introduction

Sometimes, we are legally permitted to do what the criminal law generally prohibits: police officers are entitled to restrain suspects to effect a lawful arrest; parents may use force on their children to discipline them; a ship’s crew is allowed to jettison passengers’ property to save the ship in a storm; and ordinary citizens are permitted to use deadly force to protect themselves when their lives are threatened. In all these cases and many more, we say that the actor is entitled to do what is generally prohibited because his conduct is legally justified, i.e., he has a valid justification defense.

Over the past thirty years, justification defenses have been the subject of a protracted debate in criminal law theory. Much of that debate has been based on an evaluation of the conduct itself according to rival moral theories: those of a utilitarian persuasion (such as Paul Robinson) suppose that conduct should be legally justified so long as it prevents more harm than it causes, and those who are more oriented toward the structure of practical reasoning (such as George Fletcher and John Gardner) suppose that conduct should be legally justified whenever there are stronger reasons in favor of doing it than against it, and it was done for the right reason. But the law does not recognize conduct as justified simply on the basis of its merits according to either of these moral theories. In many cases, the actor’s legal role is also a distinct and important consideration: for example, a police officer is entitled to make arrests in contexts where a private citizen may not; a corrections official may punish an offender in situations where others may not; and a parent may use disciplinary force on his child when a stranger may not. In all these cases and more, the law recognizes that, in virtue of their role, some actors are legally justified in doing what many others remain criminally prohibited from doing.

Now this revelation about the importance of the actor’s role might lead us to conclude that conduct is legally justified simply on the basis of these two variables: the moral merits of the conduct itself and the actor’s legal role. But things are still more complicated than that. Even those who play the appropriate legal role (e.g., corrections officials, police officers, and so on) are justified in acting only after the appropriate decision-maker has decided that their conduct is justified. For example, a corrections official cannot take it upon herself to administer punishment until a court has decided (through a proper trial and sentencing hearing) that it is justified to punish the offender in a certain way. If she decided to impose punishment before the court had imposed sentence, the law would treat her as an unjustified vigilante. This is so even though it the job of a corrections official to impose punishment and even though the “punishment” she administers is precisely what a court would ultimately deem to be appropriate. Similarly, under ordinary conditions, police officers may search private homes for evidence only after a justice of the peace
has decided (by granting a search warrant) that the search is legally justified. Even though it is part of a police officer’s job to undertake searches, and even though a warrant would have been granted had the police applied for one, the law does not generally recognize a warrantless police search as justified. Neither the merits of the conduct as such nor the legal role of the actor is enough; for conduct to be legally justified, the appropriate decision-maker must have made an authoritative decision that that is so.

This analysis suggests that there is a division of labor between those who have the legal power\(^1\) to decide what conduct is and is not legally justified in the circumstances and those who carry out that conduct. And indeed, this division of labor is at work in a wide variety of contexts. We find that most bureaucratic hierarchies are structured largely in terms of this distinction. For example, those who occupy senior positions in the ranks of the police force have a good deal of power to decide what conduct is legally justified (say, when it is appropriate to use force in a hostage-taking or how to conduct a major drug-bust) but they engage in very little of that conduct themselves. By contrast, those who are in the most junior ranks of the police force have much less power to decide what conduct is legally justified but it is they who tend to carry out most of the conduct that their senior officers have decided is justified.

In the private sector, we also find this bureaucratic hierarchy at work. For example, it is the captain of a ship who usually decides when it is justified to jettison passengers’ property to save the ship, but it is the crewmembers who actually carry this out. And elsewhere in the private sector, this division of labor is often present even in the absence of any formal bureaucratic hierarchy. For example, it is a child’s parents who have the power to decide whether or not it is justified to perform an operation on that child but it is a team of medical professionals who actually carry out the operation.

Sometimes, however, there is only a notional division of labor between the person who decides what conduct is justified in the circumstances and the person who carries out the justified conduct, for it is sometimes one and the same person who performs both functions. When a police officer makes an arrest without a warrant, it is she who both decides whether the use of force is justified in the circumstances and who then carries out the arrest. And when a parent uses force to discipline her child, it is he who both decides that such disciplinary force is appropriate under the circumstances and then carries it out. And perhaps most importantly, when a citizen uses force in self-defense, it is she who both determines whether or not it is justified to use force in self-defense and then actually uses that force to defend herself.

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The important point to keep in mind is not whether there is an actual or a merely notional division of labor between those who have the power to decide what conduct is justified and those who carry it out; rather, it is that all justifications involve the exercise of a legal power when the appropriate person makes the authoritative decision that a certain course of action is justified under the circumstances. Further, we find that the law accords some decision-makers a good deal more discretion in the exercise of their decision-making power than others. In the case of self-defense, for example, the law gives the decision-maker quite detailed criteria to apply to the facts at hand: she is simply charged with deciding whether it is necessary under the circumstances for her to use force to defend herself and if so, what force would be proportionate to the nature of the threat she faces. In other cases, the decision-maker has considerably wider discretion. For example, when senior police officers must decide what sorts of otherwise criminal activity their officers may engage in as part of a “sting” operation, they might have to balance broad considerations of public safety against the effects on public confidence in the police of allowing officers to engage in serious criminal activity as well as a variety of other considerations. Although the scope of discretion varies widely from one justification to another, it is a defining feature of all justifications that they involve authoritative decision-making, and all such decisions require at least some case-by-case discretion about when it is justified to do what the criminal law generally prohibits.

There are two important normative conclusions I mean to draw from this analysis of the conceptual structure of justification defenses. First, I suggest that the way in which courts should evaluate claims of justification ought to reflect the conceptual structure of their object of evaluation. When a court is asked to evaluate a justification claim such as arrest with a warrant, it is not being asked to consider, de novo, whether there really was good reason to make the arrest. Rather, the court is simply being asked to perform a sort of judicial review of the prior exercise of discretion by the justice of the peace who granted the initial arrest warrant. So long as the justice of the peace acted within his discretion and so long as he came to a reasonable conclusion based on the appropriate sorts of reasons and he acted without bias, his decision should stand. Since all justifications involve discretionary decision-making, I argue, courts should always approach the evaluation of any justification claim in a similar way. They should not evaluate the conduct on the merits; rather, they should engage in a sort of judicial review of the prior exercise of discretion by the decision-maker who held that the conduct was justified. So long as the decision-maker (be she a justice of the peace, a police officer, a parent or even an ordinary citizen) was within her jurisdiction in making that decision and so long as she reached her conclusions in the proper way, her decision should stand.
The second normative conclusion I mean to draw from the foregoing analysis is that we should consider the political legitimacy of claims of justification from a different point of view. Most writers largely ignore the problems of institutional division of labor at work in criminal law and focus their attentions almost exclusively on the merits of that conduct and perhaps on the legal role of the actor. But I suggest that the most important aspect of justifications is the discretion wielded by certain individuals to decide what conduct is justified and what is not. Accordingly, I argue that most of our normative attention should be focused on the legal recognition and control of that discretion: who should wield it, how broad their discretion should be, what guidance should the law give to them, and so on.

In answering these questions, we should keep in mind the sort of political legitimacy challenge that this discretionary power presents. Probably the most pressing normative question raised by this analysis is how we might be able to render this sort of discretion over the affairs of others compatible with traditional liberal respect for individual freedom. We might at first miss the significant normative problems raised by justification defenses. After all, there is another place in criminal law in which ordinary citizens can decide what conduct is and is not criminal, namely, the granting or withholding of consent to others’ interference with our own affairs – and consent does not seem to raise any such problems. But justifications are importantly different from consent in one crucial respect: whereas consent is a power over our own affairs, justifications always involve power over the affairs of others. Whether this is in the private sphere (where parents decide whether their children should be disciplined, captains decide whether their passengers’ property should be jettisoned, etc.), in the public law context (where justices of the peace decide whether private homes may be searched, courts decide who may be punished and how, etc.) or in the somewhat murkier contexts of self-defense and lesser evils (where ordinary citizens decide whether others may be killed, their property destroyed, etc.), justifications always involve a decision by one party about justified interferences with the affairs of another. And this, of course, raises deep issues at the core of liberalism concerning individual freedom.

As the beginning of an answer to this question of liberal legitimacy, I suggest that there are already doctrines at work in the law that can help us to render this exercise of legal power by some over the affairs of other compatible

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2. The notion of freedom I have in mind here is what is sometimes called “freedom as independence.” It is not concerned to maximize the number of valuable options available to each person (as most utilitarians or perfectionists would have it). Rather, it is the simple notion that it should be up to each person – and no one else – to decide the purposes to which her body and her property shall be put. For more on this notion and the related notions of Kantian “external freedom” and Republican notions of “freedom as non-domination,” see Arthur Ripstein, Authority and Coercion, 32 Philosophy & Public Affairs 2, 10 (2004).
with a commitment to individual freedom. In the private law context, the normative framework that allows us to do so is the fiduciary relation. The relationship between fiduciary and beneficiary — e.g., parent-child, doctor-patient, captain-passenger, director-corporation, and many more — imposes a set of normative constraints that are designed to render the fiduciary’s exercise of power over the beneficiary compatible with the beneficiary’s autonomy. And in the public law context, the norms of administrative law are similarly designed to render the discretion of public officials over their subjects’ affairs compatible with the individual rights of those subjects. Indeed, I argue, there are a number of important similarities between the normative constraints on fiduciaries in private law and those imposed on public officials in administrative law. Finally, I argue that the best way to make normative sense of the power wielded by citizens over the affairs of others that is manifest in the justifications of citizen’s arrest, self-defense and lesser evils is to conceive of the former as pro tempore public officials of necessity. It is only insofar as they are performing a public function that ordinary citizens have the authority to make such judgments, and accordingly, they are bound by similar normative constraints when deciding what conduct is justified as public officials would be in the same situation.

i. the justifications debate so far

A. Introducing Justifications

1. Methodological Preliminaries: The Concern with Structure

In the present essay, I ground my analysis of justification defenses in a close examination of their place within the conceptual structure of contemporary Anglo-American criminal law doctrine. I assume that such an analysis can help us to understand the function of justifications and to answer larger questions of political legitimacy that surround justifications in criminal law theory. Before I begin this analysis, however, a few words are in order about the merits of this approach.

For many years, most commentators on the criminal law almost entirely ignored any questions about its conceptual structure, particularly as concerns justification defenses. They assumed, as generations of scholars before them had done, that the criminal law is nothing more than “an instrument of the state” that the state could shape in whatever way best served its favored policy

3. For what is perhaps the most thorough treatment of the analogy between private fiduciaries and the position of public officials in administrative law, see Evan J. Criddle, Fiduciary Foundations of Administrative Law, 54 UCLA L. REV. 117 (2006).

4. JEROME MICHAEL & MORTIMER J. ADLER, CRIME, LAW AND SOCIAL SCIENCE 342-43 (1933).
objectives. As late as 1975, George Fletcher lamented quite accurately that the “instrumentalist style of thought is so deeply entrenched in the United States that it is hard for our commentators and draftsmen to think of a reason for punishing or not punishing that is not a function of the ends of criminal law.”

Over the past thirty years, a number of criminal law theorists have questioned the wisdom of this wholly instrumentalist account of the criminal law. Paul Robinson, George Fletcher and John Gardner, and others have insisted that the concepts at work in criminal law give rise to a certain structure that we have good reason to respect. They have argued that, insofar as we use terms such as “justification,” legislators should examine the concept of justification in moral theory more closely and the sort of conceptual structure to which it gives rise. Robinson has argued that conduct is justified so long as it prevents more harm than it causes. Fletcher and Gardner have insisted that conduct is justified so long as, first, the reasons in favor of the conduct outweigh the reasons against it, and, second, the actor did it for the right reasons. But as Mitchell Berman has pointed out, one important problem with these accounts is that justification defenses in criminal law do not, in fact, reflect these accounts of moral justification at all. Insofar as their very purpose is to explain why the criminal law has the structure it does, therefore, they have failed.

One conclusion we might draw from the failure of these attempts to discover the conceptual structure of justification defenses in criminal law is that we should forget about the conceptual analysis of criminal law altogether and simply focus on trying to achieve the instrumentalists’ policy objectives. Mitchell Berman sets out this conclusion quite succinctly as follows: “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.” But as I shall endeavor to show, this is not the only conclusion one can draw from the failure of these particular conceptual arguments. Instead, I argue that there is, indeed, a complex and in some ways attractive conceptual structure to criminal law justification defenses. Further, I

7. Id., at 77.
8. I hope to make clear below precisely how this conceptual structure is attractive. I aim to show that it provides a remarkably subtle balancing of a variety of system-wide considerations. By granting decision-making power to actors “on the ground,” justifications provide flexibility and creativity when dealing with nonideal conditions. But by maintaining strict standards of judicial review, the law also retains control over the discretion wielded by
shall endeavor to show that a close examination of this conceptual structure 
may shed considerable light onto some of the most basic issues in criminal law 
theory.

In order to make progress, however, we must (temporarily) put aside 
abstract theorizing about what conduct our favored moral theories would hold 
to be justified and consider the role that justification is supposed to play within 
the institutional framework of a modern criminal justice system. We must keep 
in mind that the criminal law is not just a set of directives to citizens; rather, it 
sets out a basic institutional framework that applies to all—state and citizen 
alone.9 By taking account of justifications’ role in allocating decision-making 
power within the legal order, it is therefore possible both to explain the general 
structure of justifications and to make clear the normative issues they raise.

2. Justifications Defenses and the Regulation of Conduct

Roughly thirty years ago, English-speaking commentators began to notice 
that one class of criminal law defenses performs quite a different function from 
all the others.10 Recognizing the distinction between legal rules that individuals 
use to guide their conduct and the conceptually secondary set of rules that 
direct courts to impose sanctions when the primary set have been breached,11
some commentators noticed that justifications seemed to be members of the first set of rules whereas most other defenses are members of the second. And while all defenses have the effect of saving the accused from some or all of the punishment he would otherwise receive, only justification defenses do this on the grounds that his conduct was in fact legally permissible.12

3. Three Structural Features of Justification Defenses

The fact about justification defenses that has most puzzled criminal law theorists over the past thirty years is that although they, like offense definitions, ultimately concern what conduct is and is not criminally prohibited, they have a very distinctive conceptual structure that makes it impossible to think of them merely as exceptions to criminal prohibitions. In fact, justifications seem to have quite a distinct and consistent structure, defined by three features in particular.13 The first two features have attracted the most attention over the years, but I argue that it is the third of these features that provides the most insight into the place of justifications within the criminal law more generally.

The first distinctive feature of justification defenses (which marks them out as more than just ordinary exceptions to criminal prohibitions) is that whereas prohibitions are defined in terms of prohibited means, justifications are set out in terms of preferred ends. That is, the criminal law identifies conduct for prohibition in terms of the means employed—killing a human being, for example, or taking someone’s property without her consent—without any concern for how noble or how base the actor’s ends might be in doing so. This point is captured in the oft-quoted (though slightly inaccurate) dictum that the criminal law is concerned with conduct, but never with motive.14 Justifications,

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12. This is a point on which even instrumentalists about the criminal law such as Mitchell Berman can agree. See Berman, supra note 6, at 32-37. Berman makes this point in Meir Dan-Cohen’s language of “conduct rules” and “decision rules.” See Dan-Cohen, supra note 11.

