

AN ATTITUDINAL THEORY OF EXCUSE

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ABSTRACT: The mother lode of criminal law scholarship is a unitary theory of excuses, that is, a normative account as to why a person who engages in conduct that a criminal statute prohibits ought nevertheless not be blamed for it. After defining “excuse” against commentators who argue that it cannot be coherently defined, and after criticizing competing theories of excuse, I argue that the feature that renders persons normatively blameless -- and, typically, legally blameless, too -- for engaging in conduct that a criminal statute prohibits is the possession of a certain attitude with which he engages in it. A person is normatively blameless if, despite engaging in conduct that a statute prohibits, he was motivated by proper respect for interests that the statute seeks to protect.

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AN ATTITUDINAL THEORY OF EXCUSE

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 committed criminal wrongs.¹

The law's other criminal defenses do not readily lend themselves to unitary normative accounts or, if they do, 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 difficult 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. Consider, too, a defendant who denies that he committed the *actus reus* of a charged offense or who claims that, if he committed it, he did so because it was the lesser of two evils and, hence, justified. Unlike

¹ See Michael Moore, *Choice, Character, and Excuse*, in PLACING BLAME 548 (Oxford: Oxford University Press, _____) ("[Excuses are the royal road to theories of responsibility generally]"). For others who have proposed theories of excuse, see Richard Brandt, *A Motivational Theory of Excuses*, in J. PENNOCK AND J. CHAPMAN, EDs., NOMOS: CRIMINAL JUSTICE 165 (New York: New York University, 1985); Michael Corrado, *Notes on the Structure of a Theory of Excuses*, 82 J. CRIM. L. & CRIMINOLOGY 465 (1991); Joshua Dressler, UNDERSTANDING CRIMINAL LAW § 17.03 (3d ed., New York: Lexis Publishing, 2001); Claire Finkelstein, *Excuses and Dispositions in Criminal Law*, 6 BUFF. CRIM. L. R. 317 (2002); George Fletcher, RETHINKING CRIMINAL LAW 798-817 (Boston: Little, Brown, 1978); John Gardner, *The Gist of Excuses*, 1 BUFF. CRIM. L. R. 575 (1998); H.L.A. Hart, *Legal Responsibility and Excuses*, in PUNISHMENT AND RESPONSIBILITY 28 (Oxford: Clarendon Press, 1968); Sanford Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257 (1987); Paul Robinson, *Excuses*, in STRUCTURE AND FUNCTION IN CRIMINAL LAW 81-94 (Oxford: Oxford University Press, 1997); Robert Sullivan, *Making Excuses*, in A. Simester & A. Smith, eds., *Harm and Culpability* _____ (Oxford: Clarendon Press, 1996); George Vuoso, *Background, Responsibility, and Excuse*, 96 YALE L.J. 1661 (1987); Glanville Williams, *The Theory of Excuses*, 1982 CRIM. L. REV. 732.

² See Paul Robinson, STRUCTURE AND FUNCTION IN CRIMINAL LAW 71-77.

non-exculpatory defenses, these are “exculpatory defenses” because they deny that the defendant engaged in conduct that was blameworthy. Nevertheless, *actus reus* defenses 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 under the circumstances.

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.³ 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.

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

³ See generally Lincoln Caplan, *The Insanity Defense and the Trial of John W. Hinckley* (New York: Dell, 1987).

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 theory of excuses as such because they deny any distinction between *excuses* and *justifications*.⁴ Other commentators believe that theories of criminal excuse are ultimately derivative of theories of punishment itself,⁵ leaving the former just as normatively contestable as the latter. Still others claim to have identified a workable theory of excuses, *e.g.*, that actors are excused for engaging in regrettable conduct when they have no “choice” or “control” to act otherwise than they do.⁶

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 that it knows to be false. Existing theories of excuse are not able to account for what they include as “excuses,” and they are not able to distinguish what they exclude as non-excuses.

Part I defines “excuse,” and it does so by distinguishing it from “justification” and defenses of *actus reus*. Part II responds to commentators who deny that excuse is a moral category that can be meaningfully distinguished from justification. Part III addresses several contending definitions and normative accounts of “excuse.” Part 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 do not manifest reprehensible attitudes toward themselves or others.

⁴ See notes _____, *infra*.

⁵ See Brandt, *A Motivational Theory of Excuses*, pp. 169-71; Corrado, *Notes on the Structure of a Theory of Excuses*, pp. 470-71.

⁶ See notes _____, *infra*.

I. A DEFINITION OF "EXCUSE"

All theories of excuse are normative accounts regarding when actors ought to be excused 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, and the other of whom does not. These respective commentators produce different theories of excuse because they begin from different starting points as to what counts as an "excuse." To assess the normative significance of their respective theories, one must assess their classifications of defenses, including their definitions of "excuse." I shall argue that excuses are best understood 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 easily understood and non-controversial, *i.e.*, the claim by a defendant that he did not commit the *actus reus* of the charged offense. With the latter defense thus firmly in mind, I will argue that "justification," as I define it, is a set of exculpatory defenses that derive from the same principle as that which underlies the *actus reus* defense but that come into play only where *actus reus* defenses are unavailing -- namely, where the commission of the *actus reus* of an offense is regarded in law as no greater a legal evil than the alternative evil an actor would have to choose under the dilemmatic circumstances in which he finds himself. I will conclude by arguing that "excuses" are nothing but the residual set of exculpatory defenses to wrongdoing that exist in law over and above 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 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 after the elements of an offense have been established. I will speak of “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 often has burdens of persuasion with respect to the latter.

A. *The Defense of Lack of Actus Reus*

Every criminal statute contains both an *actus reus* and, unless it is a strict liability statute, *mens rea* as well. The “*actus reus*” of an offense is conduct that the statute prohibits, regardless of mental states with which the conduct may otherwise be done. “Conduct,” whether in the form of an action or omission,⁷ is any harm or risk for which an actor is a but/for cause, or any undertaking that goes beyond “mere thoughts” by which a person actualizes his purposes in the world. 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 statute that makes it a crime if a person “unlawfully and with malice aforethought causes the death of another human being”⁸ (while using the term “unlawfu[l]” to refer to killings that are unjustified evils under the circumstances). Obviously, a

⁷ An “action” is the conduct of producing a certain regrettable state of affairs by altering such events as would otherwise occur, *e.g.*, a motorist’s causing a pedestrian’s death by hitting the pedestrian in a crosswalk. An “omission” is the conduct of producing a certain regrettable state of affairs by refraining from arresting such events as occur, *e.g.*, a passing motorist’s causing a mortally-wounded pedestrian’s death by refraining from calling an ambulance.

⁸ See, *e.g.*, 21 Oklahoma Statutes § 701.7 (2003).

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 *mens rea* of “malice aforethought.” However, the *actus reus* of the offense consists of only a portion of what the statute specifies as conditions of liability. The *actus reus* of murder consists of conduct that the state regards 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.⁹ 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 *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 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 same is true of offenses like “reckless endangerment”¹⁰ that are explicitly defined in terms of risk of harm.

