DISTINGUISHING JUSTIFICATIONS FROM EXCUSES

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I

INTRODUCTION

Ann swings her arm and injures Ben. She faces moral condemnation and legal liability unless she can offer an explanation that absolves her of full blame. She might make a claim of justification that, despite initial appearances, her action was desirable or proper, or she might make a claim of excuse that she does not bear full responsibility for injuring Ben. If Ann is fully justified, she will not be subject to blame or to classification as a weak or defective person. If Ann is excused, she may be regarded as wholly or partly free of blame, but she will have demonstrated weakness or some defect. Because the moral evaluation of a justified actor differs from the moral evaluation of an excused actor, deciding whether Ann is justified or excused is an important moral question.

In the legal context, a defendant who successfully establishes the legal analogue of a moral justification or excuse is typically relieved of liability. Because of the injury to Ben, it is likely that Ann will be prosecuted for assault, which is defined as "purposely, knowingly, or recklessly causing bodily injury to another."¹ Nevertheless, Ann may offer an exonerating explanation that precludes satisfaction of the basic elements of the crime or that, conceding the presence of the basic elements, precludes liability on other grounds.

In modern American criminal law the terms "justification" and "excuse" only refer to the second kind of explanation—that is, they concede the presence of the basic elements but deny liability on independent grounds. If Ann acknowledges that she intentionally hit Ben but did so to prevent him from detonating a bomb, she offers a justification; if she says that she decided to hit him because she was insane, she offers an excuse.

There are other explanations that exonerate an actor from liability because they preclude satisfaction of the basic elements of a crime. These explanations are similar to justifications or excuses but are not labelled as such by the law. If Ann says she had to take the risk that her swinging arm

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1. MODEL PENAL CODE § 211.1(1)(a) (1985). The Model Penal Code does not, of course, represent the law in any actual jurisdiction, but a number of states have followed many of its provisions. Because this paper is theoretical, it frequently cites the Code without addressing variations in different states.

would injure Ben in order to protect Carol from David's deadly attack, she effectively denies that her actions were reckless, since recklessness involves the conscious disregard of a substantial and *unjustifiable* risk.² If Ann says she was flailing her arms for dramatic effect, unaware that Ben was standing close by, she denies the minimal culpability requirement of conscious risk-taking. In admitting clumsiness, Ann removes her actions from the ambit of assault.³ As J.L. Austin noted in *A Plea for Excuses*, "[when] I have broken your dish . . . maybe the best defense that I can find will be clumsiness."⁴ The second half of this article notes that many exonerating explanations that look like justifications and excuses concern the basic elements of offenses and explains why this fact bears strongly on the expectations one should have from the legal system in distinguishing justifications from excuses more narrowly understood.

If the exclusive purpose of criminal law were to allocate an appropriate amount of punishment to those accused of doing wrong, the law would not need to distinguish between justifications and excuses. But because it reflects and reinforces moral judgments, criminal law should illuminate the moral status of various courses of action, and the community should be concerned with the reason a particular individual goes unpunished. If, without cost, the legal system could work sharp, clear distinctions between justifications and excuses, such distinctions would be desirable.

This article discusses the impediments to these clear distinctions.⁵ Section II focuses on the central feature that distinguishes justifications from excuses. Section III addresses situations in which ordinary concepts of justification and excuse leave uncertainty as to which label to apply. Troubling borderline situations need not pose significant hurdles to moral evaluation, which does not have to accept either-or labels. But traditional puzzles about moral appraisal do impinge on the distinction between justification and excuse. Section IV considers the implication of the distinction between justification and excuse for the law's necessarily more rigid labels. Because of this rigidity, the law should not aim for comprehensive, precise distinctions between justification and excuse.

2. MODEL PENAL CODE § 2.02(2)(c) (1985).

3. Another explanation Ann might give is that her arm moved because of a strong electric shock. In this situation, her action would not satisfy the requirement that a crime involve a voluntary act or omission. MODEL PENAL CODE § 2.01(1) (1985).

4. Austin, *A Plea for Excuses*, in FREEDOM AND RESPONSIBILITY 6, 7 (H. Morris ed. 1961).

5. The article builds on Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984). Although the basic themes remain the same, the organization here is different and some points are new or more fully developed.

II

BASIC CRITERIA FOR DISTINGUISHING JUSTIFICATIONS FROM EXCUSES

A. Warranted Action As the Central Feature of Justification and Nonresponsibility As the Central Feature of Excuse

When something is fully justified, it is warranted. A justified belief is a belief based on good grounds; a justified action is a morally appropriate action. When something is fully excused, it is not warranted, but the person involved is not blameworthy. An excusable belief is one that a person cannot be blamed for holding;⁶ an excusable action is one for which a person is not fully responsible. This is the central distinction between justification and excuse. Insofar as others are responsible and have the power of choice, they would do well to replicate a justified action but to avoid an act like that excused.

Occasionally commentators have suggested other distinguishing characteristics as central to the distinction.⁷ For example, it has been argued that justifications are general, applying to everyone in the same situation, and excuses are individual, relating to the characteristics of the particular actor.⁸ Although a substantial correlation of this type does exist, some legal excuses as well as some moral appraisals have objective components: their application depends on how ordinary people would react to difficult conditions. If, as this article claims, justifications depend partly on an actor's state of mind, then they do take account of an important individual characteristic.

Another proposed distinction concerns the rights of others. Generally, justified acts may be aided and not prevented, and excused acts may be prevented but not aided. These correlations, however, are imperfect. In the field of moral evaluation, one can speak of clashing courses of action as justified. A person may be morally justified in shielding a family member from the police, and the police may be morally justified in searching the person's apartment to find the family member. On occasion, the law may also privilege competing courses of action. And if excused action may be stopped, it may not always be stopped with the same tactics as unexcused action. Perhaps Richard is morally and legally justified in shooting an ordinary assailant who runs toward him with a knife in his apartment, even if he could retreat. He may not, however, be justified in shooting if he knows the assailant is crazy.

Much more could be said about these other divisions, which correlate fairly well, although not precisely, with the distinction between warranted and unwarranted action. I shall assume in what follows, however, that in morality

6. Someone might, for example, lack solid rational basis for a belief, but be "excused" because his parents powerfully instilled that belief during childhood.

