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A REDUCTIVE THEORY OF JUSTIFICATION AND EXCUSE

By

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ABSTRACT OF THE DISSERTATION

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Legal theorists commonly employ a distinction between justification defenses and excuse defenses, but there are significant theoretical disagreements about the nature of the distinction as well as about what the distinction entails. This dissertation is concerned with finding the best way to describe the distinction between the moral concepts of justification and excuse that underlie the concepts employed by legal theorists. Chapter One begins by examining moral defenses in general, with emphasis on their purpose, nature, function, and epistemology. Chapter Two critically examines many of the traditional theoretical assumptions made about justification and excuse in the literature with the goal of winnowing them down to an uncontroversial core that can provide the foundation for a fuller, more specific account. Chapter Three examines the ordinary language meaning of the words “justification” and “excuse” in order to identify any analytic constraints on what a correct theoretical account of justification and excuse may legitimately include. Finally, Chapter Four offers and defends a reductive theory of justification and excuse, which I call “the praise/blame theory.” This theory identifies justified acts with those *prima facie* wrongful acts for which the actor is morally

praiseworthy and excused acts with those *prima facie* wrongful acts for which the actor is merely not to blame. This simple account is consistent with the logical form of moral defenses, requires minimal elaboration on the terms' ordinary language content, avoids the conceptual mistakes that plague more traditional theories, and has the potential to help resolve nagging theoretical issues in related fields.

DEDICATION

I dedicate this dissertation to my wife, Katherine Elaine Reaves Haidet, and to my mother, Carol Elizabeth Landis, who both gave selflessly of their own time – taking extra turns watching the twins – so that I would have the opportunity to work on philosophy. Katy and Mom, without your help and encouragement, this dissertation would never have been completed. My heartfelt thanks go out to both of you.

TABLE OF CONTENTS

Abstract	ii
Dedication	iv
Table of Contents	v
List of Tables	xv
Introduction	1
CHAPTER ONE: Moral Defenses	
1.0 Introduction	5
1.1 Examples	5
1.2 Features of Moral Defenses	6
1.2.1 Conditions under which Moral Defenses are Appropriate	6
1.2.2 Formulated Relative to Accusation	7
1.2.3 Purpose of a Moral Defense	8
1.2.3.1 Blame, Causation, Action, and Intention	9
1.2.3.2 Blame for Mental States	10
1.2.4 Social/Psychological Aspect	10
1.2.5 Explanatory	12
1.2.6 Epistemology	12
1.2.7 Inaccurate Defenses	13
1.2.8 Third Parties	14
1.3 Developing and Objective Account of Moral Defenses	15
1.3.1 Having a Moral Defense Rather than Offering One	15
1.3.2 Some Epistemological Features Remain – the Accuser’s Perspective	16

1.3.2.1 Hypothetical Accusers and Hypothetical Defenders	17
1.3.2.2 Note Concerning the Use of “Act”	19
1.3.3 Accusation Schema	20
1.3.3.1 Broad Formulation	22
1.3.3.2 Multiple Accusations	24
1.4 Types of Moral Defenses	25
1.4.1 Denials	25
1.4.1.1 Types of Denials	26
1.4.1.2 The Relevance of Denials	27
1.4.2 Justifications	28
1.4.2.1 Examples of Justifications	28
1.4.2.2 Theoretical Claims about Justification	29
1.4.2.3 Prior Justifications	30
1.4.3 Excuses	31
1.4.3.1 Examples of Excuses	32
1.4.3.2 Theoretical Claims about Excuse	33
1.4.4 Mitigations	34
1.4.4.1 Examples of Mitigations	35
1.4.4.2 Moral Mitigation vs. Legal Mitigation	37
1.4.4.3 Partial Excuses and Partial Justifications	37
1.5 Resources	40
1.5.1 Ordinary Language	40
1.5.2 Criminal Law	42

1.6 Conclusion	45
CHAPTER TWO: Distinguishing Justification and Excuse: The Received View	
2.0 Introduction	46
2.1 Variations of the Received View	47
2.1.1 Comparison of Formulations	48
2.1.2 Minimal Content of the Received View	50
2.1.3 The Disputed Propositions	51
2.1.4 Corollaries	51
2.1.4.1 Conflicting Parties Cannot Both Be Justified	51
2.1.4.1.1 The Canonical Example of Justification	52
2.1.4.1.2 Conflicting Actions	53
2.1.4.1.3 Objective View of Good Action	53
2.1.4.2 Mutual Exclusivity of Justification and Excuse	54
2.1.4.3 Act-Oriented vs. Actor-Oriented	55
2.1.4.4 Summary	55
2.2 Casting Doubt on the Disputed Propositions and Corollaries	57
2.2.1 Problems with the Third Corollary	57
2.2.1.1 Grammatical Observation	57
2.2.1.2 Type of Act Relevant to Determinations of Excuse	57
2.2.1.3 Duress as Counterexample	58
2.2.1.4 Facts about the Actor that are Relevant to Justification	60
2.2.1.5 Casting Doubt on the Third Disputed Proposition	61
2.2.2 Casting Doubt on the Second Corollary	61