The offenses we have thus far considered all involve prohibited conduct that is “objective” in the sense that it is conduct that the state regrets and can identify 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

⁹ Cf. *Coker v. Georgia*, 433 U.S. 584 (1977).

¹⁰ Model Penal Code § 211.2.

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*.¹¹ 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."¹²

This is not to say that attempt under the MPC involves no *actus reus*. As with all offenses, an actor is guilty of attempt only if he actualizes his purposes in the world by doing more than possessing mere thoughts, whether he does so by means of an action or an omission.¹³ However, because the *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 *actus reus* of attempt is conduct the state prohibits not because it consists of

¹¹ See Model Penal Code § 5.01(1).

¹² Model Penal Code § 5.01(2).

¹³ For discussion of the moral and legal prohibition punishing a person for mere thoughts, see Meir Dan-Cohen, *Harmful Thoughts*, 18 LAW AND PHILOSOPHY 379-405 (1999).

regrettable harms or risks but because it manifests an undesirable readiness on an actor's part to bring such harms or risks about.¹⁴

Nevertheless, regardless of the form the *actus reus* of an offense takes, 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 regrettable 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.¹⁵ Others argue that there is a significant distinction, while disagreeing among themselves about the very nature of the distinction -- some arguing that justification is a state of mind,¹⁶ others arguing that it is a state of affairs,¹⁷ and still others arguing that it is both.¹⁸ Despite their

¹⁴ This is why there is no such thing as a "justified" attempt. As we shall see, justification comes into play only after an actor has produced a harm or risk that the criminal law otherwise regards as regrettable, something that an actor does not necessarily do in committing an inchoate offense. See Peter Westen and James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse – And Why It Matters*, 6 BUFF. CRIM. L. REV. 833, 878-79 (2003) (hereinafter "*The Criminal Defense of Duress*").

¹⁵ See, e.g., Mitchell Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1 (2003).

¹⁶ See, e.g., Berman, *Justification and Excuse*, p. 47; Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1847, 1903-11 (1984).

¹⁷ See, e.g., Paul Robinson, STRUCTURE AND FUNCTION IN CRIMINAL LAW 95-124.

¹⁸ See, e.g., John Gardner, *Justifications and Reasons*, in HARM AND CULPABILITY 103, 105 (Oxford: Clarendon Press, 1996).

differences, however, commentators agree that justification (or justification and excuse, 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 committed 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.¹⁹

I shall be arguing that there is a significant normative distinction between “justification” and “excuse,” properly understood. To illuminate the distinction I have in mind, however, it is important to demystify a distinction that is *not* normatively significant but merely formal -- namely, the distinction between the *actus reus* defenses previously discussed and choice-of-evils defenses to an *actus reus*. Choice-of-evils defenses to an *actus reus* arise with respect to offenses like murder and drug sales that are predicated on material harms or risks a state has a *prima facie* interest in preventing.²⁰ 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.”

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 caus[e] the death of another human being.”²¹ The policeman can hardly deny that he committed the *actus reus* of “causing the death of another human being.” Nor can the

¹⁹ Cf. Model Penal Code §§ 3.01, 3.02.

²⁰ See John Gardner, *Justifications and Reasons*, p. 107.

²¹ North Dakota Century Code § 12.1-16-01(1)(a) (2004).

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.²² North Dakota thus proceeds in two steps. First, it defines the *actus reus* of murder broadly to consist of the harm of “caus[ing] the death of another human being,” despite the fact that the broad definition includes killings that North Dakota does not regard as regrettable. Then, having defined the *actus reus* of murder overbroadly as something that is only *prima facie* prohibited, North Dakota specifies subsets of those homicides that it declares to be “justified” (including the circumstances under which the policeman acted) – thereby implicitly specifying a residual subset that it regards as *not* justified. Needless to say, North Dakota could have achieved the same substantive results in a single step by combining the *actus reus* of “causing the death of another human being” with the residual set of homicides that its justification provisions now 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 with which I began the last section does, *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.²³

²² See North Dakota Century Code § 12.1-16-01(2)(b) (2004).

²³ 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] 4 All ER 481, and the Ohio

The difference, then, between a statute like North Dakota's, which proceeds in two steps, and a statute that proceeds in one step is entirely formal. Every choice of evil that is stated as a "justification" within a two-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.²⁴ Indeed, every criminal statute that makes it a crime to "unlawfully" engage in certain conduct does precisely that by using the term "unlawfully" to incorporate absence-of-justification by reference. It follows, therefore, that an actor who commits the *actus reus* within a two-step statute but possesses a justification under the statute has the same substantive defense as an actor who fails to commit the *actus reus* of an offense within a one-step statute. Each can rightly claim that, as measured by the harms or risks that the statute declares to be regrettable, all things considered, he did nothing wrong.

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,

statute in *Martin v. Ohio*.

²⁴ See Glanville Williams, *Offences and Defenses*, 2 LEGAL STUDIES 233 (1982). But see George Fletcher, *The Nature of Justifications*, in John Gardner, Jeremy Horder, and Stephen Shute., eds., ACTION AND VALUE IN CRIMINAL LAW 175-86 (Oxford: Clarendon Press, 1993, pp. 175-86). John Gardner concedes Glanville Williams' point as a formal matter. But he argues that because choice-of-evil defenses are often complex or vague, the decision to proceed in one step rather than two 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, 125-26. However, even if one believes that choice-of-evils defenses are 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 two steps. After all, 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 two-step statute, and the choice-of-law defenses remain precisely as complex or vague. If the public can follow the *actus reus* when it is located in two-step statute, it can follow the *actus reus* when it is located in a one-step statute.

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*.²⁵ 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 regrettable harms or risks and, hence, are subject to choice-of-evils defenses; and offenses like attempt that are not premised upon the occurrence of regrettable 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 the defenses of justification in North Dakota. The latter defenses specify the circumstances in which 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 harm or risk that the state regrets, all things considered, cannot be justly blamed if he produced no such harm or risk, all things considered.

Now if everything is this easy, why the controversy? Why are commentators so divided about the relationship between justification and excuse? The reason is that the defenses that most penal codes provide under the rubric of “justification” are *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 *actus reus* of an offense is *actually* lesser than, or equal to, the

²⁵ Cf. Heidi Hurd, *Justification and Excuse, Wrongdoing and Culpability*, 74 NOTRE DAME L. REV. 1551, 1561 (1999).

alternative evil he would otherwise have to commit. Rather, they are defenses that arise when an actor *believes* that his commission of the *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 *actus reus* of an offense is complete. But unlike North Dakota, an actor has such a defense when he *believes* that commission of the *actus reus* is necessary to prevent certain alternative evils.²⁶ (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 word 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 *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:

²⁶ See Model Penal Code § 3.02(1). *But see* Paul Robinson, *Competing Theories of Justification: Deeds vs. Reasons*, in HARM AND CULPABILITY 54 (A.P. Simester & A.T.H. Smith eds., 1996), *persuasively criticized in* Berman, *Justification and Excuse*, at 42-43 & nn. 83-84.