13. There are many other features, too, that are not as significant for our purposes, such as evidentiary burdens, the rule of law, and vagueness constraints, among others. George Fletcher discusses some of these other features of justification. See George P. Fletcher, The Nature of Justification, in Action and Value in Criminal Law 175-86 (Stephen Shute, John Gardner & Jeremy Horder eds., 1993).

however, are always defined in terms of the actor’s ends, but do not necessarily specify the particular means by which to accomplish those ends: for example, one is justified in doing whatever is necessary (within proportionality limits)\textsuperscript{15} for the end of defending oneself, or effecting a lawful arrest or disciplining one’s child. To reflect this emphasis on ends rather than means, justifications bear what is sometimes called a “reasons requirement.”\textsuperscript{16} According to this requirement, one has a valid claim of self-defense only if one’s reason for action (\textit{i.e.}, one’s end) was to defend oneself; one has a valid claim of lawful arrest only if one’s reason for using force was to make a lawful arrest; and so on. The mere fact that one’s conduct had a desirable effect is not enough.\textsuperscript{17}

A second characteristic feature of justification defenses also distinguishes them from mere exceptions to offence definitions: their fault standard. Whereas particular prohibitions (including any exceptions built into them) are subject to a variety of different fault standards, justifications are almost always

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\textsuperscript{15} The place of proportionality in justifications has been highly controversial. In some early German case law, following the dictum that “right ought never yield to wrong,” there was no proportionality limit at all. See Sept. 20, 1920, Entscheidungen des Reichsgerichts in Strafsachen [RGSt] 55 (82) (F.R.G). In the common law world, however, it has long been recognized that the mere fact that one is resisting a wrongdoer does not provide an absolute right of resistance. Resistance to a wrongdoer provides a good—but not necessarily determinative—reason to act.

\textsuperscript{16} This is sometimes called the “Dadson doctrine” after the nineteenth century case in which it was most clearly stated. See R. v. Dadson, 169 E.R. 407 (Eng. 1850). Importantly, this characteristic is shared with excuses such as duress and provocation. Also, it should be noted that the reasons requirement only demands that the justifying reason be among one’s reasons for action. In some American jurisdictions, the justifying reason (in cases of necessity) must also be the actor’s primary (though still not exclusive) reason for action. See, e.g., Dozier v. State, 709 N.E.2d 27, 29 (Ind. 1999); Commonwealth v. Weaver, 511 N.E.2d 545, 615 (Mass. 1987). In Canada, the justifying reason need not have been one’s only—or even primary—reason for action. In order to meet the elements of the self-defense justification, an accused who causes death or grievous bodily harm must have had a reasonable belief that he could not otherwise preserve himself from serious harm. See Canada Criminal Code, R.S.C., ch. C-46, § 34(2)(b) (1985); R. v. Cinos, 2002 SCC 29, (Can.).

\textsuperscript{17} This raises, however, the defense of ex post facto vindication, which is a defense in some cases in England, at least (such as a police officer who is justified on the basis of a “hunch” that turns out to be correct, even though he had no reasonable and probable grounds for it at the time). Tony Honoré has argued that these justifications cannot fit within any of the accounts canvassed so far. But this sort of justification seems to be an outlier—an unusual and unprincipled exception to the general rule. See John Gardner, \textit{Justifications and Reasons, in Harm and Culpability} 103, 125 n.39 (A.P. Simester & A.T.H. Smith eds., 1996).
subject to the same independent fault standard of reasonable belief. This would make it extremely difficult to assimilate justifications and prohibitions into a single, unified set of conduct rules. For example, if the justification of self-defense were to be incorporated into the definition of the offense of murder, this would significantly change the scope of criminal liability. As it stands, someone with an honest but unreasonable belief that deadly force was necessary to protect his own life would be convicted of murder. But if “non-self-defense” were made an element of the offense, then any honest belief that deadly force was necessary and proportionate to the threat, however unreasonable, would suffice to negate mens rea and thereby ensure an acquittal of the accused.

Finally, there is a third feature of justification defenses that has attracted very little attention in the literature so far, but which also marks them out as something more than just legislated exceptions to criminal prohibitions. The law does not simply lay out justification defenses as permissions to do what is

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18. The concept of “reasonable belief” is fixed within the wording of many statutory justifications in the United States and Canada. See, e.g., City of Chicago v. Mayer, 56 Ill. 2d 366, 371 (1974); People v. Williams, 56 Ill. App. 2d 159, 165 (1965); Shorter v. People, 2 N.Y. 193, 197 (1849) (reasonable belief in need for self-defense). The Model Penal Code precludes justification where “the actor was reckless or negligent . . . in appraising the necessity for his conduct . . . in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.” Model Penal Code § 3.02 (1985). Provisions in the Canadian Criminal Code, justifying the use of force or the commission of an offence, all mandate that the belief as to the necessity of using force or commiting an offence be reasonable and proportional in the circumstances. See Canada Criminal Code, R.S.C., ch. C-46, §§ 25-33 (1985) Similarly, a Canadian defendant pleading self-defense must believe, “on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.” Id. § 34(2). For cases dealing with reasonable belief in self-defense, see, for example, R. v. Malott, [1998] 1 S.C.R. 123 (Can.); R. v. Petel, [1994] 1 S.C.R. 3 (Can.); and R. v. Lavallée, [1990] 1 S.C.R. 852 (Can.).

In the United Kingdom, reasonableness is at the heart both of self-defense and the prevention of crime. See, e.g., The Queen v. McInnes, (1971) All E.R. 295 (A.C.) (Eng.) (finding that the failure to retreat before resorting to violence was merely a factor that ought to be considered when assessing the reasonableness of the defendant’s conduct); Devlin v. Armstrong, (1971) N. Ir. L.R. 13 (N. Ir.) (same). Courts more generally have suggested that reasonableness should be judged on broad and liberal grounds. See, e.g., Reed v. Wastie, (1972) 221 (N. Ir.); R. v. Julien, (1969) 1 W.L.R. 839 (A.C.) (Eng.). A police constable is entitled to take any steps in preventing a breach of the peace that he “reasonably” thinks are necessary. See Piddington v. Bates, (1960) 3 All E.R. 660 (Q.B.) (Eng.). Further, the Criminal Law Act provides that “[a] person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.” See Criminal Law Act, 1967, c. 58, § 3(1) (Eng.).

generally prohibited. Rather, it recognizes that when certain individuals with the requisite legal power validly decide that it is justified under the circumstances to do what is generally prohibited, that decision is legally effective. That is, when those individuals decide that it is justified to do something that is generally prohibited, that very decision brings about a change in what we are legally permitted to do. Perhaps the clearest example of this phenomenon is where a justice of the peace exercises his legal power and decides that a police officer is justified in carrying out an otherwise prohibited assault as part of an arrest, or when he is justified in doing what would otherwise constitute a trespass as part of a lawful search. But this is equally true of police officers who may decide when citizens are justified in doing things that are generally prohibited in order to assist them in pursuing important law enforcement purposes, or parents who may decide that it is justified under the circumstances to use force to discipline their children.

20. U.S. courts have held that the effect of a search warrant is to authorize and make lawful that which legally could not have been done without its issuance (Creech v. U.S. 97 F.2d. 390 (C.C.A. 5th Circ. 1938)). In the United States, the issuance of search warrants is governed by rule 41 of the Federal Rules of Criminal Procedure. According to rule 41(d)(1), “After receiving an affidavit or other information, a magistrate judge — or if authorized by Rule 41(b), a judge of a state court of record — must issue the warrant if there is probable cause to search for and seize a person or property or to install and use a tracking device.”

In Canada, the Criminal Code sets out the procedure a justice of the peace must follow in granting a search or arrest warrant. Under section 487,

A justice who is satisfied . . . that there are reasonable grounds to believe that there is in a building, receptacle or place (a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed, (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament, (c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or (c.1) any offence-related property, may at any time issue a warrant authorizing a peace officer . . . to search the building, receptacle or place for any such thing and to seize it.

Canada Criminal Code R.S.C., ch. C-46, § 487

21. See Model Penal Code § 3.07 (1985); see also Criminal Law Act, 1967, c. 58, § 3(1) (Eng.). The Canadian Criminal Code justifies the use of force for any peace officer or individual lawfully assisting a peace officer in the act of making an arrest or executing process. Canada Criminal Code, R.S.C., ch. C-46, § 25(5) (1985). § 25.1(10) justifies the commission of an act or an omission that would otherwise constitute an offence if the person so committing was acting under the direction of a public officer, and that the actor reasonably believed the public officer had the authority to give such direction. Canada Criminal Code, R.S.C., ch. C-46, § 25.1(10) (1985).

22. See Model Penal Code § 3.08 (1985) (codifying a justification for the “Use of Force by Persons with Special Responsibility for Care, Discipline or Safety of Others”). In State v. England, 349 P.2d 668 (Or. 1960), a parent was not liable for a child’s death, which resulted from the negligent administration of lawful punishment. American courts have further held
More controversially, I shall argue that this is even true of ordinary citizens who may decide when it is justified to use lethal force in their own defense.23

Indeed, it is the importance of a valid decision by the appropriate individual that gives meaning to the crucial distinction between vigilantism and lawful police activity. When vigilantes such as the self-styled “Minutemen” in the United States decide to take it upon themselves to carry out the duties of border police, they are not automatically permitted to do so. Even though they might be engaging in precisely the same conduct that would be justified if undertaken by border police, there are still situations where they are rightly branded as criminals for doing it.24 This is because the justification that the relationship between parent and child is constitutionally protected. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . .”); Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923). A parent has a “fundamental liberty interest” in maintaining the parent child relationship: Troxel v. Granville, 530 U.S. 57, 65 (“The liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized”). This includes the right of parents to use “reasonable or moderate physical force to control behavior.” State v. Wilder, 748 A.2d 444, 449 (Me. 2000).

The same justification is recognized in Canada. See Canada Criminal Code, R.S.C., ch. C-46, § 43 (1985) (setting out the justification for the use of force by parents and schoolteachers against children under their care, but requiring that “the force must not exceed what is reasonable under the circumstances”); see also Canadian Found. for Children v. Canada, 2004 SCC 4, (Can.) (affirming that this justification is consistent with the principles of fundamental justice); Ogg-Moss v. The Queen, [1984] 2 S.C.R. 173 (Can.) (affirming that because the justification found in s.43 effectively removes from children the right to be free from unconsented invasions of physical security or dignity normally protected by the criminal law, it should only be extended to those who undertake the responsibilities and obligations associated with being a parent).

In England, it has long been recognized at common law that the reasonable use of force by a parent for the purpose of disciplining a child is justified. Moreover, this defense has been extended to anyone standing in loco parentis. See, e.g., R. v. Hopley, (1860) 175 Eng. Rep. 1024 (K.B.); R. v. Smith, (1985) The reasonableness of any such force will depend on such matters as physical and mental consequences for the child, the age and personal characteristics of the child, whether an external instrument was used, or whether marks were left on the child’s body. See R. v. H., (2002) 1 Crim. App. 59 (Eng.). The defense has recently been limited by legislation. In England, the Children Act denies the justification for: wounding and causing grievous bodily harm; assault occasioning actual bodily harm; and cruelty to persons under 16. See Children Act, 2004, c. 31, § 58 (Eng.). The effect of the provision is that reasonable and proportionate punishment that amounts to simple assault or battery, and does not involve cruelty, is still protected by the defense of lawful chastisement.

23. See infra Subsection II.B.1.

provisions in criminal codes do not set out general permissions to engage in socially worthwhile conduct, however that might be defined. What do you mean by “merits”? Do you mean the nobility of their ends? I think you should engage Robinson more directly here by using his terminology; rather, they simply recognize that some people (but not others) have the legal power to decide when it is justified to do what is generally prohibited.25

Although this element of decision-making power is a crucial feature of justification defenses, it is far less well recognized than the first two.26 Indeed, at one point, George Fletcher seems to deny the importance of decision altogether. He writes:

Consider the effect of a justification on the rights of third parties to assist the justified actor or to act in his or her place. Claims of justification lend themselves to universalization. That the doing is objectively right (or at least not wrongful) means that anyone is licensed to do it.27

This widely-shared view about the universality of justification is wrong in at least two distinct ways. Not only does it ignore the fact that only those who play the right legal role may be licensed to engage in certain sorts of activity (e.g., it is police officers, not Minutemen, who can detain illegal immigrants at the border). But it also ignores the fact that only certain people have the legal power to decide when that conduct is justified (e.g., it is usually the justice of the peace, not the police officer, who can decide when a search is justified). I shall return to this point—and provide further argument for the general importance of legal powers to all justifications—in Part II.

B. The Two Accounts

Over the past thirty years, a debate has raged in criminal law theory between two accounts of justifications. Both accounts have rejected the thoroughgoing instrumentalism of generations past and have accepted that

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25. As I shall argue below, this authorized person may in some cases be the very one who carries out the permitted conduct, as well. See infra Subsection II.B.

26. Kent Greenawalt was one of the first to notice the crucial role of standing in justification defenses. See Kent Greenawalt, The Perplexing Borders of Justification and Excuse, 84 COLUM. L. REV. 1897, 1915 (1984) (“Some justifications depend upon the social role of the actor or his relation to a person affected by the act. Police and parents, for example, have special authorizations to use physical force when others may not.”) Crucially, however, Greenawalt talks of the social role of the actor rather than the decision-maker, whom I take to be central to the structure of justifications in criminal law.

there is an important difference between justifications (which concern what conduct the law permits) and many other defenses such as excuses (which concern when we shall be punished for doing what is prohibited). On one side, Paul Robinson has argued consistently for a utilitarian account of justifications: as a general rule, the law ought to permit anyone to do whatever prevents greater harm than it causes. But Robinson’s utilitarian account of justification is unable to explain any of the three basic features that we have just identified: he rejects the reasons requirement as incompatible with his utilitarian reading of the harm principle, he insists that justifications should be subject to a fault standard of correctness and he does not even consider the importance of decision. On the other side, Fletcher and Gardner have consistently rejected Robinson’s utilitarianism in favor of a view focused on the structure of practical reasoning. But even they are unable to account for two of the three basic features of justifications we have just identified: they, too, reject the reasonable belief standard for justifications and simply do not consider the importance of decision.