2.2.2.1 Infancy	62
2.2.2.2 Overdetermination of Reasons	64
2.2.2.3 Does Non-Exclusivity Threaten the Project?	65
2.2.2.4 Casting Doubt on the First Corollary	65
2.2.2.4.1 Conflicting Self-Defense Claims	66
2.2.2.4.2 Potential Responses	68
2.2.2.5 Casting Doubt on the Fourth Disputed Proposition	69
2.2.2.5.1 Conceptual Dilemma	70
2.2.2.5.2 Hart on ‘Responsibility’	71
2.2.2.5.3 Capacity-Responsibility	74
2.2.2.5.4 Hall-Inspired Disjunctive Account	75
2.2.2.5.5 Mistake	76
2.2.2.5.6 Accident	77
2.2.2.5.7 Responsibility for Actions Taken in Response to Coercive Threats ...	77
2.2.2.5.8 More Asymmetries	79
2.2.2.5.9 Austin’s Doubts	80
2.3 A Critical Examination of the Minimal Content as an Analysis	81
2.3.1 The Return of DP2	81
2.3.2 (Unjustified) Excused Acts that are not Wrongful	83
2.3.3 Meaning of ‘Wrongful’	84
2.3.3.1 Consequentialist Sense of ‘Wrongful’	86
2.3.3.2 Rights Conception of ‘Wrongful’	88
2.3.3.3 Agent-Perspectival Sense of ‘Wrongful’	89

2.3.3.4	Feinberg's Account of 'Wrongfulness'	90
2.3.3.5	Minimal Content Does Not Provide Sufficient Condition	91
2.3.3.6	Substituting Permissibility for Lack of Wrongfulness	92
2.3.3.6.1	A Theory of Permissibility	93
2.3.3.6.2	Exploring Intuitions	94
2.3.3.6.3	The Logical Structure of Permission	95
2.3.3.6.3.1	The Presumption of Intentionality	95
2.3.3.6.3.2	Framing the Question as a <i>Prima Facie</i> Wrongful Act	97
2.3.3.6.4	Testing and Refining the Decision Procedure	98
2.3.3.6.4.1	Overdetermination Cases	99
2.3.3.6.4.2	Prior Awareness of Guiding Reasons	100
2.3.3.6.4.3	Adjusting the Decision Procedure	102
2.3.3.6.4.4	More Hard Cases	103
2.3.3.6.4.5	Satisfactory Account	104
2.3.3.6.5	Use of the Theory in the Minimal Content	105
2.4	Summary	106
CHAPTER THREE: Justification and Excuse in Ordinary Language		
3.0	Introduction	109
3.1	Excuse	111
3.1.1	Excuse Me (Sense 1)	111
3.1.1.1	Pardon	112
3.1.1.2	The Object of Excuse	113
3.1.2	Asking to be Excused/Dismissed (Sense 2)	113

3.1.2.1 Prior Excuses	114
3.1.2.2 Violating Rules of Conduct	115
3.1.3 Written Excuses (Sense 3)	118
3.1.3.1 Reasons	119
3.1.3.2 Institutional Defenses	120
3.1.4 Having an Excuse (Sense 4)	122
3.1.4.1 Examples	122
3.1.4.2 Observations	122
3.1.4.3 Making Excuses	123
3.1.4.4 Parts of Speech	124
3.1.5 Conclusions	125
3.1.5.1 Discrepancies	125
3.1.5.2 Unified Account of Excuse in Ordinary Language	127
3.1.5.3 The Nature of Excuse	129
3.1.5.4 Excuse in Relation to Justification	130
3.1.5.5 Implications for the Use of “Excuse” in Moral and Legal Theory	131
3.2 Justification	134
3.2.1 Examples	134
3.2.2 Observations	135
3.2.2.1 Objects of Justification	135
3.2.2.2 Normativity	137
3.2.2.3 Synonyms	138
3.2.2.3.1 Explanation	138

3.2.2.3.2 Defense	139
3.2.2.3.3 Good Reasons	140
3.2.2.3.4 Aberrant Usage	141
3.2.3 Guiding Reasons or Explanatory Reasons?	142
3.2.3.1 Sentence Structure	143
3.2.3.2 Attempts to Falsify Sentence 12	146
3.2.3.3 Conclusion about Reasons	148
3.2.4 Summary	148
3.3 Comparison of Justification and Excuse	149
3.4 The Road Ahead	150
CHAPTER FOUR:	
A Reductive Account of the Difference Between Justification and Excuse	
4.0 Review	152
4.0.1 Chapter One	152
4.0.2 Chapter Two	153
4.0.3 Chapter Three	156
4.1 Genesis of a New Theory	158
4.1.1 Support for Excuse as Blamelessness	159
4.1.2 Support for Justification as Praiseworthiness	161
4.1.3 Simplicity	164
4.1.4 Reductive	164
4.1.5 Consistency with Previous Conclusions	164
4.1.6 Productivity	166

4.1.7 Fitting the Data	166
4.1.7.1 Reflective Equilibrium	167
4.1.7.2 Jettisoning “Justification” and “Excuse”	168
4.1.7.3 Consensus Categorizations	169
4.1.7.4 Revisions Required by Praise/Blame Theory	169
4.1.7.4.1 Fewer Justifications	169
4.1.7.4.2 Tokens of the Same Defense Type	171
4.2 Notes on the Nature of Praise and Blame	172
4.2.1 Structural Constraints	173
4.2.2 Foundations of Praise and Blame	174
4.2.2.1 Reactive Attitudes as Basis of Blameworthiness	175
4.2.2.2 When Reactive Attitudes are Inappropriate	177
4.2.2.3 Moral vs. Non-Moral Evaluation	177
4.2.3 Restrictions on Blaming	178
4.2.3.1 Moral Hypocrisy	179
4.2.3.2 Whose Standards?	182
4.2.3.3 Constraints Arising from the Social Nature of Reactive Attitudes	184
4.2.4 Substantive Assumptions	184
4.3 Application	186
4.3.1 Three Sources of Confusion	186
4.3.1.1 Deliberative Action Implies Justification	186
4.3.1.2 Excuse Implies Wrongful Action	188
4.3.1.3 Excuse Implies Defect or Impairment	189

