PETER WESTEN

AN ATTITUDINAL THEORY OF EXCUSE

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The mother lode of criminal responsibility scholarship is a unitary theory of criminal excuses, that is, a persuasive normative account of why the criminal law adjudges actors to be blameless despite their having engaged in prohibited conduct.¹

The law’s other criminal defenses do not readily lend themselves to unitary normative accounts or, if they do, they rest on normative accounts that are self-evident. Consider what Paul Robinson aptly calls “non-exculpatory” defenses,² that is, defenses like double jeopardy and diplomatic immunity that bar actors from being tried for reasons that are independent of


whether or not they engaged in the blameworthy conduct with which they are charged. Individual non-exculpatory defenses such as double jeopardy may be easy to explicate, but double jeopardy and diplomatic immunity share nothing normative in common, except that, like all non-exculpatory defenses, they bar actors from being tried and convicted. Or consider the exculpatory defenses that consist of a defendant’s denying that he has committed the actus reus of a charged offense or a defendant’s claiming that, if he committed the actus reus, he did so because it was the lesser of two evils and, hence, justified. These are veritable “exculpatory defenses” because they deny that the defendant engaged in conduct that was blameworthy. Nevertheless, they rest on unitary norms that are transparent – namely, that all things considered, the defendant did nothing that the applicable criminal law regards as an undesirable or regrettable thing for an actor to do, all things considered.

Like the aforementioned defenses of actus reus and justification, excuses are also exculpatory defenses; for they, too, deny that those who invoke them engaged in conduct that is blameworthy. Yet unlike defenses of lack of actus reus and justification, excuses obtain even when a defendant has done something that society regards as undesirable or regrettable under the circumstances. Indeed, defendants may engage in the most heinous conduct and nevertheless possess excuses. Recall John W. Hinckley. Hinckley loaded his 22 caliber pistol with so-called “Devastator” bullets which explode on contact and shot at President Ronald Reagan six times, grievously wounding Reagan and two of his security personnel and inflicting permanent brain damage on White House Press Secretary, James Brady. The federal statutes that make it a crime to assassinate the President are designed to prevent precisely such conduct, and the heinousness of what Hinckley undertook would have justified the Secret Service in killing him to prevent it. Nevertheless, Hinckley possessed a defense of insanity that excused him from being condemned and punished for the heinous thing he did.

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Insanity is one of several excuses that criminal codes typically provide, including (but not limited to) involuntariness, immaturity, involuntary intoxication, and mistakes of fact and law. The question for criminal law scholars is whether these excuses are predicated on a unitary normative principle and, if so, what the principle is. The question is important because if such a principle exists and can be identified, it can serve as a normative guide to jurisdictions in deciding how broadly or narrowly to enact and construe excuses in areas in which their existence or scope is contested. The question is also fundamental because to understand when some actors ought to be excused is, ultimately, to understand when other actors are blameworthy.

Now some commentators deny the possibility of a unified theory of excuses. Other commentators believe that theories of criminal excuse are ultimately derivative of theories of punishment itself, leaving the former just as normatively contestable as the latter. Still others claim to have identified workable theories of excuses, e.g., that actors are excused when they have no “choice” or “control” to act otherwise than they do or when they are “caused” to do what they do.

I believe these views are mistaken. The difference between justification and excuse, properly understood, is as basic and simple as the difference between, “I did nothing wrong,” and, “Even if I did, it was not my fault.” Theories of excuse do not presuppose theories of punishment, provided that it is agreed that the state ought not to declare things to be true of defendants

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6 For “cause” theory, see Anders Kaye, ‘Resurrecting the Causal Theory of the Excuses’, Nebraska Law Review 83 (2005). For “choice” and “control” theories, see Section III.B.
that it believes to be false. Existing theories of excuse do not provide persuasive normative accounts of what they include as "excuses" and what they exclude as non-excuses.

Section I defines "excuse," and it does so by distinguishing it from "justification" and from defenses of actus reus. Section II responds to commentators who deny that excuse is a normative category that can be usefully distinguished from justification. Section III addresses several contending definitions and normative accounts of "excuse." Section IV advances a normative account of excuses based upon the normative predicates of speech-acts of reproach. To reproach a person for conduct is to express the belief that he acted with a reprehensible attitude toward the legitimate interests of himself or others. Just as a state ought not to reproach persons for acts that they do not commit, a state ought not to reproach persons for acts that it does not believe manifest reprehensible attitudes toward themselves or others.

I. A DEFINITION OF "EXCUSE"

All normative theories of excuse are accounts regarding when actors ought to be exculpated for engaging in prohibited conduct, and, as such, they presuppose a definition of that for which they claim to account – namely, "excuses." Suppose, for example, that two commentators each set out to rationalize excuses, one of whom understands excuses to encompass non-exculpatory defenses like double jeopardy, the other of whom does not. These respective commentators produce different normative accounts of excuse because they start with different definitions of "excuse." To assess the power of their respective normative accounts, one must assess the way they classify defenses, including the way they define "excuse." I shall argue that excuses are best

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7 Some consequentialists, though none of whom I am aware and certainly not Bentham, may take the position that the state may justly declare things to be true of defendants that it believes to be false. See Guyora Binder and Nicholas Smith, "Utilitarianism and the Punishment of the Innocent", Rutgers Law Journal 32 (2000): 115, 141–144, 148–151, 201–209. To the extent they do, the normative theory of excuses I advance is not consistent their political theories.
defined in relationship to two other exculpatory defenses, namely, lack of *actus reus* and justification.

There is extensive literature on distinctions between excuse and justification, some of it quite critical of the distinction. It is a mistake, however, to begin an exposition of excuse by juxtaposing it to justification because justification is itself a contested category. Instead, therefore, we shall start with a category of exculpatory defenses that is relatively easily defined, i.e., the claim by a defendant that he did not commit the *actus reus* of the charged offense. With the latter defense thus in mind, I will argue that “justifications,” as I define them, are exculpatory defenses that derive from the same principle as that which underlies the *actus reus* defense but are exculpatory defenses that arise where the *actus reus* defense is unavailing – namely, where, although an actor commits the *actus reus* of an offense, committing it is not a greater legal evil than the alternative evil the actor would have to choose under the dilemmatic circumstances in which he finds himself. I will conclude by arguing that “excuses” are the residual set of exculpatory defenses to wrongdoing that exist in law after defenses of *actus reus* and justification are fully accounted for.

Before proceeding, however, I should clarify what I mean by criminal “defenses.” I use “defense” broadly to refer to all claims to the effect that, given such evidence as is otherwise admissible and given such burdens of proof as otherwise apply, the state may not lawfully try and/or convict a defendant of an offense at issue. Accordingly, I use “defense” to include both exculpatory defenses like insanity, and non-exculpatory defenses like diplomatic immunity. However, I do not use “defense” to refer to exclusionary rules regarding the admissibility of real or testimonial evidence. Nor do I use “defense” to refer solely to claims upon which the defense has burdens of proof. Nor do I use it to refer to claims that come into play only after the elements of an offense have been established. Thus, I will speak of exculpatory “defenses” of lack of *actus reus* and lack of *mens rea* and “defenses” of justification, even though the prosecution invariably has burdens of persuasion with
respect to the former and the defense may have burdens of persuasion with respect to the latter.

A. The Defense of Lack of Actus Reus

Every criminal offense consists of both an actus reus and, unless it is an offense of strict liability, mens rea as well. The actus reus of an offense, as I define it, consists of an event of which a defendant is a cause that possesses three further features: (1) it is an “objective” event on a defendant’s part, as opposed to an exclusively subjective event on his part, (2) consisting of an action, an omission, or the product of an action or omission, (3) that is prohibited by the criminal law. Typically, the conduct constituting the actus reus is prohibited because it represents a harm or risk that the state seeks to prevent. Consider a murder

8 By “objective” events on a person’s part, I mean something other than “mere thoughts” or subjective mental states or intentions on a defendant’s part, but including events that are observable by third persons and subjective events that are experienced by third persons. Accordingly, the ‘causing’ of ‘fear’ in a third another or ‘inducing subjective consent’ in another is “objective” conduct on the person’s part.

9 An “action,” for purposes of criminal law, is the causing of a prohibited event by altering such events as will otherwise occur, e.g., a motorist’s causing a pedestrian’s death by hitting the pedestrian in a crosswalk. An “omission,” for purposes of criminal law, is the causing of a prohibited event not by an action but by refraining from arresting such events as will otherwise occur, e.g., a passing motorist’s causing a mortally-wounded pedestrian’s death by refraining from calling an ambulance.


statute that makes it a crime if a person “unlawfully and with malice aforethought causes the death of another human being”\textsuperscript{12} (while using the term “unlawful” to refer to killings that are unjustified evils under the circumstances). Obviously, a person is guilty under the statute only if he does all of what the statute specifies as a condition of liability, including acting with the \textit{mens rea} of “malice aforethought.” However, the \textit{actus reus} of the offense consists of only a portion of what the statute specifies as conditions of liability. The \textit{actus reus} of murder consists of conduct that the state regards \textit{ex post} as regrettable even if it is inflicted by actors without malice aforethought or without any guilty mind for that matter – namely, the conduct of “unlawfully ... caus[ing] the death of another human being.”

The conduct that murder statutes prohibit is regrettable because it is a material harm. Indeed, the material harm upon which murder statutes are predicated, i.e., unlawful homicide, is regarded in law as so fearsome that murder is the only offense for which the U.S. Supreme Court has allowed the death penalty.\textsuperscript{13} Not all criminal offenses, however, are predicated on material harm. Many offenses are predicated on conduct that the state regards as regrettable because of the \textit{risks} of material harm it presents. Consider the unlawful possession or sale of drugs. In themselves, acts of unlawfully possessing or selling drugs inflict no harm that the state wishes to prevent, provided the acts do not lead to the unlawful ingestion of drugs. Nevertheless, the state regards the

\textsuperscript{12} See, e.g., 21 Oklahoma Statutes § 701.7 (2003).
unlawful possession and sale of drugs as regrettable because of the risks of harm they involve, i.e., that they will result in harm of the unlawful ingestion of drugs.

The offenses we have thus far considered all involve prohibited conduct that the state regrets and that can be identified without making any reference to an actor’s state of mind. To be sure, a defendant will not be guilty of an offense requiring mens rea unless in addition to performing the actus reus, he also does so with the guilty mind required. But with respect to the aforementioned offenses, the state can determine whether an actor engages in conduct that the state regards as regrettable without inquiring into what he was thinking. That is not true of all criminal offenses, however. Some criminal offenses involve an actus reus that is itself partly constituted by an actor’s state of mind.

The Model Penal Code offense of attempt is a good example. As with most offenses, an actor is not guilty of attempt unless he commits the actus reus of attempt and does so with mens rea. The mens rea of attempt under the MPC is purpose: an actor is guilty of attempt to commit crime X under the MPC if, in addition to performing the actus reus of attempt, he does so with the purpose or belief that he is committing crime X. What is distinctive about attempt under the MPC, however, is its actus reus, because in contrast to the offenses we have thus far discussed, the actus reus of attempt under the MPC is itself defined by reference to the mens rea of attempt. A person performs the actus reus of attempt to commit crime X under the MPC if he engages in conduct that constitutes a “substantial step” toward committing crime X; and conduct constitutes a substantial step toward committing crime X if, and only if, it is conduct that is “strongly corroborative of the actor’s criminal purpose.”

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15 See Model Penal Code § 5.01(1).

16 Model Penal Code § 5.01(1)(c), (2). The actus reus of the impossibility attempts that MPC § 5.01(1)(b) & (c) prohibits are also defined by reference to states of mind, because the actus reus of such attempts consists of any
This is not to say that attempt under the MPC involves no \textit{actus reus}. An actor is guilty of attempt only if he actualizes his purposes in the objective world by doing more than possessing mere thoughts, whether he does so by means of an action or an omission.\footnote{For discussion of the moral and legal prohibition punishing a person for mere thoughts, see Meir Dan-Cohen, ‘Harmful Thoughts’, \textit{Law and Philosophy} 18 (1999): 379–405.} However, because the \textit{actus reus} of attempt is defined by reference to an actor’s mental state, it is not predicated on the occurrence of regrettable harms or risks in the way that other offenses are. To be sure, some criminal attempts, like Hinckley’s attempted assassination of Ronald Reagan, present the most frightful risks. But other criminal attempts, such as sting operations, do not. The \textit{actus reus} of attempt is conduct the state prohibits not because it consists of material harms or risks but because it manifests an undesirable readiness on an actor’s part to bring such harms or risks about.\footnote{This is why there can be no such thing as a “justified” attempt. “Justification,” as I define it, is a defense to conduct that consists of material harms or risks that the criminal law regards as \textit{prima facie} regrettable. Specifically, justification is a defense when, although an actor produces a harm or risk that is \textit{prima facie} regrettable, he does so as the result of a choice of evils that renders the harm or risk non-regrettable, \textit{all things considered}. There can be no such thing as a justified attempt, because attempts are defined, \textit{not} by reference to harms or risks that an actor must actually bring about, but solely by reference to such harms or risks as an actor believes he is bringing about. See Peter Westen and James Mangiafico, ‘The Criminal Defense of Duress: A Justification, Not an Excuse – And Why It Matters’, \textit{Buffalo Criminal Law Review} 6 (2003): 833, 878–879 (hereinafter “The Criminal Defense of Duress”).}

Regardless of the form the \textit{actus reus} of an offense takes, however, an actor is not guilty of the offense unless he engages in it. Thus, an actor is not guilty of homicide unless he
unlawfully causes the death of another human being; he is not
guilty of drug possession or sale unless he unlawfully possesses
or sells drugs; and he is not guilty of attempting crime \( X \) unless
he takes a substantial step toward it that strongly corroborates
his purpose to commit crime \( X \). In each case, in measuring his
conduct by what the statute declares to be a material harm or
risk or otherwise undesirable conduct, a person who does not
commit the actus reus of a charged offense can rightly say, “I
did nothing wrong.”

B. The Defense of Justification

Commentators differ sharply over the nature of justification
and its relationship to excuse. Some argue that there is no
moral distinction between justification and excuse.\(^{19}\) Others
believe that there is, or may be, a significant distinction but
disagree among themselves about the very nature of the dis-
tinction – some arguing that justification is a state of mind,\(^{20}\)
others arguing that it is a state of affairs,\(^{21}\) and still others
arguing that it is both.\(^{22}\) Despite their differences, however,
commentators agree that justification (or justification and ex-
cuse, for those who doubt the distinction) is a defense that
comes into play once the actus reus of an offense is complete.
Justification is the claim by an actor that in so far as he com-
mitted the actus reus of an offense, he is not blameworthy
because he committed it in the context of a choice of evils that
justified his committing it.\(^{23}\)

I shall be arguing that there is a significant normative dis-
tinction between defenses of actus reus and “justification,” on
the one hand, and “excuse,” on the other. In order to illuminate

\(^{19}\) See, e.g., Mitchell Berman, ‘Justification and Excuse, Law and

\(^{20}\) See, e.g., Kent Greenawalt, ‘The Perplexing Borders of Justification

\(^{21}\) See, e.g., Paul Robinson, Structure and Function in Criminal Law, pp.
95–124.

\(^{22}\) See, e.g., John Gardner, ‘Justifications and Reasons’, in Harm and

\(^{23}\) cf. Model Penal Code §§ 3.01, 3.02.
the latter distinction, however, it is useful, first, to demystify a distinction that is not normatively significant but merely formal—namely, the distinction between defenses of *actus reus* and choice-of-evils defenses of justification. Choice-of-evils defenses arise with respect to offenses like murder and drug sales that are predicated on material harms or risks that a state has a *prima facie* interest in preventing. As such, choice-of-evils defenses can be framed in one or the other of two ways without altering their normative effect: they can be explicitly framed as defenses of “justification” that come into play once the *actus reus* is complete; or, alternatively, the *negation* of such choices of evils can be included as a portion of the *actus reus*. Whichever form they take, an actor who possesses such a defense can rightly say the same thing of himself as an actor who fails to commit the *actus reus* of an offense, namely, “I did nothing wrong, all things considered.”

To illustrate, consider a paradigmatic choice of evils. Suppose that a policeman in North Dakota, coolly and deliberately shoots and kills an armed assailant whom he has warned to drop his gun but who endangers the lives of the policeman and others by continuing to fire at them. Suppose, too, that the policeman is charged with murder under a North Dakota statute that makes it an offense to “intentionally or knowingly cause the death of another human being.” The policeman can hardly deny that he committed the *actus reus* of “causing the death of another human being.” Nor can the policeman deny that he killed “intentionally.” The policeman nevertheless has a defense to murder under North Dakota law because, having declared it to be *prima facie* undesirable to “cause the death of another human being,” North Dakota goes on to specify situations in which killings are not regrettable, all things considered—namely, when they are necessary to protect oneself or others from being unlawfully killed or seriously wounded.

North Dakota thus proceeds in three steps. First, it defines the *actus reus* of murder broadly to consist of the harm of

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“caus[ing] the death of another human being,” while simultaneously disregarding the fact that the broad definition includes killings that North Dakota does not regard as regrettable. Second, having defined the actus reus of murder overbroadly and as something that is only prima facie prohibited, North Dakota separately specifies subsets of those homicides that it declares to be “justified” (including the circumstances under which our hypothetical policeman acted). Third, by virtue of separately specifying the homicides that are justified, North Dakota implicitly specifies a residual subset that it regards as not justified.