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 regrettably 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."²⁷ In contrast, given that John did not have to kill in self-defense, North Dakota would deny that he was "justified" but rule that because John reasonably believed he had to kill in self-defense, he was "excused."²⁸

The more significant problem is substantive rather than merely terminological. By equating "justification" with the "belief defense," jurisdictions become unable to draw North Dakota's distinction between justification and excuse. And being unable to

²⁷ Model Penal Code § 3.04.

²⁸ North Dakota 12.1-05-08 (2003).

draw the distinction, they adopt defenses of justification that are normatively inconsistent with their definitions of *actus reus*.²⁹ 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 he 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

²⁹ 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 100-24.

“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* to do so.³⁰ 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 in Unwitting Self-Defense to acquit Jim 3d of murder but convict him of attempted murder is consistent with both its reasoning 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 North Dakota rules accordingly by treating 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.³¹

³⁰ It will be recalled that the defense of “choice of evils” does not apply to crimes like criminal attempt, because the choice-of-evils defense only applies to offenses like murder and drug sales that are defined by reference to resulting harms or risks. See note _____, *supra*.

³¹ John Gardner makes a point of distinguishing the “objective” nature of justification from the “objective” question whether punishment should be made

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 does involve the inflicting of 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, and, hence, it is not an evil that the state regrets, all things considered. 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 not offer defenses of “justification” to actors who know full well what harm they are doing and intentionally inflict 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 at all upon resulting harms. For even if one takes that position (and I, for one, do not),³² that is *not* what the MPC achieves. 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

to depend upon the bad luck of *resulting harm*. Gardner, *Justifications and Reasons*, pp. 104-05. In doing so, however, 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 distinction in cases like the Unwitting Self-Defender, namely, that the defendant had the “luck” not to have caused objective harm.

³² See Peter Westen, *Some Commonplace Confusions Regarding Consent in Rape Cases*, 2 OHIO STATE CRIMINAL LAW REVIEW (Fall, 2004, forthcoming).

it into punishing Jim 3d for a crime of wrongful harm, even though for he did not inflict a harm that the MPC regrets under the circumstances.

C. Excuse

“Excuse,” as I define it, encompasses all exculpatory defenses that do not consist of either absence of *actus reus* or justification. That is, it encompasses all instances in which an actor can rightly claim, “Even if I committed the *actus reus* of the offense with which I am charged, and whether or not 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.”³³

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 *arguendo*, that he not only committed the *actus reus* of an offense while possessed of the *mens rea* the charged offense requires, whether the latter consists of purpose, knowledge, recklessness, negligence or some other mental condition.³⁴ My usage of “excuse” is broader in two respects. First, with respect to persons who concede, at least *arguendo*, that they committed the *actus reus* of an offense, I use “excuse” to encompass not only absences of

³³ Douglas Husak challenges the conventional view that the defense of justification is logically and normatively *prior* to the defense of excuse. See Douglas Husak, *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 *actus reus* and *mens rea*), it is *not* a defense that comes into play only after an actor commits an *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 *mens rea*, I say, contrary to Husak, that although excuse is, indeed, a defense that comes into play only after an actor commits the *actus reus* of an offense, it is *not* a defense that comes into play only after an actor does so with *mens rea*.

³⁴ See Paul Robinson, STRUCTURE AND FUNCTION OF CRIMINAL LAW at 81-83.

responsibility such as insanity, immaturity, and involuntary intoxication, but also absences of the *mens rea* that charged offenses require, including defenses of mistake of law and mistake of fact.³⁵ 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 “excuse” in any way they wish. Ultimately, however, the measure of a definition is its perspicuousness. The perspicuousness of a definition of excuse is a function of the degree to which it revealingly includes defenses that are normatively *alike* while excluding defenses that are normatively *unlike*. I will try to show in part IV that, by that measure, an attitudinal theory of excuses is superior to the competing theories discussed in part III.

II. A CHALLENGE TO ALL NORMATIVE THEORIES OF “EXCUSE”

All normative theories of excuse, including those I discuss in part III and my own in part 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 challenge the very possibility of fashioning a normative theory of “excuse” in contradistinction to “justification” because they deny that

³⁵ 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*.

any such distinction exists.³⁶ 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 later revisited and expanded upon his criticisms on two occasions.³⁷ 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;"³⁸ whether an actor *reasonably* believes he is choosing a lesser evil (even if mistakenly) as opposed to *unreasonably* believing it;³⁹ whether a defense is *general and objective* as opposed to *individual and subjective*;⁴⁰ 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).⁴¹ 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 *not undesirable* and, hence, merely *permitted*;⁴² that conduct is justified not by virtue of an

³⁶ See, e.g., Corrado, *Notes on the Structure of a Theory of Excuses*, pp. 492-93.

³⁷ See Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1847 (1984) (hereinafter "Perplexing Borders"); Kent Greenawalt, *Distinguishing Justifications from Excuses*, 49 LAW AND CONTEMPORARY PROBLEMS 89 (1986); Kent Greenawalt, *Justifications, Excuses, and a Model Penal Code for Democratic Societies*, CRIMINAL JUSTICE ETHICS 14 (Winter/Spring 1998).

³⁸ See Greenawalt, *Perplexing Borders*, at p. 1899, 1906.

³⁹ See Greenawalt, *Perplexing Borders*, pp. 1907-11.

⁴⁰ See Greenawalt, *Perplexing Borders*, pp. 1915-18.

⁴¹ See Greenawalt, *Perplexing Borders*, pp. 1918-27.

⁴² See Westen and Mangiafico, *The Criminal Defense of Duress*, pp. 866-72, 883-88. Cf. Joshua Dressler, *New Thoughts About the Concept of Justification in Criminal Law*, 32 U.C.L.A. L. REV. 61, 81-87 (1984).

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;⁴³ 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.⁴⁴

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.⁴⁵ 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 justification and excuse, will only complicate jury deliberations.⁴⁶ 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 mistake of law. Nor need they be told that they must agree on whether a certain defense

⁴³ See Westen and Mangiafico, *The Criminal Defense of Duress*, pp. 864-72.

⁴⁴ See Westen and Mangiafico, *The Criminal Defense of Duress*, pp. 869-72, 917-21

⁴⁵ Greenawalt, *Perplexing Borders*, at 1900-01.

⁴⁶ Greenawalt, *Perplexing Borders*, p. 1902, 1910-11; Greenawalt, *Justifications, Excuses, and a Model Penal Code for Democratic Societies*, pp. 17-18.

(of justification) exists before they may agree on whether a certain defense (of excuse) exists, provided that it suffices 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 ground their lawmaking in the distinction between justification and excuse.⁴⁷ 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 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 done otherwise 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?”⁴⁸

Greenawalt has three objections to the kind of distinction I propose. His first objection is linguistic. 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

⁴⁷ Greenawalt, *Perplexing Borders*, at 1915. Nevertheless, Greenawalt does encourage scholars to continue to reflect on the distinction. See *id.* at 1901-03, 1913.