7. The distinctions are explored at greater length in Greenawalt, *supra* note 5, at 1915-27; see also Dressler, *New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. REV. 61 (1984).

8. See Dressler, *supra* note 7, at 67; Greenawalt, *supra* note 5, at 1915.

and law the distinction between warranted and unwarranted action is the critical distinction between justification and excuse.

B. Partial Exonerations

Partial exonerations present a more difficult decision about terminology. It is easy to determine how to treat partial excuses, which diminish responsibility. Assume, for example, that Ben has taunted Ann so that she strikes out. Lacking full control over her actions, Ann is less to blame for intentionally hitting Ben than if she had acted with deliberation. The law may recognize the lower level of blame by imposing a lesser punishment.⁹

The more difficult questions concern partial justifications. In one sense, a partial justification can undoubtedly exist. It is possible to justify one aspect or initial stage of action even though there is no justification for another aspect or subsequent stage. Suppose, for example, that Ben starts to slap Ann. She responds initially with appropriate force but continues to hit Ben after disabling him. Ann was justified in using moderate force, but her continued hitting was unwarranted. Taken as a whole, her action could be viewed as partially justified.¹⁰

It is more difficult to determine, however, how to characterize the situation in which an act is wrong in its entirety but not as wrong as it might otherwise have been. Ann has learned that Ben has misused her close friend. She strikes him as part of a careful plan to hurt and embarrass him and to teach him a lesson. Ann's assault is unjustified but it is not *as* unjustified as assaults committed for selfish or trivial motives. The reason for the act mitigates its wrongfulness. Ann's partial exoneration bears little resemblance to most excuses because it has nothing to do with the degree of her responsibility. Indeed, she was fully responsible for her action. The reason that she is less blameful is the same sort of reason that might fully justify her act; it differs only in that it is less powerful. The conceptual difficulty is that the term justification has an either-or quality that makes people hesitant to speak of a partial justification when no aspect of the action is fully justified. Austin spoke of "terms, such as 'extenuation,' 'palliation,' 'mitigation,' [that hover] uneasily between partial justification and partial excuse."¹¹ Describing an action as partially justified when it is *less inappropriate* than it would otherwise be is theoretically useful,¹² but it is important to note that this usage strains

9. Definitions of assault generally do not contain an explicit grading based on such factors, although a judge's sentence may take them into account. Intentional killings which would otherwise be murders are, however, typically reduced in grade to manslaughter if the actor responded to provocation or was "under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse." MODEL PENAL CODE § 210.3(b) and comment 5 (1985).

10. A similar characterization might be appropriate if she initially used a baseball bat. In such a case, a degree of force would be justified but the excessive force would not be justified.

11. Austin, *supra* note 4, at 6.

12. That justification may be partial and may explain at least some provocation cases is suggested in Bickenbach, *The Defense of Necessity*, 13 CAN. J. PHIL. 79, 87-88 (1983), and Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421 (1982).

ordinary concepts. A partial justification in this sense is not the meaning that is usually associated with partial justification.

III

TROUBLESOME EDGES IN MORAL EVALUATION

Sometimes an explanation falls within the general range of justifications and excuses, but deciding on the appropriate label proves difficult. The problem may concern the relations among behavior, consequences, and knowledge, the coalescence of the elements of excuse and justification, or divergences of moral appraisal.

A. Behavior, Consequences, and Knowledge

One who makes a moral evaluation may focus on the actor's actual behavior or its consequences. One may also focus on the behavior or likely consequences as understood at the time of the act.

1. *Harmful Incidental Side Effects of Appropriate and Desirable Action.* Some desirable acts have predictable unwanted effects. A clear, if controversial, example is the traditional notion that bombing of military targets is justified even if a consequence of this action is the death of a limited number of innocent civilians. Under the traditional assumption, the act of bombing is undoubtedly justified rather than excused. But what status does the killing of innocent civilians have? One might argue: "The killing of the innocent civilians is excused because the bombing was justified." This example illustrates the degree to which labels of justification and excuse may depend on the way in which the relevant inquiry into wrongfulness is framed. The example also shows that the line between appropriateness and responsibility blurs. One might say that because the act of bombing is not wrongful, the actor's responsibility for the consequent innocent deaths is eliminated or lessened. However, if the critical inquiry addresses the decision to bomb in the first place, justification, and not excuse, is involved.

2. *Facts and Perceivable Facts.* Human beings must act on facts they know and consequences they expect, but acts that seem entirely appropriate often turn out to have consequences so unfortunate that the actor would have acted differently had he foreseen the consequences.

Victoria is brought unconscious into Frank's hospital. Only an immediate operation will save Victoria's right leg. Although the chances of the operation causing death are very slight, Victoria dies. An autopsy reveals that death occurred because she had a weak heart valve—a factor that could not have been ascertained in advance.

Plainly, Frank was blameless in performing the operation, but was his action justified or excused? The difficulty lies not in morally evaluating the situation, but in expressing that evaluation. As with the bombing example, the exonerating word that one chooses may depend on how one characterizes Frank's actions. One might argue that his performance of the operation was justified, but that his causing of Victoria's death was excused. This problem in

expression partly stems from a pervasive problem in moral evaluation: choosing whether to judge an act according to its actual or its expected consequences. A person may distinguish his evaluation of the desirability of the act from his evaluation of the actor's conduct. If one wants to make a moral evaluation of Frank's behavior or to recommend behavior for others faced with similar ascertainable facts, the word "justification" is much more suitable than the word "excuse."

Some may argue that this conclusion fails to take into account the distinction between perceptions of present facts and predictions of future consequences. Thus, action based on a sensible prediction that turns out to be wrong may be justified, but action based on a misestimation of present facts may only be excused. Such reasoning, while intuitively appealing, is flawed. If one accepts a rough determinism about natural events,¹³ then one understands that a mistaken prediction rests on ignorance of some presently existing facts or general causal relationships. The distinction between present perception and prediction collapses. Moreover, if present facts are undiscoverable, a best estimate of these facts that turns out to be wrong is not morally different from a best estimate of future consequences that turns out to be wrong.