4.3.2 Cases	191
4.3.2.1 Traditional Justification Defenses	192
4.3.2.1.1 Consent	192
4.3.2.1.2 Necessity	193
4.3.2.1.2.1 Other-Protecting	193
4.3.2.1.2.2 Personal Preservation	196
4.3.2.1.2.3 Acceptable Partiality	198
4.3.2.1.3 Defensive Force	199
4.3.2.1.4 Law Enforcement	200
4.3.2.2 Traditional Excuse Defenses	202
4.3.2.2.1 Type I Excuses	203
4.3.2.2.2 Type II Excuses	203
4.3.2.2.3 Type III Excuses	205
4.4 Competing Formal Theories	210
4.4.1 Rational Excuses	211
4.4.2 The Oxford Consensus	212
4.5 Potential Theoretical Productivity of the Praise/Blame Theory	216
4.5.1 Battered Woman's Syndrome	216
4.5.2 Abortion	218
4.5.3 Cultural Evolution and Moral Evaluation	220
4.5.4 The Moral Foundations of the Criminal Law	223
4.5.5 The Use of the Praise/Blame Theory in the Courtroom	227
4.6 Conclusion.....	230

Bibliography	232
Curriculum Vita	242

List of Tables

Table 1: Variations of the Received View	56
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INTRODUCTION

Legal theorists commonly employ a distinction between justification defenses and excuse defenses, but there are significant theoretical disagreements about the nature of the distinction as well as about what the distinction entails. While interest among philosophers in the nature of these defenses goes back (at least) to J.L. Austin's seminal article "A Plea for Excuses,"¹ theoretical interest among philosophers and legal theorists has been particularly intense over the last 25 years.² That interest in the nature of justification and excuse persists is demonstrated by the symposium on this topic hosted in 2004 by the Institute for Law and Philosophy located at Rutgers University School of Law at Camden. The proceedings of this symposium were published the following year, occupying an entire issue of the journal Law and Philosophy.³ Clearly, the issues surrounding justification and excuse continue to present an active field for philosophical research. This dissertation represents a new contribution to that field of study which attempts to convincingly resolve many of the outstanding issues. In particular, this dissertation is concerned with finding the best way to characterize the distinction between the moral concepts of justification and excuse that underlie the concepts employed by legal theorists.

Chapter One begins by examining moral defenses, the genus of which justification and excuse are species. This chapter explores the social importance of moral defenses as well as the logical priority of accusations of wrongdoing to moral defenses.

¹ J.L. Austin, "A Plea for Excuses," Proceedings of the Aristotelian Society 57 (1956-7): 1 ff.

² I would trace contemporary interest in the distinction between justification and excuse to the publication of Kent Greenawalt's groundbreaking article, "The Perplexing Borders of Justification and Excuse," Columbia Law Review 84 (1984): 1897 ff. This article convincingly overturned many of the assumptions that were made about the nature of justification and excuse by influential theorists like Fletcher and Robinson, opening the way for additional investigation and research.

³ See vol. 24 (2005), pp. 547-784.

In order to effectively distinguish between what it is to offer a moral defense and what it is to have one in a more objective sense, this chapter suggests a schema for hypothetical accusations that respects the epistemological position of an accuser as well as the purpose of offering defenses (while hopefully also successfully dodging thorny issues in action theory which might otherwise distract the focus of the dissertation).

Chapter Two critically examines a small but reasonably representative sample of the traditional theoretical claims that are commonly made about justification and excuse in the literature. The goal of this chapter is to critically examine these theoretical claims in order to arrive at an uncontroversial core of theoretical statements about justification and excuse that can provide the foundation for a fuller, more specific account. In particular, Chapter Two rejects such claims as “It is impossible for two conflicting acts to be justified,” “Excused acts are wrongful all-things-considered,” and “Justification is ‘act-oriented’ while excuse is ‘actor-oriented’.” When all of the controversial claims are removed what remains is what I call the *minimal content* of justification and excuse, namely, that *prima facie* wrongful conduct is justified only if it is not wrongful all-things-considered and that *prima facie* wrongful conduct is excused only if the actor is not blameworthy for having done it (for reasons other than its being justified). These claims are extremely weak, providing merely necessary conditions. However, they suffice as a relatively uncontroversial foundation upon which to build.

However, before a more substantive theory of the nature of “justification” and “excuse” can be built on this foundation, it is important to examine whether there are any analytic constraints on what may legitimately be called “justification” and “excuse” in the English language. Consequently, Chapter Three engages in a close examination of the

uses and functions of the words “justification” and “excuse” in ordinary language. This chapter finds that the ordinary language content of “justification” and “excuse” is approximately the same as the minimal content identified in the previous chapter. However, one important observation made along the way is that ordinary language does not itself support a clear distinction between justification and excuse. From this observation, I conclude that any theoretical distinction that we wish to make between the two terms is largely stipulative. This realization changes the focus of the debate about justification and excuse from one of discovering the right distinction to one of constructing the most useful distinction for our theoretical purposes.

Chapter Four suggests just such a useful distinction, which I refer to as “the praise/blame theory.” This theory identifies justified acts with those *prima facie* wrongful acts for which the actor is morally praiseworthy and excused acts with those *prima facie* wrongful acts for which the actor is merely not to blame. In effect, this account reduces the distinction between justification and excuse to the more primitive moral concepts of praise and blame. While this account does force some significant revisions in the way that defenses are typically categorized, I argue that the theoretical benefits of adopting the theory outweigh its theoretical costs. Not only is the theory attractive due to its sheer simplicity (making it easy for lay people, like potential jurors, to apply), it is clearly consistent with earlier conclusions about the structure and function of defenses, and it does not fall victim to some of the conceptual errors plagued by other theories. In addition, the praise/blame theory has the potential to completely resolve (or at least shed significant productive light on) issues in related fields, such as battered woman’s syndrome, abortion, the relation between moral judgment and evolving cultural

norms, the moral limits of the criminal law, the individualization of excusing conditions, and the purpose of trial by jury. I hope the reader will agree that this extraordinary potential for shedding productive light on (if not resolving) issues in other fields is one of the strongest reasons in favor of adopting the praise/blame theory of the distinction between justification and excuse.