⁴⁸ For another critique of Greenawalt, see Hurd, *Justification and Excuse, Wrongdoing and Culpability*.

desirable nor undesirable but merely permissible, they might, indeed, describe permissible conduct as morally “justified” conduct. Even if they did not, however, nothing precludes the law from using “justification” as a term of art to encompass both undesirable and permissible conduct. Law students learn early on that words can be used differently in law than in ordinary language.⁴⁹

Greenawalt’s other linguistic objection 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, 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’.⁵⁰ 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,”⁵¹ 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.”⁵²

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 “judg[e]” him, the

⁴⁹ See Heidi Hurd, *Justification and Excuse, Wrongdoing and Culpability*, 74 NOTRE DAME L. REV. 1551, 1557 (1999) (“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 . . .”).

⁵⁰ Greenawalt, *Perplexing Borders*, p. 1908.

⁵¹ Greenawalt, *Perplexing Problems*, p. 1916 n.55.

⁵² Greenawalt, *Distinguishing Justifications from Excuses*, “at p. 102. See also Greenawalt, *Perplexing Problems*, p. 1906.

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 (1) an *actus reus* of actual harm or risk and (2) *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 grounds that govern whether actors are guilty of *offenses* and also applies them 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 not call the defense “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.⁵³ But within jurisdictions that recognize defenses #1 and #2, calling them “justification” and “excuse,” respectively, is entirely consistent, linguistically, with law’s task of “mak[ing] a judgment about [an] actor.”

Greenawalt also raises a theoretical objection 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 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 reject, sometimes 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.”⁵⁴ 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 of duress as excuse he gives 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

⁵³ 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?”

⁵⁴ Model Penal Code § 2.09.

renders an actor “incapable of making rational judgments.”⁵⁵ Greenawalt concludes that because the defense of duress under the MPC encompasses both justification and excuse, “simplicity” argues in favor of retaining a unitary defense rather than teasing out its separate strands.⁵⁶

Greenawalt’s objection is puzzling on several grounds. First, on the assumption that examples 1 and 2 are indeed instances of excuse, Greenawalt’s use of duress runs counter to the thrust of his article. Far from showing that the borderland between justification and excuse is “blurred,”⁵⁷ he argues that duress arises in two contexts - one of which is justification, pure and simple, and the other of which is excuse, pure and simple. Second, Greenawalt does not seem to believe what he says about the “simplicity” of retaining a defense of duress that encompasses both justification and excuse because he concedes that 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 & 2.⁵⁸

The more serious problem is Greenawalt’s assumption that examples 1 & 2 are instances of excuse – or, indeed, that any instance of criminal duress is a non-redundant instance of excuse. I have argued elsewhere that all instances of duress, except for those rare cases in which duress is redundant with the defense of involuntariness, are justifications and, hence, present no “borderline” problems at all.⁵⁹ Take 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

⁵⁵ Greenawalt, *Perplexing Borders*, p. 1912 & n.41.

⁵⁶ Greenawalt, *Perplexing Borders*, p. 1912.

⁵⁷ Greenawalt, *Perplexing Borders*, p. 1902.

⁵⁸ Greenawalt, *Perplexing Borders*, p. 1912. Indeed, the most Greenawalt can muster 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.

⁵⁹ See Westen and Mangiafico, *The Criminal Defense of Duress*, 833-950 and esp. p. 903 n.129.

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 and, hence, is justified.⁶⁰ 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 referring to cases in which an actor chooses an evil that would be unjustified if the alternative evil were natural in origin rather than the purposeful imposition of a coercive malefactor. However, the reason the defense of duress is broader than the defense of necessity is not that the defense 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 on an actor's part that would otherwise be a greater evil *not* a greater evil under the circumstances.⁶¹ The MPC's standard of

⁶⁰ Indeed, Greenawalt seems to concede as much. See Greenawalt, *Perplexing Borders*, p. 1915-16 ("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").

⁶¹ See Westen and Mangiafico, *The Criminal Defense of Duress*, pp. 931-44.

“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.⁶² An actor has a 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.

Greenawalt makes one 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.

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

⁶² See Westen and Mangiafico, *The Criminal Defense of Duress*, pp. 906-12.

accidentally hits Ben, why need it determine precisely whether she is justified or excused when she strikes in mistaken self-defense?⁶³

Ironically, the legal situation is precisely the opposite. Rather than treating offenses *differently* from the way states like North Dakota treat defenses, the law treats them the *same* – causing Ann to be treated in a way 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 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 on the ground that they did nothing the law 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 on the ground that, while they did undesirable things, they lacked a feature that the law requires to render them blameworthy. Ann is exculpated in law not *without* reference to notions of justification and excuse, but precisely by virtue of being “excused”⁶⁴ for having done an undesirable thing.

Greenawalt’s final objection 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”⁶⁵ regarding defenses to a single, binary distinction between justification and excuse. To illustrate, he hypothesizes a drafting committee of three

⁶³ Greenawalt, *Distinguishing Between Justifications and Excuses*, p. 108. See also Greenawalt, *Justifications, Excuses, and a Model Penal Code for Democratic Societies*, p. 21.

⁶⁴ 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).

⁶⁵ Greenawalt, *Perplexing Borders*, p. 1903. See also Greenawalt, *Distinguishing Justifications from Excuses*, p. 107.

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.”⁶⁶ 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.⁶⁷

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, Legislator 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

⁶⁶ 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.

⁶⁷ Greenawalt, *Perplexing Borders*, p. 1903, 1906, 1914.

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. Greenawalt, after all, 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 thus confines his 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 to deny that there is any normative content to the distinction at all between justification and excuse because he denies that the distinction can be a "moral" one.⁶⁸ This is not to say that Berman rejects all distinctions

⁶⁸ Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 8-10 (2003).

between justification and excuse. Berman argues that there is a certain *conceptual* distinction between justification and excuse that represents, in turn, a kind of “normative” distinction.⁶⁹ But he argues that the substantive norms that the conceptual distinction represents are “sociological”⁷⁰ norms rather than “moral” norms. He thus seems to deny what 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 what 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” requires is an inquiry into what jurisdictions wish their citizens to aspire to do.⁷¹ 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 his own “conceptual” distinction between justification and excuse.

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.”⁷² 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 far from criticizing a “consensus” view, he is criticizing a strawman that, as far as I can tell, no one would embrace. Berman

⁶⁹ Berman, *Justification and Excuse*, pp. 5, 10, 24-25, 30-31, 48.

⁷⁰ Berman, *Justification and Excuse*, pp. 30-31, 37.

⁷¹ Berman, *Justification and Excuse*, pp. 32-33.