The line between facts that are unknowable and those that are knowable but not discovered is not a better basis for distinguishing justifications from excuses. If "unknowability" means inherently incapable of being known given the present stage of human understanding, then Victoria's weak heart valve was knowable. It could have been discovered if she had been killed and dissected—hardly an appropriate procedure for a doctor considering surgery. When the only way to determine a fact defeats the purpose for which one needs to know the fact, the fact is "practically" unknowable. But suppose that with sophisticated equipment and ample time for testing, Victoria's weak heart valve could have been discovered without damage to her. Even "knowability" in this sense is hardly relevant for a doctor who must act quickly and does not have prompt access to the necessary equipment. So long as one exercises the best possible judgment on the facts he can reasonably acquire, the existence of other facts knowable only in some practically unimportant sense is immaterial for purposes of moral evaluation.¹⁴ His act is justified even if, in retrospect, the estimation turns out to have been wrong.¹⁵ Neither

13. As it is used in this article, the phrase "rough determinism about natural events" dispenses with two possibilities. One is that some indeterminacy infects the natural universe. Even if that were so, most natural events in the near future might be considered predictable if there were perfect information about all present facts. The second possibility is that human choice is not determined in the way that natural events are. Even if that were so, such a possibility would not affect one's conclusions about future events that do not depend on human choices made after one acts.

14. It is more troublesome to judge the act of one person when another person would have been capable of making a more accurate estimation than the first person, and, consequently, would have acted differently. I pass over the complexity here, but it is discussed briefly in Greenawalt, *supra* note 5, at 1909-10.

15. In this simple example, Frank thinks it highly probable that Victoria has an adequately strong heart valve. If the best estimations are that a person has a 95% chance of dying quickly without an operation and a 70% chance of dying during an operation, the doctor will operate,

moral relevance nor ordinary usage supports distinguishing between justification and excuse on the basis of a line between unknowable and knowable facts.

In the converse situation, an actor does something that he reasonably believes will do harm but that turns out to be beneficial.

Ann strikes Ben solely out of personal hate. Unknown to Ann, Ben was about to trigger a device to detonate a bomb in a crowded place. Ann's blow makes Ben drop the device, which breaks and is rendered harmless.

Given the facts available to Ann, her act was wrongful, but it turned out to be highly desirable. Excuse is not an option; either Ann's act is justified or it is wrongful and not excused. Again, human expression is sufficiently rich to differentiate Ann's behavior from its consequences. One might argue that Ann was wrong to hit Ben but her actions turned out to have been warranted. However, if the central purpose is to evaluate Ann's moral status, Ann's act must be termed unjustified.

3. *Blameworthy Factual Mistakes.* Ascribing the proper characterization to acts based on avoidable factual mistakes is particularly difficult. If Frank, possessing the capabilities of an ordinary doctor,¹⁶ unreasonably fails to detect Victoria's condition, then he is somewhat blameworthy for performing the operation, though less so than would be a surgeon who knew the operation was too dangerous. One could argue that Frank offers a partial justification for what he has done. However, because his state of mind seems to go to his degree of responsibility for his actions and their consequences, his negligent ignorance is better characterized as a partial excuse.¹⁷ He is therefore less responsible than one who performs such an operation with full awareness of its dangers.¹⁸

although the patient *probably* will not survive the operation. More complex language than is used in the text would be required to cover the case, but the best estimate of probabilities would render the operation justified.

16. When people like doctors make decisions on the basis of their special skills and training, the standard of comparison is another person who has those skills and training. What if the actor has lesser capabilities than the ordinary professional, or the ordinary person in his situation, and has made the best perception possible for him? To take a stark example, imagine that a deaf person performs an act that a hearing person easily would have perceived as undesirable. One would probably say he was excused by his inability to hear, rather than that he was justified under the circumstances. Though if one were very precise, one might say that given his deafness, his action was justified. If I am correct that perceptual inadequacies are usually considered excuses, then this fact suggests that notions of justification usually assume the standpoint of an ordinary person in the given situation.

17. If partial excuse is the best label for acts done because of negligent misconceptions, what if a person makes a reasonable appraisal of the facts but one that is less accurate than was possible for him or any ordinary person in his situation? Is he then only excused, because of falling short of the best possible appraisal, or justified, because of acting on an appraisal that was appropriate? The answer to this terminological question is closely linked to how perfectionist one's view of morality is, an issue explored *infra* text accompanying notes 19-21.

18. The example demonstrates the importance of the standard with which one compares the actual state of affairs. If comparison is with a state of blameless misperception, then the statement that Frank was negligently ignorant is not an exoneration of any kind.

The reasonableness of one's failure to perceive a *justifying fact* is irrelevant to moral evaluation and the characterization of one's act. If Ann might have discovered easily that Ben was about to detonate the bomb, her act of striking Ben would not be less blameworthy than it would be if her ignorance was unavoidable. Nor is the act more blameworthy, since Ann had no moral duty to determine that her act might actually be less wrong than she supposed.¹⁹

B. Coalescence of Elements

Some situations generate elements of both justification and excuse. Separating the threads proves troublesome when one aims to ascribe labels to an act. Unexpected natural events or human threats can create "necessitous circumstances," which force individuals to risk grave danger or perform acts that would otherwise be wrong. A mountain climber in a snowstorm must break into a cabin to save his life; a man must drive a getaway car for murderers or be killed by them.

Two grounds of excuse are present. Emotional upheaval and irrationality often result from extreme situations. People in those states are considered less responsible for their actions and less blameworthy for their wrong choices than people operating under normal conditions. Notions of involuntariness concern not only an actor's mental state but also the objective conditions under which he acts. If someone else has imposed grossly unfair conditions of choice, one may say a person is not responsible for what he does even if he acts with calm deliberation.

Crucial elements of justification also are involved. If the danger is severe enough, the choice to perform an act that would otherwise be wrongful will be morally desirable. The desirability of the choice is clear in the mountain climber's case. And, whatever one may think about driving a getaway car for murderers, if the choice were between being killed or stealing a diamond, the theft would be preferable. Even when the actor's behavior is not fully justified, the danger he averts may support a claim of partial justification.