The significance of this three-step process is that North Dakota could have achieved the same substantive results in a single step by conjoining the actus reus of “causing the death of another human being” with the residual set of homicides that its justification provisions implicitly specify to be not justified. Thus, North Dakota could have said that an actor is guilty of murder if, while acting intentionally or with knowledge, he “unjustifiably causes the death of another human being” – or, more explicitly, “causes the death of a human being without its being necessary to protect himself or others from being unlawfully killed or seriously wounded.” Indeed, that is precisely what the statute does with which I introduced the previous section, i.e., the statute that makes it an offense to “unlawfully and with malice aforethought cause the death of another human being.” The term “unlawful” in the statute is a catch-all within the actus reus of murder that incorporates by reference all the circumstances in which actors are not confronted with choices of evils that negate the harm of killing a human being.27

The difference, then, between a statute like North Dakota’s, which proceeds in three steps, and a statute that proceeds in one step is entirely formal. Every choice of evil that is stated as a

27 cf., e.g., McElroy v. Holloway, 632 F.2d 605 (5th Cir. 1981) (the term “unlawful” in Georgia’s definition of homicide is an element of the offense that evidence of self-defense negates). This is not to say that the term “unlawful” always refers to absence of justification in criminal statute. It can be used as mere surplusage. See, e.g., the English statute in R v. R, [1992] 1 AC 599, [1991] 1 All ER 481, and the Ohio statute in Martin v. Ohio, 480 U.S. 228(198.
“justification” within a three-step statute that possesses an overly broad actus reus could be stated instead in negative form within a one-step statute consisting of an actus reus alone.\footnote{See Glanville Williams, ‘Offences and Defenses’, Legal Studies 2 (1982): 233. George Fletcher challenges Williams’ thesis on the ground that it would mean that ‘absences of justification’ would be as vulnerable to rules against vagueness as ‘offenses’ presently are. See George Fletcher, ‘The Nature of Justifications’, in John Gardner, Jeremy Horder, and Stephen Shute (eds.), Action and Value in Criminal Law (Oxford: Clarendon Press, 1993), pp. 175, 180–181. Williams’ thesis does, indeed, mean that absences of justification ought to be subject to the same rules against vagueness as offenses, and rightly so. See Paul Robinson, Fair Notice and Fair Adjudication: Two Kinds of Legality, pp. 42–44, 51–56 (manuscript). But those rules are not what Fletcher assumes, and not as rigorous. The principle of legality does not require that the state provide actors with notice in the form of clear and canonical legal pronouncements. Rather, an actor possesses sufficient notice of his legal obligations if conscientious members of the political community that enacted the law would regard the actor’s conduct as warranting the punishment prescribed. See Peter Westen, Two Rules of Legality (manuscript). John Gardner, in turn, concedes Glanville Williams’ point as a formal matter, but argues that because choice-of-evil defenses are often complex or vague, the decision to proceed in one step rather than three threatens to jeopardize the “rule of law” by transforming offenses that would otherwise be clear and easy for the public to follow into offenses that are too complex or vague for the public to understand. See Gardner, Justifications and Reasons, pp. 118, 125–126. However, even if one believes that choice-of-evils defenses are necessarily more complex or vague than actus reus defenses (and I do not), and even if one believes that the rule of law is less concerned with choice-of-evil defenses than with actus reus defenses (and, again, I do not), it does not follow that proceeding in one step leaves the public with less guidance than proceeding three steps. To the contrary, the actus reus elements with which Gardner is concerned remain precisely the same and precisely as clear when located in a one-step statute as when located in a three-step statute, and the choice-of-law defenses remain precisely as complex or vague in the former as in the latter. If the public can follow the actus reus when it is located in three-step statute, it can follow the actus reus when it is located in a one-step statute.}
who fails to commit the *actus reus* of an offense within a one-step statute. Each can rightly claim that, as measured by the material harms or risks that the statute declares to be regrettable, all things considered, he did nothing wrong.

The aforementioned thesis does not signify what George Fletcher believes it does. Fletcher believes that equating defenses of justification with defenses of *actus reus* – i.e., what Fletcher calls the “unity thesis” – produces an absurdity: the absurdity of claiming that we are morally obliged to feel the same indifference toward the justified killing of human beings as we now feel toward the non-killing of human beings and toward the killing of non-humans. As Fletcher puts it, if the “unity thesis” is valid, “killing an aggressor” is no different than “filling a scarecrow full of lead” or than “killing a fly.”

I disagree. Fletcher mistakenly assumes that if the criminal law does not regard justified killings as regrettable, all things considered, then individuals can have no moral obligation to mourn the losses of life, and the civil law may not require the justified killers to pay compensation or otherwise make amends to their victims. But that is a *non sequitur*. Nothing in the unity thesis precludes either private individuals or the law from acknowledging and responding to the losses that choices of evils implicate. In contrast to non-killings and the killing of insects, justified killings involve enormous losses that private individuals, the civil law, and the criminal law may rightly recognize. That the criminal law does not regret that the way actors respond to lethal aggression when they are forced to choose – namely, by killing rather than being wrongly killed – does not mean that the criminal law does not regret their having been put to such choices in the first place. On the contrary, the criminal law places enormous weight on the value of human life, as evidenced by its elaborate strictures against homicide and its strict rules regarding the lawful use of deadly force. And the criminal law does so precisely because, despite having to recognize that some killings are justified, it steadfastly refuses to equate the killing of human beings with the shooting of scarecrows or the swatting of flies.

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In sum, when I speak of "justification," I use it in the same way North Dakota does: I use it to refer to a claim by a defendant that in so far as he effectuated the harm or risk that an actus reus prohibits, he was allowed to do so because the harm or risk he effectuated was no greater than the alternative evil that he would have had to choose under the dilemmatic circumstances in which he found himself. This usage of "justification" is normatively significant because it ultimately rests on the same normative principle that underlies the defense of lack of actus reus. As we have seen, the defense of lack of actus reus arises with respect to two kinds of offenses: offenses like murder and drug sales that are predicated on the occurrence of material harms or risks and, in that respect, are subject to choice-of-evils defenses; and offenses like attempt under the Model Penal Code that are not premised upon the occurrence of material harms or risks (and, hence, are not subject to choice-of-evils defenses) but rather are premised upon an actor's undesirable readiness to bring about regrettable harms or risks. In both instances, the actus reus is conduct the state regards as regrettable or undesirable under the circumstances. In both instances, therefore, the defense of lack of actus reus rests on the principle that an actor who is charged with having engaged in conduct that a criminal statute declares to be regrettable or undesirable cannot be justly blamed if he did no such thing – that is, if he did not engage in that regrettable or undesirable conduct. The same thing is true of defenses of justification in North Dakota. The latter defenses specify the circumstances in which material harms or risks that North Dakota regards as prima facie regrettable cease to be regrettable, all things considered. Defenses of justification in North Dakota thus rest on the principle that an actor who is charged with having produced a material harm or risk that the state regrets, all things

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considered, cannot be justly blamed if he produced no such harm or risk, all things considered.\footnote{I distinguish “material” harms from “dignitary” harms. A person, $A$, who attempts to kill another person, $B$, without justification inflicts the dignitary harm on $B$ of manifesting utter contempt for $B$’s legitimate interest in life. But $A$ does not inflict the material harm of homicide on $B$ unless he actually kills $B$ without justification. Defenses of justification negate material harms. But only excuses negate dignitary harms.}

Now if everything is this easy, why the controversy? Why are commentators so divided about the relationship between justification and excuse? The principal reason is that the defenses that most penal codes provide under the rubric of “justification” are \textit{not} the choice-of-evils defenses that we have thus far discussed. That is, they are not defenses like North Dakota’s that arise when an actor’s commission of the \textit{actus reus} of an offense is actually lesser than, or equal to, the alternative evil he would otherwise have to commit. Rather, they are defenses that arise when an actor \textit{believes} that his commission of the \textit{actus reus} of an offense is lesser than, or equal to, the alternative evil he would otherwise have to commit. Take the Model Penal Code. Like North Dakota, the MPC provides a defense of what it calls “justification” that comes into play once the \textit{actus reus} of an offense is complete. But unlike North Dakota, an actor has such a defense when he \textit{believes} that commission of the \textit{actus reus} is necessary to prevent certain alternative evils.\footnote{See Model Penal Code § 3.02(1). \textit{But see} Paul Robinson, \textit{Competing Theories of Justification: Deeds vs. Reasons}, in A. P. Simester and A. T. H. Smith (eds.), \textit{Harm and Culpability} (1996), p. 54, persuasively criticized in Berman, Justification and Excuse, pp. 42–43 and nn. 83–84.} (I shall hereinafter refer to North Dakota’s usage as the “choice-of-evils defense,” and the MPC’s usage as the “belief” defense).

The fact that penal codes use “justification” differently has two unfortunate consequences – one terminological, the other substantive. The terminological consequence is that the same term ends up referring to different substantive defenses, and different words end up referring to the same substantive defense. To illustrate the problem of using “justification” to refer to different defenses, suppose that an actor uses lethal force against an aggressor under circumstances in which he \textit{actually}
must use lethal force to protect himself from being wrongfully killed or seriously wounded and in which he also reasonably believes he must do so. In that event, North Dakota and the MPC would both acquit the actor, and they would both do so in the name of “justification,” but they would mean very different things by it: North Dakota would mean that the actor actually had to use lethal force to protect himself, even if he didn’t believe he had to use lethal force; while the MPC would mean that the actor believed he had to use lethal force, even if actually he didn’t have to use such force.

Consider now a case in which different terms are used to refer to the same substantive defense. Thus, suppose that the following case arises both in North Dakota and under the MPC:

**Mistaken Self-Defense.** John, who is openly gay within a homophobic community, has been physically assaulted many times because of his sexual orientation, sometimes very brutally. To protect himself from such attacks in the future, John qualifies for and carries a concealed weapon. Unaware that John is armed, John’s co-workers play a prank on him by hiring three young actors who dress like thugs and, while wielding tire irons, grab John outside a gay bar and threaten to lynch him. Unfortunately, before the actors can reveal the prank, John pulls out his gun and, in the reasonable belief that his life is in danger, shoots and kills one of them.

North Dakota and the MPC would both acquit John, and they would do so for the same reason – namely, that despite the fact that John regrettable killed a person who was no real threat to him, John nevertheless acted in good faith and, hence, is not blameworthy. But North Dakota and the MPC use different terms to refer to the defense. The MPC would say that because John believed he had to kill in self-defense even though he didn’t, he was “justified.”33 In contrast, given that John did not have to kill in self-defense, North Dakota would deny that he was “justified” and rule instead that because John reasonably believed he had to kill in self-defense, he was “excused.”34

The more significant problem is substantive rather than merely terminological. By equating “justification” with the

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33 Model Penal Code § 3.04.
“belief defense,” jurisdictions disable themselves from being able to draw North Dakota’s distinction between justification and excuse. And being unable to draw the distinction, they adopt defenses of justification that are normatively inconsistent with the distinction in *actus reus* that they draw between completed offenses and offenses of attempt.\(^{35}\) To illustrate, suppose that the following cases arise in North Dakota and under the MPC alike:

**Murder.** Jim, a hitman, deliberately shoots at Victim with the intention of killing him, and he succeeds.

**Attempted Murder.** Jim 2d, also a hitman, deliberately shoots at a Victim 2d with the intention of killing Victim 2d. But, because Victim 2d is wearing a bulletproof vest, Jim 2d merely wounds him.

**Unwitting Self-Defense.** Jim 3d, also a hitman, deliberately shoots at an old enemy, Victim 3d, with the intention of killing him. And Jim 3d succeeds – only to discover afterwards that if he had waited a moment longer, Victim 3d would have shot and killed him first.

North Dakota and the MPC would reach the same results in “Murder” and “Attempted Murder” and for the same reasons. North Dakota and the MPC would rule that although Jim and Jim 2d both possessed the same guilty minds, Jim committed an *actus reus* consisting of the material harm of homicide, while Jim 2d committed an *actus reus* consisting merely of a readiness to inflict such harm. And North Dakota and the MPC would both reason that the *actus reus* of murder warrants higher penalties than the *actus reus* of attempted murder. The substantive difference arises with respect to “Unwitting Self-Defense.” North Dakota would acquit Jim 3d of murder, reasoning that because Jim 3d’s killing of Victim 3d was actually necessary to protect himself from being wrongly killed, the killing was a “justified” choice of evil. At the same time, however, North Dakota would presumably convict Jim 3d of attempted murder, reasoning that although Jim 3d failed to bring about the evil of unjustified homicide, he was guilty of *trying*

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\(^{35}\) Paul Robinson is the most original and powerful exponent of the view that justification ought to be defined by reference to an actor’s actual conduct (which Robinson refers to as “deed”) rather than an actor’s beliefs (which Robinson refers to as “reasons”). See Paul Robinson, *Structure and Function in Criminal Law* 100–124.
to do so. In contrast, the MPC would convict Jim 3d of murder rather than attempted murder, on the ground that when Jim 3d intentionally killed Victim 3d, he did so without believing that it was necessary to protect himself and, hence, without what the MPC requires for “justification.”

Notice that North Dakota’s decision to acquit Jim 3d of murder while convicting him of attempted murder is consistent with both its and the MPC’s reasoning in Murder and Attempted Murder. After all, the reason that North Dakota and the MPC both acquit his predecessor, Jim 2d, of murder and convict him of attempted murder is that, although Jim 2d tried his best to inflict a wrongful death that North Dakota and the MPC wished to prevent, he failed to do so. The same thing is true of Jim 3d in Unwitting Self-Defense: Jim 3d tried his best to inflict a wrongful death but, like Jim 2d, he failed. Instead, he inflicted a harm that was lesser than or equal to the harm he would have otherwise suffered and, hence, a harm that neither North Dakota nor the MPC seeks to prevent under the circumstances. And for that reason North Dakota treats Jim 3d as an attempted murderer. In contrast, the MPC’s resolution of Unwitting Self-Defense is inconsistent with its reasoning in Murder and Attempted Murder, because in the latter two cases, the MPC takes into account whether an actor succeeds in inflicting the harm he intends, while in Unwitting Self-Defense it does not.

36 It will be recalled that the “choice of evils” defense does not apply to inchoate crimes like criminal attempt, because the choice-of-evils defense operates by negating material harms or risk and, hence, applies only to offenses like murder and drug sales that are predicated upon such resulting harms or risks. See note 18, supra.

37 John Gardner argues that, although the commonplace decision of states to grade criminal offenses on the basis of resulting harm is, indeed, “objective” in nature, it does not follow defenses of justification ought to be “objective” as opposed to belief-based. Gardner, Justifications and Reasons, pp. 104–105. Gardner is correct, to be sure. But in saying so, he obscures the fact that the only reason it matters to defendants whether justification is defined objectively as North Dakota defines it or also subjectively as Gardner and the MPC define it is that defining it in the former fashion enables a jurisdiction to take account of what is distinctive in cases like the Unwitting Self-Defender, namely, that the defendant had the “luck” not to have caused objective harm.
Now one might argue that Unwitting Self-Defense differs from Attempted Murder precisely in that the former involves the harm of homicide while the latter does not. Of course, it is true that, like all choices of evils, Unwitting Self-Defense arises in a context in which an actor inflicts an evil. The point, however, is that when an actor inflicts an evil that is lesser than or equal to the evil that would otherwise befall him, the evil he inflicts is not a wrongful evil. It is not an evil that the state wishes he had refrained from inflicting under the circumstances – not an evil that the state regrets, all things considered.\textsuperscript{38} Indeed, if the MPC regretted the evil that Jim 3d actually inflicted, i.e., the evil of killing a person who would otherwise have killed him, the MPC would deny defenses of “justification” to actors who know full well that they are killing persons who would otherwise kill them and intentionally do it.

Alternatively, it might be argued that the MPC is right to judge Jim 3d on the basis of what he believed he was doing because states ought to judge actors on what they undertake rather than on what fortuitously ensues. This is not the place to debate the much mooted question whether criminal punishment ought to be based solely upon the intentions with which a person acts and not upon resulting harms.\textsuperscript{39} For even if one takes that position (and I, for one, do not),\textsuperscript{40} that is not a position that the MPC adopts. The MPC and North Dakota both believe that results signify, which is why they both distinguish between murder and attempted murder, and why their differing positions on justification ought to matter to them. The difference between them is that while North Dakota holds Jim 3d responsible solely for attempted murder precisely because he did not bring about the kind of wrongful harm for which it reserves the offense of murder, the MPC’s definition of “justification” misleads it into punishing Jim 3d for a crime of

\textsuperscript{38} See the discussion of George Fletcher in note 28, supra.

\textsuperscript{39} Insofar as a jurisdiction defines offenses in terms of intentions rather than results, all exculpatory defenses other than ‘lack of actus reus’ are “excuses” rather than “justifications,” because there are no prohibited harms or risks to be negated by the dilemmatic choices an actor may face.

wrongful harm, even though he did not inflict a harm that the MPC regrets under the circumstances.

C. Excuse

“Excuse,” as I define it, is a category that encompasses all exculpatory defenses that do not consist of either ‘absence of \textit{actus reus}’ or ‘justification’. That is, it encompasses all instances in which an actor can rightly claim, “Even if I committed the \textit{actus reus} of the offense with which I am charged, and regardless of whether I committed it without justification, I did not do so while in possession of features that the law requires for a person to be held blameworthy for doing so.”\textsuperscript{41}

This usage is broader than one finds elsewhere. Some commentators confine “excuse” to defenses such as insanity, involuntariness, and immaturity that come into play after a person concedes, at least \textit{arguendo}, that he committed the \textit{actus reus} of an offense \textit{and} that he possessed of the \textit{mens rea} the charged offense requires, whether the latter consists of purpose, knowledge, recklessness, negligence or some other mental condition.\textsuperscript{42} My usage of “excuse” is broader in two respects. First, with respect to persons who concede, at least \textit{arguendo}, that they committed the \textit{actus reus} of an offense, I use “excuse” to encompass not only conditions that negate responsibility, such as insanity, immaturity, and involuntary intoxication, but also absences of the \textit{mens rea} that charged offenses require,

\textsuperscript{41} Douglas Husak challenges the conventional view that the defense of justification is logically and normatively prior to the defense of excuse. See Douglas Husak, \textit{On the Supposed Priority of Justification to Excuse} (manuscript). Husak argues, instead, that, although excuse is a defense that comes into play only after an actor commits an offense (including elements of \textit{actus reus} and \textit{mens rea}), it \textit{is not} a defense that comes into play only after an actor commits an \textit{unjustified} offense. I find Husak’s argument entirely persuasive, with one minor exception. Because I shall be asserting that excuse encompasses the defense of lack of \textit{mens rea}, I say, contrary to Husak, that although excuse is, indeed, a defense that comes into play only after an actor commits the \textit{actus reus} of an offense, it \textit{is not} a defense that comes into play only after an actor does so with \textit{mens rea}.

including defenses of mistake of law and mistake of fact.43

Second, I use “excuse,” as North Dakota does, to refer to actors like John in “Mistaken Self-Defense” who mistakenly believe that their conduct is actually necessary to prevent a greater evil under the circumstances. Like North Dakota (but unlike the Model Penal Code), I would say of John, “He has no claim of justification, because he brought about a state of affairs that the state regards as regrettable under the circumstances. But he is excused because, although he did a bad thing, he did not do it with a guilty mind.”

Of course, commentators are free to define “justification” and “excuse” in any way they wish. Ultimately, however, the measure of any such distinction is its perspicuousness, i.e., its success in combining defenses that are normatively alike and excluding defenses that are normatively unlike. “Justification,” as I define it, is an ex post determination – much like the ex post determination regarding the absence of an actus reus – that an actor did not do anything that the state regrets, all things considered, regardless of how the situation may have appeared to him ex ante; while “excuse” is a judgment of the ex ante attitude with which the actor engaged in his conduct.44 I will try to show in Section IV that, measured by the extent to which it distinguishes defenses that are normatively alike from defenses that are normatively unlike, this definition of “excuse” is superior to the competing definitions and normative accounts of “excuse” that I discuss in Section III.

43 Accordingly, because “excuse” concedes, at least arguendo, that an actor is guilty of the actus reus of an offense, it does not refer to defenses of mens rea with respect to offenses like attempt in which mens rea is constitutive of actus reus.