⁷² Berman, *Justification and Excuse*, pp. 7-9.

reveals that he is *not* denying that justified conduct is conduct that is not *normatively* wrongful. Nor is Berman denying that excused conduct is conduct that is normatively wrongful but not *normatively* blameworthy. Rather, he 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 in 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 they 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 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 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's 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 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.⁷³

Berman advocates a "conceptual" distinction between justification and excuse that, he says, reflects "sociological" facts but in reality is grounded in 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.⁷⁴ This distinction is substantive, Berman says, not formal. That is, the distinction does

⁷³ For a description of the various ages at which various jurisdictions regard children as possessing criminal responsibility, see Lisa Micucci, *Responsibility and the Young Person*, 11 CAN. J.L. & JURIS. 277, 279-86 (1998).

⁷⁴ Berman, *Justifications and Excuses*, pp. 24-25.

not depend upon whether the legislature uses the terms “permissible” or “non-punishable.”⁷⁵ Rather, the distinction turns upon the normative judgments that legislatures and courts make in enacting and interpreting defenses. A defense renders conduct permissible 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, the norm that we aspire that people follow’.⁷⁶ A defense is an excuse if for any reason the legislature does not wish to punish actors whose conduct falls short of what the legislature has called upon them to 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 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. I could use any exculpatory defense to illustrate this problem. But consider 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; and, yet, because the process of legislating does not call upon them to rank their motives in

⁷⁵ Berman, *Justifications and Excuses*, p. 37-38.

⁷⁶ Berman, *Justifications and Excuses*, pp. 31-33, 50, 53-56, 73-74.

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 a way as to preclude them from possessing anything normatively in common other than that they lead to acquittals. He defines them 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 all being defenses. By aggregating them with exculpatory defenses, Berman makes it difficult to inquire into the very thing I shall be investigating in part IV -- namely, whether what I call "excuses" (*i.e.*, exculpatory defenses that are not defenses of *actus reus* or justification) are derivative of a broader norm of exculpation.

III. RIVAL DEFINITIONS AND NORMATIVE ACCOUNTS OF "EXCUSE"

Numerous commentators have sought to identify what John Gardner calls "the gist of excuses."⁷⁷ In order to account for excuses, commentators must first do something like what I have undertaken in part I: they must explicitly or implicitly identify 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."⁷⁸ Others define excuses to *include* such defenses without being limited to them.⁷⁹ And still others come close to defining excuses to *consist exclusively* of the very defenses that Gardner excludes.⁸⁰

⁷⁷ John Gardner, *The Gist of Excuses*, 1 BUFFALO CRIMINAL LAW REVIEW 575 (1998).

⁷⁸ Gardner, *The Gist of Excuses*, pp. 587-88.

⁷⁹ See, e.g., George Fletcher, RETHINKING CRIMINAL LAW 798-807.

⁸⁰ See, e.g., Paul Robinson, THE STRUCTURE AND FUNCTION OF CRIMINAL

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 normatively proportional to the evils avoided. To be sure, commentators argue that duress is distinctive because victims of duress sometimes make panicked 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.⁸¹ 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 of for others that the law can rightly expect of people, not an empirical measure of the way people

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⁸¹ See, e.g., Kadish, *Excusing Crime*, at 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").

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.⁸² 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.⁸³ It follows, therefore, that a person who performs a wrongful act has an excuse if, inter alia, (1) he made reasonable and good faith mistake consistent with his being of good character, (2) he was compelled by pressures over which he had no control (other than 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.⁸⁴

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

⁸² See Michael Bayles, *Character, Purpose, and Criminal Responsibility*, 5 LAW AND PHILOSOPHY 5 (1982).

⁸³ David Hume, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING 100-02 (Henry Regnery ed., 1965).

⁸⁴ For exponents of character theory, see Peter Arenella, *Character, Choice and Moral Agency*, in E. F. Paul, Fred D. Miller Jr. & J. Paul, eds., CRIME, CULPABILITY AND REMEDY 59, at 67-68 (Oxford: Basil Blackwell, 1990); Richard Brandt, *A Motivational Theory of Excuses*, in J. PENNOCK AND J. CHAPMAN, EDS., NOMOS: CRIMINAL JUSTICE 165 (New York: New York University, 1985); George Fletcher, RETHINKING CRIMINAL LAW 799-802; Nicola Lacey, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES 67-78 (1988); Victor Tadros, *The Characters of Excuse*, 21 OXFORD J. LEG. STUD. 495 (2001); and George Vuoso, *Background, Responsibility, and Excuse*, 96 YALE L.J. 1661 (1987).. For powerful criticism of character theory, see Antony Duff, *Choice, Character, and Criminal Liability*, 12 LAW AND PHILOSOPHY 345, 361-70 (1993).

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 problems. 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."⁸⁵ 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

⁸⁵ 18 U.S.C.S. Appendix § 5K2.20 (2004)(Aberrant Behavior).

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."⁸⁶

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 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.⁸⁷ More serious

⁸⁶ Cf. Antony Duff, *Choice, Character, and Criminal Liability*, 12 LAW AND PHILOSOPHY 345, 371-80 (1993). For criticism of this move to vindicate character theory, see Moore, *Choice, Character, and Excuse*, pp. 581-85.

⁸⁷ See David Hume, *An Inquiry Concerning Human Understanding* 95, 104

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.⁸⁸ Like others who seek 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 commit criminal wrongs, 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.⁸⁹ Interestingly, however, in the course 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.”⁹⁰ 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.⁹¹ These two formulations of the theory have influenced commentators, some of whom embrace “choice” as the rationale of excuses,⁹² and others of whom embrace “capacity and fair opportunity to choose.”⁹³ I shall

(L.A. Selby-Bigge ed., Oxford: Clarendon Press, 1955) (originally 1743).

⁸⁸ See H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW vii-viii, 21-24, 28-53, 181-83, 227-30 (Oxford: Clarendon Press, 1968).

⁸⁹ See H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY 28, 229.

⁹⁰ H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY 44-45, 49.

⁹¹ H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY 23.

⁹² See Moore, *Choice, Character, and Excuse*, pp. 574-88; Kadish, *Excusing Crime*, p. 259.

⁹³ See Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses, and the Model Penal Code*, 19 RUTGERS L.J. 671, 701-02 (1988); Hyman Gross, A THEORY OF CRIMINAL JUSTICE 137 (New York: Oxford University

address these two formulations of choice theory and criticize each of them on internal grounds.⁹⁴ 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 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”⁹⁵ what to do. Accordingly, he says, an actor is, and ought to be, excused from criminal conduct that he does not “real[ly]” choose.⁹⁶

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

Press, 1979); Jeremy Horder, *Criminal Culpability: The Possibility of a General Theory*, 12 LAW AND PHILOSOPHY 193, 199 (1993).

⁹⁴ For powerful criticism of choice theory, see Antony Duff, *Choice, Character, and Criminal Liability*, pp. 350-61.

⁹⁵ H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY 44.

⁹⁶ H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY 45.