What label should one affix for purposes of moral evaluation when both elements of justification and excuse are present? Because the word "excuse" connotes a degree of weakness, one should refer to acts as "justified" whenever they are warranted. Where the act is unwarranted, but the actor satisfies the requirements of excuse, then one ought to use the term "excuse". When the presence of both elements reduces but does not eliminate blame, no simple answer to the terminological question exists, although the connotations of partial justification may lead people to feel more comfortable with the term "partial excuse."

19. The conclusion that the reasonableness of her ignorance is morally irrelevant also obtains if, contrary to what has been suggested, the actual facts compel regarding her striking Ben as justified.

C. Divergences of Moral Evaluation

Clear conceptual categorization cannot alone resolve whether particular acts are wrongful without qualification, justified, excused, partially justified, or partially excused. So long as people disagree over what actions are morally right and what impairments relieve one of responsibility, they will disagree about how to characterize acts.

1. *Variant Approaches to the Nature of Morality.* The problem of distinguishing justifications from excuses extends beyond differing moral judgments about individual situations. Indeed, it reaches the heart of diverse concepts of morality. The conflict centers on the extent to which one's morality demands the best possible action and the means by which one determines which actions are morally preferable.

Joan chooses to take an expensive vacation rather than donate to famine relief the \$3,000 she has saved.

Assume that Joan would have acted in a morally preferable way if she had foregone her vacation and contributed to famine relief.²⁰ One way of viewing Joan's decision is that it was morally wrong but that it reflected a common selfishness. Therefore, she is entirely or partially excused. From a contrary perspective, Joan has no duty to contribute. Although making the contribution would have been a praiseworthy, supererogatory act, her decision to take a vacation was within the range of morally permissible acts and was therefore justified. Some moralities, including Christian perfectionism and act-utilitarianism, draw no principled distinction between duty and supererogatory acts. These moralities maintain that one ought always to do what is morally best. Other moral approaches view duty as limited to minimal respect for the rights and welfare of others, leaving individuals free to choose their actions when duty is not implicated. The position one adopts may determine whether one labels an act as justified or as excused.

Apart from demanding various degrees of perfection, moral perspectives differ widely in the grounds they assign for moral preferability. A sharp split exists between deontological and consequentialist approaches.²¹ This article focuses on two subjects of disagreement: special relationships and individual shortcomings.

Lyle helps his sister hide from the police, although he knows she has killed a person and he reasonably believes she may kill again.

20. Perhaps a believer in an "invisible hand" that renders selfish actions socially desirable would say her actual choice is morally indifferent or even preferable, but what matters for purposes of this discussion is the difference in view among those who agree that the donation would have been morally better.

21. Briefly, a consequential approach makes the morality of an act turn on whether it produces, or will predictably produce, a more favorable balance of consequences than alternatives. A deontological approach makes the morality of an act depend, at least partly, on some independent quality of the act.

Lyle realizes that society's welfare would best be served by not aiding his sister, but feels a powerful family obligation to assist her. Does morality require Lyle to take a disinterested perspective or should he give special weight to his relationship to his sister? Even from a disinterested perspective the relationship will matter since his sister will be more hurt and resentful if Lyle refuses to help than if a remote acquaintance does so. But may Lyle give more weight to his relationship with his sister than the disinterested utilitarian perspective would allow? A straightforward act-utilitarian would say "no." From this perspective, if Lyle's refusal to aid his sister would predictably yield better overall results, then Lyle's aid could at best be excused, not justified.²² But one might defend Lyle's decision as justified if one views his obligation to his sister as based on an independent moral ground that does not rest on, or always yield to, a balance of social consequences. One might argue on behalf of this view that individual lives and social relations are enriched if individuals conceive of their family obligations as having primacy. From this perspective, Lyle's decision to assist might be thought as good as, or preferable to, the alternative.

Maude commits adultery, correctly believing that if she does not do so she will become extremely frustrated and will inflict abuse on her children.

Assume that secret adultery violates a moral duty to a spouse. Maude understands that the violation of this duty will help her to forestall future violations of a duty towards her children. From an act-utilitarian perspective, Maude is warranted in taking the fruits of her predictable frustration into account; if her assessment is accurate, her adultery will be justified. Those who take a more absolute view of duty do not concede that the likelihood of a future violation of duty may justify a present violation of another duty. For them, Maude's adultery is wrongful, although her self-awareness, if accurate, may give her some kind of excuse or partial justification.

Each of these examples shows how the labels of justification and excuse tie into broad moral theories. For Joan and Lyle, a deontological approach is more likely to concede a justification than a consequential approach. For Maude, the obverse holds true. Regardless of one's viewpoint, labels can be applied and explained within the context of the particular moral theory chosen.

2. *Differences between Appraisers and Actors.* An individual evaluates another's act from his own moral perspective. That task becomes more difficult once he realizes that the actor's sense of moral correctness may differ radically from his own. For example, imagine that the observer is a nonpacifist who must judge the refusal of a pacifist to submit to the draft. The nonpacifist, who respects the pacifist's convictions, is likely to resist the simple label "justified" or "excused" and will argue: "Paul's pacifist beliefs, although understandable, are mistaken and therefore not justified, but Paul is

22. A utilitarian might admit that the aid was partially justified, in the sense that it was less wrongful than ordinary aid to known murderers.

justified in acting upon his strong convictions.”²³ To act on one’s own convictions is regarded as morally virtuous and appropriate. To the extent that he does so act, Paul is justified, but, insofar as Paul’s act rests on a mistaken moral evaluation, it is only excused. In one sense, the issue in this situation is not one of responsibility since Paul has made a deliberate choice in light of all the ascertainable relevant facts. One might say, however, that Paul is less responsible for the wrongfulness of his act than if he did realize that it was wrong.