1. Robinson’s Challenge

Paul Robinson has consistently argued for the reform of justification defenses in Anglo-American law because they do not fit his favored moral theory of justification. Although he has written extensively on matters of structure and function in criminal law, he does not pay close attention to the institutional division of labor in existing criminal law doctrine. When it comes to justification defenses, he assumes that they are, like prohibitions, part of the general rules of conduct for citizens set down by the legislature. Nevertheless, he insists that the question of whether or not a particular act is justified can only be answered ex post by the courts. As a result, he insists that


30. Paul H. Robinson, Competing Theories of Justification: Deeds v. Reasons, in Harm and Culpability 48, 48 (A.P. Simester & A.T.H. Smith eds., 1996) (“[A] ‘deeds’ theory of justification . . . allows the law to better communicate to the public the conduct rules that it commands they follow.” (emphasis added)). Antony Duff rightly points out that Robinson’s account effectively does away with justifications as a distinct category altogether. It is, he suggests, “not a theory of justification, as a criminal defense: it is a theory about where the distinction between offenses and defenses should be drawn, and holds that what ‘reasons’ theorists count as justificatory defenses should rather be counted as factors that negate an element of the offense.” See R.A. Duff, Answering for Crime: Responsibility and Liability in the Criminal Law 280 (forthcoming 2008).
Anglo-American criminal law should abandon its traditional fault standard of reasonable belief for justifications.\(^3\) Further, he argues that justification defenses should be subject to his (very controversial) utilitarian interpretation of the harm principle, according to which the state may only prohibit individuals from doing things that cause more harm than they prevent.\(^3\) When we cause harm to prevent a greater evil, Robinson argues, “due to the special circumstances of the situation, no harm has in fact occurred.”\(^3\) Any extension of the criminal sanction to such harmless conduct, he argues, is illegitimate.\(^3\) Since justifications, along with criminal prohibitions, set the boundary between permissible and criminally prohibited conduct,\(^3\) Robinson’s argument requires that we should deem to be justified all conduct that prevents more harm than it causes.

Building on these normative foundations, Robinson then suggests that much of present-day criminal law doctrine is best understood as a not-entirely-successful attempt to live up to the demands of the harm principle as he understands it. Following Herbert Wechsler and Jerome Michael,\(^3\) Robinson claims that criminal law prohibitions and justification defenses are mechanisms by which the law attempts to identify conduct that causes more harm than it prevents.\(^3\) Prohibitions do this in a more rough-and-ready fashion, simply banning whole classes of conduct because they generally cause more harm than they prevent; justifications do this in a more nuanced way, allowing for the balancing of evils in the particular case.\(^3\) This balancing structure is most evident in the “lesser evils” defense, which dominates the Model Penal Code’s account of justification.\(^3\) But, he argues, it is also in evidence in many other

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3. Id. at 267-68.

3. Id.; see also Robinson, supra note 30.


3. Indeed, the Model Penal Code simply calls their choice of evils defense “justification generally.” MODEL PENAL CODE § 3.02 (1985).
justification defenses: police officers are entitled to effect lawful arrests where the harm caused by the officer’s assault is less than the harm of allowing criminal suspects to evade justice; citizens are entitled to kill in self-defense where the harm of killing the attacker is less than the harm of allowing the object of the attack to be killed; and so on.

Finally, Robinson applies these principles to contemporary criminal law doctrine—specifically, to the “reasons requirement” that is a central part of the law of justifications throughout the English-speaking world. The traditional reasons requirement, he points out, ensures that some people whose conduct clearly prevents more harm than it causes will still be subject to criminal sanction. For example, someone who steals a bag purely for selfish gain but who later finds a bomb in it (which would almost certainly have killed many people had he not stolen it) and turns it in to the police is not entitled to a justification of lesser evils for his theft because he did not take the bag for the right reasons. This, Robinson claims, violates the harm-minimization principle because it subjects an individual to criminal sanction even though he prevented much greater harm than he caused. Accordingly, he advocates the elimination of the reasons requirement altogether. He calls his favored model, which has no reasons requirement, a “deeds” account of justifications (though it might more accurately be called an “outcomes” account), as opposed to the orthodox “reasons” account.

In sum, then, Paul Robinson is quite frank about his inability to explain why justification defenses have the structure that they do in present Anglo-American criminal law doctrine. Indeed, he suggests that the law applies a reasons requirement to justification defenses simply because it has confused

40. See, e.g., Tennessee v. Garner, 471 U.S. 1 (1985) (holding that the use of deadly force to prevent the escape of an apparently unarmed suspected felon is permissible only when necessary to prevent the escape and when the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others). Similarly, the Canadian Criminal Code authorizes the use of force in preventing a breach of the peace so long as the actor “uses no more force than is reasonably necessary to prevent the continuance or renewal of the breach of the peace or than is reasonably proportioned to the danger to be apprehended from the continuance or renewal of the breach of the peace.” See Canada Criminal Code, R.S.C., ch. C-46, § 30 (1985).

41. The Model Penal Code makes the same suggestion in its discussion of justification defenses generally. See Model Penal Code § 3.04 (1985) (providing that, in evaluating whether the “Use of Force in Self-Protection” is justifiable, the use of force must be balanced against the unlawful act being committed, and the actor must believe that the force used is necessary to protect himself from death or serious bodily harm. The defense will be denied if the actor knows he can avoid the use of force with complete safety by retreating or surrendering possession of property).

42. This example is taken from the actual case of Motti Ashkenazi. See Paul H. Robinson, The Bomb Thief and the Theory of Justification Defenses, 8 Crim. L.F. 387 (1997).

43. Id. at 407-09.

44. Robinson, supra note 30, at 48.
the appropriate requirements for excuses (which also bear a reasons requirement) and justifications.\textsuperscript{45} The proper basis upon which the law should exempt conduct from criminal prohibition, he argues, is that it prevents more harm than it causes. Anything that runs counter to this rationale (such as the reasons requirement) should be eliminated.\textsuperscript{46}

2. Fletcher and Gardner’s Response

Over the years, George Fletcher and John Gardner\textsuperscript{47} have attacked the specifics of Robinson’s revisionist account of justifications on numerous occasions—particularly its insistence on doing away with the reasons requirement.\textsuperscript{48} Whereas Robinson assumes that courts should consider conduct to be justified whenever it prevents more harm than it causes, Fletcher and Gardner insist that the concept of justification that courts should apply is considerably more complex than Robinson’s harm-minimization principle. Although they provide a subtle and, in many ways, convincing account of the concept of justification in practical reasoning, they are not much closer than Robinson to being able to explain the structure of contemporary Anglo-American criminal law doctrine. And this is because they, too, have mistaken the proper institutional place of justification defenses.

Fletcher and Gardner begin their account of justifications in the same place as Robinson, with the observation that justifications are part of the criminal law’s rules of conduct—rules that tell us what is, and what is not, permitted. And, like Robinson, they insist that the question of whether or not a particular act is justified can only be answered ex post by the courts.\textsuperscript{49} But unlike Robinson, they insist that courts should not deem conduct to be justified simply on the basis of the harm it causes and averts. Whereas Robinson would assert that justified wrongdoing is on a moral par with ordinary, permitted conduct (for neither type of act causes more harm than it prevents), Fletcher

\textsuperscript{45}. Robinson, \textit{supra} note 10, at 274-79.

\textsuperscript{46}. Robinson, \textit{supra} note 10, at 292.

\textsuperscript{47}. It is hard to say that George Fletcher and John Gardner defend precisely the same account. Gardner’s position is—quite explicitly—a retelling of Fletcher’s with considerable emendations and new foundations in Joseph Raz’s theories of authority and practical reasoning. In my retelling, I elide some of the differences between the two accounts for the sake of brevity. For more on the relationship between Fletcher and Gardner’s positions, see John Gardner, \textit{Fletcher on Offenses and Defenses}, 39 TULSA L. REV. 817 (2004).

\textsuperscript{48}. Gardner cites Kenneth Campbell as a major inspiration for the underpinnings of this view. See Gardner, \textit{supra} note 17, at 107 n.8 (citing Kenneth Campbell, \textit{Offences and Defenses, in Criminal Law and Justice} 73 (Ian Dennis ed., 1987)).

\textsuperscript{49}. It is this sense of “decision rule” that Fletcher is referring to when he states that justifications “function, it seems, as decision rules rather than conduct rules.” See Fletcher, \textit{supra} note 13, at 180.
and Gardner insist that there is a radical moral difference between the two: ordinary, permitted conduct is usually unobjectionable, they argue, but justified wrongdoing, while permissible, is nonetheless morally conflicted. Indeed, as Fletcher has argued, when we violate a prohibition and invade another’s rights, “even if the right is trumped or overridden [by a justification], we should retain a certain sense of loss in witnessing the overriding of the right.”

It is this element of moral conflict, both he and Gardner argue, that gives justification defenses their distinctive flavor. They thus argue that if we wish to understand why the criminal law is structured in terms of (ex ante, legislated) prohibitions and (ex post, court-controlled) justifications, we should put aside any utilitarian assumptions that there is a single, unified formula that can simultaneously determine what is wrongful, what is justified and what is prohibited. Once we do so, they suggest, we will be able to make sense of the particular function played by justification defenses.

The fact is, Fletcher and Gardner insist, criminal law doctrine has a complex structure because the structure of the underlying moral norms is itself complex. In criminal law, and everywhere else, it is the concept of wrongdoing that is more basic than concepts of justification or prohibition. Fletcher and Gardner argue that if there are strong moral reasons not to do something, then it is appropriate to say that it is wrong to do it. The legislature reflects this fact by telling us to disregard any reasons—by providing what Gardner, following Joseph Raz, calls “exclusionary reasons”—we might have to engage in such wrongful conduct. Criminal offense definitions, they say, provide exclusionary reasons not to consider any reasons for engaging in certain sorts of conduct. Once we establish the scope of wrongdoing through offense definitions, however, we still have not determined what conduct should be prohibited, all things considered, since there are many situations where an individual might still be justified in doing a real wrong. For example, even though there are always good reasons not to kill another person (and therefore, they suggest, it is always wrong to do so), there are strong countervailing reasons why we should nevertheless be permitted to do so in situations of legitimate self-defense. The class of permitted conduct, then, includes not only non-wrongful conduct but also justified wrongdoing. The reason why we say that killing in self-defense is justified wrongdoing—rather than saying that it is not wrong at

53. Gardner, in particular, puts great emphasis on the claim that justified wrongdoing is really wrong, even though justified—not just prima facie wrong. See Gardner, supra note 51, at 78.
all— is that the reasons against killing, though outweighed, still exist and still have force.

The law’s focus on the justified actor’s reasons for action, Fletcher and Gardner argue, comes from this complex interplay of wrongdoing, justification and prohibition. Although we are permitted to engage in wrongdoing under certain circumstances, they argue, we are allowed to do so only if we can show the court ex post facto that our conduct was in fact justified, all things considered. And this means not only that our conduct was justifiable—that is, that there were good reasons for someone to have done it in the circumstances—but that we were in fact justified in doing it under the circumstances. And this means that there must not only have been good reason for us to have violated the prohibition as we did, but also this good reason must have been our reason for action at the time. Only if both of these sorts of reasons are present—what Gardner calls “guiding reasons” and “explanatory reasons”54—is our conduct in fact justified.

Fletcher and Gardner are able to offer an explanation for why our reasons for action matter by means of their sophisticated account of justification in practical reasoning. But this account forces them to reject another core feature of justifications: their distinctive fault standard. Fletcher and Gardner’s insistence that we are entitled to a justification only where there were both good reasons to act as we did (guiding reasons) and where we acted for those reasons (explanatory reasons) leads them to conclude with Robinson that justification defenses should always be subject to a fault standard of correctness, rather than reasonable belief. As Fletcher puts it, “[j]ustification—harmony with the Right—is an objective phenomenon. Mere belief cannot generate a justification, however reasonable the belief might be.”55 But this conclusion is starkly at odds with settled doctrine: it would represent a seismic shift in the structure of criminal law if police officers were only held to be justified in making an arrest if they were correct in their belief that there was good reason to do so (rather than merely having reasonable and probable grounds for believing this), or if parents were only justified in disciplining their children if they were correct in their belief that disciplinary force was in their child’s best interest in the particular case (rather that just having good reason to believe that this was so), and so on.56 As Kent Greenawalt has pointed out, “in the common law, it is universally said that police are justified in making arrests

54. Garder, supra note 17, at 103, citing Joseph Raz, Practical Reason and Norms (2d ed. 1990)).
55. Fletcher, supra note 50, at 972.
56. Id. at 973 (“American legislatures routinely equate reasonable belief in the existence of a justification with the actual existence of the justification.”).
based on probable cause. . . . No one of whom I am aware has asserted that police are really only ‘excused’ in these situations.”

It is because they focus directly on the court’s evaluation of the conduct ex post facto that Fletcher and Gardner, like Robinson, assume that the fault standard for justifications should be one of correctness. Courts should find that the conduct was genuinely justified, they assume, only if they determine that there was in fact good reason to do it. But if they were to focus instead, as I shall, on the intervening decision—the ex ante exercise of a legal power judging the conduct to be justified—they would see why a fault standard of reasonable belief is appropriate. It is only possible for the decision-maker to determine whether conduct is justified in the circumstances based on the evidence available to him at the time. So long as there are reasonable and probable grounds to find that the conduct is justified, he should so find—and once this decision has been validly made, this renders the conduct justified for the purposes of criminal law. It would be impossible to make such decisions only in terms of whether, with the benefit of hindsight, courts will also find that there were good reasons for acting in this way. In short, although Fletcher and Gardner are able to offer and explanation for the importance of the law’s reasons requirement for justifications, their failure to recognize the place of decision-making powers still leaves them unable to explain the fault standard of reasonable belief. In the end, they are almost as sharply at odds with Anglo-American criminal law doctrine as Robinson. But our examination of precisely how and why they and Robinson failed points the way toward another, more promising account.

C. The Beginnings of a New Account: The Power to Decide

The two accounts of justifications that have dominated the theoretical debate over the past thirty years make similar mistakes about the institutional place of justification defenses in criminal law. Whereas Robinson rejects both the fault standard of reasonable belief and the reasons requirement for justifications, Fletcher and Gardner are able to explain the reasons requirement but they are still unable to explain the fault standard of reasonable belief. In addition to these problems, however, both accounts are guilty of an even more serious failing, for neither of them can explain what is perhaps the most important feature of justification defenses: their deep connection to the power

of certain individuals to make authoritative decisions about when it is justified to do what the criminal law generally prohibits.

Robinson’s account, focused as it is on the minimization of harm, is unable to make any sense of the criminal law’s focus on this power of certain legal actors to decide that certain conduct is justified. His account is always focused on the consequences of particular acts, leaving no conceptual room for considerations of whose job it is to decide what conduct is legally justified. He cannot explain in anything but an ad hoc fashion why the law insists that police officers who have reasonable and probable grounds for a search should ever have to seek the say-so of a justice of the peace before proceeding,58 or why citizens should be entitled to do more when authorized by a peace officer than they may when acting on their own.59 In all these cases and more, the criminal law recognizes actors as justified only when the appropriate decision-maker has exercised a legal power determining that their conduct is permissible. Any account of justifications that leaves this crucial element out of the mix is surely doomed to fail.

Fletcher and Gardner’s position is no less vulnerable than Robinson’s to a similar critique. Although they do not share his consequentialist assumption that justification defenses are designed to save all harm-minimizing conduct from criminal sanction, they, too, are unable to account for the crucial role of decision-making power in the structure of justifications. Like Robinson, they assume that we can determine what conduct is and is not justified just by looking at the conduct (and perhaps the status of the actor). As a result, they

58. In the United States, a warrantless search is constitutionally suspect under the Fourth Amendment. Terry v. Ohio, 392 U.S. 1, 20 (1968). (“[T]he police must, whenever practicable, obtain advance judicial approval of searches and seizures through a warrant procedure.”) Despite this general principle, however, U.S. courts have recently deemed constitutional a wide variety of warrantless searches. Under section 41(d)(3)(A) of the Federal Rules of Criminal Procedure, a magistrate may issue a warrant based on information communicated by telephone or other appropriate means, including by fax. There is no general policy of avoiding the use of such warrants (U.S. v. Jones, 696 F.2d 479 (7th Cir. 1982)).