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 involuntary 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 inculcates actors whose voluntary intoxication causes them to unwittingly undertake risks of which they would be aware if they were sober.⁹⁷

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 prevent 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.⁹⁸

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*.⁹⁹ 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

⁹⁷ For a choice theorist who recognizes that choice theory is inconsistent with the law of criminal negligence, see Moore, *Choice, Character, and Excuse*, pp. 588-90.

⁹⁸ See Kadish. Cf. Dan-Cohen to the effect that a person can choose to do what he has no choice but to do.

⁹⁹ H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY 23.

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., persons suffering from epilepsy or reflex actions or persons who are violently pushed) and people who are subjected to overwhelming physical 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 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).¹⁰⁰ 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 invoked to give persons

¹⁰⁰ See Michael Moore, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 257 (1984); Morse, *Acts, Choices, and Coercion*, pp. 1642-45.

who choose to inflict harms or risks in states of insanity, hypnosis, or sleepwalking the benefit of the same kind of exculpation enjoyed by persons who lack an opportunity to make any choices at all.¹⁰¹ They are metaphors because neither science nor forensics knows of any way to determine that an actor who intentionally chooses to do something could not have chosen otherwise.¹⁰²

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 *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.¹⁰³

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

¹⁰¹ For a powerful statement of this thesis, see Stephen Morse, *Acts, Choices, and Coercion: Culpability and Control*, 142 U. PA. L. REV. 1587, 1591-92 (1994). See also Sanford Kadish, *Excusing Crime*, 266 (conceding that invoking lack of "choice" in such cases is "metaphorical"). See also *id.* at 282.

¹⁰² See Morse, *Acts, Choices, and Coercion*, pp. 1600-01 ("[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").

¹⁰³ 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").

jurisdictions possess criminal defenses of insanity that are defined in “cognitive” terms; that is, they are defenses like the rule in M’Naghten that consist of the claim that by virtue of mental illness, the defendant did not *know* what he was doing or, if he did, he did not *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.¹⁰⁴ 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.¹⁰⁵

¹⁰⁴ See e.g., *Bethea v. United States*, 365 A.2d 64, 72 (D.C. Ct. of App. 1976); *Washington v. Crenshaw*, 98 Wn.2d 789, 798, 659 P.2d 488, 494 (1983).

¹⁰⁵ See Bangor Daily News, October 17, 1996; Bangor Daily News, October 10, 1996; Portland Press Herald, October 8, 1996; **Portland Press Herald (Maine), October 17, 1996, page 1A**; Portland Press Herald (Maine), October 12, 1996, page 1A; Portland Press Herald (Maine), October 11, 1996, page 1A.

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 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. Alarmed 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 stomped 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 "votes" 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* is a felicitous fit.¹⁰⁶ 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

¹⁰⁶ 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 on the ground that the jury might reasonably find that Bechard did not *really* know what he 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.

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."¹⁰⁷

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 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, Hinckley was mentally ill; and like Bechard, Hinckley knew he was attacking persons who were no threat to his life, and Hinckley knew what he was wrong was wrong. But in contrast to Bechard's compulsive and disordered thinking, Hinckley's kind of thinking

¹⁰⁷ Bangor Daily News, October 17, 1996.

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.¹⁰⁸

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 significant, and a perspicuous theory of excuse would identify them.¹⁰⁹ 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.

3. *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.¹¹⁰ In doing so, Robinson opens himself to criticism on external grounds, that is, on the ground that

¹⁰⁸ 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* 540-41 (New York: Foundation Press, 2004).

¹⁰⁹ As we shall see in Part IV, the significant difference between Hinckley and Bechard is that Hinckley can be reproached for selfish disregard for 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 of others, *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.

¹¹⁰ See note _____, *supra*.

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, 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 as 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.¹¹¹ Yet Robinson's capacity theory excludes from the class of "excuses" certain defenses that, like *M'Naghten*, also consist of the claim, "I

¹¹¹ Paul Robinson, STRUCTURE AND FUNCTION OF CRIMINAL LAW 86.

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 *know* the facts of which he was aware (as opposed to *not knowing*) because if it did, *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, *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 *M Naghten*.¹¹² 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." The *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 *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 *M Naghten*. Suppose further

¹¹² Cf. Brandt, *A Motivational Theory of Excuses*, p. 185-86 (recognizing this with respect to insane mistakes of fact but denying it with respect to insane mistakes of law).

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. Nevertheless, if the jurisdiction now adopts *M Naghten*, it will be adopting what Robinson calls an “excuse” in contradistinction to the identical defense that would have existed without it that Robinson would deny 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 with the past decade, one of which defines "excuses," and the other of which explores the normative "gist" of excuses so defined.¹¹³ "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;"¹¹⁴ (2) they violate the elements of criminal offenses, including *actus reus* and *mens rea* elements alike;¹¹⁵ 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.¹¹⁶ Gardner thus excludes as excuses several defenses that Hart and 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."¹¹⁷ 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.¹¹⁸ The exculpatory defenses that remain are "excuses," Gardner says; and those that are full defenses consist of these: duress, 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

¹¹³ John Gardner, *Justifications and Reasons*, in HARM AND CULPABILITY 103-129 (Oxford: Clarendon Press, 1996); John Gardner, *The Gist of Excuses*, 1 BUFF. CRIM. L. REV. 575 (1998).

¹¹⁴ Gardner, *The Gist of Excuses*, at 589. See also Gardner, *Justifications and Reasons*, at 121-22 & n. 35.

¹¹⁵ See Gardner, *Justifications and Reasons*, at 120-21.

¹¹⁶ See Gardner, *Justifications and Reasons*, at 105, 119.

¹¹⁷ See Gardner, *The Gist of Excuses*, at 589.

¹¹⁸ See Gardner, *Justifications and Reasons*, at 120-21.

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.¹¹⁹ 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 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

¹¹⁹ Gardner, *Justifications and Reasons*, at 119 (“form of life”), at 120 (“reasonable”); Gardner, *The Gist of Excuses*, at 587 (“role”), 575 (“standards of character”); id. (“courage . . .”).

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.¹²⁰ 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 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.¹²¹ Gardner would also say (again rightly, I believe) that B is excused if, and only if, B acted, 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.”¹²² 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*.¹²³ Now consider the kinds of duress that Gardner

¹²⁰ Westen & Mangiafico, *The Criminal Defense of Duress*, p. 948 n. 224.

¹²¹ See Gardner, *Justifications and Reason*, at 105.

¹²² Gardner, *The Gist of Excuses*, at 597. See also *id.* at 578.

¹²³ Gardner, *Justifications and Reasons*, at 119-20, 122.

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."¹²⁴ 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 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.¹²⁵

¹²⁴ Gardner, *Justifications and Reasons*, at 113.

¹²⁵ 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*, at 596-97. 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.

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.¹²⁶ 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.¹²⁷ 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.¹²⁸ "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 social welfare in equilibrium or because committing the *actus reus* actually reduces social welfare.¹²⁹

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.¹³⁰ This means that Finkelstein includes within "excuse" all of the defenses that Hart would include (*e.g.* accident, mistake of fact, and mistake of

¹²⁶ See Claire Finkelstein, *Excuses and Dispositions in Criminal Law*, 6 BUFF. CRIM. L. R. 317 (2003); Claire Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621 (1996); Claire Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 252 (1995).