In the converse situation, the actor behaves wrongly by his own moral appraisal but correctly in the view of an observer. The nonpacifist evaluates Paul’s submission to the draft, knowing that Paul is a pacifist by conviction who has allowed himself to be drafted because he does not want to appear odd.²⁴ Unless Paul’s reason for violating his convictions is one that reduces the level of appropriate blame, excuse is not in issue: either Paul is justified or his act is wrongful. Again, the observer is likely to resist an either-or conclusion, arguing: “What Paul actually did was justified under a correct moral appraisal of the choices but he was not justified in disregarding his own judgment about what was right.”

The examples discussed demonstrate that the simple labels of justification and excuse are often too crude to express all the aspects of a moral evaluation. Nevertheless, language is sufficiently rich to provide an appropriate description of moral judgment. In contrast, the law is less flexible.

IV

DISTINGUISHING JUSTIFICATIONS FROM EXCUSES IN THE LAW

In this section, after identifying those troublesome borderlines of moral evaluation that create difficulty for the law, I suggest that the criminal law ought not attempt to delineate bright-line distinctions between justifications and excuses.

A. Troublesome Borderlines in the Law

Some instances that create difficulty for moral labelling do not pose significant problems for the law. For example, the law does not often concern itself with situations where incidental harm predictably results from desirable acts. Harm is often crucial to the definition of a crime but almost always because it results from a culpable action. Thus, if Ann recklessly swings her arm and strikes only air, she is guilty of no crime, but if she connects with

23. Alternatively, the observer might think that another’s acts violate the rights of innocent beings. Suppose the observer is an opponent of abortion, who must judge a doctor who performs them, or a vegetarian believer in animal rights who must judge those who eat meat. These observers would be unlikely to feel comfortable with the label “justified,” and would wish instead to make plain that the other’s moral position is founded on a profound error.

24. The more obvious reason for submitting to the draft, that the pacifist fears going to jail for not doing so, is not cited here because in the United States genuine pacifists do not have to go to jail.

Ben's jaw, she has committed an assault. The law treats an actor's behavior as justified when the actor correctly claims the act that predictably produced an incidental harm was warranted.

The law aims to make individuals respect the interests of strangers. When it demands accession to the rights or interests of strangers, it is ordinarily inflexible. Apart from granting limited privileges not to testify against close family members, the law does not ordinarily allow one to commit otherwise criminal acts in the interests of benefiting close relatives. One exception to this general principle is the defense of duress. The law of duress allows an actor to respond to some threats against himself and the members of his family even though an outsider would view the actor's resulting crime as inflicting a greater harm than the action threatened against him.²⁵ Duress is typically labelled an excuse, and any permitted preference for family members should be so viewed, because the act was based on impairment of rational judgment or unfair conditions of choice. The law does not view any such preference as justified. Since the acts excused violate the more substantial protected interests of strangers,²⁶ it would have been better, from the law's point of view, if the actor had not yielded to the threat.

The formal law makes few concessions to actors who commit crimes based on idiosyncratic views of what is morally required. Although sincere moral convictions may affect the exercise of prosecutorial discretion or sentencing,²⁷ they generally do not serve as either justifications or excuses. On occasion, a legislature creates a special exception, as Congress has done with respect to conscientious objectors to military service.²⁸ However, these exceptions to ordinary principles of liability are not typically labelled either justifications or excuses.

25. It is anomalous that present American law does not recognize a similar defense for one who is impelled to act by natural forces.

26. This statement may seem too simple if one considers partial justifications and the range of morally permissible acts. The law's treatment is certainly consistent with the idea that a partial justification as well as a full excuse is present. Furthermore, even when resistance to duress is preferable, submission may be morally permissible. Therefore, one cannot be sure if exoneration rests on this broad idea of justification or on excuse. The response to these concerns is that the law's labelling reflects the common view that infringement of the moral rights of innocent people is not typically regarded as morally permissible when the predictable consequences are, on balance, undesirable.

27. See generally Greenawalt, *Conflicts of Law and Morality: Institutions of Amelioration*, 67 VA. L. REV. 177 (1981).

28. Selective Service Act, 50 U.S.C.A. app. § 456(j) (West 1985). The courts also have carved out other similar limited constitutional privileges. These privileges are primarily based on the free exercise and free speech clauses, U.S. CONST. amend. I. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (because Amish believe that continued public education is contrary to religion and their way of life, Amish are permitted to withdraw children from school after the eighth grade, notwithstanding the state law mandating compulsory education to age 16); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (parents, Jehovah's Witnesses, are not criminally liable for contributing to the delinquency of minors by encouraging their children not to salute the flag during the pledge of allegiance where religious belief of the Jehovah's Witness is that the flag is a "graven image" and cannot be honored); *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (not a criminal offense for Navajo Indians to use peyote, a narcotic drug, in their religious rituals).

The major problems for the law are factual misperceptions, the coalescence of elements of justification and excuse, and varying standards of moral appropriateness. Even these labelling difficulties do not arise in every setting in which they would for moral evaluation. They do not, for example, surface in the law when the actor's obvious behavior or the explanation of his behavior puts him outside the reach of the basic elements of crime.

State citizens are divided among those who think adultery should be criminal, those who think adultery is always or usually morally permissible, and those who think adultery is at best morally excusable but not a proper subject for criminal punishment. The latter two groups combine to successfully repeal existing criminal sanctions against adultery. Maude subsequently commits adultery.

Since Maude's behavior is not a concern of the criminal law, that law does not label her act as justified, excused, or wrongful.²⁹ The law's failure to distinguish between justifications and excuses extends to situations in which a harm that the criminal law usually reaches is involved but some basic element of a crime is missing. Suppose Ann's explanation of her swinging arm hitting Ben is that she did not mean to hit Ben and had no idea he was nearby. If the law accepts her claimed failure to perceive the facts, she has not committed assault, which requires at least recklessness with regard to the chance of harm.³⁰ Once it is clear that assault is absent, the criminal law has no occasion to label Ann's conduct as justified or excused or to decide if her lack of awareness of the risk to Ben involved some fault on her part.³¹

B. Facts and Perceivable Facts

How should the law evaluate situations where an actor is mistaken about justifying circumstances? Consider first the faultless factual appraisal.

1. Ann(1) strikes Ben, believing that Ben is trying to assault her. Anyone else would have reached the same conclusion. In fact, Ben was only pretending to assault Ann and intended to stop short of hitting her.
2. Ann(2) strikes Ben because she hates him, completely unaware that he was about to detonate a bomb. Her action prevents the detonation.