In Canadian law, there is a presumption that a warrantless search is unreasonable and therefore a violation of section 8 of the Canadian Charter of Rights and Freedoms. See Hunter v. Southam, Inc., [1984] 2 S.C.R. 145 (holding that section 8 of the Charter requires prior authorization in the form of a warrant, except where obtaining a warrant is not feasible). There are very few exceptions to the presumption of unreasonableness; a warrantless search may be upheld if it is exercised in exigent circumstances, see Eccles v. Bourque, [1975] 2 S.C.R. 739 (Can.); Hunter v. Southam Inc., [1984] 2 S.C.R. 145 (Can.), or as incident to arrest, see Cloutier v. Langlois, [1990] 1 S.C.R. 185 (Can.); R. v. Caslake, [1998] 1 S.C.R. 51 (Can.). But these powers have been limited by the Canadian Charter of Rights and Freedoms. Situations in which policy officers may arrest without a warrant are similarly limited. The Canadian Criminal Code also codifies a procedure through which police officers may request warrants by phone where it is impractical to appear in person before a justice of the peace. See Canada Criminal Code, R.S.C., ch. C-46, § 487 (1985).

59. See supra note 21.
too are unable to explain the central importance of the intervening exercise of a legal power by an authoritative decision-maker. So long as there were good reasons to act in a certain way and those were the actor’s reasons, they assume that this should be enough to ground a justification. But in fact, as I shall argue, conduct is legally justified only if the appropriate person validly decides that it is justified. The mere fact that there are good reasons to engage in certain conduct is not enough to justify it, even if they are the actor’s reasons for action. The appropriate decision-maker must consider those reasons and make an authoritative decision on the matter before we can say that the conduct is in fact legally justified.

ii. justifications and the power to decide

In this section, I present an alternative account of justifications that emphasizes an aspect of the criminal law that has hitherto been largely ignored. I suggest that while legislative provisions and common law rules concerning justifications are ultimately concerned with regulating individual conduct, they do not do so in a straightforward way by prohibiting and permitting conduct directly. Instead, they do so indirectly, by recognizing that certain individuals have the legal power to decide when it is justified to engage in conduct that is generally prohibited. Put another way, I argue that we cannot make sense of justification defenses simply as part of what H.L.A. Hart called the law’s “duty-imposing rules,” relieving us of certain duties imposed by criminal prohibitions. This is because they crucially make reference to what he called “authority-conferring rules” that recognize that certain individuals have legal powers to change legal relations simply as a result of their valid decision to do so.\(^{60}\)

A. Legal Powers, Decision Rules and Conduct Rules

At the root of both of the foregoing models of justifications is the same basic assumption about the sorts of legal rules that are at work in the criminal law. Meir Dan-Cohen sets out this basic assumption most clearly in one of the best-known articles in recent criminal law theory.\(^{61}\) The legal rules at work in the criminal law, Dan-Cohen suggests, can be neatly divided into two groups,
which he calls “decision rules” and “conduct rules,” based on their subject matter and the audience to whom they are directed. Whereas conduct rules are addressed to ordinary citizens and concern what conduct those citizens are and are not permitted to do, decision rules are addressed to state officials and concern how those officials should exercise their decision-making powers over citizens.

Some rules can fairly intuitively be placed into one category or another. Criminal offense definitions, for example, clearly seem to be addressed to citizens and concern what conduct they are and are not permitted to do. Accordingly, basic rule-of-law concerns about fair notice to citizens are crucial here – for it only fair to hold someone responsible for violating a rule of conduct if the rule has been made available to him. Excuse defenses such as duress, however, seem to be the result of decision rules. It is implausible, Dan-Cohen points out, to think of these defenses as rules addressed to citizens, permitting them to commit criminal offenses so long as they do so under duress. Rather, it makes better sense to say that the law instructs officials to excuse individuals who have committed offenses under duress. And since decision rules apply directly to officials, we should be less concerned to give notice of these rules to citizens and more concerned to give clear guidance to the relevant officials on precisely what these rules require them to do.

A court should proceed quite differently when faced with each of these two sorts of rules. When a court faces a decision rule such as whether to excuse the accused on grounds of duress, its task is very straightforward: simply follow the decision rule that tells it when to grant an excuse and when not to. There is a more complex interplay of rules at work when courts confront a conduct rule such as a criminal offense definition. Here, the court must (1) follow decision rules that instruct it in how it should (2) use a conduct rule as a yardstick by which to determine whether the actor violated that conduct rule.

Dan-Cohen’s neat distinction between these two sorts of rules seems to animate both the Robinson and the Fletcher-Gardner model of justifications – but in a rather surprising fashion. On the one hand, they all agree that the subject matter of justifications is typical of conduct rules (for they all insist that justifications concern what citizens may and may not do). On the other hand, they all insist that justifications are addressed to courts, rather than to citizens (for they say that it is up to courts to determine what conduct is justified, ex post facto, based on a standard of correctness). So do they conclude that justifications are conduct rules or decision rules? George Fletcher’s answer to

62. Dan-Cohen, supra note 11, at 627. This distinction follows the structure of Hart’s distinction. See supra note 11 and accompanying text.
63. Id. at 648-50. Dan-Cohen distinguishes between prohibitions (which serve as conduct rules) and some fault standards, which he believes function as decision rules.
64. Id. at 632-34.
this question has changed, depending on the context. When the focus of discussion was on the subject matter of justifications, he has asserted that “the criteria of justification are supposed to function not only as decision rules, but ex ante as conduct rules.” But when the focus was on the appropriate fault standard for justifications, he has asserted that justifications “function, it seems, as decision rules rather than conduct rules.” Although Robinson and Gardner have not been as explicit in stating their equivocation on this issue, it seems that they are committed to following Fletcher on this point.

On my account, justification defenses can be fit into Dan-Cohen’s conceptual apparatus of conduct rules and decision rules, but we must be very careful to place find their proper place. While ordinary conduct rules, such as criminal prohibitions, are created by legislation ex ante, and ordinary decision rules, such as those concerning excuses or denials of responsibility, govern the exercise of judicial decision-making ex post facto, justification defenses seem to crystallize at some point in the middle. That is, a justification consists in both (a) a decision rule guiding the relevant decision-maker’s determination that a particular course of conduct is or is not justified under the circumstances; and (b) a resulting conduct rule telling the relevant actors that they are entitled to do what that decision-maker validly held to be justified.

When a court is faced with a claim of justification, then, it is not easy to explain the nature of its task in terms of Dan-Cohen’s talk of decision rules and conduct rules. The court’s task is not a simply one-step process of following a decision rule (as it does when considering whether or not to grant an excuse) nor is it even a two-step process of following a decision rule instructing it to use a conduct rule to evaluate an actor’s conduct (as it does when considering whether the accused committed a certain offense). Rather, its job is the three-step process of judicial review of decision-making. According to this procedure, the court (1) follows a decision-rule instructing it to (2) evaluate the decision of another decision-maker concerning (3) what conduct was justified in the circumstances. That is, the court should not just use a conduct rule to evaluate the actor’s conduct directly. Instead, it should evaluate the intervening decision (by asking whether the decision-maker was within her jurisdiction in making the decision, whether she drew a reasonable conclusion based on appropriate consideration of the relevant considerations, etc.) and, if it finds that that decision was valid, it should simply defer to that decision, whether or not it would have decided in the same way itself.

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65. Mitch Berman points out this apparent contradiction in Fletcher’s views, supra note 6, at 37.
66. Fletcher, supra note 50, at 976.
67. Fletcher, supra note 13, at 180.
So, should we call justification defenses “conduct rules,” then, or “decision rules”? It might be best to avoid this language altogether and to keep in mind that things are rather more complicated.68

B. Three Types of Decision-Makers, Three Types of Justifications

So far, we have noted that at least some important justification defenses arise from the exercise of a legal power by authoritative decision-makers. But do all justification defenses in Anglo-American criminal law fit this general pattern? In this section, I will consider somewhat more systematically the broad sweep of justification defenses in Anglo-American criminal law to confirm that this model presents the most plausible account of generally recognized justification defenses throughout Anglo-American criminal law.

I organize my review of justification defenses into three groups according to the sort of relationship that exists between the decision-maker and the party whose interests are subject to the decision. In the first group are those justifications where the decision-maker owes a fiduciary duty toward the party whose interests are subject to her decision. Justifications in this group arise from such exercises of legal power as a parent’s decision that it is justified to use disciplinary force on his child, the doctor’s decision that it is justified to operate on his unconscious patient and the ship’s captain’s decision that it is justified for his crew to jettison passenger property in a storm. In the second group are those justifications where the decision-maker is a state official and the party whose interests are subject to the decision is one or more ordinary citizens. Justifications in this group arise from exercises of legal power such as the decision of a justice of the peace that a police search is justified, the decision of a court that the imposition of punishment by a corrections official is justified and decision of a firefighter that the destruction of property is justified. Finally, in the third group are those justifications where both the decision-maker and the person whose interests are subject to the decision are ordinary citizens. Justifications in this group arise from exercises of legal power such as the decision of a citizen that she is justified in killing in self-defense, her decision that she is justified in causing the lesser evil to avoid the greater and her decision that she is justified in performing a citizen’s arrest.

68. Several administrative law scholars have commented on the inability of the conduct rule/decision rule dichotomy to describe the place of administrative agencies exercising delegated decision-making authority. See, e.g., Colin S. Diver, The Optimal Precision of Administrative Rules, 93 YALE L.J. 65 (1983); Edward L. Rubin, Law and Legislation in the Administrative State, 89 COLUM. L. REV. 369 (1989).
1. Private Fiduciaries

The most neglected category of justification defenses in recent debates is made up of those that arise from the exercise of a legal power by a private fiduciary.69 George Fletcher simply leaves them out of his taxonomy of justifications altogether70 and Paul Robinson simply assimilates them to the quite different class of “public authority” justifications.71 When we look closely, however, we find that they make up an important and a distinct class of justification defenses. There are a great many occasions where the criminal law treats individuals as justified in interfering with a certain individual’s rights because the person standing in the position of fiduciary to that rights-holder has decided that it is justified to interfere in that way. The trouble is that most commentators either explain these justifications in a way that conceals the crucial role of decision by the fiduciary or they ignore them altogether.72

The justification of disciplinary force that is open to parents and those acting in loco parentis is a well-known justification, but it is usually explained in a way that ignores the crucial role of decision-making power. Paul Robinson’s treatment is typical in this respect. He explains the general structure of justification defenses in the following way, leaving out any role for decision-making: “All justifications have the same internal structure: triggering conditions permit a necessary and proportional response. The triggering conditions are the circumstances which must exist before the actor will be eligible to act under a justification.”73 According to this way of thinking, parental use of disciplinary force can be explained without recourse to the exercise of decision-making power. As soon as the child acts in a way that merits the use of disciplinary force, this acts as a “triggering condition” which permits a necessary and proportional response. When we think of the use of

69. Ernest Weinrib explains the basic structure of the fiduciary relation as follows: “Two elements thus form the core of the fiduciary concept and these elements can also serve to delineate its frontiers. First, the fiduciary must have scope for the exercise of discretion, and second, this discretion must be capable of affecting the legal position of the principal.” (The Fiduciary Obligation, 25 U. TORONTO L.J. 1, 4) For a very thoughtful and subtle investigation of the fiduciary relation and its role in private law, see PAUL B. MILLER, ESSAYS TOWARD A THEORY OF FIDUCIARY LAW, (unpublished Ph.D. dissertation, department of philosophy, University of Toronto, 2007).
70. Fletcher, supra note 27 at 770-98.
72. Andrew Ashworth is one important exception to this tendency. Although he suggests that the rationale for this justification of disciplinary force may reside in some form of delegation by the state of its power to punish, he also points out that it might also have an independent basis in the parent’s power to determine, within limits, what is in the “best interests” of the child. See ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 150 (5th ed. 2006).
73. Robinson, supra note 3, at 216.
disciplinary force in this way, justifications seem to operate as simple exceptions to the general prohibition against the use of force. But to put things in that way seems to suggest that the law somehow affords less protection to children than it does to ordinary citizens: for parents are subject to fewer prohibitions concerning the use of force toward their children than they are toward total strangers. But it is surely more in keeping with the structure of parents’ relations to their children generally, however, to say that parents actually owe greater duties to their children than they do to strangers.

A better way to understand the justification of disciplinary force that is available to parents is to think of it as arising from the exercise of decision-making power by parents over their children. That is, just as we recognize that parents have the legal power to decide their child’s name and may make decisions about the disposition of their child’s property, they may also decide when it is appropriate to use otherwise prohibited force to discipline the child. The parent is not just someone who is sometimes relieved of the law’s prohibitions against violence. Rather, the parent is someone whom the law entrusts with important decisions about the child’s welfare – and sometimes the exercise of that decision-making power results in a determination that the use of disciplinary force toward the child is justified in the circumstances. It is the parent’s valid exercise of her legal power over her child’s person and interests – deciding that her use of force on her child is appropriate in the circumstances – that renders that conduct lawful.

When we look more closely, we find that there are a great many justification defenses that arise from the exercise of legal powers by fiduciaries over beneficiaries. Unlike the parental justification of disciplinary force, however, most of these justification defenses are simply ignored altogether by criminal law scholars. Fiduciary relationships arise between parent and child by operation of law, but there are a great many other fiduciary relationships

74. Indeed, it is not surprising that Robinson, who sees justifications as simple permissions arising from “triggering conditions,” also seeks to do away with the reasons requirement. For so long as the proper conditions existed and our response was a necessary and proportionate response, why should it matter what our reasons for action were? As I shall explore in greater detail in section II.B.3 below, the element of decision is most consistent with the reasons requirement through justification defenses.

75. The law imposes a great many positive obligations on private fiduciaries that it does not impose on others. For example, parents owe a positive obligation to the children and to their spouse to provide them with the necessities of life (Eversley v. State, 748 So.2d 963 (Fla. 1999), Criminal Code of Canada s. 215); a ship’s crew owes a positive obligation to its passengers to put their interests first in an emergency (infra note 75); and so on.


that arise either through unilateral undertaking\(^78\) or by agreement.\(^79\) Adoptive parents and doctors providing assistance in emergency situations both enter into fiduciary relationships (to their adoptive children and their patients, respectively) through their unilateral undertakings. In ordinary circumstances, the relationship between doctor and patient, between lawyer and client, between captain and passenger of a ship,\(^80\) between settlor of a trust and trustee, and between director of a corporation and the corporation itself all arise by agreement.\(^81\) In all these cases, the criminal law treats conduct that would otherwise be criminal as justified because of the exercise of legal power by the relevant decision-maker: doctors who are unable to obtain consent from their patients (whether because they are unconscious or for other reasons) are still justified in interfering with the patient's bodily integrity without consent insofar as this follows from their decision that a particular medical procedure would be justified;\(^82\) similarly, a lawyer is entitled to interfere with the

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78. Lord Browne-Wilkinson suggested that the paradigmatic fiduciary relationship is established “where one party, A, has assumed to act in relation to the property or affairs of another, B.” White v. Jones [1995] 2 A.C. 206, 271 (Eng.).