44 Jeff McMahan nicely observes that because no definition of “justification” is capable of simultaneously adopting both the ex post view of the extent to which acts are regrettable and the ex ante view of events as they appear to actors at the time, one cannot sensibly criticize a definition of “justification” that is based upon an ex post viewpoint on the ground that it fails also to take account of ex ante viewpoints, and vice versa. See Jeff McMahan, Self-Defense and Culpability (manuscript).
II. A CHALLENGE TO ALL NORMATIVE THEORIES OF “EXCUSE”

All normative theories of excuse, including those I discuss in Section III and the theory I propound in Section IV, rest on a shared assumption that “excuse” is a normative set that can be coherently and meaningfully distinguished from “justification.” Most commentators who write about justification and excuse make that assumption, though they differ, and sometimes heatedly, as to what the distinction is. A few commentators, however, engage in a more radical critique. They either challenge the possibility of fashioning a normative theory of “excuse” in contradistinction to “justification” or question its usefulness.\(^{45}\) I shall discuss two such critiques – those of Kent Greenawalt, and Mitchell Berman.

A. Kent Greenawalt

Kent Greenawalt wrote a celebrated article in 1985 criticizing efforts to distinguish justification and excuse in law, and he revisited and expanded upon his criticisms on two later occasions.\(^{46}\) Some of Greenawalt’s criticisms are irrelevant to our inquiry because they are confined to proposed distinctions between justification and excuse that I reject for the same reasons he does. Thus, Greenawalt criticizes the coherence and practicality of distinctions between “justification” and “excuse” that are based upon the following: whether conduct is “positively desirable” as opposed to “wrongful”;\(^ {47}\) whether an actor *reasonably* believes he is choosing a lesser evil (even if mistakenly) as opposed to *unreasonably* believing it;\(^ {48}\) whether a defense is

\(^{45}\) See, e.g., Corrado, Notes on the Structure of a Theory of Excuses, pp. 492–493.


\(^{47}\) See Greenawalt, Perplexing Borders, p. 1899, 1906.

\(^{48}\) See Greenawalt, Perplexing Borders, pp. 1907–1911.
general and objective as opposed to individual and subjective; and whether third persons are permitted to assist the actor (as opposed to being prohibited from assisting him) and whether they and the victim are prohibited from resisting him (as opposed to being permitted to resist him). The distinction I propose does not possess any of these features and, hence, is not subject to criticisms that are confined to them. Rather, I argue that conduct is “justified” not only when it is positively desirable but also when it is permissible by virtue of being not undesirable; that conduct is justified not by virtue of an actor’s believing the alternative to be a greater evil but by virtue of the alternative actually being a greater evil; that the measure of relative evils (and, hence, the existence of justification) can be a function of subjective factors in the form of role-based or agent-relative considerations that shape an actor’s legitimate interests in acting one way as opposed to another; and that the presence of justification does not determine whether third parties may assist an actor, nor does the presence of excuse determine whether third parties and an actor’s victim may resist him.

Some of Greenawalt’s other criticisms are also irrelevant because they are confined to certain aims for distinguishing between justification and excuse that I do not share. Thus, Greenawalt argues that because of the rightful role of general verdicts in jury trials, jury instructions based upon distinctions between justification and excuse will do nothing to clarify jury verdicts. He also argues that jury instructions that are based upon the terms “justification” and “excuse,” and instructions that require jurors to agree on individual defenses of

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50 See Greenawalt, Perplexing Borders, pp. 1918–1927.
54 Greenawalt, Perplexing Borders, pp. 1900–1901.
justification and excuse, will only complicate jury deliberations.\textsuperscript{55} I agree. My aim in distinguishing between justification and excuse is not to bring greater clarity to general criminal verdicts. Nor is it to instruct juries in the language of “justification” and “excuse.” Nor is it to require that jurors agree that individual defenses of justification and excuse exist where they can agree that either one or the other of such defenses exist. To be sure, jurors need to understand the elements of the criminal defenses they apply, whether the defenses consist of insanity, mistake of law, necessity or duress. But they need not be told that the reason the law recognizes insanity is that it is an excuse, and that by virtue of being an excuse, it shares something in common with mistakes of law and fact. Nor need they be told that they must agree on whether a certain defense (of justification) exists before they may agree on whether a certain defense (of excuse) exists, provided that they agree that either one or the other exists.

Nevertheless, some of the criticisms that Greenawalt directs to other distinctions between justification and excuse do apply to my own. And among the aims he dismisses for distinguishing between them is one that I embrace. Specifically, he believes it is generally “counter-productive” for lawmakers – that is, legislators who must enact defenses and judges who must construe and fashion them – to try to formulate their lawmaking in the precise distinction between justification and excuse.\textsuperscript{56} In contrast, I believe that lawmakers who are engaged in fashioning new exculpatory defenses or clarifying existing exculpatory defenses can only benefit by asking themselves, “What is the basis for this defense? Is it that actors who invoke the defense

\textsuperscript{55} Greenawalt, Perplexing Borders, pp. 1902, 1910–1911; Greenawalt, Justifications, Excuses, and a Model Penal Code for Democratic Societies, pp. 17–18.

\textsuperscript{56} Greenawalt, Perplexing Borders, at 1915 (“While ... some value might derive from more strenuous efforts to distinguish warranted action from wrongful but excused action, I have argued that many, though not all, attempts to attain greater precision in the law itself would be counterproductive in light of the overall aims of a system of criminal law.”). Nevertheless, Greenawalt does encourage scholars to continue to reflect on the distinction. See id. at pp. 1901–1903, 1913.
have produced no harm or risk that the state regards as regrettable for persons in their circumstances to have produced—nothing, that is, the state wishes such persons had not done under the circumstances? Or is it that, regardless of whether actors who invoke the defense have engaged in conduct the state regards as regrettable or undesirable for persons in their circumstances to have performed, they lacked certain additional features that must obtain for persons to be blameworthy for such conduct?''

Greenawalt has three sets of objections to the kind of distinction I propose. Greenawalt’s first set of objections is linguistic in nature. It departs from ordinary language to use “justification” in law for conduct that is merely permissible, he says, because “justification” is usually used in moral discourse to refer to conduct that is positively desirable. I’m not sure Greenawalt is right about ordinary language. Like most people, speakers probably assume that “desirable conduct” and “undesirable conduct” together occupy the field without leaving any middle ground between them. Once speakers realize that conduct may be neither desirable nor undesirable but merely permissible, they might, indeed, describe permissible conduct as morally “justified” conduct. Even if they do not, however, nothing precludes the law from using “justification” as a term of art to encompass both desirable and permissible conduct. Law students learn early on that words can be used differently in law than in ordinary language.

Another of Greenawalt’s linguistic objections involves cases that North Dakota and I regard as excuses rather than justifications, namely, cases in which an actor reasonably believes that the harm or risk he imposes is necessary to avoid a greater evil,

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58 See Hurd, ‘Justification and Excuse, Wrongdoing and Culpability’, *Notre Dame Law Review* 74: 1557 (“We should thus avoid ham stringing our analysis of the distinction between justified and excused actions by an ex ante requirement that we use moral language the way that it is used in daily gossip...”).
only to discover afterwards that he was mistaken and that the harm or risk served no purpose at all. Greenawalt concedes that when speakers elaborate upon such cases, they qualify their statements by distinguishing between the act and the actor by saying, ‘The act was not justified, but the actor was’. But, Greenawalt says, given that states do not qualify their statements in that way—that is, given that states use the single label of either “justification” or “excuse” to refer tout coup to defenses that such actors possess—states should use “justification” rather than “excuse.” They should do so, he says, because “justification” is a term of “moral appraisal,” and “if one is concerned with judging the actor, the actor’s blameless perception of the facts ought to be sufficient to support a justification.”

Now we have previously seen that within states that use “justification” to include what is merely permissible (as opposed to desirable), “justification” is not necessarily a term of moral approval. But even if “justification” were a term of moral approval, and even though the law is concerned with “judging” an actor, it is a non sequitur for Greenawalt to conclude that in order to “judge[el]” him, the law ought to use “justification” to refer to what an actor reasonably believes he is doing as opposed to what he actually does. After all, with respect to any offense that consists of an actus reus of actual harm or risk and mens rea regarding such harm or risk, there are two independent grounds on which an actor might be adjudged innocent of the offense: first, on the ground that regardless of any guilty mind he may have had, he did not actually bring about the harm or risk that the statute declares to be regrettable; and second, on the ground that regardless of the regrettable harm or risk he may have actually brought about, he reasonably believed otherwise and, hence, lacked a guilty mind. States like North Dakota follow the same approach with respect to exculpatory defenses that arise after an actor has committed the actus reus of an offense with proscribed mens rea. North Dakota invokes these two

59 Greenawalt, Perplexing Borders, p. 1908.
60 Greenawalt, Perplexing Borders, p. 1916, n. 55.
61 Greenawalt, Distinguishing Justifications from Excuses, p. 102. See also Greenawalt, Perplexing Borders, p. 1906.
grounds, which govern whether actors are guilty of offenses, and applies them as well to determine whether actors are guilty of exculpatory defenses. Thus, with respect to an actor who has committed the actus reus of an offense with proscribed mens rea, North Dakota is willing to exculpate him on either of two alternative grounds, namely (1) on the ground that, given the choice of evils at issue, the actor did not actually bring about a harm or risk that the law regrets under the circumstances; or (2) on the ground that, although the actor may actually have brought about a harm or risk that the law regrets under the circumstances, he reasonably believed otherwise and, hence, lacked a guilty mind with respect to the choice of evils he believed he faced.

Greenawalt argues that in so far as states enact a defense such as #1, they should eschew the language of “justification.” But the reason Greenawalt gives (i.e., that “justification” is a term of “moral appraisal” for “judging [an] actor” and therefore should only be used to refer to defenses such as #2) is a non sequitur because defenses #1 and #2 are both part of “judging” an actor. Defense #1, which North Dakota happens to call “justification,” judges an actor by what he does; defense #2, which North Dakota happens to call “excuse,” judges him further by what he reasonably believes he is doing. Admittedly, if Greenawalt had his way, he would abolish defense #1 altogether. But within jurisdictions that recognize defenses #1 and #2, calling them “justification” and “excuse,” respectively, is entirely consistent, linguistically, with the law’s task of “mak[ing] a judgment about [an] actor.”

Greenawalt also has theoretical objections to the distinction I would draw. As the title to his first article suggests, Greenawalt devotes much of his attention to demonstrating that theoretical distinctions between justification and excuse

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62 Greenawalt claims that predicating justification on acts as they actually are (rather than on what actors reasonably believe them to be) requires that one possess a “complex theory of moral judgment.” Greenawalt, Perplexing Borders, p. 1909, n. 34. But that is not so. It requires only that, in deciding whether to punish an actor, the state possess a legitimate interest in ascertaining, “Did he actually do anything that we firmly wish he had not done under the circumstances?”
collapse at the “borderlines” that should separate them. Most of his illustrations are irrelevant for our purposes, however, because they concern distinctions between justification and excuse that I, too, reject, often for the same reasons he does. Nevertheless, Greenawalt offers one illustration that is pertinent, namely, the defense of duress. An actor has a defense under the Model Penal Code to what would otherwise be an offense if he was “coerced” to commit it by a threat of unlawful force against himself or another that “a person of reasonable firmness in his situation would have been unable to resist.”

Greenawalt argues that duress under the MPC is a unitary defense which is stated broadly enough to encompass two quite distinct situations, one of which is pure justification, and the other of which is pure excuse. Duress is pure justification, he says, when what an actor does is a choice-of-evil that in other settings would constitute necessity. Duress is an excuse, he says, when what an actor does is not a choice of evils that in other settings would constitute necessity and, yet, remains exculpatory under the circumstances. The two examples he gives of duress as excuse are (1) “[w]hen threats lead people to make understandable choices favoring family interest over the equal or more powerful interests of strangers;” and (2) when a coercive threat renders an actor “incapable of making rational judgments.”

Greenawalt concludes that, because the choices that constitute duress under the MPC are either distinctly justified choices or distinctly excused choices, the “best” solution in terms of clarity is to define “necessity” to encompass all justified choices and to “prune” the defense of duress to encompass what he believes are solely excuses, i.e., examples 1 and 2.

The problem with the argument is Greenawalt’s unsupported assumption that examples 1 and 2 are instances of excuse – and,

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63 Model Penal Code § 2.09.
64 Greenawalt, Perplexing Borders, p. 1912, n. 41.
65 Greenawalt, Perplexing Borders, p. 1912. Indeed, the most Greenawalt musters in defense of the MPC rule is that “having a single unified defense of duress that reaches justifications and excuses hardly constitutes a breach of any fundamental principle of what a criminal code should look like.” Id. at 1913. See also Greenawalt, Distinguishing Justifications from Excuses, p. 104.
indeed, that any instance of criminal duress is a non-redundant instance of excuse. I have argued elsewhere that, except for rare cases in which duress is redundant upon the defense of involuntariness, and except for instances of mistaken duress, duress is a justification and, hence, presents no “borderline” problems at all. Consider Greenawalt’s example 1, i.e., where “threats lead people to make understandable choices favoring family interest over the equal or more powerful interests of strangers.” The existence of “family interest[s]” are agent-relative interests that the state can take into consideration in deciding whether conduct that would otherwise be a greater evil under the circumstances is not a greater evil under the circumstances and, hence, is justified.

Example 2 is more difficult, because Greenawalt does not clarify what he means by a coercive threat that renders an actor “incapable of making rational judgments.” Greenawalt may be referring to rare cases in which an actor is so disconcerted by a coercive threat that, like a person swarmed by bees, he acts reflexively rather than assessing other people’s interests in relation to his own. Such cases are rare because as an act of coercion, duress is typically employed by wrongdoers who, rather than wagering on an unthinking reflex on their victims’ part, seek to structure their victims’ choices in such a way that they decide to save themselves at the expense of others. In any event, the defense of duress is superfluous in cases of unthinking reflex because the latter are fully addressed by the defense of “involuntariness,” just as they are when an actor is swarmed by bees. It is more likely, therefore, that Greenawalt is

66 See Westen and Mangiafico, The Criminal Defense of Duress, pp. 833–950 and esp. p. 903, n. 129, 949, n. 224. I should add that duress is also an excuse when, though an actor chooses a greater evil by virtue of exhibiting less courage in the face of a threat than the law regards as acceptable, he is exculpated because the threat consists of something with respect to which he is revealed to possess an idiosyncratic, irrational, and self-destructive phobia, e.g., snakes or rats.

67 Indeed, Greenawalt seems to concede as much. See Greenawalt, Perplexing Borders, pp. 1915–1916 (“If “the situation” is defined broadly enough, it may include roles and relational characteristics; so perhaps their relevance to justification is not at odds with the idea that justifications are general and objective”).
referring to cases in which an actor chooses an evil that would be unjustified if the alternative evil were natural in origin rather than a purposeful imposition by a coercive malefactor. However, the reason the defense of duress is broader than the defense of necessity is not that the defense of duress excuses actors from blame for doing what the state firmly believes is a greater evil under the circumstances, but that the very features that distinguish duress from necessity (i.e., that the threats of duress are human in origin, wrongful, and coercive) contribute to their evil in the eyes of the state and, hence, render conduct by an actor that would otherwise be a greater evil not a greater evil under the circumstances. The MPC’s standard of “reasonable firmness” captures those features. “Reasonable firmness” is not average firmness or typical firmness. It is normatively appropriate and proportional firmness in the context of a human, wrongful, and purposefully coercive threats. An actor has a

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69 See authorities cited in Westen and Mangiafico, The Criminal Defense of Duress, pp. 906–912. Kyron Huijgens argues that the requirement of “reasonable” fortitude in the law of duress is a requirement of “ordinary” fortitude – “even,” Huijgens says, “if such fortitude is “inadequate” – rather than normatively appropriate fortitude, though Huijgens undermines that position by later stating that reasonable fortitude is the fortitude that a person “should” display under the circumstances in which he finds himself. See Kyron Huijens, ‘Duress is Not a Justification’, Ohio State Journal of Criminal Law 2 (2004), 303, 311, 313. Huijens argues that judges ought to excuse actors who, though they “d[o] wrong,” nevertheless exhibit “ordinary, even if inadequate” fortitude because it would be “hypocritical” of them to punish persons for exhibiting the same inadequate fortitude that the judges themselves would have exhibited. Id. at 311–312. This “hypocrisy” argument is problematic in two respects. First, it is not hypocritical to blame others for one’s own faults, provided that one is candid about one’s own faults. See Antony Duff, ‘Principle and Contradiction’, in Philosophy and the Criminal Law, pp. 197–201, n. 40. (Cambridge: Cambridge University Press, 1998). Second, even if a judge were hypocritically to deny his own moral failing in the course of reproving a defendant for the same failing, it does not follow that because a judge self-righteously conceals his failing, the defendant is, therefore, entitled to escape punishment for his admitted failing. cf. Ferdinand Schoeman, ‘Statistical Norms and Moral Attributions’, Responsibility, Character, and the Emotions (Cambridge: Cambridge University Press, 1988), pp. 287, 303, 305–307.
defense of duress if, and only if, his conduct is justified under the circumstances – that is, only if his choice is one that the state regards as a normatively permissible choice for an actor to make, given the human, wrongful, and purposeful coercion to which he was subjected.\textsuperscript{70}

Greenawalt also raises a further theoretical objection. He uses a simple case of assault to ask, ‘If distinguishing between justification and excuse is supposedly so useful in analyzing defenses, why is it that we have no need for the distinction in analyzing offenses?’ Thus, he says, suppose that without realizing Ben is nearby, Ann swings her arm and hits Ben within a jurisdiction that makes it an offense for an actor to intentionally strike a person without the latter’s consent. The law does not need complicated distinctions such as justification and excuse to dispose of Ann’s claim, Greenawalt says. It simply determines that she did not have the mental state required by the statute, i.e., intention, and, hence, is not guilty. In Greenawalt’s words:

\textsuperscript{70} Antony Duff recognizes that actors possess defenses of duress only if they exhibit “the degree of courage” – and “the kind of commitment to the values protected by the law” – “that we can properly demand of citizens.” Antony Duff, ‘Rule-Violations and Wrongdoings’, in Stephen Shute and A. P. Simester (eds.), Criminal Law Theory (2001), p. 47, 64. And Duff further recognizes such defenses “might sound like justifications rather than excuses.”