CHAPTER ONE

Moral Defenses

1.0 Introduction. Since the purpose of this dissertation is to explore and describe the distinction between moral justification and moral excuse, the best way to begin that project is to take a closer look at the genus of which they are a species. That is, we need to begin by familiarizing ourselves with *moral defenses*. Aside from listing and describing different varieties of moral defense, this chapter will also offer a general account of the conditions under which moral defenses are typically offered. It is my view that one cannot achieve a useful, viable, or persuasive theory of moral justification and excuse without a clear understanding of the contexts in which they are typically offered in the course of everyday life. On the way to a clearer understanding of moral defenses, this chapter will seek to answer the following questions. What is a moral defense? Why and under what circumstances are moral defenses offered? What kinds of moral defenses are there? How are specific moral defenses commonly categorized? What resources are available that can aid us in our investigation of moral defenses in general and justification and excuse in particular? The answers to these questions will lay the groundwork for the work that is presented in subsequent chapters.

1.1 Examples. Perhaps the best way to introduce moral defenses is to start with a few simple examples. In each of the following four examples, B offers a moral defense to A. Example #1: Suppose hostess A is preparing food for her dinner guests in the kitchen when she hears a loud crash in the living room. A hurries out to see what

happened and finds one of her guests B standing over a broken vase. B says, “Don’t look at me; it was the cat.” Example #2: Suppose that vacationer A is about to enter her reclusive mountain cabin for the first time in six months when a haggard-looking stranger B suddenly walks out the front door to greet her. After introducing himself, B says, “I’m sorry for breaking into your cabin, but I was in desperate need of food and shelter. Until an hour ago when I found your cabin, I had been lost in the woods for five days.”

Example #3: Suppose motorist A is sitting at a red light in her car when another car suddenly strikes A’s from behind. The accident is only minor. A gets out of her car to survey the damage and the other driver B does the same. B exclaims, “I’m so sorry for hitting your car. I tried to stop in time, but there was a big oil spot in the road that made my brakes useless.” Example #4: Suppose mother A enters a room just in time to see one of her children B hit the other one C. Realizing that she has been caught red-handed, B turns to her mother and says, “He wouldn’t stop picking on me!”

1.2 Features of Moral Defenses. These examples help to demonstrate several important features of moral defenses.

1.2.1 Conditions under which Moral Defenses are Appropriate. Moral defenses become appropriate in response to the occurrence of a harmful or otherwise morally undesirable event⁴ that an observer might conclude is the result of human action. One might have thought that only human actions and their consequences could possibly generate the need for a moral defense. However, as Example #1 demonstrates, moral defenses are sometimes also appropriate in response to events that are not results of

⁴ The reader should be aware that I am not using the term “event” in any technical sense. As far as I am concerned, “event” is a catch-all that refers to something that happened (or something that didn’t happen). It could be an action, the consequences of an action, or merely a state of affairs.

human action. In that example, the undesirable event – the breaking of the vase – was caused not by human action, but by the activity of a cat. What makes the moral defense appropriate in that instance is that the observer A might reasonably infer from circumstantial evidence that the vase was broken as a result of B's action. Thus, when we wish to speak as generally as possible, we will say that moral defenses are appropriate whenever a morally undesirable event could be (mistakenly or correctly) interpreted as the result of a specific individual's action. Stating the conditions under which moral defenses are appropriate is much easier, though, when the accused's behavior is actually witnessed (as in Example #4) rather than merely inferred (as in Example #1). When the behavior is witnessed, we may say that moral defenses are appropriate when that behavior is *presumptively wrongful*.⁵ Behavior is presumptively wrongful if it resembles a wrongful act to an external observer. (Here I assume that wrongful acts resemble wrongful acts. That is, an act that is presumptively wrongful can also be *actually* wrongful or wrongful *in fact*.) In general, then, behavior stands in need of moral defense if an observer might suspect the actor of wrongdoing.

1.2.2 Formulated Relative to Accusation. Usually, a moral defense is offered in response to a specific allegation of wrongdoing. This is certainly the case when we consider legal defenses. Legal defenses are defenses offered in response to formal criminal charges. However, it is the very formality of legal defenses that represents the most important difference between them and moral defenses. Moral defenses are much more informal than legal defenses and, as such, they are offered under significantly different conditions. For instance, it is important to realize that sometimes moral defenses are offered spontaneously. Notice that in each of the examples above, the moral

⁵ The terms “apparently wrongful” or “*prima facie* wrongful” would also have sufficed.

defense is offered in the absence of any articulated accusation. However, it does not follow from the fact that some moral defenses are offered in the absence of an allegation of wrongdoing that there is no conceptual relation between accusations and moral defenses. In each of the examples above, B offers a moral defense because she anticipates the kind of moral accusation that *could* be leveled by someone in A's epistemological position. For instance in Example #1, B realizes that the information that is available to A might cause her to suspect B of wrongdoing. All A knows is that there was a loud crash coming from the living room and that, several seconds later, B was seen standing in the vicinity of a broken vase. The point of offering a defense under these circumstances is to forestall and defeat any potential moral accusations or suspicions. Thus, even when no accusation is articulated, moral defenses are still made relative to some accusation, even if it is only a hypothetical one. (Henceforth, we will refer to the person who offers the moral defense as the *accused* and the person to whom the moral defense is directed as the *accuser*, even when no accusation has been made.)