79. Although this agreement might exist within a contract, it need not do so. See Stone v. Davis, 419 N.E.2d 1094, 1098 (Ohio 1981) (“A fiduciary relationship need not be created by contract; it may arise out of an informal relationship where both parties understand that a special trust or confidence has been reposed.”).

80. The sailors and passengers, in fact, cannot be regarded as in equal positions. The sailor (to use the language of a distinguished writer) owes more benevolence to another than to himself. He is bound to set a greater value on the life of others than on his own. And while we admit that sailor and sailor may lawfully struggle with each other for the plank which can save but one, we think that, if the passenger is on the plank, even ‘the law of necessity’ justifies not the sailor who takes it from him. United States v. Holmes, 26 F. Cas. 360, 367 (1842).


82. In the United States, the Model Penal Code provides that use of force by a doctor is justified in “an emergency, where the actor believes that no one competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.” Model Penal Code § 3.08(4) (1985).

In Canada, the Ontario Health Care Consent Act states, “In deciding what the incapable person’s best interests are, the person who gives or refuses consent on his or her behalf shall take into consideration” the patient’s best interests. Ontario Health Care Consent Act of 1996, S.O., ch. 2, sched. A, § 21.2 (Can.). The statute then provides several factors that ought to be weighed in determining “best interests,” id., and authorizes doctors to administer treatment without consent in an emergency and where “steps that are reasonable in the circumstances” have been taken to obtain consent. Id. §§ 25(2)-(3), 27. In such an emergency, a health practitioner may administer treatment if the substitute decision maker fails to comply with section 21; see also Marshall v. Curry, [1933] 3 D.L.R. 260 (Can.).

In the United Kingdom, a “best interests” defense of medical necessity has been developed through judge-made jurisprudence. See, e.g., R. v. Bournewood Cmty. & Mental Health
financial affairs of his client so long as he has the appropriate power of attorney over those assets and he is acting pursuant to his decision that his conduct is in his client’s best interests; and so on.

The independent significance of legal powers in the structure of these justifications is most clearly evident in situations where the person exercising the legal power is different from the person engaged in the justified conduct. For example, although it is generally the ship’s captain who has the legal power to make decisions about what it is justified to do with her passengers’ property and persons in a storm, this does not mean she will herself carry out the justified conduct. Indeed, it will usually be her crew (once she has made her decision, of course) who jettison cargo or force passengers onto lifeboats. Similarly, an incompetent patient’s family members are usually the ones to exercise the legal power authorizing medical treatment—but it is doctors, nurses and other medical professionals who then administer the course of treatment. Once again, the crucial element in the justification of all such conduct is the valid decision by an authorized individual.

This analysis, which puts the decision-making power over what conduct is justified at the center of our account of justifications, makes much better sense of the three basic structural features of justifications doctrine in all these cases than either the Robinson or the Fletcher-Gardner alternative. Unlike Robinson’s alternative, it explains the importance of the law’s reasons requirement for justifications. It is the strict limits on the authorized person’s legal power to permit otherwise prohibited conduct that accounts for the importance of the actor’s reasons for action. Captains do not have unbridled discretion to permit their crew to jettison cargo for any reason they wish; rather, because of the fiduciary duty they owe their passengers, they only have the authority to exercise their powers in the best interests of their passengers. Accordingly, they are only authorized to permit specific acts that further the

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83. But Alon Harel argues that these two tasks may not always be separable. He suggests that there is an intrinsic relationship between the parental role and the imposition of sanctions just as there is an intrinsic relationship between the state’s role and the imposition of criminal punishment. In both cases, he argues, the decision maker should also be the one to impose the punishment. See Alon Harel, Why Only the State May Punish: On the Vices of Privately-Inflicted Sanctions for Wrongdoing (2007) (unpublished, on file with author).

84. In some cases, however, parents’ exercise of decision-making power has been ruled invalid. This was the case in the famous English case of In re A (Children) (Conjoined Twins: Surgical Separation), (2000) 4 All E.R. 961 (A.C.) (Eng.). In that case, the hospital applied to the court to seek authorization for a surgical procedure that would separate a pair of separate conjoined twins and would almost certainly lead to the death of one of them against the wishes of the parents. Id. In a small number of cases, the court exercises the decision-making power over medical issues itself. See R. v. Bournewood Cmty. & Mental Health NHS Trust, (1998) 3 All E.R. 289 (H.L.) (Eng.), where doctors sought leave of the court to sterilize a mentally incompetent but sexually active patient.
best interests of their passengers, such as saving the ship from sinking.\footnote{Indeed, the duty of fiduciaries to treat all beneficiaries of the same class equally would also explain the court’s insistence on fair procedures for the determination of whom to throw overboard in United States v. Holmes, 26 F. Cas. 360, 367 (C.C.E.D. Pa. 1842). As the court put it: When... a sacrifice of one person is necessary to appease the hunger of others, the selection is by lot. This mode is resorted to as the fairest mode... for selection of the victim. [...] In no other than this or some like way are those having equal rights put upon an equal footing, and in no other way is it possible to guard against partiality . . . .} Similarly, parents do not have absolute discretion to decide to assault their children for any reason they like. The scope of their fiduciary duty toward their children means that they are authorized only to decide to do so for the purpose of disciplining their children.

Second, unlike both Robinson’s view and Fletcher and Gardner’s view, this account is also able to explain why justification defenses are subject to a fault standard of reasonable belief. Because justification defenses are always concerned with the exercise of a legal power, the fault standard that is of concern to us is the one that governs the exercise of that power. The parent’s decision that it is necessary in the circumstances to assault his child for the purpose of correction must be reasonable based on all the facts available to him at the time of his decision. But we cannot ask that he be able to anticipate facts that only become available later, at the time of trial (as would be required by a correctness standard). The same is true of the captain’s decision to permit the jettisoning of cargo, the doctor’s decision to order emergency medical treatment, and so on. The net effect of all this is that so long as the authorizing party’s decision is based on reasonable beliefs about the relevant facts, then that person’s decision to permit the conduct is a valid one.

2. Public Officials

It is possible to make sense of justifications arising from the exercise of decision-making power by public officials in much the same way as those that arise from the decisions of private fiduciaries. In order to do so, however, we need to make a few minor adjustments to our analysis. Whereas private fiduciaries are only entitled to make decisions about justified interferences with the interests of their specific charges (parents over their children, family members over their incompetent relatives, captains over their passengers, etc.), public officials are entitled to make decisions about when it is justified to interfere with the interests of many more people. Generally speaking, a justice of the peace may grant a search warrant over the property of anyone within his jurisdiction, so long as there are appropriate grounds for doing so. And a police officer may determine that it is appropriate for him to arrest any person within
his jurisdiction without a warrant under the appropriate circumstances. That is, this second class of justification defenses is still narrowly limited in the class of persons who may exercise the relevant legal power—specific state officials—but the class of persons whose interests are subject to that decision-making power is considerably broader—usually including anyone within the state’s jurisdiction.86

Just as justification defenses claimed by private fiduciaries make it possible for them to carry out their fiduciary duties toward their charges, so justification defenses make it possible for public officials to carry out their official duties toward the citizenry. Indeed, without justification defenses, state officials would be quite unable to perform their most basic functions. Markus Dubber points out that from a different point of view, a list of police functions looks like a list of serious criminal offenses:

The statutory threat of punishment looks suspiciously like “menacing,” wiretapping like “eavesdropping,” entrapment like “solicitation” (or even “conspiracy”), searching a suspect’s house like “trespass,” searching (or frisking) the suspect herself like “assault,” arresting her like “battery,” seizing her property like “larceny,” a drug bust like “possession of narcotics” (with or without intent to distribute), indicting—and convicting—a defendant like “defamation,” imprisoning the convict like “false imprisonment,” and executing her like “homicide” (“murder,” to be precise).87

The way the law recognizes that police officers are entitled to effect arrests is to say they are justified in doing what would otherwise constitute an assault; they are entitled to search private places because they are justified in doing what would otherwise constitute a criminal trespass; they are entitled to engage in otherwise criminal conduct as part of a “sting” operation because they are justified in doing so; and so on.

The parallel between justifications claimed by state officials and those claimed by private fiduciaries is somewhat surprising. Private fiduciaries are entitled to exercise legal powers over the interests of those in their charge, but they are bound by law to exercise those powers only for the benefit of those in their charge. Similarly, it would seem that state officials are entitled to exercise legal powers only over those within their jurisdiction but only for the benefit

86. These questions of jurisdiction quickly become complicated: although the person usually (but not always) must be present in the jurisdiction in order to be subject to the state official’s decision-making power, he often need not be a citizen of that country. For example, border guards may be permitted to apprehend illegal aliens, and police officers may be permitted to arrest noncitizen criminal suspects.

Criminal law doctrine does not usually make explicit the interests that public officials must take into consideration when exercising these legal powers. Instead, most commonly, officials are simply granted the power to make particular decisions based on specific criteria: for example, they may permit an arrest where there are reasonable and probable grounds to believe that the individual is guilty of an offence of sufficient seriousness.\(^88\)

For now, I shall simply assert without arguing that the criminal law sets out these decision-making powers in a way that may plausibly be interpreted as the expression of a quasi-fiduciary duty owed by public officials to the public at large (or to a particular sub-class of the public). I shall return to the question of the quasi-fiduciary nature of the relationship that obtains between public officials and the citizenry in Part III.

Once again, the crucial role of legal decision-making powers in these justifications is most obvious in those cases where there is a clear division of labor between those officials who exercise legal powers (such as a judge or a justice of the peace who grants search or arrest warrants) and those who carry out the justified conduct (such as the police officers who are armed with such warrants).\(^89\) In all these cases, the scope of the justification available to the actor is defined quite precisely by the terms of her warrant.\(^90\) In other cases, however, the division of labor is still present but not quite as obvious, such as when a junior police officer must defer to her senior officer’s judgment of what conduct would be justified when dealing with complex operations such as a siege or a “sting” operation. Sometimes police officers have the power to decide what conduct ordinary citizens are justified in carrying out in order to deal with emergency situations.\(^91\) In all these cases, there is still a division of

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89. *Id.*

90. *See* Walter v. United States, 447 U.S. 649, 656 (1980) (plurality opinion per Justice Stevens) (“When an official search is properly authorized – whether by consent or by the issuance of a valid warrant – the scope of the search is limited by the terms of its authorization.”).

91. *See* Model Penal Code § 3.07(1) (1985) (authorizing the use of force to effect an arrest by the actor making or assisting in making that arrest); *id.* § 3.07(4) (authorizing the use of force by a private person assisting in an unlawful arrest); Canada Criminal Code, R.S.C., ch. C-46, § 25(1) (1985) (stating that everyone who is required or authorized by law to do anything in the administration or enforcement of the law, including a private person, is justified in doing whatever is required, so long as they act reasonably); *see also id.* § 25.1(10) (similarly stating that “[a] person who commits an act or omission that would otherwise constitute an offence is justified in committing it if a public officer directs him or her to commit that act or omission and the person believes, on reasonable grounds, that the public officer has the authority to give that direction”); *id.* § 27 (authorizing the use of force to prevent the commission of an offence); Criminal Law Act, 1967, c. 58, § 3(1) (Eng.) (justifying “such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large” by any person).
labor between the exercise of decision-making powers and the carrying out of the justified conduct.

In many other cases, however, the individual making the decision and the individual carrying out the justified conduct are one and the same. When police officers execute warrantless arrests\textsuperscript{92} or when they use force to prevent the commission of an offense,\textsuperscript{93} they both decide that the conduct is justified and also carry out that justified conduct. Although the division of labor between decision-making and carrying out the conduct is not quite so obvious, it is still quite evident in the hierarchical structure of state decision-making that lurks in the background of such situations. In the state, as in any bureaucratic organization,\textsuperscript{94} the general impetus is to ensure that legal decision-making powers are exercised at the highest ranks—even though it is individuals at the very lowest ranks who usually carry out the justified conduct. Because the justice of the peace sits higher in the state decision-making hierarchy than a police officer, the officer must ask the justice of the peace for a warrant to proceed with a search or an arrest unless it would be impracticable under the circumstances to wait for permission.\textsuperscript{95} It is also why the power of lower-ranking officials is usually narrower than that accorded to their superiors in the hierarchy.\textsuperscript{96} It is only in cases where it is impracticable to divide labor in this way that the two roles—deciding what is justified and carrying out the justified conduct—actually overlap. Even though police officers have the power to decide when it is justified to arrest or to search in some cases, this is only, \textit{faute de mieux}, because no more senior state official is available to do so in their place.

As with justifications claimed by private fiduciaries, this legal power-based account of justifications is best able to explain why justifications have both a reasons requirement and a fault standard of reasonable belief. Once again, the reasons requirement is a result of the limitations on the power of state officials to permit violations of general criminal prohibitions. Unlike private persons consenting to the use of their own bodies and interests, officials cannot


\textsuperscript{93} Id. §§ 30, 25(1), 25(4)

\textsuperscript{94} The classic text on the theory of bureaucracy is Max Weber, Economy and Society (1968).

\textsuperscript{95} See supra note 58 and accompanying text.

\textsuperscript{96} There are also a number of provisions that require police officers to defer to the decisions of their superiors in order to engage in justified conduct. In Canada, many of these provisions are to be found in an omnibus justification provision set out in s. 25.1 of the Criminal Code of Canada. Subsection (3) of that provision empowers senior officials such as the minister of public safety and emergency preparedness to designate individuals to carry out otherwise prohibited conduct. Subsection (6) empowers “senior officials” to determine what conduct it is justified for public officers to undertake.
exercise their legal powers arbitrarily. For this reason, when public officials deem a particular course of conduct to be justified, they must always be in a position to explain this judgment in terms of specific, legally recognized justifying purposes: police officers are entitled to invade another’s privacy as part of a search, they are entitled to assault citizens while arresting them, and so on. Accordingly, such permissions do not permit just any invasion of privacy or any assault, but only those that (wholly or partially) constitute a search or an arrest. Second, this powers-based approach is also best able to explain the fault standard of reasonable belief for justifications. The police officer who makes an arrest without a warrant is justified in doing so if and only if his decision that the arrest was justified was made on the basis of reasonable and probable grounds.

3. Ordinary Citizens with Decision-Making Powers

Finally, the justification defenses that have attracted by far the most attention among criminal law theorists are those that arise from the exercise of decision-making powers by ordinary citizens caught in extraordinary situations such as self-defense (understood broadly to include not only defense of self but also defense of property and defense of others), citizen’s arrest, and (where the defense exists), lesser evils. If we wish to show that our account truly applies to all justification defenses, then it will be crucial—also most challenging—to show that it applies even in this context. It is much more difficult to demonstrate the connection of this group of justification defenses to the exercise of decision-making power than it is for the other two groups, for two reasons. First, there is never an actual division of labor here between those individuals whose job it is to decide what conduct is justified under the circumstances and those whose job it is to carry out that justified conduct. As a result, it is more difficult to identify an exercise of decision-making power. Second, it is a good deal more difficult to explain why some ordinary citizens, rather than any others, should be the ones to decide when it is justified to interfere with the interests of others.