\textsuperscript{70} Id. at 65. Yet Duff advances two reasons for concluding that some instances of duress are excuses. First, he says, the law of duress’s requirement of “reasonable resolution” is analogous in some instances to the acknowledged excuse of “reasonable mistake” of fact. Second, he says, a person can exhibit “reasonable resolution” and, yet, fall short of “ideal” standards of commitment and courage. Id. at 65–66. Neither argument seems persuasive. ‘Reasonable mistake’ is, indeed, an excuse but only because of what such a mistake is about – namely, a counterfactual event that, \textit{had it been true}, would have rendered an actor’s conduct consistent with society’s values. In contrast, ‘reasonable resolution’ is a justification because, rather than being about a counterfactual event, is itself an \textit{embodiment} of society’s values. Conduct under duress may, indeed, be less than “ideal.” But conduct is justified – and, hence, is conduct that leaves nothing to be “excused” – if it is either ideal or minimally tolerable. Just as an actor’s conduct need not be “ideal” in order to negate the \textit{actus reus} of an offense, it need not be ideal in order to constitute a justification.
As long as Ann was unaware that she might hit Ben, she has not committed an assault, and the criminal law does not engage in labeling to decide whether her arm swinging was justified or only excused.

If the law’s failure to label acts that do not amount to crimes is acceptable, then the question arises whether a failure to label precisely is unacceptable when other circumstances preclude liability. If the law need not determine whether Ann is justified or excused when she accidentally hits Ben, why need it determine precisely whether she is justified or excused when she strikes in mistaken self-defense?71

Ironically, the legal reality is precisely the opposite of what Greenawalt implies it is. Rather than treating offenses differently from the way states like North Dakota treat defenses, the law gives offenses the same treatment that North Dakota gives defenses—thus giving Ann treatment that illustrates the very point Greenawalt seeks to refute. The law asks two things of Ann: (1) “Did Ann commit the actus reus of assault by inflicting the undesirable harm of striking Ben without his consent?”; (2) “If so, did Ann lack the kind of mens rea that renders a person blameworthy under the statute for doing the undesirable thing she did?” The first question parallels North Dakota’s inquiry into justification by exonerating actors when they do nothing the statute at hand regards as a harm to be eschewed under the circumstances. The second question parallels North Dakota’s inquiry into excuse by exonerating actors when, though they have done undesirable things, they lacked features that are required to render them blameworthy. Ann is exculpated in law not without reference to the elements of exculpation underlying what I call “justification” and “excuse,” but precisely by virtue of the fact that, though she did something the law regrets (i.e., she committed the actus reus of assault without “justification”), she lacked mens rea and, hence, in my language is “excused” from being blamed for it. 72

71 Greenawalt, Distinguishing Between Justifications and Excuses, p. 108. See also Greenawalt, Justifications, Excuses, and a Model Penal Code for Democratic Societies, p. 21.

72 Greenawalt, Distinguishing Justifications from Excuses, p. 198 (“If Ann’s swinging arm injures Ben, she might offer an excuse, saying: “I’m sorry, but I didn’t realize you were there””) (emphasis added).
Greenawalt’s final set of objections is political in nature. He argues that it is politically undesirable to expect lawmakers to reduce the “complexity and diversity of a society’s moral views” regarding defenses to a single, binary distinction between justification and excuse. To illustrate, he hypothesizes a drafting committee of three legislators who together must decide whether homeowners ought to have a duty of retreat, that is, whether homeowners may use deadly force in defense of their homes even where they could safely retreat instead. Legislator 1 regards it as positively desirable for homeowners to stand their ground rather than retreat; Legislator 2 balks at saying that it is positively desirable for homeowners to stand their ground when they can safely retreat, but nevertheless believes it is morally permissible for homeowners to do so; Legislator 3 believes that it is wrong for homeowners to stand their ground when they can safely retreat, but he is (i) “[unwilling] to impose his moral conviction [upon his constituents] and demand behavior that many people find unnatural,” and (ii) “skeptical of the capacity of jurors to determine when someone knows he can retreat safely.”

The three legislators differ sharply in their moral assessments of retreat, and, yet, they agree that homeowners should be able to stand their ground without fear of criminal liability. However, Greenawalt says, if they must first decide whether to classify their reasons as “justification” or “excuse,” the task will not only “take a lot of time and energy,” it will fail to capture their “divergen[t] moral evaluations” of retreat.

Greenawalt’s argument may have force with respect to other distinctions between justification and excuse. However, with respect to the distinction I propose, his illustration suggests that rather than being a political vice, distinguishing between justification and excuse can be a political virtue. Despite their differences, the three legislators all have reasons of “justification” for rejecting a duty of retreat (though, as we shall see, Legis-

73 Greenawalt, Perplexing Borders, p. 1903. See also Greenawalt, Distinguishing Justifications from Excuses, p. 107.
74 Greenawalt, Perplexing Borders, p. 1906. See also Greenawalt, Distinguishing Justification from Excuse, p. 107; Greenawalt, Justifications, Excuses, and a Model Penal Code for Democratic Societies, pp. 18–19.
75 Greenawalt, Perplexing Borders, p. 1903, 1906, 1914.
lator 3 may also have reasons of “excuse,” though if he does, his reasons are highly problematic in criminal law). The three legislators all have reasons of justification because, measured by the basic question, “Has the actor inflicted a harm or risk that the state regards as regrettable under the circumstances?” they all agree that a homeowner who uses lethal force rather than retreat does nothing regrettable. Thus, because Legislator 1 believes that standing one’s ground is positively desirable, he would deny that it is regrettable; because Legislator 2 believes that standing one’s ground is morally permissible, he would also deny that it is regrettable; and although Legislator 3 believes that it would be regrettable for homeowners to stand their ground if the law could accurately determine after-the-fact that they could have retreated with complete safety, Legislator 3 does not believe the law can accurately make such determinations after-the-fact and, therefore, believes that to avoid convicting homeowners whose actions were not regrettable, the law must adopt a prophylactic rule that treats all homeowners as if standing their ground were not regrettable.

Now what about Legislator 3’s other reason for rejecting a duty to retreat, viz., that despite personally believing it to be morally wrong for homeowners to stand their ground when they can safely retreat, he is “[unwilling] to impose his moral conviction [upon his constituents] and demand behavior that many people find unnatural.” It is not clear what Greenawalt means in contrasting Legislator 3’s personal moral convictions with those of his constituents. Nor is it clear what Greenawalt means in saying that the legislator’s constituents find a duty of retreat “unnatural.” If Greenawalt means that while Legislator 3 personally regards it as wrong for homeowners to stand their ground rather than retreat, he feels duty-bound to represent his constituents who in general do not think it is wrong, then, again, Legislator 3’s reasons are reasons of justification; because in rejecting a duty to retreat, Legislator 3 is speaking for constituents who do not regard standing one’s ground as regrettable. However, Greenawalt may mean something else. He may mean that while Legislator 3 believes his constituents agree with him that standing one’s ground is wrong, Legislator 3 also believes that most of his constituents, being morally weak, would
probably end up doing the wrong thing if they themselves were in that situation. If that is Legislator 3’s stance, the defense he would be enacting would, indeed, be an excuse rather than a justification. Nevertheless, Greenawalt is wrong to argue that Legislator 3 should not have to confront his reason as a putative excuse. On the contrary, it is politically desirable that Legislator 3 confront what codifying such a excuse would mean, because it would force Legislator 3 to recognize that he would be creating an excuse without precedent in criminal law – namely, an excuse consisting of the claim, “Most people would do the same thing under the circumstances.” Now it might be thought that the MPC defense of duress does precisely that in its reference to people of “reasonable firmness.” But that is not so. The MPC defense of duress is not predicated on polls as what most people actually do. If it were, the defense ought to be generalized to exonerate automobile drivers who, being late, exceed speed limits; employees who under financial pressure steal office supplies from their employers; taxpayers who under financial pressure fudge on their taxes; people who loot in the context of urban riots; concentration camp guards who commit crimes against humanity; and ethnic groups that run amok in the context of ethnic cleansing. The defense of duress is predicated on what a “reasonable” person would do, a “reasonable” person being not an average person but a right-minded person who, when confronted with a coercive threat of personal injury to himself or loved ones, maintains a normatively acceptable balance between his self interests and the interests of others.  

B. Mitchell Berman

On its face, Mitchell Berman’s critique of prevailing distinctions between justification and excuse appears to be more radical than Greenawalt’s. After all, Greenawalt concedes that there are paradigmatic cases in law and morals in which the normative distinction between justification and excuse is both clear and significant. And Greenawalt therefore confines his

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objections to “borderline” cases in which he believes that the normative distinction breaks down (though Greenawalt fails to explain how the normative distinction can be significant in some cases without resting on norms that are significant generally). In contrast, Berman seems at first glance to deny that there is any normative content at all to the distinction in criminal law between justification and excuse, because Berman denies that the distinction can be a “moral” one.  

This is not to say that Berman rejects all distinctions between justification and excuse. Berman argues that there is a certain conceptual distinction between justification and excuse, and that the latter, in turn, represents a kind of “normative” distinction. But he argues that the substantive norms that underlie the conceptual distinction are “sociological” norms rather than “moral” norms. He thus seems to deny what nearly every other commentator who writes about justification and excuse assumes – namely, that justification stands for conduct that is right and good (or at least not wrong and bad), and that excuse stands for conduct that is wrongful but blameless.

In reality, however, Berman’s critique is not as drastic as it seems. Berman does not deny that the distinction between justification and excuse in law is a normative distinction between conduct that is not wrongful, on the one hand, and conduct that is wrongful but blameless, on the other. Indeed, the “sociological” inquiry that his own definition of “justification” generates is an inquiry into what jurisdictions wish their citizens to aspire to do. Rather, when Berman denies that justification and excuse can represent “moral” judgments in law, he is using “moral” and “sociological” in non-standard ways to make a different point that can scarcely be disputed. I shall first address the portion of Berman’s article that appears to speak to normative distinctions between justification and excuse such as mine. I will then say something about the merits of Berman’s own “conceptual” distinction between justification and excuse.

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79 Berman, Justification and Excuse, pp. 30–31, 37.
80 Berman, Justification and Excuse, pp. 32–33.
Berman sets up what he calls the “standard account” of justification and excuse in law, namely, that legally justified conduct is conduct that is not “morally wrongful,” while legally excused conduct is conduct that is “morally wrongful” but nevertheless morally “blameless.” He then proceeds to argue that the standard account is and will continue to be fundamentally inconsistent with the shape of criminal law defenses. In doing so, however, Berman reveals that he is not using the term “moral” in the same way that exponents of the standard account do, and that far from criticizing a “consensus” view, he is attacking a view that scarcely anyone could embrace. Berman reveals that he is not denying that justified conduct is conduct that, in the eyes of the law, is not normatively wrongful. Nor is Berman denying that excused conduct is conduct that, in the eyes of the law, is normatively wrongful but not normatively blameworthy. Rather, Berman is making the non-controversial assertion that the kinds of normative judgments of right and wrong, blameless and blameworthy, that enter into judgments of justification and excuse in law are not necessarily the same as they would be in ethics. That is to say, in denying that there is a “moral” basis to the distinction between justification and excuse in law, Berman is stating what most law students discover early on, namely, that the legal rules that govern the state’s official condemnation of its citizens are not, and ought not to be, identical to the ethical norms that govern people’s personal reproaches of one another.

Legal norms of state-imposed punishment differ from personal norms of interpersonal reproach because, even if the two sets of norms have common origins, the institutions and sanctions of state-imposed punishment differ significantly from those of interpersonal reproach. Interpersonal reproof is just that: it is personal and typically private or semi-private; while official condemnation is purposefully impersonal and purposefully public. Individuals who reproach one another typically know one another and, if they make mistakes, can correct them; while the institutions of official punishment are state officials and random jurors with no personal knowledge of the

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81 Berman, Justification and Excuse, pp. 7-9.
events and little ability to correct mistakes. The sanctions of personal reproach are gradational and relatively mild, ranging from a raised eye-brow, to verbal chastisement, and to social ostracism; while the sanctions of official punishment are crude and severe, ranging from public condemnation to incarceration to death. Accordingly, even if lawmakers and the public started with identical senses of wrongdoing and blame, one would expect the official rules of criminal law to differ from the ethical rules of interpersonal relationships. Nevertheless, the fact that lawmakers end up making different judgments of wrongdoing and blame in the criminal context than they and the public make in interpersonal contexts does not prevent their judgments in law from being judgments of wrongdoing and blame.

Consider a case in which a 6-year, 11-month-old boy purposefully breaks all of his sister’s porcelain dolls or tortures a family pet. The boy’s parents will rightly behave differently than the juvenile courts. The parents, who are intimate with the boy and his motivation, may well scold him, demand that he apologize, and impose other domestic sanctions, while continuing to monitor his responses and development. The juvenile court, in contrast, will surely dismiss all charges on the ground that, being under the age of seven, he is too young to be punished at the hands of the state. So why it is that the boy has an excuse of “immaturity” in law that he does not have at home? Is it because the law believes that children have no sense of responsibility at 6 years 11 months and, yet, suddenly acquire it at the moment they turn 7? Is it because lawmakers at work abjure the moral bearings they possess at home? Is it because the law’s excuse of immaturity is entirely lacking in normative basis? Clearly not. Legislators recognize that because the juvenile court system is impersonal, because its public declarations of delinquency are highly stigmatic, because the few sanctions at its disposal are harsh, and because it is in institutionally incapable of tailoring juvenile sanctions to the gradational senses of responsibility of children under 7, the juvenile delinquency systems ought to follow a bright-line rule that leaves the disciplining of children under 7
to their parents. The law’s excuse of immaturity is not lacking in normativity; it is consciously based upon normative judgments regarding the difference between public reproof and inter-personal reproof.\textsuperscript{82}

In place of what he denies is a “moral” distinction between justification and excuse, Berman proposes a “conceptual” distinction that, he says, reflects “sociological” facts but is, in reality, predicated on normative judgments. A defense is a “justification,” he says, if it renders permissible conduct that would otherwise be a crime. A defense is an “excuse,” in turn, if it renders non-punishable conduct that is criminal.\textsuperscript{83} This distinction is substantive, Berman says, not formal. That is, the distinction does not depend upon whether the legislature uses the terms “permissible” or “non-punishable.”\textsuperscript{84} Rather, the distinction turns upon the normative judgments that legislatures and courts make in enacting and interpreting defenses. A given defense causes conduct permissible, Berman says, if and only if its true legislative purpose is to declare, ‘This is the norm by which we, the legislature, call on people to guide their conduct – that is, the norm that we aspire that people follow’.\textsuperscript{85} A defense is an excuse, Berman says, if for any reason the legislature does not wish to punish actors whose conduct falls short of what the legislature has aspires that they do.

The measure of any internally-consistent distinction between justification and excuse is its usefulness, particularly in relation to competing distinctions. I have two doubts about the usefulness of Berman’s distinction. The first concerns Berman’s definition of “justifications.” I doubt that it is possible to determine with any confidence whether a legislature’s true motive in enacting an exculpatory defense is to declare how the legislature aspires that people


\textsuperscript{83} Berman, Justifications and Excuses, pp. 24–25.

\textsuperscript{84} Berman, Justifications and Excuses, pp. 37–38.

\textsuperscript{85} Berman, Justifications and Excuses, pp. 31–33, 50, 53–56, 73–74.
behave (as opposed to what the legislature regards as acceptable conduct under the circumstances), or whether the legislature’s true motive is to exonerate actors whose conduct falls short of what the legislature aspires that people do. Consider, for example, a legislature that – having made it a crime “To intentionally kill another human being” – provides a defense to those who “reasonably believe that using lethal force is necessary to protect themselves from being unlawfully killed, even if they are mistaken in their belief.” According to Berman, if the legislature’s true motive is to inspire people to follow the injunction, “Thou shalt not kill,” while simultaneously providing a defense for those who kill in self-defense, then the defense is an “excuse.” If, on the other hand, the legislature’s true motive is to inspire people to ascertain facts as best they can and reluctantly to kill rather than be wrongly killed, then the defense is a “justification.” The problem is that if individual legislators were casually polled, they would probably confess to having both motives. Yet, because the process of legislating does not call upon them to rank their motives in those terms, there is no way to determine after the fact which motives predominated.

The second problem with Berman’s distinction concerns his definition of “excuses.” Berman defines “excuses” in such as way as to preclude them from possessing anything normatively in common, apart from the fact that they lead to acquittals. He defines excuses as consisting of all defenses that are not “justifications” – including both exculpatory defenses like insanity and non-exculpatory defenses like diplomatic immunity. Now we have seen that non-exculpatory defenses share nothing normatively in common with one another, apart from their all being defenses. By aggregating them with exculpatory defenses, Berman makes it difficult to inquire into the very thing I shall be investigating in Section IV – namely, whether what I call “excuses” (i.e., exculpatory defenses that are neither defenses of actus reus nor defenses of justification) are derivative of a single, unified norm of exculpation.
Numerous commentators have sought to identify what John Gardner calls “The Gist of Excuses.” In order to account for excuses, commentators must first do something along the lines of what I undertake in Section I: they must explicitly or implicitly define the set of defenses for which they hope to provide accounts. Interestingly, commentators differ widely on the kinds of defenses that qualify as “excuses.” Thus, Gardner defines excuses in such a way as to exclude defenses of insanity, immaturity, and involuntariness, which he regards instead as defenses of “lack of responsibility.” Others define excuses to include such defenses without being limited to them. And still others come close to defining excuses to consist exclusively of the very defenses that Gardner excludes.

My purpose in this part is to describe and criticize the leading accounts of excuse. I shall be criticizing them from both internal and external standpoints. By internal criticism I mean criticism that accepts a commentator’s definition of “excuse” but critically examines how persuasively the commentator accounts for the normative content of criminal defenses that thereby fall within the definition. By external criticism I mean criticism that accepts a commentator’s normative account of the content of what the commentator defines as “excuses” but critically examines whether the definition of excuses is under-inclusive or over-inclusive. To illustrate what I mean by such external criticism, consider the defense of duress. Commentators commonly classify duress as an excuse, in contradistinction to necessity and self-defense which they classify as justifications. Yet we have seen that duress, necessity, and self-defense all share the same essential features: they are all choice-of-evil defenses that are valid if, and only if, the evils chosen are

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normatively proportional to the evils avoided. To be sure, commentators argue that duress is distinctive because victims of duress sometimes make panicked or emotionally-charged choices that they would not make if they were cool and collected. But of course the same thing can happen to victims of necessity and self-defense, and when it does, the latter are judged by the standards of persons in their stressful “situations” without altering the way necessity and self-defense are classified. Some commentators also claim that the defense of duress is distinctive in that it allows actors to do the wrong thing when the average person, when confronted with the same hard choice, would also do the wrong thing. However, we have seen that that is not so. Actors under duress are judged by the standards of persons of “reasonable” resolution, “reasonableness” being a normative measure of the steadfastness and respect for others that the law can rightly expect of people, not an empirical measure of the way people typically behave. As a consequence, any theory of excuse that classifies duress as an excuse is subject to external criticism on the ground that it is either over-inclusive in including duress as an excuse or under-inclusive in excluding necessity and self-defense as excuses.