¹²⁷ Finkelstein, *Excuses and Dispositions in Criminal Law*, p. 346 ("true justifications"), p. 346 ("commendable"), p. 328 ("greater social good").

¹²⁸ See Finkelstein, *Self-Defense as a Rational Excuse*, pp. 642-43.

¹²⁹ Finkelstein, *Excuses and Dispositions in Criminal Law*, p. 351, 354.

¹³⁰ Finkelstein, *Excuses and Dispositions in Criminal Law*, pp. 330-32.

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.”¹³¹ 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”¹³² to encourage those adaptive dispositions, 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

¹³¹ Finkelstein, *Excuses and Dispositions in Criminal Law*, p. 346.

¹³² Finkelstein, *Excuses and Dispositions in Criminal Law*, p. 357 n.50.

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.

IV. AN ATTITUDINAL THEORY OF EXCUSE

The measure of a normative theory 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 unlike 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 that are considering adopting or modifying 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, on the one hand, 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 he lacked; and (C) the degree to which criminal excuses, as I defined them in part I, derive from the latter normative claim.

A. *The Constitutive Relationship between a State's Criminal Judgment of An Actor and Its 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 a sensation 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 a sensation a person experiences by virtue of believing that certain conditions 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.¹³³ 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 a 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.¹³⁴

¹³³ See Jean Hampton, *Forgiveness, Resentment, and Mercy*, in FORGIVENESS AND MERCY 54 & n.14 (Cambridge: Cambridge University Press, 1988); Dan Kahan and Martha Nussbaum, *Two Conceptions of Emotions in Criminal Law*, 96 COLUM. L. REV. 269, 282-84 (1996).

¹³⁴ See Peter Strawson, *Freedom and Resentment*, in Gary Watson, ed., FREE WILL 59, 62-66 (New York: Oxford University Press, 1982) ("reactive"); Jean Hampton, *Forgiveness, Resentment, and Hatred*, supra note ____, at 43-45, 54; Jean

To illustrate, consider Oliver Wendell Holmes's observation that "even a dog distinguishes between being kicked and being stumbled over."¹³⁵ 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 person's resentment abates not because he thinks he *shouldn't* be resentful, but because he *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 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 sentiment 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.¹³⁶

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 B 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

Hampton, *The Retributive Idea*, FORGIVENESS AND MERCY 124-25. See generally Antony Duff, TRIALS AND PUNISHMENT 39-40 (Cambridge: Cambridge University Press, 1986); T.M. Scanlon, WHAT WE OWE TO EACH OTHER 268-72 (Cambridge, Mass.: Harvard University Press, 1998); R. Jay Wallace, RESPONSIBILITY AND THE MORAL SENTIMENTS 66-67, 74-75, 76-77.

¹³⁵ Oliver Wendell Holmes, Jr., THE COMMON LAW 13 (Boston: Little, Brown, & Co., 1881).

¹³⁶ See Jeffrie Murphy, *Forgiveness and Resentment*, in FORGIVENESS AND MERCY 18 (Cambridge: Cambridge University Press, 1988); R. Jay Wallace, RESPONSIBILITY AND THE MORAL SENTIMENTS 33-39 (Cambridge, Mass.: Harvard University Press, 1984).

inflicts upon a third party, C, or even at an indignity that B inflicts upon B himself.¹³⁷ 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 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

¹³⁷ See R. Jay Wallace, *RESPONSIBILITY AND THE MORAL SENTIMENTS* at 18-23.

and what protective or therapeutic measures, if any, would be necessary, to prevent them from engaging in such conduct again.¹³⁸ The reality, of course, is quite different. In reality, the criminal justice system not only adjudicates the existence of wrongful conduct but also expresses society's collective indignation at defendants for their wrongful conduct.¹³⁹ Every criminal judgment of which I am aware is not only an adjudication of facts but an implicit or explicit expression of society's normative sentiments regarding the attitudes with which the defendant acted. Being expressions of indignation and reproach, criminal judgments express societal sentiment that defendants sought to aggrandize or indulge themselves by acting with malice, contempt, indifference, disregard or neglect toward what the criminal law regards as the legitimate interests of persons, including the interests of defendants themselves.

B. The Normative Claim that It Is Unjust To Condemn Actors for Possessing Reprehensible Attitudes 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

¹³⁸ For a critical discussion of Wooten's views, see H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY 193-209.

¹³⁹ Cf. Antony Duff, TRIALS AND PUNISHMENT 39-40 (Cambridge: Cambridge University Press, 1986); 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."); Jeffrie Murphy, *Introduction*, in FORGIVENESS AND MERCY 8 ("punishment may be regarded as the institutionalization of such emotions as resentment and indignation"); Robert Schopp, *Justification Defenses and Just Convictions*, 24 PACIFIC L.J. 1233, 1258-62 (1993).

the state has not proven he possessed.¹⁴⁰ 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 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."¹⁴¹ 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.¹⁴² And commentators do so precisely because of the

¹⁴⁰ 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* 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*).

¹⁴¹ See, e.g., Kadish, *Excusing Crime*, pp. 257, 282.

¹⁴² See, e.g., Andrew Ashworth, *Principles of Criminal Law* 168-69 (3d ed., Oxford: Oxford University Press, 1999); Peter Cane, *RESPONSIBILITY IN LAW*

normative claim that 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.¹⁴³

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

Excuses, as I defined them in part 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 used criminal sanctions to express public 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

AND MORALITY 109-10 (Oxford: Hart Publishing,, 2002); Antony Duff, *Strict Liability, Legal Presumptions, and the Presumption of Innocence*, manuscript on file with _____, text accompanying note 19; Douglas Husak and Richard Singer, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. R. 859, 860 (1999); Sanford H. Kadish, *BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW* 89-91 (1987); Andrew Simester & Robert Sullivan, *CRIMINAL LAW: THEORY AND DOCTRINE* 173-74 (Oxford: Hart Publishing,, 2000).

¹⁴³ 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.

possessing the reprehensible attitudes toward themselves or others that 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.¹⁴⁴ Now it is sometimes 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* on his part, much less a bad act.¹⁴⁵ I think it is misleading to conceptualize these defenses in terms of acts. For one thing, framing the defense in terms of acts implies that the 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 by epilepsy fully as much as auto fatalities by speeding. Furthermore, framing the defense in terms of acts implies that an actor cannot be blamed for it, regardless of his culpability in allowing himself to fall prey to such interventions; 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 that result from epileptic attacks.¹⁴⁶

Instead, as Paul Robinson observes, it is more perspicuous to regard instances of absence of will as excuses.¹⁴⁷ 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 why,

¹⁴⁴ See Model Penal Code § 2.01.

¹⁴⁵ See generally Michael Moore, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* (Oxford: Clarendon Press, 1993).