1.2.3 Purpose of a Moral Defense. It follows from the foregoing discussion that the purpose of a moral defense is to diminish moral blame. That is, in order for a moral defense to be effective, the additional information that the accused offers to the accuser must either render the accused completely blameless⁶ for the event in question or must at least reduce the degree of blame that is appropriate. (We call those moral defenses that eliminate blame *complete defenses* and those that merely reduce blame *partial defenses*.) To put the idea more precisely, a given statement counts as a moral defense only if there is some relevant accusation such that the statement would (if true) serve to diminish the accused's blameworthiness for the action specified in the accusation.

⁶ The reader should assume that my use of the term 'blame' and its cognates always refers to *moral* blame.

1.2.3.1 Blame, Causation, Action, and Intention. At this point it might be wise for me to unpack some of the assumptions contained in my language so that they do not impede future progress. An accusation is a charge of wrongdoing. That is, an accusation is an allegation that someone has *done* something that is *wrong*, something for which the individual deserves blame. However, one can only be blamed for an event if one's action (or inaction) is the morally relevant cause of that event.⁷ An action (or inaction) can be the morally relevant cause of an event only if the action was *consciously undertaken* (or *consciously avoided*). Thus, blame is appropriate only when behavior that one consciously undertakes is the morally relevant cause of an undesirable event. Sometimes behavior that is consciously undertaken is referred to as *intentional*. But it is important to realize that behavior can be "intentional" in this sense even when the actor does not intend the consequences of the behavior. For instance, suppose that irresponsible gun enthusiast B fires a pistol on a public street merely for enjoyment, and it just so happens that a nearby pedestrian is shot. (Let's call this Example #5.) In such a case, B is to blame for the shooting because an action which she consciously undertook, i.e., firing the gun, is the morally relevant cause of the pedestrian's injuries.⁸ Her act is intentional in the sense described above despite the fact that she did not *intend* to shoot anyone.⁹ The point I want to emphasize here is that, even though moral defenses may be appropriate in

⁷ Here I mean to identify the cause of an event as we would identify it in ordinary language (as opposed to the causes that might be identified by a philosopher or scientist). The salience of human action in an ordinary language account of causation as well as the conditions under which an act may be singled out as *the* cause of an event are central topics of H.L.A. Hart and A.M. Honore's Causation in the Law (Oxford: Clarendon Press, 1959).

⁸ What makes this cause a morally relevant one? It is morally relevant at least in part because, by firing the gun, B has failed to live up to the standard of consideration for the welfare of other human beings that we expect from her.

⁹ Although B is to blame for the shooting in this case, she is not as blameworthy as she would have been had she intended to shoot someone when she fired the gun. We will say that the fact that she caused the harm recklessly rather than intentionally mitigates her blameworthiness (at least somewhat). For more information regarding mitigation, see section 1.4.4 below.

response to events that are not caused by human action at all (as in Example #1), all coherent moral accusations assume that the event was caused by intentional (i.e., consciously undertaken) human action. In other words, it follows from the claim that B is blameworthy for X that B has consciously undertaken some action that led to X. (We will spend more time considering the form that accusations take in section 1.3.3 below.)

1.2.3.2 Blame for Mental States. One further clarification is in order at this point. In this dissertation we are interested in the blame that is deserved for what people *do* (or sometimes for what people fail to do). However, this focus on action and inaction is not intended to rule out the possibility that people may also sometimes deserve blame for *non*-actions, things that are neither actions nor inactions. For example, some might think that people can legitimately deserve blame just for *believing* that one group of people is inferior to another on the basis of skin color (even in the absence of any actions taken on the basis of this belief). Others might think that people can legitimately deserve blame just for *wanting* to view child pornography (even in the absence of any action taken on the basis of this desire). The fact that this dissertation is focused on blame for the things we do or don't do should not be interpreted as a rejection of the view that it is coherent to use 'blame' concepts in relation to mental states. Such issues are simply beyond the scope of this dissertation.

1.2.4 Social/Psychological Aspect. As the previous section indicates, the purpose of offering moral defenses is the avoidance of moral blame. To blame someone for something is to judge that the individual has failed to live up to a standard of behavior that could have been and should have been upheld, and her failure has resulted in harm or other morally undesirable consequences. Judgments of blame are often accompanied by

strong negative emotional responses such as indignation and resentment¹⁰ and may lead to the breaking of social ties with the offender. The judgments people make about one's behavior are intimately related to the judgments people make about the individual as a whole.

Being social animals, we are generally quite concerned with the judgments that others make of us, since those judgments form the foundation of our status within the social group. Understandably, we are most concerned about the opinions of those who are socially closest to us, but we are also concerned about the esteem in which we are held by perfect strangers. For instance, in Example #3, we may assume that A and B are perfect strangers; nevertheless, it is (apparently) important to B that A understands that her failure to control her vehicle was not her fault. To fail to address the issue would be to allow the possibility that the stranger (A) might think less of her (B). Similarly, consider Example #1 again, but this time suppose that A and B are old friends whose respect for one another is well-established and no longer needs to be earned. Because of this level of mutual respect, A would never suspect B of wrongfully destroying her vase. Yet it is not too far-fetched to imagine that B offers her moral defense anyway. Even if there is no chance that B's relationship with A could be adversely affected by the breaking of the vase, it should not surprise us to find B defending herself from potential accusations.

What these examples are intended to show is that, as human beings, we are almost compulsively interested in assuring that we do not lose standing or status with those

¹⁰ Here I follow P.F. Strawson in grounding evaluative moral claims in the reactive attitudes that we experience when we participate with others in interpersonal relationships. See P.F. Strawson, "Freedom and Resentment" in *Freedom and Resentment and Other Essays* (London: Methuen, 1974), 5-13. The approach taken in this chapter is largely inspired by Strawson's ground-breaking work in "Freedom and Resentment."

around us. Even when the opinions of others are consequentially irrelevant to our lives (like the stranger's) or unshakably predetermined (like the old friend's), often we will still feel the need to offer moral defenses to those who might suspect us of wrongdoing. These considerations indicate that moral defenses are an integral and ineliminable aspect of human life and human social interaction.