A. The Character Theory of Excuses

The character theory of excuses is a function of a broader, character theory of blameworthiness often attributed to David Hume. According to Hume, a person who performs a wrongful act is blameworthy if, and only if, his conduct manifests bad character on his part – that is, if, and only if, his conduct reveals him to possess a settled disposition to disregard the legitimate interests of others. It follows, therefore, that a person who

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90 See, e.g., Kadish, *Excusing Crime*, p. 265, 274 (arguing that an actor is excused for making a wrong choice under duress and that he is excused because, “though he breached a legal norm, he acted in circumstances so constraining that most people would have done the same,” and, hence, “the person has not shown himself to be more blameable than the rest of us”).


performs a wrongful act has an excuse if, *inter alia*, (1) he made a reasonable and good-faith mistake that is consistent with his being of good character, (2) he was compelled by pressures over which he had no control (other that the pressures of settled character), (3) he was too young to have developed a settled character, (4) he acted from insanity rather than any settled character on his part, or (5) his conduct was out of character for him.93

The character theory of excuses has a great many strengths, in addition to its Humean pedigree. The theory is revealing of culpability, because Hume's account of when actors ought to be excused from blame (i.e., when their wrongful conduct does not manifest bad character on their part) is a direct function of Hume's account of when actors are deserving of blame (i.e., when their wrongful conduct is a manifestation of bad character on their part). The theory also fares well under external critique because its definition of “excuses” comes into play only with respect to actors who have engaged in conduct that the state regards as regrettable or undesirable, and with respect to them, the definition of excuses is co-extensive with the entirety of their exculpatory defenses.

The character theory of excuses nevertheless presents at least two internal obstacles. First, the theory accepts as an excuse what the criminal law universally rejects as a defense, namely, the claim by a wrongdoer that his conduct was “out of character” for him. The character theory accepts such claims as an excuse because conduct that is out of character for an actor manifests no

character of his at all, much less bad character, and, hence, provides no basis for blame. In contrast, the criminal law rejects such claims, at least when proffered as complete defenses to wrongdoing. Suppose, for example, that a man with a sterling and seemingly deserved reputation for honesty acts on impulse and steals petty cash from his employer. The fact that the theft is an exceptional lapse from otherwise good character may constitute a partial defense for the man by virtue of mitigating his punishment. Thus, the Federal Sentencing Guidelines permit judges in certain cases to reduce the sentences of defendants whose impulsive conduct “represents a marked deviation... from an otherwise law-abiding life.” But the fact that wrongful conduct is an exceptional lapse of otherwise good character provides no basis in law for exculpating an actor altogether.

Now one might try to resolve the foregoing problem by linking character to conduct. The argument would go as follows: “It is a fallacy to conceive of ‘character’ as existing independently of conduct. A person’s character is constituted by the attitude toward others that he exhibits in the totality of his conduct toward them, including conduct that departs from what his past behavior leads observers to predict. Thus, an employee who acts on impulse to steal only once exhibits less bad character than an employee who plans his theft in advance or who steals many times. But the former employee’s wrongful conduct nevertheless exhibits bad character on his part because it reveals him to be a person who, when the impulse arises, is willing to steal once from his employer. And because his wrongful conduct exhibits bad character on his part, he deserves to be blamed for it, albeit perhaps less than wrongdoers who reveal themselves to be inveterate thieves.”

This redefinition of “character” may resolve the first problem in the character theory of excuses, but it does not address the second problem. The second problem is that the theory rejects as an excuse what the criminal law typically accepts as a defense – namely, a claim by a mentally-ill actor with chronic

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paranoia that because of his chronic mental illness, he did not know what he was doing when he killed an innocent victim in the mistaken belief that the latter was trying to kill him. Now I have said that the character theory excuses actors whose wrongful conduct is a product of intermittent mental illness rather than character. But it does not excuse a mentally ill actor whose wrongful conduct is a product of chronic paranoia that has become his character, because his conduct is then as much a manifestation of his character as anyone’s. Nor, under the revised theory stated above, does the character theory excuse an actor whose wrongdoing is the product of aberrant bouts of mental illness that are out of character for him, given that “character” under the revised view is constituted as much by aberrant acts as by predictable acts.

To be sure, one could try to supplement character theory by adding that a person ought not to be blamed for manifestations of character over which he has no control. But that raises problems of its own. For one thing, it would not satisfy Hume and other like-minded “compatibilists;” for Hume was a determinist who believed that no one has control over the character he possesses, and, hence, lack of control over character cannot itself be exculpating. More serious still, if lack of “control” excuses a person for conduct that stems from character, it must be because lack of control excuses generally, regardless of character. In that event, however, lack of control operates not as a supplement to a character theory of excuses but as an independent rival to a character theory of excuses.

B. The Choice Theory of Excuses

H.L.A. Hart published a series of celebrated essays between 1957 and 1967, expounding what has since become known as the “choice” theory of criminal excuses. Like others who seek

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to account for criminal excuses, Hart begins by identifying which legal defenses he means to include within excuse. Excuse,” Hart says, comes into play after actors otherwise engaged in prohibited conduct, and it exculpates actors on the basis of certain “mental conditions,” including, he says, accidents, mistakes of law and fact, insanity, immaturity, involuntariness, and duress. Interestingly, however, in the course of Hart’s 10-year effort to account for such excuses, he frames it in two slightly but significantly different ways. Sometimes Hart argues that actors are, and ought to be, excused from criminal conduct that they do not “choose.” At other times, Hart argues that actors are, and ought to be, excused from criminal conduct that they lack “capacity and a fair opportunity to choose” to avoid. These two formulations of the theory have influenced commentators, some of whom embrace “choice” as the rationale of excuses, and others of whom embrace “capacity and fair opportunity to choose.” I shall address these two formulations of choice theory and criticize each of them on internal grounds. I shall also criticize on external grounds commentators who accept the choice theory of excuses but exclude as “excuses” certain defenses that Hart includes, namely, defenses of mistake of fact and law regarding the elements of offenses.

1. Absence of Choice
In his 1957 “Legal Responsibility and Excuses,” Hart derives excuse from what he asserts to be the nature of the criminal law itself. Criminal law, he says, is a “choosing system.” It specifies

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103 For powerful criticism of choice theory, see Antony Duff, Choice, Character, and Criminal Liability, pp. 350–361.
the harms and risks it wishes people to avoid, and it gives people “reasons” to avoid them by girding them with “costs.” But criminal law ultimately leaves it to people “to choose” what to do. Accordingly, he says, an actor is, and ought to be, excused from criminal conduct that he does not “real[ly]” choose.\footnote{H. L. A. Hart, Punishment and Responsibility, p. 44.}

This version of the choice theory successfully explains some defenses. Thus, it explains why it is a defense that an actor’s conduct was a product of epilepsy. It explains why, when a person is charged with a crime of purpose or knowledge, it is a defense that his conduct was the product of accident, mistake of fact, or mistake of law. And it explains why it is a defense that a mentally-ill or involuntarily intoxicated actor did not know what he was doing or, if he did, that he did not know it was wrong. However, this version of the choice theory does not account for the law’s treatment of other defenses. The theory fails to explain why the law excuses certain actors who do choose and refuses to excuse certain actors who do not choose.

To illustrate the law’s refusal to excuse actors from criminal conduct that they do not choose, consider crimes of negligence. Suppose, for example, that an actor is charged with involuntary manslaughter based on evidence that he negligently killed another person, say, by accidentally dropping a cocked pistol or mistakenly believing a rifle is unloaded. An actor who accidentally or mistakenly kills does not choose to kill. Indeed, if he chose to kill, he would be guilty of either murder or voluntary manslaughter. Yet the law does not regard his failure to choose to kill as a defense to involuntary manslaughter. Involuntary manslaughter is precisely the offense a person commits by killing not through choice, but through negligence. The law also regularly inculpates actors whose voluntary intoxication causes them to unwittingly undertake risks of which they would be aware if they were sober.\footnote{For a choice theorist who recognizes that choice theory is inconsistent with the law of criminal negligence, see Moore, Choice, Character, and Excuse, pp. 588–590.}
Now consider the converse, viz., the law’s willingness to excuse actors from criminal conduct that they do choose. An example is a mentally-ill actor who knows what he is doing, and knows that it is wrong, but claims to suffer from a “compulsion” to do it. Even if one assumes that compulsions of that kind prevent actors from choosing other than they do, it does not follow that the compulsion prevents actors from choosing what they do. On the contrary, the claim with respect to such compulsions is precisely that they leave actors with no alternative but to choose to do what they do.

2. Absence of Capacity and Fair Opportunity to Choose Otherwise

Hart shifts emphasis in his later essays. Rather than arguing that an actor has a defense to criminal conduct, $x$, if he fails to choose $x$, Hart argues that an actor has a defense to $x$ if he fails to possess a “capacity and fair opportunity to choose” non-$x$. The latter version of the choice theory has several advantages over the former version. Thus, the latter version explains why the law punishes negligence and acts of persons who are voluntarily intoxicated. Negligent actors and voluntarily intoxicated actors may not choose to engage in the wrongful conduct with which they are charged, but they do possess the “capacity and fair opportunity” to choose to avoid such conduct by attending more closely to what they are doing and by refraining from intoxicating themselves. The capacity version of choice theory also appears to explain why mentally-ill actors are excused from knowingly committing wrongful acts that they are allegedly compelled to commit. Such mentally-ill persons may knowingly choose to do what they do, the argument goes, but given their compulsions, they do not have capacity to choose otherwise.

The problem with the capacity version of choice theory is that, although it appears to explain insanity cases based upon compulsions, it does so by means of a question-begging metaphor. The capacity theory is persuasive with respect to persons who lack an opportunity to exercise their wills (e.g.,

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persons suffering from epilepsy or reflex actions or persons who are violently pushed) and people who are subjected to overwhelming physically force against their will (e.g., persons who are carried kicking and screaming into the street and then charged with being in a public place), because lack of “capacity” literally describes them: lacking an opportunity to affect their conduct through an exercise of their wills, they have no “capacity” to prevent wrongful harms or risks that may occur and, hence, absent strict liability, should not be blamed for them. The same is not true, however, of actors who in their insanity, hypnosis or sleepwalking, engage in complex actions that require what philosophers call “intentionality” (i.e., propositional beliefs about the world), and choices of means toward ends (e.g., walking down stairs to get to a woodpile, picking up an axe to use it, wielding the axe for its purpose). Of course, one can say of such persons that they have no “capacity” or no “substantial capacity” to choose otherwise than they choose. But with respect to conduct that presupposes intentionality and choices of means and ends, the terms “no capacity” and “no control” are not literal descriptions of events that can actually be observed or experienced. They are metaphors that are invoked in order to provide persons who choose to inflict harms or risks in states of insanity, hypnosis, or sleepwalking the benefit of the same kind of exculpation that is presently enjoyed by persons who are unable to make any choices at all. They are metaphors because neither science nor forensics knows of any way to determine that an actor who

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intentionally chooses to do something could not have chosen otherwise.\footnote{See Morse, Acts, Choices, and Coercion, pp. 1600–1601 ("[I]t is famously the case that ... it is impossible to differentiate ‘irresistible’ impulses from those simply not resisted"); Kadish, Excusing Crime, p. 281 ("there is no way objectively to establish that a person could not refrain from a criminal action, rather than would not"); Christopher Slobogin, ‘The Integrationist Alternative to the Insanity Defense: Reflections on the Exculpatory Scope of Mental Illness in the Wake of the Andrea Yates Trial’, \textit{American Journal of Criminal Law} 30 (2003): 315, 322 ("Considerable research on impulsivity has taken place in recent years. But we still do not know how to measure [it]. ...In short, when we discuss ‘impulsivity’, we literally do not know what we are talking about.")}

To be sure, the fact that a theory speaks in metaphors does not prevent it from having explanatory force, provided that its use of metaphor is \textit{perspicuous} – that is, provided that the features that trigger the metaphor are evident and normatively compelling. The principal internal problem with the capacity theory of excuses is a lack of perspicuousness. The features that are supposed to trigger the metaphors of “no capacity” may be evident with respect to some varieties of disordered agency (e.g., hypnosis and somnambulism), but they are highly occluded in others. And because they are occluded, they deprive the theory of explanatory power. The theory purports to explain when actors are, and are not, excused from blame. But because the theory refers to the conditions of blamelessness only obliquely rather than directly, it obfuscates what it purports to clarify.\footnote{cf. Morse, Acts, Choices, and Coercion, p. 1610 (arguing that “notions of loss of control are almost always parasitic upon other justifications for excuse and that the notion of loss of control unduly threatens to mislead or confuse legislators, criminal justice system participants, and the public").}

A good example are the legal defenses that most closely appropriate the language of capacity theory, namely, so-called “volitional” tests of insanity. Nearly all Anglo-American jurisdictions possess criminal defenses of insanity that are defined in “cognitive” terms; that is, they are defenses like the rule in \textit{M’Naghten} that consist of the claim that by virtue of mental illness, the defendant did not \textit{know} what he was doing or, if he did, he did not \textit{know} it was wrong. In addition, however, many jurisdictions superimpose defenses of insanity
that are defined in "volitional" terms. Volitional defenses of insanity consist of the claim, "The defendant may have known what he was doing, but being mentally ill, he lacked capacity to control himself." The "irresistible impulse" defense of insanity is a volitional defense of criminal insanity. So, too, is the second part of Model Penal Code section 4.01, which provides a defense to a mentally-ill actor who, though he may have known what he was doing and may have known that it was wrong, nevertheless lacked "substantial capacity to conform his conduct to the requirements of the law." Volitional tests of insanity are designed to exculpate mentally-ill persons who do not obviously qualify for cognitional defenses of insanity like M’Naghten and, yet, suffer from compulsive and disordered thinking that tends to evoke pity rather than indignation and reproach. Mark Bechard was such a person.

Mark Bechard and the Sisters. Bechard was 38 on January, 1996, when he attacked a group of elderly nuns from the Sisters of the Blessed Sacrament Convent in Waterville, Maine, who had recently become a source of solace and comfort for him. By then he had already had a twenty-year history of hallucinations, mood swings, and delusions of persecution regarding political figures, entertainers and strangers. Beginning when he was 10 years old, he was plagued with severe headaches and began having difficulty sleeping. By the time he was a high school junior, he felt he was being persecuted by his friends. After a single semester at college, he returned home, saying that he began getting "dark moods" and not sleeping for days at a time. He told his mother that voices in his head were always there, always talking to him, and he felt an obligation to follow their directions. The next year he was hospitalized a dozen times. Over the following 20 years, he was an outpatient at a half-dozen mental institutions. He was placed on medication which seemed to work for several years; but by January, his mother said, "The voices were getting louder and he was losing control." He had always been religious, and he walked barefoot one year from Waterville to Bangor, Maine, to bring the priest a message of "repentance" that he said God was telling him in his head. He had hoped to

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become a priest, but was beginning to despair that he would not stay healthy enough to fulfill his felt vocation. In the six months before the event, he spent increasing time at the Convent, where he enjoyed praying with the nuns.

Bechard awoke on January 27 in a particularly dark mood, aggravated, perhaps, by his having stopped his medication. “His face was black,” his mother later said, “he didn’t have any eyes at all – they were just all black. Things were coming out his mouth but it was not any language. It wasn’t French; it wasn’t English.” He took his trumpet and trombone – possessions, his mother said, that “gave him his identity” – and threw them in the trash and left the house in a cold and driving rain storm, dressed in nothing but pants and a T-shirt. His mother called the emergency mental-health hotline, but the telephone lines were down because of the storm and no one answered. Meanwhile, Bechard walked to the convent where he sat in a pew, drenched and sobbing, his head jerking back and forth, and breathing heavily. During the Prayer of the Faithful, when the usual response of the congregation is “Lord, hear our prayer,” Bechard would say: “May God thwart the path of the evil one.” The nuns, though aware of his mental illness, were accustomed to his being well-dressed and clean-shaven. Alarmèd by his appearance and bizarre behavior, they worried that he might be high on drugs. When he asked to speak to a priest, the nuns pretended to direct him to the rectory but instead directed him to the outside and locked the door. Upon being shut out, he first began sobbing, jerking his head, and taking in loud gulps of air. Then he proceeded to the kitchen door, broke the glass of the door, unlocked it from inside, and entered on a rampage. He killed his first victim, 67 year-old Sister Marie Fortin, by knocking her to the ground and repeatedly stomping on her face. He killed his next victim, 68 year-old Sister Edna Cardozo, by beating her about the face and stabbing with a kitchen knife that he left protruding from her cheek. He found his next victim, 69 year-old Sister Patricia Keane in the chapel, where she was praying. He grabbed Sister Keane’s metal walking cane and struck her three times on the head until it broke, whereupon he seized a statue of the Blessed Virgin and despite her exclamations of “No, don’t do that,” he hit her with it. He was poised to hit her again with it when a policeman entered and ordered him to “freeze.” He immediately put the statue down and lay down on the floor.

Bechard’s bizarre behavior continued at the police station. His mood changed rapidly and repeatedly from being repentant to having hallucinations. He would go from being very calm one minute to, as one officer described it, “trying to dig his eye out with his toes.” He slammed his face into the floor. He talked to himself. He shouted at people who were not there. He seemed to be “yell[ing] at himself from inside himself,” one officer said, shouting, “Go, Mark, go.” “Why, Mark? Why?” “Now look what you did. Don’t do it! Don’t do it!” Bechard later told psychologists that mysterious voices told him to go to the convent and get “cat smut” in order to
save the “Pixie.” Characters he called “the abusifier” and the “votese” told him to execute the nuns, he said. But when he was asked why he killed the nuns, Bechard replied: “I don’t know why. I loved them.”

Bechard is not one whom the cognitive test of M’Naghten felicitously fits. After all, Bechard must have known that he was striking defenseless nuns because he proceeded methodically from one defenseless nun to another, despite their pleas for mercy. And he must have known that striking them was wrong because he claimed to be acting not on behalf of God or an oracle of goodness but on behalf of the “abusifier.” Moreover, the trial judge did not acquit Bechard on the ground that Bechard did not know he was acting wrongly. The trial judge acquitted Bechard in the language of the capacity theory of excuses. He acquitted Bechard on the ground that, by virtue of his mental illness, Bechard “lacked even the most basic control to stop himself.”

Many observers, I suspect, will agree with the judge that because of Bechard’s particular kind of disordered thinking, Bechard was more to be pitied than condemned. And because they agree with the result the judge reached, they may look favorably on the language of “control” in which the judge framed his decision. But it is important to recognize that when the judge concluded that Bechard could not “control ... himself,” the judge was not describing phenomena that can be scientifically observed. For there are no scientific criteria to ascertain when a person who chooses to do one thing could not have chosen otherwise — no way to know that Bechard could not have stopped when the nuns begged for mercy, just as he immediately

114 This is not to say that Bechard could never be acquitted under a traditional M’Naghten rule of insanity. Obviously, a judge in a jurisdiction bound by M’Naghten could instruct a jury on insanity in a case like Bechard’s in a way that permitted the jury to find that Bechard did not really know what he was doing. Rather, the point is that within a jurisdiction that views claims of insanity with skepticism and, following the Hinckley verdict, construes M’Naghten narrowly, it is a hurdle to say of Bechard that he did not know that he was killing and did not know that killing was wrong. See generally Abraham Golstein, The Insanity Defense (New Haven: Yale University Press, 1967), pp. 45–46, 66, 75–76.

stopped when the policeman ordered him to “freeze.” Rather, when the judge concluded that Bechard “lacked control to stop,” he used “lack [of] control” not as description but as a conclusory label for certain features of Bechard’s disordered thinking that evoked pity in observers rather than indignation.