Although these two problems are particularly acute among justifications in this category, we have encountered them both already elsewhere. In a number of situations, we have already found that one and the same person both decides whether a particular course of conduct is justified and also carries it out. In the

97. We shall return to the rationale for this limitation of the exercise of legal powers by state officials (see infra Part III), but it is clearly a general feature of present doctrine that they are answerable for the exercises of legal powers.

98. I call them “ordinary citizens” only to distinguish them from individuals who either act as private fiduciaries or who act as public officials. But they need not be “ordinary” in any other sense. As I shall discuss in greater detail below, many—indeed, perhaps even most—of these “ordinary citizens” are in fact private security personnel.
case of parents and their children, for example, it is generally the parent who both decides what conduct is justified in the circumstances and then also carries out that conduct. The same is true of doctors deciding when to operate in an emergency and then carrying out the operation, and of police constables making an arrest without a warrant and many other situations. There is no reason in principle why the same person cannot perform both functions.

We have also encountered situations where individuals who do not have significant decision-making powers are entitled to decide what conduct is justified in certain circumstances only because other, better qualified decision-makers are temporarily unavailable. For example, the police officer making an arrest without a warrant is entitled to make the decision that the arrest is justified only because recourse to a justice of the peace is impracticable under the circumstances. If we think of ordinary citizens as the lowest ranks of officialdom (below even the police constable), then the structure of justifications such as self-defense, lesser evils and citizen’s arrest is most readily apparent. Private citizens do not have a standing power to make these decisions; rather, they are entitled to decide when it is appropriate to use force in self-defense, to prevent a greater evil or to effect an arrest only where recourse to state officials is impracticable. Indeed, it is a generally accepted matter of criminal law doctrine that private citizens are not entitled to use force in self-defense, arrest or to avoid the greater evil if someone closer to the center of state decision-making authority was available to make that determination.99 This is just another way of stating the law’s imminence limit on justifications that are available to ordinary citizens.100 That is, just as the police officer must defer to the justice of the peace’s decision whether or not to perform a search or an arrest whenever it is practicable to do so, the ordinary citizen must similarly defer to the police officer’s decision. Where it is open to a citizen to withdraw from a situation and seek the assistance of a police officer, she is not entitled to make any decisions about whether it is

99. However, as Clifford Rosky points out, in the United States, “[p]rivate police are often ‘deputized,’ or given general public police authority, by federal, state, and local governments.” Clifford J. Rosky, Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States, 36 CONN. L. REV. 879, 898 (2003) (citing, as examples, Georgia and South Carolina statutes).

100. Although most U.S. jurisdictions focus on the temporal imminence of an attack in the law of self-defense, the Supreme Court of Canada has emphasized that the more basic concern (reflected in the Canadian statutory language) is not temporal imminence for its own sake, but rather the absence of any lawful alternative course of action (R. v. Lavallée, [1990] 1 S.C.R. 852, ¶ 59 (Can.) citing § 34(2) of the Criminal Code of Canada.) On this view, it is therefore a matter of some urgency to ask when the police can be counted on to provide such a lawful alternative. This has been an issue in cases involving battered women, e.g., R. v. Lavallée, [1990] 1 S.C.R. 852 (Can.), as well as in countries where there is little or no rule of law, e.g., R. v. Ruzic, [2001] 1 S.C.R. 687 (Can.).
permissible to use force in self-defense or to prevent the greater evil.101 Finally, the scope of the legal powers available to ordinary citizens is consistently narrower even than those available to justices of the peace and narrower even than those available to police officers.102 That is, citizens, like police officers, must defer to those who are higher up the state’s decision-making hierarchy than themselves whenever possible. Indeed, there are even echoes of this hierarchical structure of decision-making power in the Model Penal Code’s insistence that the lesser evils justification is open to citizens only where the legislature has not already specifically decided otherwise.103

As with both of the other two classes of justification defenses, this powers-based account makes the best sense of both the reasons requirement and the fault standard of reasonable belief. The rationale for the reasons requirement is most clearly evident with these justifications. In all these justifications, the same person first decides that the conduct is justified and then undertakes that conduct. But in order to have decided that the conduct was justified, he must have considered the reasons why that conduct was justified. And therefore, he could only be justified in undertaking the action if he already had in mind the reasons why that conduct was justified. Similarly, the rationale for the fault standard of reasonable belief is also most clearly evident with these justifications. When the power-holder decides whether or not a particular course of action is justified, he can only proceed on the basis of evidence that is reasonably available to him. It would be absurd to criticize such a decision on the basis of facts that only became evident later, at the time of trial. And since conduct is justified so long as the appropriate decision-maker validly

101. Indeed, in the United States, this feature of the defense of necessity is quite strictly construed. The defense was famously denied to New York prison inmates who captured guards and civilians as hostages and threatened to assault and kill them, in protest against allegedly deplorable prison conditions. In denying the defense, the court held that the injuries feared were not imminent and, therefore, the prisoners had legal alternatives through which to air their grievances. See People v. Brown, 333 N.Y.S.2d 342 (N.Y. Sup. Ct. 1972). An Indiana court denied the defense to a juvenile who claimed he brought a handgun to school in order to protect himself from threatened retaliation by a former gang. The court held that there had been reasonable, legal alternatives that the defendant had bypassed, such as seeking help from his parents, informing the police, or requesting an absence from school. See Dozier v. State, 709 N.E.2d 27 (Ind. Ct. App. 1999). Further, the defense of necessity has been universally denied in cases of civil disobedience and political protest because of the availability of legal alternatives. See, e.g., United States v. Schoon, 971 F.2d 193 (9th Cir. 1991); State v. Cozzens, 490 N.W.2d 184 (Neb. 1992); State v. Warshow, 410 A.2d 1000 (Vt. 1980).

102. See supra note 21 and accompanying text.

103. Model Penal Code § 3.02(1): “Conduct that the actor believes to be necessary to avoid a harm or evil to himself or another is justifiable, provided that… (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.”
held it to be justified at the time, the appropriate standard to apply is one of reasonable belief at the time (rather than correctness after the fact).

C. Summary

Justification defenses generally—whether they concern private fiduciaries, public officials or even private citizens caught in extraordinary situations—all exhibit the same basic juridical structure. In each case, they involve the exercise of a legal power by an authorized individual deciding whether or not otherwise prohibited conduct is justified under the circumstances. The exercise of a legal power by private fiduciaries over the interests of the beneficiary is subject to the strict standards of the fiduciary relation: the fiduciary may only do so in the interests of the beneficiary. The exercise of legal power by public officials over the interests of those within their jurisdiction is also subject to a number of important limits that are set out piecemeal in the criminal law. Finally, the exercise of legal power by ordinary citizens over the interests of others more generally is subject to similar constraints to those of the public official. The only significant difference is that the powers available to private citizens are narrower even than those available to the lowest-ranking public official, for they are available only when the private citizen is unable to seek assistance from the authorities.

iii. justifying justifications

My argument so far has been limited to a claim about the conceptual structure of Anglo-American criminal law doctrine and the institutional division of labor that it sets out. I have argued that, contrary to the received wisdom on this issue, it is neither the legislature nor the trial courts that determines what conduct is justified. Instead, the criminal law recognizes a third class of decision-makers who have the legal power to decide when it is justified to do what the criminal law generally prohibits. Sometimes, those decision-makers are judges or justices of the peace issuing warrants; sometimes they are public officials such as police officers or firefighters; sometimes they are private fiduciaries such as parents or doctors; and sometimes they are just ordinary citizens caught in extraordinary situations. But whoever those decision-makers are in particular cases, they play a crucial role in the structure of justification defenses. The legislature does not set out precisely what conduct is justified in advance; instead, it relies on these power-holders to decide this question based on their appreciation of the circumstances. Similarly, trial courts do not decide whether conduct is justified; instead, they simply review the authoritative decisions of these power-holders on that question.
Now, if my claims about conceptual structure and institutional division of labor are correct, what normative consequences follow? Indeed, do any normative consequences follow at all? Surely it is criminal law doctrine that should change in response to normative argument, not the other way around. But the point here is not that we must adjust our normative arguments so that they support the structure of criminal law doctrine exactly as it is. Rather, the point is that our normative concerns with a particular doctrine should vary with our understanding of precisely what role that doctrine plays within the larger enterprise of criminal law. As I shall suggest in this final section, once we place justification defenses in their appropriate institutional setting, we find that they are the battleground for a quite different set of normative issues than the ones that have occupied criminal law theorists over the past thirty years.

A. Re-orienting the Normative Debate

1. Different Structure, Different Norms

The sorts of normative issues we focus on in a particular area usually follow from our assumptions about the conceptual structure and institutional division of labor that is at work in that area.\textsuperscript{104} This tight connection between normative and descriptive aspects of criminal law theory is evident in both of the accounts of justifications we have surveyed. Despite their differences on the substantive test for justification Robinson, Fletcher and Gardner are all in agreement that the courts are the appropriate institutional actors to determine whether a particular course of action was justified. Although they insist that justifications concern what conduct ordinary citizens may or may not do, they all agree that we can only know for sure whether a course of action is justified \textit{ex post facto}, once a trial court has examined all the facts available to it and made its determination. It is for this reason that Robinson, Fletcher and Gardner all focus their energies on a dispute about the appropriate substantive standard that courts should apply when deciding whether or not a particular course of action was justified under the circumstances.

My argument about the conceptual structure of justification defenses and the resulting institutional division of labor leads me to a somewhat different set of normative concerns. Because I take it that it is not up to the trial courts to determine what conduct is and is not justified – because this question has already been decided by a distinct set of decision-makers – I insist that there

\textsuperscript{104} As I have tried to make clear in my discussion of Robinson, Fletcher and Gardner (in sections I.B.1-2, \textit{supra}), all three of these commentators in fact base much of their argument on certain \textit{assumptions} about institutional division of labor in criminal law. I do not mean to suggest, however, that they see themselves as making an argument based on institutional division of labor. It is one of the advantages of my account that it makes explicit the institutional division of labor that is at work in criminal law in a way that others do not.
are a number of other important normative questions at stake than just the appropriate substantive norms of justification in criminal law. Because I argue that there is a third group of decision-makers whose job it is to determine when it is justified to do what is generally prohibited, I insist that we should consider the normative issues raised by the very significant legal power that these decision-makers exercise over the interests of others.

By shifting the focus of attention away from the substantive norms by which we determine whether conduct is justified and toward the authority of decision-makers to decide what nonideal conduct is and is not permissible as a means to preserving or restoring ideal conditions, I mean to emphasize a point that has significance well beyond the debate about justification defenses. The philosopher John Searle expresses this more general point as follows:

One of the great illusions of the era is that ‘Power grows out of the barrel of a gun.’ In fact power grows out of organizations, i.e., systematic arrangements of status-functions. And in such organizations the unfortunate person with a gun is likely to be among the least powerful and the most exposed to danger. The real power resides with the person who sits at a desk and makes noises through his or her mouth and marks on paper. Such people typically have no weapons other than, at most, a ceremonial pistol and a sword for dress occasions.\(^{105}\)

That is, criminal law theorists who are interested in the important questions of power and legitimacy should spend a good deal less time worrying about what low-level actors do (such as beat cops, border guards, corrections officials, and ordinary citizens) when they are engaged in justified conduct. Instead, they should spend a good deal more time focusing on how power-holders exercise their discretion (such as justices of the peace, police officers and even private citizens) when they decide what generally prohibited conduct is and is not justified under the circumstances.

Although the normative questions that arise under my account of justification defenses are quite different from the ones that criminal law theorists have focused on over the years, they are not altogether new. Indeed, they are some of the most enduring normative issues that we face anywhere in the legal system. The most important of these questions are of three sorts. First, we are concerned with the question of authority: On what grounds can we say that these decision-makers have the authority over others to decide when it is justified to interfere with their interests? Second, we are concerned with the problem of discretion: How much discretion should power-holders have to decide when it is justified to interfere with the interests of others? And third,

\(^{105}\text{JOHN SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 117-118 (1995).}\)
we are concerned with the problem of *legality*: How can courts render the exercise of discretion by these decision-makers consistent with the rule of law? I do not promise even to scratch the surface of these three deep and ancient problems. In what follows, I mean only to highlight some of the ways in which they arise in the context of justification defenses and to show how these problems are crucially related to issues in a few other areas of the law. But before we turn to these questions (in part B below), it is worthwhile to pause for a moment to consider the role that justification defenses play within the larger system of criminal law.

2. Consent and Individual Autonomy

Justifications are not the only place in the criminal law where individuals’ decisions determine the scope of permissible conduct. The power of individuals to consent to interferences with their own interests\(^\text{106}\) is probably the most familiar example of this sort of phenomenon.\(^\text{107}\) But, as Peter Westen makes clear, consent does not operate as a justification defense but as a negative element of many offenses. He explains the situation as follows:

Most offenses are offenses of non-consent. Thus, larceny is not the taking of another’s property as such, but the forcible taking of another’s property without his consent. Kidnapping is not the forcible removal or confinement of a person as such, but the forcible removal or confinement of a person without his consent. So, too, with offenses of trespass, theft, and assault. Legal consent by S vis-à-vis A transmutes what would otherwise be “larceny” by A into charity; “kidnapping” into companionship; “trespass” into hospitality; “assault” into sport; “maiming” into surgery; and “rape” into intimacy.\(^\text{108}\)

106. This qualification is crucial. Many justification defenses crucially involve what is usually called the granting of consent – but not to interferences with our own interests. We often say that a justice of the peace consents to a search or an arrest, a family member consents to the withdrawal of treatment from her terminally ill relative, etc. But in all cases of justifications, the legal power is exercised over the interests of another. And it is precisely because the legal power is exercised over the rights of others that it requires justification. For the rest of this section, I use “consent” as a shorthand for “consent to interferences with our own interests.”

107. JOSEPH RAZ, *THE AUTHORITY OF LAW*, 19 (1989) draws the distinction neatly as follows: “[W]e can divide powers into powers over oneself and powers over others. The most important species of power over oneself is the power to undertake voluntary obligations. Power over others is authority over them. […] It is interesting to note that when speaking of a person’s authority over himself, we always refer to his power to grant himself permissions or powers.”

Now, Westen is clearly right that as a doctrinal matter, consent generally operates as a negative element of particular offenses rather than as a distinct justification defense. But there is also a deeper explanation for this doctrinal difference that concerns the very different ways that these two exercises of decision-making power affect claims of individual freedom. When individuals grant consent to the use of their own bodies and property, this is best understood as a way for them to extend the scope of their freedom. Although there are some things that we can choose to do with our bodies and our property all by ourselves, there are also a great many things that we can only do together with others. Indeed, Westen’s examples of charity, companionship, hospitality and intimacy are all activities of that sort. Consent is the legal mechanism that allows us to use our bodies and property in these irreducibly social activities.

The reason why lack of consent is an important element of so many offenses is that the wrongness of the conduct in question lies precisely in the fact that it constitutes a usurpation of another person’s exclusive power to decide what shall be done with her body or property. Although a good deal of effort has been made over the years to explain such offences purely in consequentialist terms (by suggesting that non-consensual conduct is always more harmful than similar consensual conduct), this sort of argument has never gained much traction. Instead, it is now widely understood that all of these offences are usurpations of another’s exclusive power to decide what shall


110. Supra note 2.

111. Action that is irreducibly social is the subject of a large and growing philosophical literature. See Margaret Gilbert, On Social Facts (1989), Raimo Tuomela, The Importance of Us: A Philosophical Study of Basic Social Notions (1994).