1.2.5 Explanatory. In most instances, offering a moral defense will involve offering an explanation of the event in question. Usually, moral defenses serve to provide additional information about why or how a particular event occurred. It follows from this fact that, when offering a moral defense, the accused presumes that the accuser may be unaware of the supplemental information contained in the moral defense.

However, not all moral defenses represent explanations. Consider the following example (Example #6). Suppose office worker A returns to her desk to find that her box of cookies is empty. She is sure that there were still a few cookies left in the box when she left, and she suspects foul play. She turns to her nearest co-worker B and asks, "Did you eat my cookies?" B simply replies, "*I didn't do it; it wasn't me.*" Clearly, B has offered a moral defense (what we will eventually call a 'denial'), but it does not seem to count as an explanation of any kind. In particular, B's statement does not count as an explanation for the absence of the cookies. However, I suspect that this kind of 'bare denial' may be the only counterexample to the claim that moral defenses are explanations. Most moral defenses will be at least minimally explanatory.

1.2.6 Epistemology. As was indicated at the beginning of the previous section, the practice of offering moral defenses only has a point under certain epistemological circumstances. In particular, the offering of moral defenses only makes sense under the

assumption that the accuser is lacking important information that is or would be relevant to a moral evaluation of the accused. So, referring to Example #1 again, it would make no sense for B to offer a moral defense to someone who witnessed the cat knocking over the vase. Someone who is already aware of all the relevant facts with regard to the breaking of the vase needs no exculpatory explanation of that event. Only those who are in a state of relative ignorance with regard to how and why the vase was broken stand in need of the information provided by the moral defense.

It is for these reasons that moral defenses are most frequently offered to the following two types of people: those who did not witness the undesirable event at all but have reason to suspect the accused of being responsible for it (like A in Example #1) and those who witnessed the undesirable event but are uncertain of the possible reasons or motivations for it (like A in Example #4).

1.2.7 Inaccurate Defenses. The following examples show that moral defenses as they are commonly offered are not always accurate. In Example #1, B attempts to avoid blame for breaking the vase by telling A that the cat did it. However, it is possible that B is mistaken about what knocked the vase over. Perhaps B only saw the cat run by, but it was in fact the dog that caused the vase to fall and break. If indeed it was the dog and not the cat that was responsible for the destruction of the vase, then the explanation that B offers is factually incorrect. We might refer to this type of moral defense as *erroneous*. Another, perhaps more familiar, type of false moral defense occurs when the accused lies about what happened in an attempt to conceal her culpability.¹¹ For instance, in Example #3, B tells A that she collided with A's car because an oil spot in the road made it impossible for her to stop in time. But suppose she actually struck A's car because she

¹¹ I use the terms "culpability" and "blameworthiness" interchangeably.

was distracted by a flock of birds and failed to notice A's car until it was too late. She lies to A about the reason for the crash because she doesn't want to admit her negligence. We might refer to this type of moral defense as *dishonest*. Similarly, there may be moral defenses which are factually accurate but which misrepresent B's degree of blameworthiness in the situation. Returning to Example #1, suppose B had been harassing A's cat by chasing it around the living room. If the cat knocked over the vase in a frenzied attempt to escape B's harassment, then the moral defense that B eventually offers A is factually accurate but it falsely indicates that B is not at all to blame for the destruction of the vase. We might refer to this type of moral defense as *misleading*. Finally, there is the standard case of moral defenses that are both true and not misleading. When we need to distinguish these moral defenses from the others, we might refer to them as *genuine*. (Unless explicitly stated otherwise, the reader should assume that the defenses offered in examples are genuine.)

1.2.8 Third Parties. It is sometimes feasible for third parties to offer moral defenses on behalf of others. To illustrate this point, let's alter Example #1 so that B did not witness the vase's destruction, but another person C, who was in the room at the time, did. When A comes into the room and sees B standing next to the broken vase, C interjects on B's behalf, "It was the cat." Similar alterations could be made to the other examples. Suppose we were to alter Example #2 so that the owner of the cabin A is not greeted at her doorstep by the intruder B but rather by a paramedic C. C takes A into the cabin and shows her an unconscious B lying on the ground. C explains, "He had been lost in the forest for several days and was severely malnourished. He broke into your cabin, used your phone to call for help, and then apparently collapsed. He was

unconscious when we arrived.” These examples show that there is nothing unusual about accepting moral defenses that are offered by third parties on behalf of others.

1.3 Developing an Objective Account of Moral Defenses. Now that we have listed the most prominent features of moral defenses as they are offered, it is important to be clear about which of those features we will adhere to and which of those features we will abstract away from as we develop a more objective account of moral defenses.

1.3.1 Having a Moral Defense Rather than Offering One. Notice that up to this point, we have cataloged the features of moral defenses *as they are offered*. That is, we have been outlining a theory of what it is to *offer* a moral defense. However, in this dissertation, we are more interested in what it is to *have* a moral defense. *Having* a moral defense is meant to be an objective notion. By that I mean that the existence of a moral defense and its effect on an individual’s blameworthiness does not depend on whether the defense is actually offered to anyone as an explanation or whether the defense is even known by anyone to exist. So although the concept of blame has its natural home in the realm of social interaction and psychological attitudes towards others’ behavior, when we talk about *blameworthiness* – the degree of blame that a person *deserves* relative to a given act – we are referring to an objective state of affairs that is not dependent on what is known or what is said. In the ensuing investigation of moral defenses, we will be primarily concerned with this objective notion of blameworthiness.