To be sure, if triers of fact intuitively grasp the features of disordered thinking that the metaphor of “no control” is designed to capture, volitional tests of insanity will function as they are supposed to. The problem with volitional tests of insanity is that triers of fact do not always understand what they are supposed to do, and when they do not, volitional tests leave them without guidance. That was precisely the problem that beset the jury in trying John Hinckley. Like Bechard, John Hinckley was mentally ill; and like Bechard, John Hinckley knew he was attacking persons who were no threat to his life, and Hinckley knew what he was doing was wrong. But in contrast to Bechard’s compulsive and disordered thinking, John Hinckley’s kind of thinking aroused indignation in most observers rather than pity. Unfortunately, the jurors who were impaneled to try Hinckley did not intuitively grasp the features of compulsive and disordered thinking that the metaphor of “no control” is presumably designed to capture. And because the volitional test of insanity provided them with no explicit guidance, they ended up making a judgment of “no control” that so outraged the public that numerous legislatures, including Congress, repealed the volitional test altogether.116

This is not to equate Hinckley’s mania with Bechard’s disordered thinking for purposes of excuse. The normative differences between the two men’s species of insanity are

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116 For an account of the political and legal reaction to the Hinckley verdict, including skepticism among lawmakers about what it means to say that Hinckley could not control himself, see Richard Bonnie, Anne Coughlin, John Jeffries, and Peter Low, Criminal Law (New York: Foundation Press, 2004), pp. 540–541.
significant, and a perspicuous theory of excuse would identify them.\textsuperscript{117} The point is that volitional tests of insanity do not identify those differences. They provide jurors with no guidance as to the normative judgments they are supposed to be making and, by providing jurors with no such guidance, relegate the resolution of insanity cases to a hope and prayer.\textsuperscript{118}

3. \textit{Paul Robinson's Realm of Excuses}

Paul Robinson accepts Hart's choice theory of excuses, but he excludes from his definition of "excuses" certain defenses that Hart includes – namely, defenses of mistake of fact and law that arise with respect to the elements of offenses.\textsuperscript{119} In doing so, Robinson opens himself to criticism on external grounds, that is, on the ground that he excludes from his definition of excuses certain defenses that are normatively identical to defenses that he includes as excuses.

An obvious example is the similarity between reasonable mistakes of fact with respect to defenses of justification (which Robinson includes within "excuse") and reasonable mistakes of fact with respect to elements of offenses (which Robinson excludes from "excuse"). Consider two actors – "John" and "Joan." John, seeing a third person, V, running toward him, kills V in the reasonable but mistaken belief that killing V is necessary to prevent V from wrongfully killing him. In contrast,

\textsuperscript{117} As we shall see in Section IV, the significant difference between Hinckley and Bechard is that Hinckley can be reproached for selfish disregard of the legitimate interests of others, because he acted for many months to bring about a consistent, perversely rational and well-defined goal at their expense, i.e., the goal of doing the most heinous thing he could imagine in order to demonstrate to Jodie Foster the depth of his commitment and to indelibly link his identity to hers in the world's eyes, and because he achieved his goal. In contrast, Bechard cannot be reproached for selfishness because neither Bechard nor anyone else can make sense of what he hoped to achieve.

\textsuperscript{118} See Richard Bonnie, 'The Moral Basis of the Insanity Defense', \textit{ABA Journal} 194, 69 (1983): 196 (the risks of "moral mistakes" in administering the insanity defense are greatest "when the experts and the jury are asked to speculate whether the defendant had the capacity to ‘control’ himself or whether he could have ‘resisted’ the criminal impulse").

\textsuperscript{119} See Paul Robinson, Structure and Function of Criminal Law, p. 83.
Joan, using a theater pistol upon a theatrical stage, kills another person, V, in the reasonable but mistaken belief that the pistol is loaded with blanks. John and Joan both inflict a harm that the state regrets and that the criminal law of homicide seeks to prevent. Both act on the basis of states of mind for which they cannot be faulted. Yet Robinson would say that John’s is a defense of excuse, while Joan’s is a defense of lack of mens rea. By placing the two defenses in separate categories, Robinson obscures the fact that John’s excuse and Joan’s defense of lack of mens rea share the same exculpatory principle in common – namely, that a person who inflicts a harm that the state regrets ought nevertheless to be exculpated if his attitude was one of proper regard for the interests of others.

Another but less obvious example is the similarity between the M’Naghten defense of insanity (which Robinson treats as “excuse”) and reasonable mistakes of fact and law with respect to elements of offenses (which Robinson excludes from excuses). M’Naghten provides a defense to wrongdoers who, because of mental illness, do not know what they are in fact doing or, alternatively, do, indeed, know what they are in fact doing but do not know it is wrong. M’Naghten constitutes an “excuse” under Robinson’s capacity theory because by virtue of their mental illnesses, actors have no capacity to know that they are doing something wrong. Yet Robinson’s capacity theory excludes from the class of “excuses” certain defenses that, like M’Naghten, also consist of the claim, “I didn’t know,” namely, defenses of mistake of fact and mistake of law that arise with respect to the elements of offenses.

Admittedly, M’Naghten contains an additional claim besides “I didn’t know.” It contains the claim, “But I couldn’t help not knowing.” Nevertheless, it is important to understand the limited role that “I couldn’t help it” plays in M’Naghten. After all, it does not suffice under M’Naghten to show that a person couldn’t help but not know, because if it did, M’Naghten would be a defense for persons who are ignorant because of voluntarily intoxication as well as those who are ignorant because of insanity. Nor does it suffice under M’Naghten to show that a person could not help but

120 See Paul Robinson, Structure and Function of Criminal Law, p. 86.
know the facts of which he was aware (as opposed to not knowing) because if it did, \textit{M’Naghten} would be a defense for persons who, perhaps because of some kind of uncontrollable autism, are more aware of the wrongful risks they are undertaking than other persons would be. Rather, \textit{M’Naghten} is a defense if, and only if, actors are unaware of facts or law for reasons that were not their fault. Significantly, however, the very same defense exists in sane persons and for precisely the same reasons. A sane person who makes a reasonable mistake of fact or law with respect to an offense or a justification that is not based upon strict liability has the same defense as a mentally-ill person under \textit{M’Naghten}.\footnote{cf. Brandt, \textit{A Motivational Theory of Excuses}, pp. 185–186 (recognizing this point with respect to insane mistakes of fact but denying it with respect to insane mistakes of law).}

They both have defenses if, and only if, they can claim, “I didn’t know I was doing anything wrong, and my ignorance was not my fault.”\footnote{cf. Slobogin, ‘The Integrationist Alternative to the Insanity’, \textit{American Journal of Criminal Law} 30: 315, 332–337.} The \textit{M’Naghten} requirement that an actor’s ignorance be attributable to mental illness performs the same function as the ordinary requirement that a sane actor’s ignorance be reasonable, namely, the function of demonstrating that the actor’s ignorance cannot be attributed to fault on his part. In both cases, however, what exculpates is that, for reasons that were not their fault, the sane and insane actors did not know that they were doing anything wrong.

To appreciate the similarity between \textit{M’Naghten} and ordinary defenses of mistake of fact or law, suppose that a jurisdiction has not yet had occasion to either adopt or reject \textit{M’Naghten}. Suppose further that the jurisdiction possesses a statute that makes it an offense to “negligently kill another human being.” Suppose finally that two homicides occur: one by a thespian, “Olivier,” who reasonably, but mistakenly, believes that a pistol he is handed to use on the stage is loaded with blanks; and a mentally-ill person, “Lenny,” who strangles a woman in the mistaken belief that he is squeezing a lemon. Olivier will presumably be acquitted on the ground that by virtue of his reasonable mistake of fact, he was not negligent. What about Lenny? Obviously, Lenny’s mistake of fact would have been
outlandish in a non-psychotic person. But what about a person like Lenny who cannot help but see lemons where others see human necks? Can Lenny’s mistake be said to have been reasonable for an insane person like him? If so, then Lenny will be acquitted on the same ground as Olivier, even though the jurisdiction has not yet adopted M’Naghten. This means that if the jurisdiction now adopts M’Naghten, it will merely be replicating a defense that would have existed without it. Yet if the jurisdiction now adopts M’Naghten, it will be adopting what Robinson calls an “excuse,” in contradistinction to the identical defense that would exist without it that Robinson denies is an “excuse.”

C. Recent Theories of Excuse

John Gardner and Claire Finkelstein have each recently advanced original theories of excuse.

1. John Gardner’s “Role-Based” Theory of Excuse

John Gardner has written two essays within the past decade, one of which defines “excuses,” and the other of which explores the normative “gist” of excuses so defined.123 “Excuses,” as Gardner defines them, come into play only with respect to persons who possess the following features: (1) they are “responsible,” that is, they possess the capacity to “reason intelligibly through to action;”124 (2) they violate the elements of criminal offenses, including actus reus and mens rea elements alike;125 and (3) they do so under circumstances that Gardner classifies as “unjustified,” viz., where the offenses are the wrong thing to do, all things considered, or, alternatively, where the offenses are acceptable things to do, all things considered, but where the actors fail to act for those acceptable reasons.126 Gardner thus excludes as excuses several defenses that Hart and

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124 Gardner, The Gist of Excuses, p. 589. See also Gardner, Justifications and Reasons, pp. 121–122 & n. 35.
125 See Gardner, Justifications and Reasons, pp. 120–121.
others include. Gardner excludes insanity, immaturity, sleepwalking, and hypnosis, all on the ground that their victims are incapable of reasoning intelligibly and, hence, in Gardner’s taxonomy lack something that is even more fundamental than excuse, namely, “responsibility.”127 And, like Robinson, Gardner excludes accident, mistake of fact, and mistake of law regarding the elements of offenses, all on the ground that their victims lack mens rea and, hence, are not guilty of anything that he believes would call for excuse.128 The exculpatory defenses that remain are “excuses,” Gardner says; and those that are full defenses consist of these: duress, and accident, mistake of fact, and mistake of law regarding defenses of justification.

Having defined excuses, Gardner provides what he calls an “Aristotelian account” of them. A responsible actor who commits an unjustified offense ought nonetheless to be excused, Gardner says, if, given the social “role” or “form of life” the actor occupies, his subjective thinking in committing it is “reasonable” – that is, his subjective thinking manifests the “skills” and “standards of character” of “courage, carefulness, honesty, self-discipline, diligence, humanity, good will, and so forth” that society rightly expects of persons in his social role.129 To illustrate, Gardner asks us to imagine two actors who are otherwise similarly situated, one of whom is a professional policeman and the other of whom is an ordinary citizen. Each actor shoots and kills a victim in a hostile and stressful setting in the mistaken belief that his respective victim is reaching for a loaded firearm. Each actor is responsible because each is capable of reasoning intelligibly through to action; each is guilty of the offense of intentionally killing another person; and each commits the offense under circumstances that are unjustified, given that, all things considered, it is wrong to kill a person who presents no serious threat. Whether they are “excused,” Gardner says, depends upon whether they acted reasonably; and their reasonableness, in turn, depends upon

128 See Gardner, Justifications and Reasons, pp. 120–121.
whether they exhibited the skill in sensing threats and level-headedness in responding to stress that society rightly expects of policemen and ordinary citizens, respectively. Since society can rightly expect greater skill and level-headedness of policemen than of ordinary citizens, Gardner says, the citizen may well have a claim of excuse that the policeman lacks.

The most notable thing about Gardner’s theory of excuses is its singularly narrow scope. Gardner defines “excuse” in such a way as to exclude most of the defenses that intrigue commentators, including insanity, sleepwalking, immaturity, and accident, mistake of fact, and mistake of law regarding the elements of offenses. To be sure, classifying defenses narrowly is appropriate if, by doing so, one normatively accounts for defenses within the class and normatively distinguishes defenses outside the class. But Gardner does not. Gardner fails to account for the exculpatory nature of duress. And like Paul Robinson before him, Gardner fails to distinguish the exculpatory nature of accident, mistake of fact, and mistake of law regarding defenses of justification (which he includes within “excuse”) from the exculpatory nature of accident, mistake of fact, and mistake of law regarding elements of offenses (which he excludes from “excuse”).

Having already addressed the latter failure in connection with Robinson’s theory of excuse, I will focus on Gardner’s failure to account for duress. Gardner’s problem with duress is this: Gardner argues that excuse comes into play only with respect to offenses that are unjustified; yet, given Gardner’s definition of “justification,” offenses committed under duress—as opposed to offenses committed under mistaken duress—ought to be regarded as offenses that are justified. To see why, consider a case in which duress is truly an excuse under Gardner’s definition as well as my own, namely, a case of mistaken duress.\(^\text{130}\) Suppose, for example, that a malefactor, \(A\), threatens to seriously harm \(B\) unless \(B\), in turn, does something to \(C\) that would otherwise constitute an offense \(X\). \(B\) reasonably but mistakenly believes that \(A\)’s threat is genuine and does as he is ordered, leading to his eventually being

\(^{130}\) Westen & Mangiafico, The Criminal Defense of Duress, p. 948, n. 224. See also text accompanying notes, pp. 65–69, supra.
prosecuted for committing offense X. How would Gardner analyze such a case? Gardner would say (and rightly, I believe) that B's offense is unjustified because committing offense X was not actually necessary to prevent a threatened harm. Gardner would also say (again rightly, I believe) that B is excused if, and only if, B acted in his mind, not with the levels of courage or cowardice that we statistically predict people to possess, but with the "courage and self-control we have a right to expect of each other." And, finally, Gardner would say (and again rightly, I believe) that B possesses the courage and self-control that society rightly expects when the balance between self-interest and the interests of others upon which he acts in his mind is a balance that society would regard as acceptable for a person in B's social role to act upon in actuality. Now consider the kinds of duress that Gardner cannot explain, namely, instances in which everything is the same except that B is correct in thinking that A's threat is genuine. A person who is correct in thinking that A's threat is genuine is a person who acts both in his mind and in actuality upon a balance between self-interest and the interests of others that society regards as acceptable, all things considered—which is precisely the sort of person whom Gardner has said is "justified." And by Gardner's own account, a person who is justified cannot also be excused.

To be sure, Gardner's most arresting claim is that in determining whether to excuse an actor for mistaken justification, the law ought to judge the actor by the higher standards of skill and character that are appropriate to any more rigorous social role he occupies beyond that of ordinary citizen, whether it is the role of policeman, soldier, or doctor. For our purposes, however, it is unnecessary to take a position on Gardner's claim about social roles because, rather than being an effort to account for the way the law treats what he calls "excuses," it is a conscious effort to transform the way the law presently treats such excuses. In any event, if Gardner's claim about social roles is valid, it is a claim that extends to judgments regarding the

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131 See Gardner, Justifications and Reason, p. 105.
132 Gardner, The Gist of Excuses, p. 597. See also id., p. 578.
133 Gardner, Justifications and Reasons, pp. 119–120, 122.
134 Gardner, Justifications and Reasons, p. 113.
reasonableness of all accidents and mistakes, including accidents and mistakes regarding elements of offenses, not a claim (as Gardner would have it) that is confined to accidents and mistakes regarding justification.135

2. Claire Finkelstein’s Theory of “Rational Excuses”
Claire Finkelstein propounds a novel definition of “excuses” as well as a novel account for a certain subset of them.136 Finkelstein’s definition of excuses is a function of her definition of “justification.” An actor has a “true justification,” she says, when the law regards the commission of the actus reus of an offense a “commendable” thing to do under the circumstances – that is, when an actor is faced with a choice of evils such that committing the actus reus produces “greater social good” than foregoing it.137 Thus, she says, where several innocent persons are mortally threatened by a culpable and wrongful aggressor, a third party is truly justified in killing the aggressor because given the choice between the death of innocent persons and a culpable wrongful aggressor, the death of the aggressor is a positive social good.138

“Excuses,” Finkelstein says, are the exculpatory defenses that remain when committing the actus reus of an offense is not commendable, whether because committing the actus reus leaves

135 Gardner argues that with respect to judgments of excuse, actors ought to be strictly liable for their failure to comply with the standards of the social roles they occupy, even if they are incapable of complying, because excuses, he says, are not designed to guide people’s conduct. Gardner, The Gist of Excuses, pp. 596–597. As a defense of strict liability, the argument seems to me to be a non sequitur. But if the argument is valid, it applies as well to judgments of reasonable accident and mistake in connection with elements of offenses, because the standards of mens rea that reasonable accidents and mistakes negate are not designed to guide conduct either.


social welfare in equilibrium or because committing the *actus reus* actually reduces social welfare.\textsuperscript{139}

To illustrate her notion of excuses, Finkelstein asks us to suppose an innocent actor’s life is threatened by several wrongful but morally innocent children. The law accords the innocent actor a defense in the event he chooses to kill the children. But, Finkelstein says, the defense is best understood as an “excuse” rather than a “justification,” because, she says, given the choice between one innocent life (i.e., the actor’s) and several innocent lives (i.e., the children’s) the death of several is not a greater social good.\textsuperscript{140} This means that Finkelstein includes within “excuse” all of the defenses that Hart would include (e.g., accident, mistake of fact, and mistake of law regarding elements of offenses, insanity, immaturity, involuntariness, duress) plus some defenses that Hart regards as justifications – namely, instances of self-defense and necessity in which the law allows actors to choose evils despite the fact that doing fails to produce what Finkelstein takes to be a greater social good.

Finkelstein does not purport to possess a unitary account of all excuses, so defined. Indeed, with the exception of duress, she does not purport to be saying anything original about any of defenses that Hart regards as excuses. Rather, she purports to be able to account solely for what she calls “rational excuses” – namely, instances of duress, self-defense, and necessity in which the law permits responsible and rational adults to commit offenses despite the fact that committing them does not produce greater social good. These are all instances, she says, in which actors are motivated by “dispositions” of self preservation and love of family and friends that are socially “adaptive,” in that they are “dispositions an agent acquires in pursuing his own welfare, but which generate collective gains for members of society as a whole.”\textsuperscript{141} The reason the law allows mature and rational adults to engage in criminal acts that do not produce greater social good, she says, is that it “maximizes society’s overall welfare”\textsuperscript{142} to encourage those adaptive dispositions.

\textsuperscript{139} Finkelstein, Excuses and Dispositions in Criminal Law, p. 351, 354.
\textsuperscript{140} Finkelstein, Excuses and Dispositions in Criminal Law, pp. 330–332.
\textsuperscript{141} Finkelstein, Excuses and Dispositions in Criminal Law, p. 346.
\textsuperscript{142} Finkelstein, Excuses and Dispositions in Criminal Law, p. 357, n. 50.
even at the price of tolerating criminal acts that themselves produce no greater social good.

