally justified, not merely excused. "[A]n action that exhibits the 'courage and commitment that the law can properly demand of us' is not excused action. It is action that the law regards as tolerable, and hence action that is ultimately justified."[174]

This, it seems to me, is the only argument Westen and Mangiafico marshal that directly challenges the excuse characterization of duress.[175] Yet I think it does not succeed. Certainly it is logically possible for the law sometimes to tell its addressees that they must act with more than a morally adequate degree of firmness.

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172. *See, e.g.*, MPC § 2.09(1), quoted *supra* note 77.

173. *See* Westen & Mangiafico, *supra* note 160 (manuscript at 175–76) ("The term 'reasonable firmness' . . . . holds actors to the firmness—the steadfastness to avoid wrongdoing—that the law believes they *ought* to possess under the circumstances.").

174. *Id.* (manuscript at 216) (quoting R.A. Duff, *Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law?*, 6 BUFF. CRIM. L. REV. 147, 177 (2002)).

175. The conceptualization thesis, recall, need entail only that the justificatory necessity defense should be broader in cases of manmade threats than in cases of natural threats. And the law's refusal to extend any defense to situational duress not amounting to the choice of a lesser evil can be explained and justified on second-order concerns that are reconcilable with the concession-to-human-frailty view of duress that would render it an excuse.

That is, the law could conceive of its own substantive, action-directing norms as sometimes demanding something closer to moral heroism. In this event, somebody who commits a prima facie criminal offense only because she has given in to substantial pressures (say, in the form of a do-it-or-else command issued by another) has violated the criminal law even all-things-considered, hence is not legally justified. And yet, if the law chooses not to punish people it deems not morally blameworthy, then the fact (if true) that our offender has exhibited morally reasonable firmness might sensibly translate into a conclusion that she is not morally blameworthy, hence legally excused. To the extent that legal excuse piggybacks upon or incorporates moral excuse, then the defendant's being not morally blameworthy *ipso facto* renders her legally excused, even though the law's decision to demand (in the substance of its forward-looking norms) more than mere non-blameworthiness denies her legal justification.

In short, so long as the forward-looking norms of the criminal law can be more demanding than are the backward-looking moral norms of proper blame ascription, there appears no reason to deny that the criminal law can recognize a subset of duress that is not also the choice of a lesser evil or that any such defense counts as an excuse for purposes of legal taxonomy. The conventional wisdom that duress is an excuse therefore withstands the Westen and Mangiafico challenge.

Proper classification of the provocation "defense"—i.e., the rule of law that intentional homicides committed under certain sorts of "heat of passion" qualify as voluntary manslaughter instead of, as they would be but for the provocation, murder—is much more controversial. According to the majority view, provocation is a partial excuse—an "indulgence," as one influential nineteenth-century decision put it, "to the frailty of human nature."[176] A minority view characterizes it as a justification. As Andrew Ashworth explains,

> [t]his is not to argue that it is ever morally right to kill a person who does wrong. Rather, the claim implicit in partial justification is that an individual is *to some extent* morally justified in making a punitive return against someone who intentionally causes him serious offence, and that this serves to differentiate someone who is

176. Maher v. People, 10 Mich. 212, 219 (1862). The secondary literature defending this vision is large. For the most recent contribution by one of the leading defenders of the partial-excuse view, see Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959 (2002).

> provoked to lose his self-control and kill from the unprovoked killer . . . . The complicity of the victim cannot and should not be ignored, for the blameworthiness of his conduct has a strong bearing on the court's judgment of the seriousness of the provocation and the reasonableness of the accused's failure to control himself.[177]

If the above account of duress is correct, however, the very same sorts of reasons would seem to render provocation an excuse too. Most plausibly understood, I suggest, mitigation for provoked homicides is not part of the substantive, forward-looking normativity of the criminal law, but rather is a backward-looking inquiry into the just extent of the given defendant's punishability. It amounts, as Herbert Wechsler explained in defense of the Model Penal Code's expansion of common law provocation principles,[178] "to a plea in mitigation based upon a mental or emotional trauma of significant dimensions, with the jury asked to show whatever empathy it can."[179] The criminal law should not be understood as advising one poised to kill in a heat of passion that doing so might be partially excused or partially justified, or that it could bring forth a reduced sentence relative to some sort of empirical or intuited baselines. Rather, the criminal law's prohibitory norm, I should think, seeks to realize itself in unequivocal terms: "Do not kill this person, no matter how inflamed your passions may be, and no matter how justifiably you may be aggrieved."

If and when that norm is violated, however, it then turns to the state to determine how much punishment is due. And at *that* stage the law may conclude that the circumstances surrounding the defendant's conduct render her deserving of less punishment than would be the situation otherwise. Is this merely because she had "lost control"? I don't think so. As Dan Kahan and Martha Nussbaum persuasively argue, the emotions that caused the defendant to experience a much-diminished capacity for rational self-control are themselves proper subjects of moral evaluation.[180] It is a necessary condition for mitigation to be deemed appropriate that the defendant had lost

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177. A.J. Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292, 307–08 (1976) (footnote omitted).

178. *See* MODEL PENAL CODE § 210.3(1)(b) (1962) (providing that "a homicide which would otherwise be murder" is manslaughter if "committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse").

179. Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1446 (1968).