To illustrate what I mean by an objective notion of blameworthiness and an objective account of moral defenses, consider the following example (Example #7). Suppose B strikes A during an emotional confrontation. Suppose also that afterward B is

ashamed of what she did and accepts that she is worthy of blame for having done it.

However, suppose further that, unbeknownst to anyone, B's behavior was actually caused by a mini-stroke in a portion of her brain that normally regulates violent behavior. If she had not suffered the mini-stroke, then that portion of her brain would have functioned normally and suppressed her aggressive impulse. But since that portion of her brain was momentarily incapacitated, the aggressive impulse was acted on. In this case, even though B believes her behavior was under her own control and is therefore willing to accept blame for it, as a matter of fact, B was not to blame for her behavior because a physiological fluke rendered her unable to control her behavior. In this case, there exists a moral defense for B's behavior (i.e., B has a defense for hitting A) even though no one, not even B, is aware of it.

Granted, such a case is clearly unusual. In the vast majority of cases there will be at least *one* person who is aware of the existence of a moral defense, namely the accused herself. Nonetheless, the fact that we can imagine the existence of moral defenses that no one is aware of helps to make the point that there is no inherent difficulty in thinking about moral defenses objectively, i.e., thinking about moral defenses in a way that is unrelated to what anyone in the scenario knows or believes.

1.3.2 Some Epistemological Features Remain – the Accuser's Perspective.

Although the previous section makes it clear that we will be abstracting away from some epistemological features of moral defenses in our investigation, it is impossible for us to abstract away from all epistemological features. In particular, we noted above that moral defenses function by offering supplemental information to someone who might otherwise suspect an individual of wrongdoing. Therefore, moral defenses are only relevant in

those situations in which someone (A) lacks, or at least from someone's perspective *might* lack, important information about another person B's moral relation to a specific undesirable event. That is, moral defenses only make sense when it is possible to imagine some individual who has reason to believe that someone else performed an action that at least superficially resembles an act of wrongdoing. Therefore, it isn't feasible for us to abstract away from *all* epistemological features of moral defenses, because we will always need a perspective like the one provided by A in our examples: the perspective of someone with direct or circumstantial evidence of wrongdoing, i.e. the perspective of someone who is (or who at least could be) in a state of relative uncertainty about the moral status of B's act or alleged act.

1.3.2.1 Hypothetical Accusers and Hypothetical Defenders. In the previous sub-section we noted that epistemological concerns cannot be abstracted away from completely, because in order for an explanation to be relevant, there needs to be someone to whom the explanation is directed. That is, there must be somebody who lacks the exculpatory information that the moral defense provides. Although this less-informed epistemological position must exist, it need not be occupied by a specific individual. For example (Example #8), imagine that B kicks a sleeping alley cat while walking down the street one day, but no one sees her perform this act of cruelty, nor does anyone ever have any reason to suspect her of performing it. In this situation, no one occupies the position of (potential) accuser. Still, it clearly makes sense for us to ask the question whether B has a moral defense for her behavior. All we need to do is imagine what sort of defense B might offer to a *hypothetical accuser*. Generally, we imagine the hypothetical accuser to have the same information that a reliable witness would have. At a minimum, a

hypothetical accuser must have enough information to construct a coherent moral accusation. This information is limited to externally observable information. That is, the hypothetical accuser is assumed to lack information related to the actor's knowledge, intent, motive, practical reasoning ability, control of her body, and state of consciousness as well as any information related to hidden causes.

On the other hand, suppose that B's apparent act of cruelty has an exculpatory explanation that even B herself is unaware of. (Perhaps B was sleepwalking when she kicked the cat, or perhaps her act was due to a temporary brain malfunction like the one in Example #7.) Since B is unable to explain her own behavior, she would not be able to offer a genuine moral defense to a hypothetical accuser. However, B's inability to *offer* a moral defense does not mean that she does not *have* a moral defense. Since we are not interested in the epistemological (or linguistic) limitations of the accused in an objective investigation of moral defenses, it will make sense for us to allow a *hypothetical defender* to offer a defense on B's behalf. A hypothetical defender is able to offer defenses that the accused, for whatever reason, cannot. In contrast to the hypothetical accuser, the hypothetical defender possesses all information relevant to the act, both observable and unobservable. That is, the hypothetical defender possesses all the information relevant to formulating a genuine moral defense.

Imagining hypothetical accusers and hypothetical defenders helps us to make a smooth transition between the familiar but contingent and epistemologically murky realm of what it is to *offer* a moral defense and the abstract but tidier and objective realm of what it is to *have* a moral defense. One *has* a moral defense for a given act when an

omniscient hypothetical defender could *offer* a genuine, effective moral defense to a hypothetical accuser.

1.3.2.2 Note Concerning the Use of “Act.” Philosophers usually reserve the term “act” and its cognates for behavior that is intentional in the sense described above (i.e., consciously undertaken). I will sometimes refer to this philosophical usage of the term “act” as acting in the *robust* sense. Since hypothetical accusers only have externally observable information about an agent’s behavior available to them, they will not always be able to distinguish mere behavior from acting in the robust sense. For example, suppose that in Example #8, B kicked the cat due to a bizarre muscular reflex over which she had no conscious control. In such a case, some theorists would say that, since there was no act in the robust philosophical sense, B does not stand in need of a moral defense at all.¹² However, this viewpoint is clearly at odds with the practice of offering moral defenses that has been described above. On my view, a moral defense is appropriate in this situation because a hypothetical spectator who is unaware of the cause of B’s behavior could legitimately suspect B of wrongdoing. By explaining that the kick was not intentional but rather was caused by a muscular reflex, a hypothetical defender offers a moral defense against the accusation that B is to blame for kicking the cat. To claim that B requires no moral defense for her behavior because that behavior was the result of an unconscious reflex would be to fundamentally misunderstand the nature of moral defenses. Moral defenses are offered in response to moral accusations. Accusations are necessarily formulated in a state of relative ignorance concerning the motives and reasons

¹² John Gardner takes this view. He writes, “Justifications and excuses are available only to those whose actions have intelligible rational explanations, i.e. whose actions properly reflected reasons for action that they took themselves to have....” John Gardner, “The Gist of Excuses,” Buffalo Criminal Law Review 1 (1998): 588.

for action. So, the fact that B's behavior resulted from an unconscious reflex *constitutes* a moral defense for her behavior; it does not make moral defense irrelevant.