The first thing to note about Finkelstein’s approach is that it is not a general account of excuses, even as she defines them. It is an account of a mere subset of those excuses. Finkelstein’s analysis of adaptive dispositions has nothing to say about defenses of accident, mistake of fact and law, insanity, immaturity, and involuntariness. More importantly, Finkelstein does not account for the rational excuses she sets out to explain because she is unable to distinguish them from what she calls “true justifications.” A person has a true justification to an offense, Finkelstein says, when its commission produces greater social good. A person has a rational excuse to an offense, she says, when, even though commission of the offense does not itself produce a greater social good, the combination of its commission and its encouragement of the dispositions of self preservation and love of family and friends that motivate its commission do maximize overall social welfare. In the end, therefore, Finkelstein’s accounts of rational excuses and true justifications both come down to the same principle, namely, that an actor has a defense to an offense when, all things considered, the actor’s conduct is “commendable” in society’s eyes in that it produces greater “social good” than the alternative.

IV. AN ATTITUDINAL THEORY OF EXCUSE

The measure of a normative theory of law is its robustness. A robust normative theory of criminal excuses (1) provides a persuasive and independent normative account of a substantial range of contemporary defenses in criminal law, (2) treats likes alike and unalikes unalike by including as “excuses” all defenses that share the same normative principle of exculpation and by excluding all defenses that do not, and (3) provides normative guidance to jurisdictions regarding how to reform and supplement existing defenses. The attitudinal theory of excuse does all these things. Moreover, it has the added virtue that it derives criminal excuses from their converse, i.e., criminal culpability, and in doing so illuminates the nature of criminal culpability.
I will proceed by discussing (A) the constitutive relationship between a state’s criminal judgment of an actor for his conduct and its expressed belief that he acted with a reprehensible attitude toward either others or himself, (B) the normative claim that it is unjust for a state to declare that an actor possessed a reprehensible attitude toward others or himself that the state believes he lacked; and (C) the extent to which criminal excuses, as I defined them in Section I, derive from the latter normative claim.

A. The Constitutive Relationship between a State’s Criminal Judgment of An Actor and the State’s Expressed Belief that He Acted with A Reprehensible Attitude

The relationship between a state’s criminal judgments of actors for their conduct and the state’s expression that they acted with certain reprehensible attitudes is constitutive: by publicly declaring an actor to be guilty of a criminal offense, the state expresses indignation at what he has done; and by expressing indignation, the state expresses its belief that he acted with a certain disparaging attitude toward what the criminal statute at hand declares to be the legitimate interests of persons, including himself.

To unpack this constitutive relationship between criminal judgments and attitude, let us start with the sentiment of resentment. Resentment is something that a person experiences. However, in contrast to sensations of thirst and indigestion, resentment is also an emotion. And being an emotion, resentment is cognitive in origin, that is, it is something a person experiences in response to believing that certain conditions obtain (or taking himself as believing they obtain). One can experience thirst or indigestion without believing that particular conditions exist. But one cannot experience jealousy, envy, resentment or other emotion without first believing that something is true or taking oneself as believing it is true.\footnote{See Jean Hampton, ‘Forgiveness, Resentment, and Mercy’, in Forgiveness and Mercy, p. 54 & n.14 (Cambridge: Cambridge University Press, 1988); Dan Kahan and Martha Nussbaum, ‘Two Conceptions of Emotions in Criminal Law’, Columbia Law Review 96 (1996): 269, 282–284; Robert Roberts, ‘What An Emotion Is: A Sketch’, Philosophical Review 67 (1988): 183–209.}
Resentment is a “reactive” emotion because it arises in A in reaction to certain beliefs on his part about the attitude that another, B’s, conduct manifests toward A himself: resentment is the emotion that A experiences when he believes that B has sought to aggrandize or indulge himself at A’s expense by engaging in conduct that manifests an disparaging attitude on B’s part toward what A regards as his own legitimate interests, whether the disparaging attitude consists of malice, contempt, indifference, disregard, or neglect.\textsuperscript{144}

To illustrate, consider Oliver Wendell Holmes’s observation that “even a dog distinguishes between being kicked and being stumbled over.”\textsuperscript{145} The dog experiences the kick as painful, regardless of the attitude that motivated it. But the dog resents the pain only if the dog believes that the kick was the product of malice, contempt, or disregard. Much the same is true of people. A person who is struck from behind may be filled with immediate anger, based on the assumption that the blow is the product of another’s malice or carelessness. But as soon as the injured person discovers that the individual who struck him is blind and helpless, his resentment abates. His resentment abates not because he thinks he \textit{shouldn’t} be resentful, but because he \textit{cannot} be resentful once he no longer believes that the blow originated in a disregard of his legitimate interests.

To be sure, the scope of a person’s resentment depends upon the scope of what he assesses his legitimate interests to be. A person with an exaggerated sense of self-importance will take


\textsuperscript{145} Oliver Wendell Holmes, Jr., \textit{The Common Law}, p. 13 (Boston: Little, Brown, & Co., 1881).
offense where more a modest person would not. Regardless of whether the community at large agrees with individuals about their self-importance, however, resentment functions as a normative emotion because it rests upon an assessment of what a person believes to be the legitimate relationship between his self-interest and the interests of others.

As I have said, resentment is the emotion a person, A, feels in reaction to what he believes to be B’s selfish efforts to indulge himself at A’s personal expense. However, A can experience a similar emotion of indignation at what he believes to be the indignity that B inflicts upon a third party, C, or even at an indignity that B inflicts upon B himself. Thus, a person can be indignant at the abusive way a teenager treats his parents, or indignant at the way a teenager mutilates or abuses her own body, feeling that the teenager manifests a lack of appropriate dignity toward her parents or herself. Like resentment, indignation is a reactive emotion that is triggered by A’s belief regarding B’s failure to accord a person, including B himself, the dignity that A believes the person deserves; and, hence, the scope of A’s indignation is a function of what A assesses to be the dignity that persons deserve. A’s assessment of the dignity that others deserve may or may not reflect the standards of the community at large. Like resentment, however, indignation remains a normative sentiment because it rests on an assessment of what the indignant person believes to be the legitimate interests of persons.

A criminal judge who convicts and sentences a defendant does three things – of which the second is the most significant for our purposes: (1) the judge adjudges the defendant to have engaged in conduct that the state declares to be regrettable or otherwise

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undesirable; (2) the judge reproaches or condemns the defendant by expressing society’s collective indignation at him for his conduct; and (3) the judge typically imposes upon the defendant some form of hard treatment that the judge explicitly or implicitly declares the defendant to deserve by virtue of defendant’s being a proper object of reproach.

Now perhaps one can imagine a regime in which judges do only the first and neither express society’s collective indignation at defendants nor impose hard treatment upon them by virtue of their deserving such indignation. Barbara Wooten proposed such a scheme. She proposed that traditional criminal law be replaced with an institution consisting of two stages, neither of which would involve expressions of indignation: an adjudicatory stage at which judges would determine whether actors engaged in regrettable or undesirable conduct, without, however, reproving or reproaching them for it; and a second stage at which judges would determine how dangerous the actors were and what protective or therapeutic measures, if any, were be necessary, to prevent them from engaging in such conduct again. The reality, of course, is quite different. In reality, the criminal justice system not only officially adjudicates the existence of prohibited conduct but also officially reproaches and condemns the actors whom it finds engaged in it. Official reproach and condemnation, in turn, are expressions of societal indignation toward

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149 cf. Joel Feinberg, Doing and Deserving: Essays in the Theory of Responsibility, p. 98 (Cambridge: Cambridge University Press, 1970) (“the expression of the community’s condemnation is an essential ingredient in legal punishment”); Kadish, Excusing Crime, p. 264 (“It may be argued that ... it is not intrinsic to judgments of criminality in our society that they express a moral fault. But this view is surely mistaken.”); Robert Schopp, ‘Justification Defenses and Just Convictions’, Pacific Law Journal 24 (1993): 1233, 1258–1262 (“legal punishment ... [is] a social institution for expressing moral condemnation”); A. P. Simester and G. R. Sullivan, Criminal Law: Theory and Practice, 2d ed., p. 15 (Oxford: Oxford University Press, 2003) (“When the Court finds an accused guilty of committing a crime, ... there is a public implication that she is blameworthy. ... Paradigmatically, ... censure is inherent in criminal convictions”).
defendants for the attitudes with which they acted. Criminal convictions are societal judgments that defendants not only engaged in prohibited conduct but were motivated by disparaging attitudes toward what the statutes at hand declare to be the legitimate interests of persons, including the interests of defendants themselves.

B. The Normative Claim that It Is Unjust For the State To Condemn Actors for Possessing Reprehensible Attitudes that the State Believes They Lack

We have seen that to condemn a person for his conduct is to express indignation toward him; and to express indignation is to declare him to have engaged in the conduct with a disparaging attitude toward the legitimate interests of persons, including, perhaps, legitimate interests of his own. When the state condemns a defendant for conduct that, for all the state knows, was not motivated by disparaging attitudes toward himself and others, the state commits two prima facie wrongs. The state wrongs the public by expressing a falsehood, the falsehood being the state’s explicit or implicit assertion that the defendant acted on the basis of a disparaging attitude that the state has not proven he possessed. Worse yet, the state wrongs the defendant by subjecting him to what may be the greatest harm a state can inflict on its citizens, viz., the harm of publicly declaring that, in addition to committing a bad act, the defendant has revealed himself to have

150 See Antony Duff, Trials and Punishment, pp. 39–40 (Cambridge: Cambridge University Press, 1986); Joel Feinberg, Doing and Deserving, p. 98 (“punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part of either the punishing authority himself or of those ‘in whose name’ the punishment is inflicted”); Jeffrie Murphy, Introduction, in Forgiveness and Mercy, p. 8 (“punishment may be regarded as the institutionalization of such emotions as resentment and indignation”).

151 cf. Sanford Kadish, Excusing Crime, p. 264 (“To blame a person is to express a moral criticism, and if the person’s action does not deserve criticism, blaming him is a kind of falsehood”); Scanlon, What We Owe To Each Other, p. 267 (“[T]he condemnatory aspect of punishment is subject to a further requirement: the condemnation must be appropriate. What triggers this requirement is not the unpleasantness of the condemnation, but the content of the judgment expressed.”)
been a *bad person* deserving of society’s low regard. Indeed, it is precisely to avoid those wrongs that states typically refrain from punishing defendants for bad acts unless states can prove that defendants acted with attitudes of malice, contempt, indifference, disregard, or neglect or neglect of the interests of oneself or others. To invoke the language of the Model Penal Code, states typically refrain from punishing defendants for bad acts unless they can prove that defendants acted with “purpose” to harm themselves or others, “knowledge” that they are harming themselves or others, or “extreme indifference,” “recklessness” or “negligence” regarding the legitimate interests of themselves or others. Indeed, that is what commentators mean when they say that states typically inflict “moral blame” only upon defendants who have revealed themselves to be morally “blameworthy.”152 They mean that states typically *represent* defendants to have been bad persons by virtue of the attitudes with which they acted only if states *prove* them to have been bad persons by virtue of the attitudes with which they acted.

This is not to deny the existence of strict liability in criminal law. Some states hold criminal defendants strictly liable for certain offenses, regardless of the attitudes with which the defendants may have acted. Nevertheless, most commentators regard strict liability as unjust, particularly with respect to major offenses carrying serious penalties.153 And they do so precisely

152 See, e.g., Henry Hart, ‘The Aims of the Criminal Law’, *Law & Contemporary Problems* 23 (1958): 401, 412 (“[I]t is necessary to be able to say in good conscience in each instance in which a criminal sanction is imposed for a violation of law that the violation was blameworthy and, hence, deserving of the moral condemnation of the community”); Kadish, Excusing Crime, p. 257, 282.

because of the normative claim being advanced here – namely, that, given that all criminal convictions are expressions of societal reproach, including convictions for strict-liability offenses, it is unjust for the state to reproach defendants (and, thereby, express the belief that they acted with bad attitudes with respect to interests the criminal law protects), unless the state proves that defendants did, indeed, act with those bad attitudes.154

C. The Degree to Which Criminal Excuses Derive from the Aforementioned Normative Claim

Excuses, as I defined them in Section I, consist of all exculpatory defenses in criminal law other than the absence of actus reus and the existence of justification. Excuses thus include (1) instances in which conduct is not the product of a person’s will; (2) instances of accident, mistake of fact, and mistake of law regarding either the elements of offenses or the elements of justification; (3) immaturity; (4) lack of cognition due to insanity or involuntary intoxication; (5)fugue states of automatism, such as hypnosis and sleepwalking; and (6) lack of volition due to insanity or involuntary intoxication. Significantly, these are precisely the defenses that a jurisdiction would adopt if it employed criminal sanctions to express official reproach (as all jurisdictions do), and if the jurisdiction regarded it as unjust to reproach defendants for having acted with reprehensible attitudes toward themselves or others that the defendants did not possess. This is so because each of these six conditions precludes actors from possessing the reprehensible attitudes toward themselves or others that

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154 Critics of character theory argue that it cannot account for the fact that the criminal law punishes certain actors whom society regards as possessing good character, such as a compassionate wife who helps her suffering and terminally ill husband end his life. See Finkelstein, Excuses and Dispositions in Criminal Law, p. 338. The latter critique is inapposite to attitudinal theory. The measure of an actor’s attitude for purposes of attitudinal theory is the respect or lack of respect that his act manifests, not for moral interests in general, but for the interests that the criminal statute at hand seeks to safeguard.
official condemnation represents defendants to have possessed.

1. **Conduct that is Not the Product of Will**

   It is a defense in most jurisdictions that a crime occurred because the defendant was physically pushed or pulled or carried by another person, or that he was the victim of a reflex action or of epilepsy.\(^{155}\) It is also commonly said that the reason such absences of will are defenses is that – rather than negating *mens rea* on a defendant’s part – these conditions negate the existence of any act at all on his part, much less a bad act.\(^ {156}\)

   I agree that such absences of will ought typically to exonerate. But I believe it is misleading to conceptualize the exonerating by reference to the absence of an “act” as opposed to the absence of “mind.” For one thing, framing these defense in terms of the absence of an act implies that such a defendant is not a but/for cause of harms or risks that the state seeks to prevent; while in reality the state regrets automobile fatalities that persons bring about through epilepsy fully as much as fatalities they bring about by speeding. Furthermore, framing the defense in terms of an absence of act implies that no predicate exists by which to blame such an epileptic for being a but/for cause of a prohibited harm or risk – say, the prohibited risk of reckless “driving” – regardless of his culpability in allowing himself to fall prey to the causal chain of events; while in reality an actor such as an epileptic who culpably places himself in a setting in which epilepsy endangers others is culpable for the harms and risks that result from epileptic attacks.\(^ {157}\) Finally, conceptualizing these defenses in terms of an absence of “act” obfuscates what such defendants share in common with defendants who possess defenses of ‘lack of *mens rea*’ – namely, that, although both classes of defendants are but-for causes of prohibited events, neither class is blameworthy.

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\(^{155}\) See Model Penal Code § 2.01.


because, in bringing about the *actus reus* at issue, neither is motivated by disparaging attitudes toward interests that the statutes at hand seek to protect.\(^{158}\)

Accordingly, I believe, along with Paul Robinson, that it is more perspicuous to regard instances of absence of will as excuses.\(^ {159}\) A person who is the but/for cause of a harm or risk that the state regards as regrettable is one who satisfies the *actus reus* elements of the offense at issue. The reason that victims of pushing or pulling, victims of reflex actions, and victims of epilepsy are exonerated is that they are excused of responsibility for elements of *actus reus* they cause. Attitudinal accounts of excuse explain why they are excused – and, indeed, why they are the clearest candidates for exculpation: persons who are entirely lacking in will are persons whose causal relationship to prohibited events is not motivated by *any* attitude toward the interests the criminal law seeks to protect, much less being motivated by *disparaging* attitudes toward those interests.\(^ {160}\)

2. *Accident, Mistake of Fact, and Mistake of Law*

Reasonable accidents and reasonable mistakes of fact regarding elements of offenses are invariably defenses to all but strict-liability offenses; and reasonable accidents and mistakes of fact regarding elements of *justification* are nearly always defenses, too. In contrast, reasonable mistakes of law regarding elements of offenses and the elements of justification are less often...

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\(^{158}\) This obfuscation is, perhaps, best illustrated by statutes that claim to punish conduct on a strictly liable basis (and, hence, to eliminate defenses of *mens rea*) and, yet, recognize defenses of lack of will as defenses of lack of “act” – thereby implying, absurdly, that a person who speeds because his brakes fail has a defense, while a person who speeds because erroneous speed limits are posted does not. *cf.* State v. Barker, 571 P.2d 65 (1971).


\(^{160}\) This is not to say that a victim of involuntariness cannot possess a disparaging attitude toward the legitimate interests of himself or others. A person who is pushed or pulled or carried without any act of will on is part may possess a disparaging attitude toward others. But he is not an appropriate object of reproach because his attitude does not motivate the *actus reus* – that is, it does not motivate the prohibited event for which he is a but-for cause. I am indebted to Douglas Husak and Jeff McMahan for this point.
defenses, because criminal law typically presumes that all mistakes of law are unreasonable, despite evidence to the contrary. Nevertheless, commentators are increasingly of the view that actors ought to be exonerated when they commit *mala prohibita* offenses by virtue of mistakes of law that conscientious persons would also make. An attitudinal account of excuses explains why these defenses exist and why commentators advocate enlarging the defense of mistake of law. A person makes a mistake of fact when, although he is aware of what the state regards as wrongful conduct, he is unaware that he is in fact doing such a thing. A person makes a mistake of law when, although he is aware of what he is in fact doing, he is unaware that the state regards the doing of such things as wrong. Normatively, an actor who commits the *actus reus* of an offense because of a reasonable mistake of law is just as blameless as an actor who does so because of a reasonable mistake of fact: for neither of them knows or has reason to know that he is doing anything that society regards as wrong and, hence, neither of them acts with an attitude of disregard or neglect for what the statute declares to be the legitimate interests of themselves or others.

An attitudinal theory also explains why all accidents and mistakes, even those that are unreasonable, are defenses to offenses predicated upon mental states of purpose, knowledge or intention. When the state punishes a person for a crime of purpose, knowledge, or intention, it condemns him not only for committing the *actus reus* but also for doing so with an attitude of a certain kind, namely, an attitude of self-aggrandizing malice or contempt toward the legitimate interests of himself or others. A person who commits the *actus reus* accidentally or by mistake lacks those disparaging attitudes. Just as it is both false

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and unjust to condemn a person for possessing some disparaging attitude when he lacks any such attitude, it is equally false and unjust to condemn a person for possessing a specific disparaging attitude when he lacks that attitude.