There are at least three possible approaches to evaluating these hypotheticals: (a) an actor's faultless appraisal should control, in which case Ann(1) is justified and Ann(2) is not; (b) the actual facts should control, in which case Ann(2) is justified and Ann(1) is not; and (c) justification depends on an actor's being supported both by the actual facts and by his appraisal of them, in which case neither Ann(1) nor Ann(2) is justified.

29. One might say that anything the criminal law permits is actually justified, but that seems implausible if the behavior is wrong under other areas of the law. Adultery, for example, is still viewed in many states as grounds for divorce.

30. See *supra* text accompanying note 1. Most modern American criminal statutes make clear that recklessness requires subjective awareness of risk. Common law jurisdictions have not always had this requirement. See, e.g., *Beeman v. State*, 232 Ind. 683, 692, 115 N.E.2d 919, 923 (1953) (in upholding conviction under reckless homicide statute, Indiana Supreme Court stated that "[i]t is sufficient that the actor realizes, or should realize that there is a strong probability that such harm may result").

31. That issue would be relevant if Ben sued Ann in tort.

In the discussion on moral evaluation, I suggested that if one is concerned with judging the actor, the actor's blameless perception of the facts ought to be sufficient to support a justification. Ann(1) is not to be blamed for her action, but Ann(2) is to be blamed for hers. Since the criminal law attempts to make just such judgments about actors, it too should treat the faultless mistaken appraisal as sufficient to support justification. The dominant import of American law is to treat mistaken appraisals in this way.

One objection to this treatment of the faultless mistaken appraisal is that justification necessarily depends on consonance with the true facts.³² However, the concept of justification is sufficiently complex to encompass those situations where an actor's appraisal of the facts is as good as anyone's could be under the circumstances.

A second objection is that an actor is unlikely to consider his action justified when he feels remorse over sensible choices that turn out badly and hurt others.³³ This argument fails, however, to account for the complexity of the relationship between remorse and wrongdoing. Moral training may lead one to feel remorse when he causes certain harms even where, in relatively rare instances, one's causing those harms was not the result of a wrongful act.

A third objection is that the "actor's appraisal" approach leads to the conclusion that both persons in a conflict of force may be justified.³⁴ The answer to this objection is that despite its initial oddness, there is nothing illogical about saying both persons are justified. In fact, that conclusion is appropriate for situations that occasionally arise.

Each of the two other approaches to labelling acts as justified is more problematic than the approach based on the actor's faultless appraisal. By demanding that behavior conform with the unknowable actual facts, each approach would break the link between legal justification and the appropriate moral judgment of the actor. Neither approach regards Ann(1) as justified³⁵ even though she has committed no moral wrong.

The position that justification depends on consonancy with *both* subjective appraisal and actual fact fails to explain adequately why the absence of either support is enough to term an act unjustified, and why the presence of both is needed to make an act justified. The view that justification depends exclusively upon actual fact, on the other hand, avoids this oddity, but it offends one's intuitive moral sense by treating Ann(1) as unjustified and Ann(2) as justified. The appeal of this position lies not in its moral sensitivity but in its legal conclusions.³⁶ An examination of this position, however, shows that one can reach the conclusions without relying on this approach.

32. See, e.g., Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 972-80 (1985).

33. See, e.g., Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?*, 26 UCLA L. REV. 1355, 1363 (1979).

34. See, e.g., Fletcher, *supra* note 32, at 975.

35. In any event, under either approach, Ann would not be punished, since her faultless factual perception would give rise to an excuse.

36. See generally 2 P. ROBINSON, CRIMINAL LAW DEFENSES § 122 (1984).

Although the actual facts approach labels the actions of Ann(2) as justified, it does not absolve Ann of liability. Modern law no longer embraces the notion that an actor can escape liability for his actions whenever the success of his efforts would not amount to a crime. Under most current law, Ann(2) would be guilty of attempted assault because she was trying to do something that would have been assault if the facts had been as she thought. A good argument can be made that Ann(2) should not be treated like the person who has actually committed assault.³⁷ Because he has caused no harm, the person who swings in order to hit, but misses, is guilty of a less serious offense than one who hits. Similarly, Ann(2), on balance, has caused no harm since her act turned out to be socially beneficial.³⁸ Nonetheless, it is somewhat artificial to speak of Ann(2)'s striking Ben as justified. What she did is not really regarded as justified, since she remains subject to criminal penalties. It would be more precise to term her act unjustified, but deserving of comparatively less punishment than if she had caused the expected harm. Thus, even if one accepts the practical conclusion yielded by the "actual facts" approach, the conceptualization involved in that approach is highly strained. Therefore, just as the moral judgment of the actor embraces such an idea, the law ought to embrace the idea that justification exists where action is based on a faultless appraisal of the facts.³⁹

How does one evaluate those situations where one's failure to correctly appraise the facts is blameworthy? Suppose that the failure of Ann(1) to realize that Ben was pretending was negligent. As discussed previously, such an explanation may lead one to consider Ann(1) less responsible for the harm caused than someone who was aware that his swinging fist was likely to strike Ben.⁴⁰ If a choice must be made between labelling the act as "justified" or "excused," the latter would be more precise. I address below whether the law is to be faulted for not employing the more precise label.

C. Coalescence of Elements

How should the law deal with situations in which elements of justification and excuse coalesce? Confusion over the combination of these elements is reflected both in the somewhat anomalous status of duress and in the largely unconscious shift over time from the idea that necessity is an excuse to the idea that it is a justification. Duress is typically labelled an excuse,⁴¹ yet if someone credibly threatens to kill three bystanders unless Ann steals a bicycle, Ann surely must be considered justified in stealing the bicycle. Many

37. This distinction may not be that important in the context of assault, but consider the significant difference between actual murder and attempted murder.

38. The connection between actual harm and the degree of liability is a matter for conjecture, but it is assumed here that Ann(2) should be treated like the person who merely attempts assault.

39. This article does not consider appraisal that is reasonable but not the best that the actor, or people generally, are capable of producing.