180. This is the central thesis of Kahan & Nussbaum, *supra* note 12.

some capacity to control her thoughts and actions. But it is not sufficient. If the ultimate measure of an actor's blameworthiness is the degree to which she fails to manifest appropriate regard for right values and interests, then to lose control because, say, one hates gay people can, and should, be assessed differently than to lose control because one is angry at an injury done to one's child.[181]

*Aha!*, defenders of the partial-justification conception of provocation might retort, isn't this simply to say "that an individual is *to some extent* morally justified in making a punitive return against someone who intentionally causes him serious offense"?[182] Perhaps. But that is not to the point. The question is not (as Ashworth's argument seems to imply) whether the intentional killer with a paradigmatic provocation claim is not only less morally blameworthy than would be the case but for the provocation, but also has acted less morally wrongfully. The question—or what is generally taken to be the question—is whether the provocation claim is better classified *for purposes of the internal taxonomy of the criminal law* as a partial excuse or as a partial justification.

And if my account of *legal* justification is correct, then to classify provocation as a partial (legal) justification is not only to believe that defendants who have a valid provocation defense are partially morally justified (a matter with respect to which I'm agnostic), but also to assume that statutory punishments for serious crimes like intentional homicides are part of the regime's conduct rules. Put another way, it is to assume that the criminal punishment to be administered for voluntary manslaughter is a price, not a sanction.[183] But even if some criminal penalties are properly conceived of as prices, that the penalties available for intentional homicides would be among them is exceedingly implausible. If this is right, then the reduction in penalty that a valid provocation claim buys exists as part

181. *Id.* at 312–15 & nn.183–84 (contrasting Commonwealth v. Carr, 580 A.2d 1362, 1364 (Pa. Super. Ct. 1990) with People v. Shields, 575 N.E.2d 538, 546 (Ill. 1991)). Kahan and Nussbaum proceed to contend that provocation is neither justification nor excuse. *Id.* at 318–19. Provocations cannot be partial justifications, they believe, because "[j]ustifications are said to identify acts that produce morally preferred states of affairs." *Id*. And they can't be partial excuses because excuses "are concerned with how the defendant's particular circumstances affected her capacity or opportunity to obey the law." *Id.* at 319. Of course, I believe that here the authors go awry by assuming too uncritically what I have argued are incorrect conceptions of these legal categories.

182. *See supra* note 177 and accompanying text.

183. For the classic comparison between price and sanction see Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984).

of the criminal law's backward-looking rules of responsibility, not as part of its forward-looking, conduct-guiding norms. Legally speaking, therefore, it is a partial excuse, not a partial justification, notwithstanding that a defendant might be deemed entitled to this excuse in part because her conduct was partially justified, morally speaking.[184]

## CONCLUSION

I have argued here that the distinction, for purposes of the criminal law, between justification and excuse has no necessary *substantive* relationship to moral wrongfulness.[185] Instead, the roles that justifications and excuses play in the criminal law are only *structurally* equivalent to the roles they play in moral reasoning: justification defenses qualify the offenses to provide that certain conduct is not criminal, all things considered; excuse defenses specify the circumstances under which an offender cannot be punished for having violated the criminal law. This might seem a weak claim, entailing nothing in particular about the concrete disputes that have so vigorously engaged scholars for the past twenty-five years. But that is always true of conceptual, or analytical, studies. As the philosopher C.L. Stevenson explained, "[t]he purpose of an analytic or methodological study, whether of science or ethics [or law, we might add], is . . . to send others to their tasks with clearer heads and less wasteful habits of investigation."[186] Moreover, to say that a proper understanding of justification and excuse entails no particular conclusions to a variety of substantive disputes is, in fact, to say

184. *See also* Dressler, *supra* note 176, at 962 ("It is a partial excuse based on the actor's partial loss of self-control, although (and here is where confusion lies) the *reason* for the actor's loss of self-control sometimes (but not always) has a justificatory-type component.").

185. A final caveat: Justifications and excuses within the criminal law may have a necessary substantive relationship to their counterparts in ordinary morality if *all of law* has a necessary substantive relationship to morality. Whether that is so, and if so, what the nature of that relationship is, are the central questions of the main branch of contemporary jurisprudence and cannot be explored with any seriousness here. But let me caution against a too complacent assumption that the theoretical claims within any particular field of law are ultimately hostage to the (yet more abstract) theoretical claims about law, full stop. The relationship, rather, is one of mutual interdependence. Thus, were it to turn out that the thesis presented here is compatible (in part or in toto) only with a particular variety of positivism, then just as arguments against that variety of positivism would count against the instant thesis (or some part thereof), so too would arguments in support of the present thesis count against the competing theories of law.

186. C.L. STEVENSON, ETHICS AND LANGUAGE 1 (1944).

something of importance. What follows is a radical skepticism of all arguments that purport to derive any necessary shape for the positive criminal law from the justification/excuse distinction itself. By showing just how thin is the conceptual distinction between the defenses of justification and excuse (even if the contents of the two categories are driven by considerations that are substantive to the criminal law, not just formal), I hope to prod scholars to argue for their favored articulations of particular defenses (like particular offenses) in terms of good policy broadly conceived—justice, fairness, efficiency, administrability, and the like—not in terms of conceptual or logical truths.

When embarking upon these tasks, to be sure, theorists and law reformers may find it extremely useful to think hard about what makes conduct morally justifiable and about when conduct that is not morally justifiable is nonetheless morally excusable. This is because no minimally just regime of criminal law can treat these judgments with indifference. It is a different matter entirely to try to separate the "legally justifiable" from the "legally excusable." The case for the wisdom in that still has not been made.