3. Immaturity
Childhood and youth are universally defenses to the most heinous of offenses. The reason that children possess such defenses is not that they are entirely unaware of what they are doing or that it is wrong. On the contrary, children can typically recount what they have done in words that are not very different from the words of the criminal law; and children typically realize they are doing something wrong, particularly with respect to serious offenses. What children are too immature and inexperienced to understand, and, indeed, what the state assumes they are incapable of understanding, is the significance of those interests in the lives of people.162 That is, children are incapable of understanding why people care so much about these interests and why society regards them as worthy of protection.163 Because children are incapable of appreciating those interests in the way adults do, their conduct is incapable of manifesting disparaging attitudes toward those interests – or, at least, incapable of manifesting the kind of malice, contempt, indifference, disregard and neglect that the state expresses when it punishes criminal offenses. Children are excused because to punish them would be to express that they

163 See Peter Arenella, ‘Character, Choice and Moral Agency’, in E. F. Paul, Fred D. Miller Jr., and J. Paul (eds.), Crime, Culpability and Remedy, Vol. 59, pp. 67–68 (Oxford: Basil Blackwell, 1990): The six-year-old who took the toy while “knowing” it was a bad thing to do made a practical judgment about whether the satisfaction of getting it outweighed the risk of getting caught and punished. He has not had sufficient time and experience to internalize moral norms as something worthy of his respect. Nor does he have sufficient empathy and understanding for the feelings of other human beings as separate selves that would provide him with the moral comprehension and motivation to act on the basis of moral reasons that place constraints on his self-interested acts.
possessed disparaging attitudes toward the legitimate interests of others that they lack.\textsuperscript{164}

4. \textit{Lack of Cognition Due to Insanity or Involuntary Intoxication}

Nearly all jurisdictions regard it as a defense to the \textit{actus reus} of an offense that by virtue of pathological insanity or involuntarily-induced intoxication, an actor did not know what he was in fact doing, or if he did know what he was in fact doing, he did not know that it was wrong. Both defenses can be regarded as species of insanity defenses\textsuperscript{165} – the former for persons whose insanity is chronic and pathological in origin, the latter for persons whose insanity is temporary and results from involuntary intoxication. Both defenses also possess features that distinguish them from the previously-considered defenses of mistake of fact and mistake of law. Nevertheless, for purposes of excuse theory, the distinctions are superficial because the function of cognitive defenses of insanity is to treat sane and insane persons equally with respect to the exculpatory principle that underlies the defenses of mistake of fact and mistake of law.

To examine the normative equivalence that exists between ordinary defenses of mistakes of fact and law and cognitive defenses of insanity, consider a feature that distinguishes the former from the latter, namely, the requirement that the ordinary mistakes of fact or law be reasonable. A sane person has a complete defense of mistake of fact or law to offenses of negligence only if his mistakes are reasonable. In contrast, an insane person has a complete defense if he is merely mistaken about what he is in fact doing or mistaken in thinking it is not wrong, regardless of how unreasonable his mistakes would be in a sane person. As previously discussed, however, the reason


\textsuperscript{165} cf. Model Penal Code § 2.08(4), defining the defense of involuntary intoxication in the same terms as the insanity defense of § 4.01(1)(1).
that even unreasonable mistakes of fact and law are defenses for the insane is that by virtue of being mistaken, they do not realize that they are infringing upon the legitimate interests of others, and by virtue of being insane, they are unable to recognize the very thing that distinguishes them from sane persons, i.e., that their mistakes are unreasonable. Assume, for example, that an insane person makes the mistake of fact of thinking that he is squeezing a lemon rather than his spouse’s neck, or the mistake of fact of thinking that the person whom he is killing is an imminent threat to his life rather than no threat at all. Believing that he is squeezing a lemon or killing a lethal and wrongful attacker, the insane person believes that he is respecting the legitimate interests of others. And being insane, he is unable to recognize the egregiousness of his mistake. Like a sane person who wrongfully kills another because of a reasonable mistake of fact, an insane person who wrongfully kills another because of an unreasonable mistake of fact is excused because, although the insane person commits the actus reus of killing an innocent person, he lacks the attitudes of maliciousness, contempt, indiffERENCE, disregard, and neglect toward the legitimate interests of others that state-imposed blame represents offenders as possessing.

Another feature that distinguishes the ordinary defense of mistake of law from the cognitive defense of insanity concerns the relevance of believing that one is acting lawfully. A sane actor has a defense of mistake of law only if he believes he is acting lawfully. In contrast, an insane person who believes he is acting unlawfully may nevertheless possess a defense if he does not believe his conduct is wrong.166 The reason that an insane person may have a defense to conduct he knows is unlawful is that, being insane, he may not understand what sane people invariably do, namely, that conduct that the state regards as unlawful is conduct that the people of state also regard as a wrong thing to do. For, in his delusion, an insane person may possess a belief that a sane person would not, viz.,

166 See Model Penal Code § 4.01(1) (leaving it to states to exculpate insane persons who, though they appreciate the “criminality” of their conduct, do not appreciate its “wrongfulness”).
that even though the people of the state regard his conduct as unlawful, they nevertheless do not regard his conduct as a wrong thing to do. Assume, for example, that because of his insanity, a person believes (1) that God has directly ordered him to kill a particular person, and (2) that the people of the state wish persons to follow God’s direct orders when God’s orders conflict with society’s laws. The insane person knows that he is violating the law. But like the sane person who makes a reasonable mistake of law, he lacks a bad attitude because he believes he is acting consistently with what the people of the state regard as the legitimate interests of others under the circumstances.  

5. Fugue States of Automatism

Hypnosis, sleepwalking, and other fugue states of automatism are defenses in most jurisdictions. Commentators typically explain why such conditions are defenses by classifying them with epilepsy and reflex actions as states of “involuntariness.”  

However, it is misleading to classify automatism with instances in which persons are entirely lacking will, because automatism involves complex, agent-directed actions in which actors perceive the world, make means/ends judgments about it, and act to carry out their ends. 

Consider Mrs. Cogdon, the sleepwalker. While in a state of somnambulism, Mrs. Cogdon descended the stairs of her house without falling, crossed the yard to the woodpile where she found the axe she was seeking, returned to the house with the axe, mounted the stairs, again without missing a step, entered her daughter’s bedroom, and using the axe for the purpose of chopping, struck her sleeping daughter in the head, killing her. Mrs. Cogdon’s actions were not the reflexes of a

167 He would be acting with a bad attitude if he chose to follow God’s orders in disregard of the law while knowing full well that people of the state prefer persons who hear orders from God to follow the law when God’s orders and the law conflict.


169 See note 106, supra.

person entirely lacking in will. They were agent-directed actions that the most sophisticated robots could scarcely perform. They were the actions of a person who perceived the world, made judgments about it with respect to her ends, and carried them out.

This is not to say that Mrs. Cogdon should be blamed for what she did. Rather, it is to say that excusing Mrs. Cogdon on grounds of “involuntariness” is misleading because her conduct was the product of numerous choices, such as choosing how to hold and wield an axe. Excusing her for not being able to “control herself” is equally misleading because there is no way to establish that an actor who chooses to do something could not have chosen otherwise. The reason Mrs. Cogdon should be excused is that she performed her actions in a profound state of dissociation from the normative attitudes that constitute her as a person, that is, her attitudes regarding the legitimate interests of herself and others. Condemning her would be unjust because it would represent her to have possessed a certain malice or contempt for her daughter’s legitimate interests that she lacked. She was as fully disconnected from the normative attitudes of the agent who killed her daughter as one person is disconnected from another. To condemn her for what she did is analogous to condemning an unwitting actor, $A$, for the harms he unwittingly inflicts upon $B$ at $C$’s behest simply because $C$ can be proved to have acted with malice.

To be sure, a person who commits the actus reus of an offense while under hypnosis may be culpable if he subjected himself to

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171 See Morse, Acts, Choices, and Coercion, p. 1649.
173 Students of psychology differ as to whether the diagnostic syndrome, “Multiple Personality Disorder,” is, indeed, a valid phenomenon. See Schopp, Multiple Personality Disorder, Accountable Agency, and Criminal Acts, pp. 299–300 (2001). However, for the argument that in so far as MPD exists, to punish a “host” for the conduct of an “alter” is tantamount to punishing a person for the conduct of another or of another over whom the former person has no control, see Elyn Saks, ‘Multiple Personality Disorder and Criminal Responsibility’, *Southern California Interdisciplinary Law Journal* 10 (2001): 185, 189–194. But see Jennifer Radden, ‘Am I My Alter’s Keeper?’, *Southern California Interdisciplinary Law Journal* 10 (2001): 253.
hypnosis for the purpose of committing the offense, or while indifferent to it, or neglectful of the possibility that he might commit it. But otherwise the offense manifests the disparaging attitudes of the hypnotist, not the person whom he hypnotizes. The same is true of sleepwalkers, except that with sleepwalking, there is no hypnotist and, hence, no one else to condemn.

6. Lack of Volition due to Insanity or Involuntary Intoxication
Many jurisdictions regard it as a defense to commit the *actus reus* of an offense because of pathological insanity or insanity induced by involuntary intoxication that precludes a person from being able to control himself. Thus, the Model Penal Code, which numerous jurisdictions follow, provides a defense to a person who, because of insanity or involuntary intoxication, lacks substantial capacity "to conform his conduct to the requirements of the law." These so-called "volitional" defenses of insanity and involuntary intoxication are designed for persons like Mark Bechard who, though they appear to know what they are doing and know that it is wrong, nevertheless tend to evoke pity in observers rather than indignation. The enduring question, of course, is why conduct such as Bechard’s tends to evoke pity in observers rather than indignation. As we have seen, it is not because Bechard could not "control himself," because lack of control is a metaphor for some undefined feature of his conduct that evokes pity. I believe that an attitudinal theory of excuse accounts for that feature because it addresses what is most salient in schizophrenics like Bechard.

The most salient feature of Mark Bechard’s behavior on the day of the murders was that, being populated by cacophonous voices that left him "yelling at himself from inside himself," Bechard engaged in conduct that was profoundly irrational to

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174 Model Penal Code §§ 2.08(1), 4.01(1).
175 See Kadish, Excusing Crime, p. 279 ("Many defendants acquitted on grounds of legal insanity, particularly those with psychoses, "knew" what they were doing and "meant" to do it in a literal sense.").
everyone involved, including himself. Commentators have long observed that the hallmark of criminal insanity is “irrationality.” A person acts “rationally” when he chooses means that are plausibly designed to advance what he regards as personal ends. Bechard was able to engage in means/ends analysis of a primitive sort, because he was able to select means that were effective in killing his victims. Yet Bechard found it impossible to explain to anyone, including himself, how killing nuns whom he personally and religiously cherished could possibly advance anything that he regarded as a personal end. When Bechard tried to explain, he either fell into nonsense or confessed bewilderment. He first said that mysterious voices told him to go to the convent to get “cat smut” to “save the

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176 cf. Stephen Morse, ‘Excusing the Crazy: The Insanity Defense Reconsidered’, Southern California Law Review 58 (1985): 777, 813: We can understand that some test was originally needed to cope with cases of crazy persons who seemed to know right from wrong, but nevertheless acted for crazy reasons... But such a person is not compelled simply because he or she acts on the basis of a strongly held, albeit crazy, belief. Nor is the person compelled because craziness influenced the behavior. [A]ction pursuant to a crazy desire is no more compelled than action based on a normal desire. The proper reason to excuse, of course, is that the person was irrational – even though narrowly aware of right and wrong – not that the person was compelled.

Pixie.” He then said, “I don’t know why [I killed the nuns]. I loved them.”

What commentators have not yet explained, however, is why jurisdictions regard irrationality as exculpatory. Why should the perpetrators of horrific acts like Mark Bechard’s be exculpated simply because their conduct appears to be profoundly irrational to everyone, including themselves? It cannot be because punishing such actors would not protect the public, because it would. And it cannot be because punishing them would not deter sane actors from being tempted to commit atrocities under the pretense of being irrational, because, again, it would. It must be because something in the irrationality they exhibit precludes observers from experiencing the reactive emotion of indignation. I believe that it is because by virtue of their irrationality, they lack an attitude that is a predicate to the cognitive emotion of indignation. Indignation is the normative emotion a person, A, experiences when he believes that another person, B, selfishly seeks to aggrandize or indulge himself at the expense of the legitimate interests of others. A person cannot act selfishly to aggrandize or indulge himself without being able to make sense of his goals. Bechard may have acted with an attitude of contempt or even malice toward the legitimate interests of the nuns he killed. But he cannot be seen to have acted selfishly to indulge himself at the expense of the nuns, because he was as bewildered as we are as to why he was doing it or what he hoped to gain from it.

V. CONCLUSION

Twenty years ago, Kent Greenawalt bemoaned what he called the “undevelopment of theories of justification and excuse,” and he urged scholars to give serious attention to the “laudatory goal” of “achieving greater clarity between justification

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179 See Gary Watson, Responsibility and the Limits of Evil, p. 265 n. 12 (“Reactive attitudes [of resentment and indignation] are even more clearly pointless in the case of a radically disintegrated personality, one that has no coherent moral self to be addressed”).
and excuse.”¹⁸⁰ Yet, rather than reserving judgment until scholars had had an opportunity to do so, Greenawalt proceeded to declare that systematically classifying all criminal defenses by reference to justification and excuse “is not an appropriate [objective] for Anglo-American penal law.”¹⁸¹ I think Greenawalt’s judgment was premature. Scholars have devoted a great deal of attention to justification and excuse in the intervening years, as Greenawalt himself urged them to. Thanks to their efforts, it is now possible, I believe, to classify and draft criminal defenses with reference to the distinction between justification and excuse without falling afoul of the problems that troubled Greenawalt.

A major barrier to conceptual clarity has been the very term “justification.” Because people tend to associate justification with its cognate, “justice,” they tend to confine “justification” to conduct that is just, rather than treat it as including all conduct that is not unjust. How different things might have been if, instead of being framed in terms of “justification” and excuse, the issue had all along been framed in terms of “privilege” and excuse, or even “permission” and excuse! A second barrier has been the tendency to assume that justification is a function of what an actor believes he is doing rather than what he actually does. By conceptualizing justification in terms of an actor’s belief rather than his acts, commentators made it impossible to distinguish justification from excuses such as accident, mistake, and cognitive insanity. A third barrier has been the tendency to classify the defense to which Greenawalt himself devoted most of his attention, viz., the defense of duress, as an excuse rather than a justification. By classifying duress with insanity and mistake of fact rather than with self-defense and necessity, Greenawalt and others precluded themselves from making sense of the distinction between justification and excuse.

It is now possible to see that the distinction between justification and excuse, properly understood, is as basic as the distinction between absence of actus reus and absence of mens

¹⁸⁰ Greenawalt, Perplexing Borders, p. 1913, 1927.
¹⁸¹ Greenawalt, Perplexing Borders, p. 1913, 1927.
rea. Indeed, the two distinctions rest on common principles of exculpation. The difference between justification and excuse is as basic and simple as the distinction between, “I did nothing wrong,” and, “Even if I did, it was not my fault.” Excuse thus includes accidents, mistakes of fact and law, absence of will, automatism, immaturity, insanity, and involuntary intoxication.

A major benefit of “distinguishing rigorously between justification and excuse”\(^\text{182}\) is that it reveals that despite their diversity, excuses share a single principle of exculpation in common. I argue that excuses reflect the principle to the effect that, whether or not a person has brought about a harm or risk that the state regrets, all things considered, it is nevertheless unjust for the state to blame him unless he acted with an attitude of selfish or self-indulgent disregard for what the state, speaking in its criminal statutes, regards as the legitimate interests of persons under the circumstances, whether the attitude consists of malice, contempt, indifference, disregard, or neglect.

Attitudinal theory is more than an abstract category for classifying defenses. It has pronounced legal consequences, because it is a normative guide for reforming and supplementing existing criminal defenses.\(^\text{183}\) Volitional defenses of insanity, for example, are controversial in part because of skepticism about what it means to say that a person who chooses to do something could not “control himself.”\(^\text{184}\) Attitudinal theory provides an alternative way to conceptualize the defense, capturing what observers tend to regard as exculpatory about certain kinds of knowing but irrational conduct by insane and involuntarily intoxicated persons. Attitudinal theory also suggests that the defense of mistake of law ought to be as broad as the defense of mistake of fact. A person makes a reasonable mistake of law when, although he knows what he is in fact doing, he does not

\(^{182}\) Greenawalt, Perplexing Borders, p. 1903.

\(^{183}\) For an argument that attitudinal theory reveals inconsistencies among rules regarding “fair warning,” “notice,” and \textit{ex post facto} criminal lawmaking and guidance as to how they can be reformed, see Peter Westen, Two Rules of Legality in Criminal Law (forthcoming).

\(^{184}\) See note 108, supra.
know and has no reason to know that the state regards such conduct as wrongful. A person who thus makes a mistake of law is just as blameless as a person who makes a reasonable mistake of fact – that is, he is just as blameless as a person who knows what the state regards as wrongful but does not know and has no reason to know that he is in fact doing such a thing. For both are persons who, though they may be doing something the criminal law regards as regrettable, all things considered, nevertheless act with attitudes of proper respect for the legitimate interests of persons. 185

Finally, by virtue of illuminating the normative nature of excuse, attitudinal theory also illuminates the normative nature of blameworthiness. Excuse negates blame, in that it renders persons unworthy of reproach despite the heinousness of their criminal wrongdoing. A normative theory of excuse is an hypothesis regarding the precise features that render a person normatively blameless for criminal harms or risks that he produces or for the otherwise undesirable conduct in which he engages. According to attitudinal theory, the feature that renders persons normatively blameless – and, typically, legally blameless, too – is any state of mind, or absence of state of mind, that negates their possessing a disparaging attitude toward what the criminal statute at hand declares to be the legitimate interests of persons. Conversely, and significantly, a person is normatively blameworthy for engaging in conduct that a statute prohibits if he was motivated by an attitude of disrespect for the interests that the statute seeks to protect,

whether the attitude consists of malice, contempt, indifference, callousness, or inadvertence toward those interests.\textsuperscript{186}

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Law School
University of Michigan
Ann Arbor, MI 48108-1215
USA
E-mail: pkw@umich.edu

\textsuperscript{186} A colleague has said in conversation that, although lack of a bad attitude may justly suffice to negate blameworthiness, the presence of a bad attitude does not necessarily suffice to attribute blameworthiness, because, in the event all persons are pre-determined to possessed the attitudes they end up possessing, it may be unjust to blame them for attitudes they could not help but possess. For the argument that concerns about free will and determinism are incoherent and, hence, no basis for further concerns or arguments about criminal justice, see Peter Westen, ‘The False Problem of Free Will and Determinism’, \textit{Buffalo Criminal Law Review} 8 (2004): 101, 122–149.