40. Consistent with the discussion of moral evaluation, I assume that the fact that one is careless in not recognizing that one's act is justified does not affect how one's act should be labelled.

41. See MODEL PENAL CODE § 2.09(1) (1985).

jurisdictions now classify this type of reaction to a threat as a general justification (or necessity).⁴² In other jurisdictions, however, duress is the only applicable defense. The treatment of necessity exclusively as a justification produces an indefensible distinction between human threats and "threats" from "natural forces." A person who commits an unjustified act in response to a human threat that most people would not resist has the excuse of duress. On the other hand, a person who performs an unjustified act in response to a dire "threat" posed by flood or fire that most people would not resist has no defense at all. Thus, a person who kills four strangers under the credible threat that otherwise three members of his family will be killed may successfully claim duress. However, a person who, in order to save his three family members during a flood, grabs a boat that otherwise, to his knowledge, would have been used to save four strangers, will have no defense since the act is not justified and is not the result of a threat in the sense used in most duress formulations.

The cleanest conceptual approach to these difficulties is one that parallels the approach to moral evaluation discussed earlier.⁴³ Whether the extraordinary influence on choice is natural exigency or human threat, one ought first to look at whether an act is legally justified. If the act falls short of being justified, one ought then to ask whether sufficient grounds for excuse are present.⁴⁴

D. Divergence of Moral Evaluation

The problem of legal labelling is more pressing than that of moral appraisal because the law speaks with a single voice. As noted previously, attaching labels to any particular act requires both a judgment about the act and a theoretical framework to lend significance to the label.

A heavily armed group of bandits enters a small village and threatens to kill every resident unless the villagers kill an enemy of the bandits who is hiding. The villagers initially do not comply, and the outlaws kill all the members of one family, leaving the villagers one hour to decide whether the killings will continue. The villagers give in and kill the bandits' foe, saving the lives of the seventy remaining residents.

One may view the villagers' decision to kill in a number of different ways: it might be regarded as the best possible solution, as the morally indifferent product of an unresolvable dilemma, as less preferable than the decision not to kill but within the range of morally permissible alternatives, or as definitely wrong but excusable. Regardless of the viewpoint taken, most people would agree that the villagers should not be punished. How well does a determination that the killing is justified represent the first three positions? If

42. See *id.*, § 3.02 and comment 1.

43. See *supra* section IIIB. The modern German penal law takes this approach. See Strafgesetzbuch §§ 34-35 (W. Ger.). See generally Esser, *Justification and Excuse*, 24 AM. J. COMP. L. 621, 622 (1976) ("According to the new general part of the German Penal Code, the distinction between (objective) justification of act [§ 34] and mere (subjective, individual) excuse of the actor [§ 35] is now expressly recognized as a matter of principle . . .").

44. A partial justification, rendering the act *less* wrongful, might be relevant in deciding whether the act should be excused.

the label “justified” means *only* that a decision is within a permissible range, then it is an appropriate label for all three. But if “justified” is taken to signify that a choice is preferable or indifferent, the label will not fairly reflect the third position.

Because the law permits much behavior that is regarded as morally less preferable than its possible alternatives, the “permissible decision” idea is probably the justification notion that is best suited for the law. However, the difficulty involved in distinguishing the “permissible decision” notion from stronger concepts of justification and from excuse casts considerable doubt on the usefulness of “permissible decision” as the basis for a systematic elaboration of justification and excuse.

E. Constraints on Legal Precision About Justification and Excuse

Certain features of the law pose significant limits on the appropriate aspirations to precision in the categorization of justifications and excuses.

1. *Limits in Applications to Particular Cases.* Criminal procedure presents a significant barrier to any search for precision in characterization of individual cases.

Sam has helped Thomas rob a grocery store. Sam claims that Thomas threatened to kill him if he refused to help, but two bystanders say that they heard Thomas threaten only to “beat the hell out of” Sam. The jurisdiction has formulated its defenses so that an action that prevents harm greater than the crime is justified, and an action that prevents a harm lesser than the crime may be excused if ordinary people would have made a similar choice. In this jurisdiction the judge decides whether a claim of justification is established if certain facts are present.

Sam has possible claims of justification and duress. Of course, if the prosecutor does not proceed with the case, or Sam agrees to plead guilty to a lesser offense, the system will provide no clear indication whether a justification or excuse was actually present. But suppose that the case goes to trial and the jury hears the conflicting evidence about the threat. The judge instructs the jury that if Sam actually thought he would be killed, his aid was justified. He also instructs that if Sam thought he would be beaten up, his aid was not justified but excused, provided that ordinary people would have reacted the same way to the threat. The jury returns a general verdict of not guilty. Observers will not know whether the jury determined that Sam was justified or whether he was excused, or indeed, whether the jury reached a definitive judgment on that question at all. One possibility is that the jurors split on the question and, because resolution of the case did not require agreement on the question, the jury never attempted to answer it.

The system might surmount this impediment to the application of precise labels by requiring more specific responses from the jury about their decisions, as is the rule with insanity acquittals. The currently predominant use of the general verdict, however, is thought to give greater latitude to the jury. If the system values that result, its sacrifice to the interests of labelling precision would be a dubious exchange.

The threat example is by no means unique. A similar result obtains when a negligent belief in justifying circumstances will exonerate an actor from liability for a crime that requires purpose, knowledge, or recklessness. Recall the example of Ann(1) striking Ben and claiming that she was sure Ben was attacking her. In jurisdictions that correlate the level of culpability regarding justifying circumstances with the level of culpability for the underlying offense, Ann, if she is telling the truth, is not guilty of an assault. She has not been *reckless* in supposing that a justifying circumstance existed, and recklessness is the minimum culpability level for assault. Suppose the law labelled action based on a negligent belief in justifying circumstances as "excused" and action based on a faultless belief as "justified." A jury believing Ann would not need to decide whether her belief was faultless or careless because she would be acquitted in either event.

These examples illustrate that so long as general verdicts prevail, not even the most precise labels will yield precise applications to many cases. Thus, labelling remains of limited utility.