112. The legal limits on the power of consent are best understood as flowing from this rationale. For example, under the Model Penal Code, one does not have the power to consent to serious bodily injury that is not inflicted as part of an athletic contest or “other concerted activity.” Model Penal Code § 2.11(2). And in Canada, one does not have the power to consent to activities that cannot easily be conceived of as cooperative such as the infliction of death or serious injury: see R. v. Jobidon, 2 S.C.R. 714 (1991); Rodriguez v. British Columbia (A.G.), 3 S.C.R. 519 (1993); Criminal Code, R.S.C., ch. C-46, § 14 (1985) (Can.).

113. In the context of property, Jeremy Waldron famously stated that: “the concept of ownership is the very abstract idea… that the decision of the named individual object about what should be done with an object is taken as socially conclusive.” Jeremy Waldron, The Right to Private Property 52 (1988). See also Larissa Katz, Exclusion and Exclusivity in Property Law (forthcoming U. Toronto L. J.)

happen to his body and property – and that the equivalent conduct, when undertaken with valid consent, is not wrongful (and needs no justification) because it is simply carrying out the other’s wishes. As such, it affirms the other party’s power to determine the use to which his body and property may be put, rather than undermining it.\footnote{Arthur Ripstein puts this point very powerfully in terms of what he calls “the sovereignty principle.” See Arthur Ripstein, Beyond the Harm Principle, 34 PHIL. & PUB. AFFAIRS 215 (2006).} 

Despite their deep similarities, then, justifications appear to be the mirror image of consent in at least one important respect: rather than expanding individual freedom, justifications seem to represent a fundamental attack upon it. Rather than giving individuals greater power to decide what happens to themselves and to what is theirs, justifications give power to others to decide what happens to us and to our interests.\footnote{Of course, some justifications (such as the justification available to police officers to run red lights and to exceed the speed limit when in hot pursuit of a suspect) do not involve interference with the body or property of any other individual. Instead, they involve interferences with the public interest in road safety. Nevertheless, because the rules of the road are essential preconditions to the exercise of individual liberty, interferences with these public interests should be seen as interferences with individual freedom. For the most detailed argument for this position, see Arthur Ripstein, Public Right in Kant: A Road Map (manuscript on file).} Indeed, I shall argue, this important difference between consent and justifications presents the deepest problem of legitimacy for justifications. It is important to note here the radical difference between the law’s attitude toward the exercise of legal power in consent and in justifications. The law treats our consent to others’ interference with our bodies and our property as just another exercise of our freedom. Accordingly, just as the law leaves it up to us to decide how to use our own bodies or property as we see fit, it also leaves it up to us to decide as we wish whether to grant or withhold consent to others’ use of our bodies and property. But when it comes to the exercise of legal powers in justifications, the law does not give the decision-maker nearly so much discretion. Whenever someone makes a decision about when it is justified to interfere with another’s interests, the law requires (at least) that her decision be based on the right sorts of reasons and that it be the result of the right sort of deliberation.

3. Prohibitions and Justifications, Ideal and Nonideal Theory

Why does Anglo-American criminal law leave it up to the discretion of particular decision-makers to determine when it is justified to do what the law generally prohibits? Why doesn’t the legislature simply set down a \textit{complete} set of conduct rules dealing even with these situations, as Robinson suggests? Or, if some of these questions are to be dealt with elsewhere, why don’t we leave it up to the courts to settle these questions at trial, as Fletcher and
Gardner suggest? The answer, it seems, lies in a deep difference between the law’s prohibitions and its justification defenses. Borrowing John Rawls’ distinction between the “ideal” and the “nonideal,” we may think of the criminal law’s prohibitions collectively as what he calls “ideal theory”—the terms on which we would ideally like to interact with one another. According to Rawls’ account, ideal theory is entirely non-purposive because it simply sets out a framework of fair and stable terms of interaction within which individuals can pursue their own ends as they see fit. As such, it is the sort of thing that is best set out in clear, general terms by the legislature. Criminal law justifications, by contrast, can be thought of as the law’s “nonideal theory”—concerned with the way in which we may respond justly to injustice and to other “nonideal” conditions. As such, it is appropriate that justifications are set out in remedial, purposive terms. It is also appropriate that rather than dictating precisely what is and is not permissible, they simply grant a limited sphere of discretion to decision-makers to determine how best to preserve or to restore ideal conditions.

B. Justifications and the Control of Discretion

In this last section of the essay, I consider how the law addresses some of the major normative issues that arise in the context of justifications: the questions of authority, discretion and legality. Once again, I group justifications according to the status of the decision-maker. The first class of justifications, which arise from an exercise of decision-making power by private fiduciaries, is in some sense the least problematic. Here, the private law of fiduciary relations explains why the fiduciary has authority to make

117. John Rawls famously argues that the appropriate way to make out a theory of justice is to begin by setting out a (conceptually prior) ideal theory. “Thus the principles of justice that result are those defining a perfectly just society, given favorable conditions.” JOHN RAWLS, A THEORY OF JUSTICE 351 (1971). These fair and stable terms of interaction under ideal conditions provide a yardstick by which to determine what constitutes a just response to injustice (in which category he includes “punishment and compensatory justice”) or to other nonideal conditions (in which category he includes “the natural features of the human situation, as with the lesser liberty of children”). Id. at 244. He writes: “The reason for beginning with ideal theory is that it provides, I believe, the only basis for the systematic grasp of these more pressing problems.” Id. at 9.

118. Christine Korsgaard has pointed out the purposive/nonpurposive distinction between ideal and nonideal theory as follows:

Nonideal conditions exist when, or to the extent that, the special conception of justice cannot be realized effectively. In these circumstances our conduct is to be determined in the following way: the special conception becomes a goal, rather than an ideal to be lived up to; we are to work toward the conditions in which it is feasible.

decisions for the beneficiary, how much decision-making discretion he should wield and how courts should review those exercises of discretion in order to render them compatible with the rule of law. The second class of justifications, which arise from the decision-making power of public officials, is slightly more complicated. Here, it requires a good deal more effort to explain how public officials have the authority to make decisions regarding the interests of citizens and what sort of decision-making discretion they should wield over those citizens. It is in this context, however, that the standards of judicial review rendering the exercise of discretionary decision-making consistent with the rule of law are most highly developed. Finally, the third class of justifications, which arise from the exercise of decision-making power by ordinary citizens caught in extraordinary circumstances, is most complicated of all. It is not at all obvious how ordinary citizens should ever have decision-making authority over their fellow citizens nor is it clear how much discretion they should wield when doing so. I shall suggest that the best way to understand these justification defenses is to see them as special cases of those that apply to public officials. The decision-making authority of ordinary citizens is derived entirely from their role as stand-ins for public officials who are unable to make those decisions themselves. Accordingly, I shall argue, we should look to public law for the grounds of their authority, the appropriate constraints on their discretion and for the appropriate standards by which courts should review their decisions.

1. Private Fiduciaries

A great many criminal law justifications, as we have seen, arise from the exercise of decision-making power by private fiduciaries over the interests of their beneficiaries. Fiduciary relations are in some sense exceptional arrangements precisely because of the threat they pose to individual freedom: it is only in unusual circumstances that the law will recognize that one individual has the authority to make decisions about the affairs of another. In some cases, this apparent threat to individual freedom is illusory. When two competent adults agree to establish a fiduciary relationship between themselves – as doctor and patient, shareholder and director of a corporation, etc. – we should not think of the power of the fiduciary to make decisions about the beneficiary’s interests as undermining the latter’s individual freedom. Rather, institutional arrangements built around the fiduciary relation such as corporations, trusts and professions all provide individuals with a greater variety of ways to arrange their affairs from which they may choose. So long as the entrusting party does not cede decision-making power absolutely,\textsuperscript{119} we

\textsuperscript{119} Of course, an absolute and irrevocable grant of decision-making authority would crucially undermine individual freedom. But this is why residual control rights are essential to the
can consider the fiduciary relationship to be just another instrument by which the beneficiary may exercise his individual freedom. The fiduciary has the authority to make decision over the beneficiary’s affairs conferred on him by the beneficiary himself.

In addition to these fiduciary relationships that arise through bilateral agreement, however, there are also a great many other such relationships where the fiduciary wields decision-making power over the affairs of a beneficiary who never consented to such an arrangement. In all these cases, the law entrusts decision-making power over the beneficiary’s affairs to a fiduciary because the beneficiary is incompetent to make decisions for herself. This is true both of fiduciary relations that arise by operation of law (say, as between natural parent and child) and those that arise by unilateral undertaking (say, as between adoptive parent and child, or between doctor and unconscious patient in need of emergency medical care). In all these cases, someone is needed to speak for the beneficiary because she cannot speak for herself (because she is a minor, unconscious or otherwise legally incompetent). Sometimes the law looks to a natural connection between fiduciary and beneficiary (as in the case of biological parents and their children) and at other times the law looks to the undertaking of a potential fiduciary to determine who should stand in the position of fiduciary. In these cases, however, the fiduciary relationship operates as a remedy to a particular problem: who should speak for those who cannot speak for themselves? The fiduciary’s authority over the beneficiary is slightly more controversial in these cases for, rather than representing an expression of the beneficiary’s choice, it is the law’s effort to provide a substitute in the absence of any choice by the beneficiary.

Because the fiduciary wields at least some discretionary decision-making authority in all fiduciary relations, there is always the possibility that the fiduciary will not exercise that discretion in the beneficiary’s best interests, as he should. Because the fiduciary has the power to make decisions regarding the affairs of another, he might be tempted to ignore the beneficiary’s interests either because he prefers to pursue his own interests or simply because he is too lazy or careless to put forth the effort required to pursue those interests properly. It is in order to control these two sorts of agency problems that fiduciary law imposes the twin fiduciary duties of loyalty and care. The problem of the fiduciary relation has been described as follows: “[It] is a relation in which the principal’s interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law’s blunt tool for the

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legitimacy of such fiduciary arrangements. Indeed, D. Gordon Smith suggests that the retention of residual control rights by the beneficiary is “the defining attribute of fiduciary relationships.” (D. Gordon Smith, The Critical Resource Theory of Fiduciary Duty, 55 VAND. L. REV. 1399, 1405 (2002)).
control of this discretion.”120 The fiduciary’s duties require him to exercise his legal power over the beneficiary’s interests with reasonable care (avoiding laziness and incompetence) and in the beneficiary’s best interests rather than his own (avoiding self-dealing). Thus, parents may decide that it is justified to use force on their children – but only if they reasonably121 conclude that it is in the best interests of their child to do so;122 and doctors may decide that it is justified to invade the patient’s bodily integrity by performing an operation – but only if they reasonably deem it to be in the best interests of the patient.123

2. Public Officials and the Judicial Review of Administrative Action

It is often said that public officials stand in a fiduciary relationship to the people.124 In many cases, courts not only make this general claim, but go on to list quite specific tenets of fiduciary law as applicable to public officials in the exercise of their powers. For example, some American courts have said of public officials that they

stand in a fiduciary relationship to the people whom they have been elected or appointed to serve. … As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity. In discharging the duties of their office, they

120. Weinrib, supra note 65, at 4 (1975). In a later article, Weinrib sets out the problem of fiduciary relations in slightly different terms, highlighting the importance of the legal status of both parties as equal, self-determining agents: “[W]hen on party acts on behalf of the other, the law supposes that the dependence of the beneficiary on the fiduciary would transform the former into a possible means for the latter, and thus be inconsistent with their equality as self-determining agents, unless accompanied by a beneficiary’s entitlement to the fiduciary’s loyalty.” Ernest Weinrib, The Juridical Classification of Obligations, in THE CLASSIFICATION OF OBLIGATIONS (ed. Peter Birks, 1997) 37, 46.

121. See supra note 18 and accompanying text.

122. See supra note 22 and accompanying text; see also ASHWORTH, supra note 72 at 150.

123. See supra note 82 and accompanying text.

124. It is not nearly so clear why state officials and citizens find themselves in this position. Consent-based accounts of state authority (whether actual or hypothetical) seem to suggest that the relation between state and citizen is either one of contract or a fiduciary one founded in mutual agreement (such as the relationship between shareholder and corporate director). But given the failings of most consent-based arguments for the authority of the state, it might seem more helpful to construe this relationship as a fiduciary relationship founded on necessity, akin to the relationship between parent and child or doctor and unconscious patient. Kantians, for example, might argue that the state is necessary to exercise certain powers that are simply impossible for individuals acting on their own to exercise. But this argument in political theory extends well beyond the scope of this essay. On the failings of explicit consent based arguments for state authority, see A. JOHN SIMMONS JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS (2001). On the failings of hypothetical consent models, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, 151 (1977).
are required to display such intelligence and skill as they are capable of, to be
diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity…\textsuperscript{125}

We should not be surprised to see courts insisting that a fiduciary relationship exists between public officials and citizens. Public officials clearly do exercise tremendous decision-making powers over the interests of citizens, determining not only when their property may be searched, when they may be arrested and so on but also when they are entitled to government benefits, when they deserve police protection against various sorts of harm, \textit{etc}. And as we have seen, the exercise of decision-making power by some over the affairs of others – what Raz and others refer to simply as “authority”\textsuperscript{126} – presents the most serious potential threat to individual freedom. The way that private law reconciles the existence of such power with individual freedom is by recognizing a fiduciary relationship and imposing significant limits (in the form of fiduciary duties) on the fiduciary’s discretion to decide matters as he sees fit. It is natural, then, that courts should look to precisely the same legal instrument – the fiduciary relation and fiduciary duties – to reconcile the freedom of individual citizens with the power of public officials to make decisions about their legal rights.

There are two aspects of the law governing decision-making by public officials that suggest a deep connection to the private law of fiduciaries. The first is the duty of fairness that applies to fiduciaries who are responsible for a number of different beneficiaries (as in the case of parents of multiple children, directors of corporations with multiple shareholders or captains of ships with multiple passengers). Although the fiduciary may draw distinctions between different beneficiaries and different classes of beneficiaries, he may not do so arbitrarily.\textsuperscript{127} In this way, a fiduciary’s duties owed to multiple beneficiaries gives rise to a duty of \textit{fairness} when deciding how to accommodate the interests of various beneficiaries. This raises deep and troubling questions about when a fiduciary may impose significant burdens on some beneficiaries for the benefit of others. For example, when a ship’s captain orders the jettisoning of a passenger’s property (or even a passenger) in a storm, the law requires does not only that he must reasonably believe this to be in the best interests of his passengers as a whole (because it is necessary to saving the ship


\textsuperscript{126}. \textit{See} Raz supra note 67.

\textsuperscript{127}. Howe v. Lord Dartmouth, [1802] 7 Ves. 137 (Eng.).
in a storm). It also requires that the procedure through which he selects the person whose property (or person) is to be jettisoned treat the interests of all passengers as equally deserving of concern and respect. And, of course, these fairness concerns arise even more commonly in the context of public officials who must choose quite regularly how to sacrifice the interests of some for the benefit of others.