¹⁴⁶ See Paul Robinson, *Causing the Conditions of One's Own Defense*, 71 *VIRGINIA LAW REVIEW* 1 (1985).

¹⁴⁷ Paul Robinson, *STRUCTURE AND FUNCTION IN CRIMINAL LAW* at 35-38.

moreover, they are the clearest candidates for exculpation: persons whose conduct is the product of an entire absence of will are persons who lack a disparaging attitude toward the legitimate interests of others or themselves because, entirely lacking in will, they possess no instrumental attitudes at all.

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 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 even conscientious persons would make.¹⁴⁸ 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 nor neglect

¹⁴⁸ See, e.g., Douglas Husak & Andrew von Hirsch, *Culpability and Mistake of Law*, in *ACTION AND VALUE IN CRIMINAL LAW* 157 (John Gardner, Jeremy Horder, and Stephen Shute. eds., 1993); John Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 *Am. J. Crim. L.* 1, 5-36 (1997); Stephen Garvey, *The Moral Emotions in Criminal Law*, 22 *QUINNIPIAC L. REV.* 145, 149 (2003).

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 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 *normative* significance of the interests they infringe.¹⁴⁹ That is, children are incapable of understanding why people care so much about these interests and why society regards them as worthy of protection.¹⁵⁰ Because children are incapable of appreciating those

¹⁴⁹ See S. Asquith, *Justice, Retribution and Children* in A. MORRIS & H. GILLER, EDS., *PROVIDING CRIMINAL JUSTICE FOR CHILDREN* 7, 14 (London: Edward Arnold, 1983).

¹⁵⁰ See Peter Arenella, *Character, Choice and Moral Agency*, in E. F. PAUL, FRED D. MILLER JR. & J. PAUL, EDS., *CRIME, CULPABILITY AND REMEDY* 59, at 67-68 (Oxford: Basil Blackwell, 1990):

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 possessed disparaging attitudes toward the legitimate interests of others that they lack.¹⁵¹

4. *Lack of Cognition Due to Insanity or Involuntary Intoxication*

Nearly all jurisdictions regard it as a defense to the *actus reus* of an offense that by virtue of pathological 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 defenses¹⁵² -- the former for persons whose insanity tends to be chronic and is 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

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.

¹⁵¹ Cf. Stephen Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 23 (1997):

[I]t [is] unjust to express a negative moral reactive attitude . . . to an agent who lacked the capacity when she breached to understand and be guided by good, normative reason.

¹⁵² 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).

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 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 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*.¹⁵³ 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.*, 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 order 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 believes he is acting consistently with what the people of the state regard as the legitimate interests of others under the circumstances.¹⁵⁴

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."¹⁵⁵ 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

¹⁵³ 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").

¹⁵⁴ 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.

¹⁵⁵ See, e.g., Deborah Denno, *Crime and Consciousness: Science and Involuntary Acts* 87 MINN. L. REV. 269, 271 (2002).

judgments about it, and act to carry out their ends.¹⁵⁶ Consider Mrs. Cogdon, the sleepwalker.¹⁵⁷ 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 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 not be excused 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.¹⁵⁸ 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.¹⁵⁹ She was as fully disconnected from the normative attitudes of the agent who killed her daughter as one person is disconnected from another.¹⁶⁰ To condemn her for

¹⁵⁶ See note _____, supra.

¹⁵⁷ See Sanford Kadish and Stephen Schulhofer, *Criminal Law and Its Processes* 178 (Gaithersburg, New York: Aspen Publishers, 7th edition, 2001).

¹⁵⁸ See Morse, *Acts, Choices, and Coercion*, p. 1649.

¹⁵⁹ Robert Schopp, *Multiple Personality Disorder, Accountable Agency, and Criminal Acts*, 10 S. CAL. INTERDIS. L.J. 297, 309-10 (2001).

¹⁶⁰ 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*, at 299-300

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 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."¹⁶¹ 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.¹⁶² 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

(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*, 10 S. CAL. INTERDIS. L.J. 185, 189-94 (2001). But see Jennifer Radden, *Am I My Alter's Keeper?*, 10 S. CAL. INTERDIS. L.J. 253 (2001).

¹⁶¹ Model Penal Code §§ 2.08(1), 4.01(1).

¹⁶² 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.").

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 "yell[ing] at himself from inside himself," Bechard engaged in conduct that was profoundly irrational to everyone involved, including himself.¹⁶³ Commentators have long observed that the hallmark of criminal insanity is "irrationality."¹⁶⁴ 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 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

¹⁶³ Cf. Stephen Morse, "Excusing the Crazy: The Insanity Defense Reconsidered," 58 *Southern California Law Review* 777, 813 (1985):

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.

¹⁶⁴ See, e.g., Stephen Morse, "Brain and Blame," 84 *Geo. L.J.* 527, 539 (1996); Kadish, *Excusing Crime*, p. 282; Michael Moore, *Law and Psychiatry: Rethinking the Relationship* 244-45 (1984).

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.¹⁶⁵ 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.

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 and excuse.”¹⁶⁶ Yet, rather than reserving judgment until scholars had had an opportunity to do so, Greenawalt proceeded to declare that classifying criminal defenses by reference to justification and excuse “is not an appropriate [objective] for Anglo-American penal law.”¹⁶⁷ 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

¹⁶⁵ See H.L.A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 18-19 (Oxford: Oxford University Press, 1968).

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 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, involuntary intoxication.

One of the benefits of “distinguish[ing] rigorously between justification and excuse”¹⁶⁸ is that it reveals that despite their diversity, excuses share a single principle of exculpation in common. I

¹⁶⁶ Greenawalt, *Perplexing Borders*, pp. 1913, 1927.

¹⁶⁷ Greenawalt, *Perplexing Borders*, pp. 1913, 1927.

¹⁶⁸ Greenawalt, *Perplexing Borders*, p. 1903.

argue that excuses reflect the principle 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, in turn, provides a norm to guide jurisdictions in restating or reforming existing defenses. Volitional defenses of insanity and of involuntary intoxication, 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.”¹⁶⁹ 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 know and has no reason to know that the state regards such conduct as wrongful. A person who makes a mistake of law of that sort 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, because 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.

Finally, by virtue of illuminating the normative nature of excuse, attitudinal theory also illuminates the normative nature of blame. Excuse negates blame, in that it adjudges persons to be unworthy of reproach despite the heinousness of their criminal wrongdoing. A normative theory of excuse is an hypothesis as to the features that render a person normatively blameless for criminal harms or risks that he produces or the otherwise undesirable conduct

¹⁶⁹ See note ____ supra.

in which he engages. According to attitudinal theory, the feature that renders persons normatively blameless -- and, typically, legally blameless, too -- is the possession of a certain attitude with which he engages in such wrongdoing. A person is normatively blameless for engaging in conduct that a statute prohibits if he was motivated by proper respect for interests that the statute seeks to protect. Conversely, 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.¹⁷⁰

¹⁷⁰ My colleague Tom Green has said in conversation 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 possess 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* (in draft).