2. *The Necessary Crudeness of Legal Categories.* When one uses a term in moral evaluation, one can include any qualifying phrases or explanations. Statutory law is necessarily much cruder. It must choose one label or another without subtle elaboration. Although capable of greater nuances than statutes, judicial opinions often must also settle for relative simplicity.

There is a second respect in which the law is necessarily cruder than morality. Legal categorization must usually be responsive to facts discoverable in the legal process. It cannot draw important lines on the basis of differences that are unascertainable by observers. One reason, for example, not to require retreat even if the actor knows he can retreat with perfect safety is that it is so difficult for an outsider to appraise whether the actor realized that retreat would be safe. By contrast, moral evaluation does not call upon an individual to make an authoritative determination of the morality of someone else's actions. Factors that are hard to determine can be considered critical to the evaluation, and the evaluation can be highly tentative or expressed in terms that depend on unknown facts: "What John did was immoral if he was aware" Insofar as a particular legal categorization does not affect the outcome, the need for distinctions that rely on discoverable facts is less than if the outcome hinges on the categorization. The distinction between justification and excuse is not so important when a defendant is destined to be acquitted. Yet, concern about lines that depend on undiscoverable facts remains. If most legal lines matter for results and must be designed for practical application, the law may not be the best vehicle for introducing new distinctions that are neither practically applicable nor vital for legal outcomes.

Furthermore, in establishing guidelines for permissible behavior, the law must focus on a few key factors, omitting others that might enter into moral evaluation. In the United States, one can use deadly force to defend himself in his home even if he could retreat with perfect safety. Most statutes do not

draw distinctions based on the assailant's mental state or on his relationship to the homeowner. Those who think that an ordinary failure to retreat falls within the zone of morally permissible behavior would judge more harshly a homeowner who shoots his angry brother when he could retreat with safety than a homeowner who shoots a stranger in that situation. Perhaps the law should adopt a similar distinction, but there are limits to the number of factors the law can sensibly consider.

The law's necessary crudeness precludes legal labelling from precisely tracking moral evaluation. If terming the use of deadly force "justified" when the actor knew retreat would be safe implies that standing one's ground is morally equivalent to retreating, the label is somewhat misleading, even when the assailant is a stranger. In fact, most people would regard retreat as morally preferable. Justification is an even more misleading term in the case of mentally ill and family member assailants, since the predominant view is that the actor in such cases is at best excused.

F. The Law's Resolution of Disagreements and Uncertainties

Because people hold varying moral perspectives, they judge particular acts differently. For instance, people who value highly the defense of right believe the use of deadly force is morally better or at least the moral equivalent of retreating. Others prefer retreating but regard standing one's ground as morally permissible. Still others think that standing one's ground is wrong, but that a failure to retreat is excusable, considering human pride, the general emotional response to attack, and the short time for response. Finally, there are those who would not punish the actor who stands his ground even though they are uncertain how to regard his use of deadly force.

Lawmakers must resolve these uncertainties and disagreements if they wish to provide precise labels. Those who conceive of the criminal law as a proper vehicle for moral enlightenment may wish the law to give clear answers to moral questions that divide and trouble the community. On the other hand, those who think the law should primarily react to the moral understandings of the citizenry will question the wisdom of lawmakers undertaking to settle matters of general moral controversy.

G. The Tolerability of Imprecision

I have thus far identified some of the substantial costs involved in attempting to achieve comprehensive and precise distinctions between justification and excuse. Such attempts at categorization would achieve minimal practical value at the cost of considerable time and energy. Furthermore, the resulting labels would inevitably be misleading by purporting definitively to answer questions about which people are deeply divided.

These costs lead one to wonder whether the law is always flawed by its present imprecision. Is it a flaw that the use of force in self-defense is labelled a justification even if in some situations the decision to stand one's ground

should more precisely be considered an excuse? Is it a flaw that for a crime requiring reckless conduct, an act based on a negligent belief in a justifying circumstance is labelled a justification? Is it a flaw that the "excuse" of duress undoubtedly covers some circumstances in which submission to coercion is morally justified? The law's treatment of justification and excuse should generally track moral understanding. However, the law is necessarily crude. Its present imprecision is itself a caution that the law does not attempt to affix a precise moral label to each instance of behavior. Recognition of the goals the law can reasonably accomplish may be much healthier than pretentious aspirations to make the law the arbiter of every doubtful moral question.

The law's treatment of the basic elements of crime confirms this judgment. As generally used, the terms "justification" and "excuse" apply to situations that the law does not regard as crimes. If Ann's swinging arm injures Ben, she might offer an excuse, saying: "I'm sorry, but I didn't realize you were there." Alternatively, she might offer a justification: "You saw that I was swinging my arms to teach dramatic effect to my acting class; why didn't you pay attention?" As long as Ann was unaware that she might hit Ben, she has not committed an assault, and the criminal law does not engage in labelling to decide whether her arm swinging was justified or only excused.

If this state of affairs is unacceptable, the criminal law should begin making moral judgments about acts that fall short of amounting to crimes. Perhaps the law should evaluate every act that causes harm. The ability to develop such a harm-based approach to criminal law labelling is doubtful, particularly since some frequent harms that usually do not involve crimes may be the basis of criminal liability if committed with a certain kind of intent. Viable or not, the harm-based approach would radically transform modern American criminal law.

If the law's failure to label acts that do not amount to crimes is acceptable, then the question arises whether a failure to label precisely is unacceptable when other circumstances preclude liability. If the law need not determine whether Ann is justified or excused when she accidentally hits Ben, why need it determine precisely whether she is justified or excused when she strikes in mistaken self-defense? Conceivably, mislabelling is worse than no labelling. But if no one expects precision from legal labels, mislabelling seems no worse than a failure to label.

Statutes and judicial opinions should not aspire to comprehensiveness and precision in distinguishing justifications from excuses. This conclusion does not suggest that scholars should eschew attempts to build comprehensive systems. They are free to employ moral theory, to engage in evaluations of particular situations, and to fully explain the meanings of the terms they choose. A scholar may well be able to develop a comprehensive distinction between legal justification and legal excuse, but he should not expect the necessarily crude materials of statutes and opinions to endorse that distinction.