The second aspect of the law governing decision-making by public officials that connects it to private fiduciary law is the way in which courts treat the decisions of power-holders in both cases. When a fiduciary’s decision is challenged in the courts – say, because it is alleged that the fiduciary breached his duty of loyalty to the beneficiary – courts will not address the wisdom of the fiduciary’s decision as such. Rather, they will show at least some deference to his decision-making discretion. Instead of dealing with the correctness of his decision head-on, they will consider the manner in which the fiduciary reached his decision: did he pursue a self-interested transaction without informing the beneficiary? did he fail to exercise the good business judgment when deciding to enter into the transaction? and so on. And if the fiduciary violated one of his duties (of loyalty, care, etc.) in reaching his decision, then the court will usually impose a remedy designed to nullify the legal effect of the decision – by voiding the resulting transaction directly or, where this is not a practical solution, by creating a constructive trust or ordering a disgorgement of profits. Similarly, when a public official’s decision is challenged by way of judicial review, the courts do not address the wisdom of the decision directly. Rather, they concern themselves with the manner in which the official exercised his discretion. Further, just as courts will defer more or less to a fiduciary’s decision-making depending on the

128. See U.S. v. Holmes, supra note 80.

129. Perhaps the best-known area of public decision-making where these fairness considerations are at play is in the law of “regulatory takings.” If a regulation unfairly targets a specific individual or class of individuals, then it will be treated as a taking, requiring compensation under the Fifth Amendment. See Armstrong v. United States, 364 U.S. 40, 49 (1960): “[The] Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole...” See also: Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), Eric A. Kades, Drawing the Line Between Takings and Taxation: The Continuous Burdens Principle, and its Broader Application, 97 NW. U. L. REV. 189 (2002).


131. In the leading U.S. administrative law case of Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837 (1984), Justice Stevens stated that so long as the administrative agency’s decision did not contravene the unambiguously expressed intent of Congress, courts should construe any gaps in the statutory scheme as an “express delegation of authority to the agency to elucidate a specific provision of the statute by regulation” and defer to any reasonable constructions of the statute by the agency.
degree of trust reposed in him,\textsuperscript{132} so courts will defer more or less to administrative agencies based on a number of related factors, as well.\textsuperscript{133}

Bolstering this parallel between private fiduciaries and public officials, a number of recent scholars have pointed out that courts treat public agencies and private fiduciaries in strikingly similar fashion.\textsuperscript{134} Although courts do not generally make explicit that they are imposing duties of loyalty and care in the public law context nor do they cite private fiduciary law as their authority for doing so,\textsuperscript{135} the context of these duties is nonetheless present in the judicial review of administrative decision-making. Evan Criddle summarizes the situation in American administrative law as follows:

The parallels between private fiduciary duties and agency duties are striking. Agencies are bound to exercise reasonable prudence when exercising delegated powers, and they are forbidden from entering self-interested transaction or arbitrarily discriminating between similarly situated beneficiaries. Courts enforce these fiduciary duties as minimal standards of rationality, consistency, transparency, public deliberation, and thoroughness in investigating alternatives.\textsuperscript{136}

Although the focus of Criddle’s concern is the judicial review of administrative decision-making more generally, our concern here is somewhat narrower. For now, we are interested only in how courts treat the decisions of public officials when this is central to a claim of justification (such as the claim that a search or arrest was justified because an official granted the requisite warrant). Because the law subjects both private fiduciaries and public officials to strict fiduciary (or fiduciary-like) duties, they may only make decisions about what conduct is and is not justified according to certain well-defined patterns of reasoning. The justice of the peace who must decide whether or not to grant a search warrant, for example, is not free to consider just \textit{any} reason that might justify the invasion of a citizen’s privacy. Instead, he is instructed by the law to consider only a particular set of justifying considerations and to


\textsuperscript{133} See Criddle, \textit{supra} note 3 at 164. He suggests that the different levels of deference to administrative agencies “may best be understood not as a linear continuum but rather as a heterogeneous family of distinct but interrelated species.”

\textsuperscript{134} Id., Evan Fox-Decent, \textit{The Fiduciary Nature of State Legal Authority}, 31 QUEENS L.J. 259 (2005).

\textsuperscript{135} In the United States, most judicial review of administrative decision-making occurs under the Administrative Procedures Act and the U.S. Constitution. In other common law countries without such a comprehensive statutory régime (such as Canada and the United Kingdom), principles of natural justice play this role.

\textsuperscript{136} Criddle, \textit{supra} note 3, at 151.
make his decision accordingly. (And, because the justice of the peace is bound by the decision rules that guide him, he might sometimes be legally required to grant a warrant in some cases where he thinks it to be morally unjustifiable, too.) Similarly, the parent who is faced with the decision whether or not to use physical force to punish his child is not free to consider just any justifying consideration. Instead, he may only consider those factors that have to do with the best interests of the child. Any other reasons—for example, that it might teach other children a lesson or that it might gain the approval of grandparents who advocate harsh discipline—is strictly outside the scope of reasons that the parent may consider when deciding whether or not to use disciplinary force.

When courts are asked to determine whether a police officer was justified in carrying out a search or an arrest, they go through the same sort of reasoning as they do when asked to determine whether a private actor was justified in carrying out conduct that a private fiduciary had deemed to be justified. In both cases, the trial court’s main task is to undertake a review of the power-holder’s earlier decision to permit the conduct in question; the court’s task is not to decide for itself whether the conduct was justified in light of all the evidence now available to it. Indeed, this is a point of doctrine that is so uncontroversial that even George Fletcher (who, as we have seen, is committed to a correctness standard for all justifications) acknowledges it. He writes: “If the form of the allegations is correct and the police do not exceed the scope of a properly drawn warrant, there is little that the affected party can do to challenge the legitimacy of the intrusion.” That is, so long as the decision to allow the arrest or search was made by someone with the requisite decision-making authority and the decision was made on in the right way, courts will allow that decision to stand even if when they would have decide the matter differently based on all the facts available to them.


138. One should not confuse this point with one that is similar but different. Although parents may not decide to use force on their children for reasons that have nothing to do with the child’s well-being, they must rely on certain cultural and religious norms to make their decisions about what constitutes the best interests of the child. For example, a Jewish parent might reasonably decide that it is in the best interests of his son to have a bris, but a non-Jewish parent might not. (Thanks to Ted Diskant for drawing my attention to this distinction.)

139. Although the trial of police officers in this sort of case is unlikely, we have certainly seen police officers tried for excessive use of force. In the British context, there have been a number of high-profile trials of soldiers in Northern Ireland charged with murder in connection to the use of force. See Kelly [1989] NI 341, Kelly v. UK (1993) 74 DR 139.

140. Fletcher, supra note 27 at 772-73.
3. Private Citizens with Public Powers

The greatest challenge to my powers-based account of justifications is to explain how ordinary citizens could legitimately exercise decision-making power over others, as they seem to do in situations of self-defense, lesser evils, citizen’s arrest and so on. In the other two classes of justification defenses, we were able to provide at least the beginnings of such an explanation by referring to the special position of the decision-makers. In private law, the fiduciary’s authority derives either from the consent of the beneficiary or the need for someone to speak in the name of the beneficiary because she is unable to speak in her own name. In public law, the authority of public officials to wield decision-making power over citizens and their interests is a highly controversial issue, but a good deal of Anglo-American law seems to suggest that it, too, is explained in terms of the fiduciary model.

But when we come to the justifications that turn on the decisions of ordinary citizens about when it is justified to interfere with the interests of their fellow citizens – self-defense, lesser evils, citizen’s arrest and so on – the authority of these private citizen decision-makers is much less clear. In each of these justifications, the law recognizes in ordinary people the power to make extremely important decisions about the interests of others: whether they may be killed in self-defense, whether their property may be destroyed to avoid the greater evil, whether they may be assaulted as part of a citizen’s arrest, and so on. What is particularly troubling about the exercise of such decision-making powers is that they seem to be wielded by individuals with no special status that could explain their authority to make such decisions. And this leaves us with the greatest problem of authority of all: if literally anyone can make decisions about others’ most basic interests in life, liberty, security and property, then the law’s claim that each person is sovereign over herself and her basic interests is hollow indeed.

The beginnings of an answer to the problem of authority starts to appear when we recall that private citizens are entitled to make these decisions about the interests of others only under extremely unusual circumstances. That is, we are entitled to decide that it is justified to kill in self-defense, or that it is justified to violate a prohibition to avoid a greater harm, or that it is justified to use force to perform a citizen’s arrest only when it is essential to make that decision promptly and there are no properly qualified public officials available to do so. This tells us that there is an important division of labor taking place between public officials and private citizens. Whatever the moral standing of private citizens to use force in these situations, the criminal law in most Anglo-American jurisdictions quite clearly treats private citizens as exercising these powers only as stand-ins for public officials who have the standing power to make these decisions. Private citizens do not have the authority to make such
decisions in their own right. Rather, they have such authority, it seems, only insofar as they stand in the shoes of public officials to whom this authority belongs.

This conclusion about the authority of private citizens to make decisions about when they may act in self-defense, to promote lesser evils or to perform a citizen’s arrest is highly unorthodox. Particularly in recent years, there has developed a voluminous literature discussing the precise contours of each citizen’s right to engage in such justified conduct. Following the lead of Robinson, Fletcher and Gardner, most of that discussion simply takes for granted that courts should recognize conduct as justified whenever their best moral theory tells them that there were strong moral reasons to permit individuals to engage in such conduct notwithstanding the strong reasons against permitting it that motivated the original prohibition. But, as we have seen, these accounts of justifications are deeply flawed in their understanding of the institutional division of labor at work in justification defenses and in criminal law more generally. Anglo-American criminal law does not leave it up to trial courts to determine what conduct is and is not justified, based on their best moral theory. Instead, they leave it up to another set of decision-makers to determine in medias res whether the conduct is justified. The job of trial courts is to review that decision-maker’s exercise of discretion for procedural and jurisdictional flaws and not to decide the issue de novo.

Moreover, when we put aside contemporary assumptions about these justifications that are available to ordinary citizens, we find that there is actually substantial support for my suggestion that private citizens in these situations act as pro tempore state agents of necessity. For example, William Blackstone, in his Commentaries on the Laws of England, argues that otherwise prohibited conduct such as killing is legally justified only insofar as it is undertaken to pursue one of the state’s own purposes: the court-ordered killing of someone sentenced to death, killing that is necessary to apprehend someone resisting arrest and killing to prevent a serious crime such as murder. The Supreme Court of the United States recognized this point as follows: “At early common law only those homicides committed in the enforcement of justice were considered justifiable; all others were deemed unlawful . . . .” That is, the right of ordinary citizens to kill in self-defense derives from their power to decide enforce the law when no officials are in a

141. This is in contrast to what John Locke might suggest. For more on Locke’s account of self-defense and the law of nature, see Jeremy Waldron, Self-Defense: Agent-Neutral and Agent-Relative Accounts, 88 CAL. L. REV. 711, 736 (2000).
142. 4 WILLIAM BLACKSTONE, COMMENTARIES *178-82. Edward Coke also makes clear that private conduct such as self-defense is justified only insofar as it furthers the state purpose of law enforcement. See EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 55 (1644).
position to do so. The fact that citizens in such situations are exercising a
degraded state function is most readily apparent in the case of citizen’s arrest.
In Canada, for example, the power of arrest, even when exercised by private
citizens, has been explicitly characterized as a delegated state power. In *R. v.
Lerke*, the Alberta Court of Appeal made this point quite clearly as follows:

Each citizen had a part to play in this system of criminal procedure with
not only the right to make arrests, but the duty to do so in appropriate
cases. The right and the duty, however, was directly derived from the
Sovereign himself and the citizen acting in obedience to this royal
command functioned as an arm of the state. . . .

. . .
The power exercised by a citizen who arrests another is in direct
descent over nearly a thousand years of the powers and duties of
citizens in the age of Henry II in relation to the “King’s Peace.”
Derived from the Sovereign *it is the exercise of a state function.*

Seen in this light, the source of ordinary citizens’ legal power to decide when it
is permissible to violate criminal prohibitions in order to defend themselves, to
effect an arrest, to prevent a breach of the peace, or to prevent the greater evil
seems quite clearly to derive from the power of front-line state officials such as
police constables to make such decisions, as well.

Indeed, the Canadian discussion of the powers and duties of citizens from
the time of Henry II and Blackstone’s discussion of justifications and state
function both remind us that the distinction between public officials and
private citizens was not always as neat as contemporary criminal law theorists
often assume. In the early modern period, state formation largely took place
not by the hiring of government employees, but by the licensing of private
citizens to undertake state functions in its name.* The lesson from English
constitutional history about the murkiness of the public-private divide is
particularly relevant today in the age of privatization. That is, although
criminal law theorists usually assume a neat distinction between public
officials and private citizens, this distinction simply does not hold up in
practice. At an amazing rate, governments across the western world are
privatizing services that were once considered to be at the very core of the

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145. The use of ordinary citizens to carry out state functions is an ancient and familiar strategy,
sometimes called “government by license.” See Michael J. Braddick, *State Formation in Early
Modern England* c. 1550-1700 (2000). The same practice is in vogue once again, although today it is usually referred to as “reinventing government” or simply
“privatization.” See Michael J. Trebilcock, Ron Daniels & Malcolm Thorburn, *Government
government’s role from prison management to the waging of war.¹⁴⁶ And where they are not explicitly privatizing such services they are often retreating from the provision of services, leaving the private sector to provide them in their place. This is perhaps most dramatically visible in the recent steady growth in the private security industry across the developed world. In all these cases, putatively “private” citizens – whether they are private security guards, private prison employees or mercenaries – engage in conduct that is generally prohibited, claiming criminal justifications in their defense.

The modern phenomenon of privatization (or, given the historical precedent, what might more accurately be called “re-privatization”) raises perhaps the deepest and most difficult problems for defenders of a neat public-private divide.¹⁴⁷ For decades, American and Canadian constitutional scholars have tried to set out a workable distinction between state action that is subject to constitutional review and private action that is not, but to no avail.¹⁴⁸ The present discussion of justifications and the manner in which the authority of private citizens to decide when conduct is justified seems to be derivable from their position as pro tempore public officials might provide a sort of new beginning to this deeply unsatisfying debate.¹⁴⁹

Conclusion

Criminal law theory made a significant advance roughly thirty years ago when George Fletcher popularized the important conceptual distinction between justifications and excuses. In the intervening years, however, very little progress has been made in exploring the structure and function of justification defenses. The reason for this failure, I have suggested, is a widely shared misconception about their place within the criminal law’s institutional structure. Contrary to what is generally believed, it is not up to trial courts to decide, ex post facto what conduct is justified and what is not. This determination is made ex ante by other institutional actors such as private fiduciaries, public officials and, sometimes, ordinary citizens caught in extraordinary circumstances. The court’s role is simply to review the validity of that prior exercise of decision-making discretion.

More broadly, our study serves as a reminder of the importance of institutional structure in criminal law. It is almost always misleading to address issues in criminal law by way of abstract moral theorizing because this leaves out the crucial question of institutional division of labor. Before addressing the substantive of particular questions – what conduct should be prohibited, justified, excused, etc. – we must first address ourselves to the institutional questions that I have called the problems of authority, discretion and legality. These institutional questions receive their most thorough treatment in two other areas of law: the private law of fiduciaries and public administrative law. If we wish to make progress in understanding justification defenses – and the institutional structure of criminal law more generally – it is to these areas of law that we should attend.