The point of these comments is to call the reader's attention to the fact that the philosophically robust sense of the word "act" and its cognates will play a limited role in the investigation that is to follow. Since hypothetical accusers are minimally informed and only have access to the outwardly observable aspects of behavior, they will often be unable to distinguish between kicks that are acts in the robust sense and kicks that are not. Therefore, the robust sense of "act" will not be of much theoretical use to us. Since it is often linguistically convenient to use the terms "act" and "action" to refer to behavior whose intentionality is uncertain, my use of the term "act" and its cognates will not respect the distinction between intentional action and mere behavior. As far as this dissertation is concerned, the terms "action," "conduct," and "behavior" will all be used synonymously.¹³

1.3.3 Accusation Schema. In its simplest form, any accusation, whether real or hypothetical, can be formulated as the following two-place predicate involving a person B and a (potentially) morally undesirable event X: B is morally blameworthy for X. For instance, the unstated accusation in Example #1 takes the form "B is morally blameworthy for the destruction of the vase." The moral defense that B offers is intended to falsify this accusation.¹⁴ When necessary, all accusations can be reduced to this simple form. Of course, in many cases, the undesirable event is itself an act, like the kicking of an alley cat. In such cases we can substitute the description of an act for the event 'X'.

¹³ I will use the phrase "mere behavior" when I wish to distinguish bodily movements that are not intentional actions from those that are.

¹⁴ Only fully exculpating moral defenses falsify the accusation. Partially exculpating defenses – what we will eventually call "mitigations" – merely seek to amend the accusation in morally significant ways.

We may also safely substitute a description of an act when there is no doubt about what the accused did. To illustrate this point, compare the accusations in Example #1 and Example #4. In Example #1, the accusation has to be formulated in terms of an event rather than in terms of an act because the accuser A did not actually witness the breaking of the vase. Since she has no way of knowing the exact nature of B's behavior in relation to the broken vase, she (or a hypothetical accuser in her epistemological position) cannot be sure exactly what to accuse him of doing. Therefore, phrasing the accusation in terms of the event rather than an act makes the most sense. On the other hand, in Example #4 A observes B striking C. In that case, the accuser knows precisely how to characterize B's behavior, so the accusation can safely be put in terms of an act rather than a (mere) event: "B is blameworthy for hitting C."

Notice that as we abstract away from moral defenses as they are offered, we do not need to be quite so concerned about situations in which an individual is accused of something that she had nothing to do with (as in Example #1). As we focus on what it is to *have* a moral defense, we can make use of hypothetical accusers. Since hypothetical accusers are reliable witnesses to what happened, we will usually be in the position of having an accurate description of B's behavior available to us as we consider B's blameworthiness. Therefore, as we consider moral defenses objectively, we will generally be able to construct the accusation in terms of an act rather than an impersonally described event (like "the destruction of the vase"). Therefore, in most cases, we will be able to construct accusations in the following form: "B is morally blameworthy for X-ing," where "X-ing" refers to a specific type of action. (Even though accusations in an objective account of moral defenses can usually be phrased in terms of

acts rather than mere events, I will still sometimes use the word “event” to describe the object of an accusation, particularly when the context of the accusation is unclear. In these cases, “event” should be understood to include acts.)

At this point, the reader may be curious why we are formulating accusations in terms of “blameworthiness” rather than in terms of “responsibility.” In other words, one might wonder what is wrong with adopting the following formulation for moral accusations: “B is morally *responsible* for X (or for X-ing).” While this formulation may be linguistically more familiar than the one I employ above, the term “responsibility” and its cognates are famously ambiguous.¹⁵ By constructing moral accusations in terms of “blameworthiness” rather than “responsibility,” I am trying to avoid that ambiguity and hopefully facilitate a more perspicuous investigation. More importantly, claiming that someone is responsible for an event does not necessarily impute the sense of suspicion or potential censure that is inherent in an accusation. One can be responsible for actions that are morally neutral or even laudable. Hence, charging that someone is “responsible” for something is inadequate as a basis for the formulation of a schema of moral accusations.

1.3.3.1 Broad Formulation. Normally, we think of accusations as attributing a *particular variety* of wrongdoing to an individual. For instance, in Example #1, we might have thought that an accusation would take something like the following form: “B maliciously broke A’s vase,” or “B carelessly broke A’s vase.” These accusations are *narrow* in the sense that they try to specify the exact nature of the act and thereby attempt to precisely identify the actor’s degree of culpability. Formulating accusations in this

¹⁵ For an account of five different senses of the term “responsible,” see chapter nine of H.L.A. Hart’s Punishment and Responsibility (Oxford: Clarendon Press, 1968).

narrow way is analogous to the way accusations are typically made in the criminal law. However, as far as an objective theory of moral defenses is concerned, it makes sense to construct accusations *broadly*, utilizing the most general assertion of wrongdoing possible. That is precisely what the accusation schema I presented above is designed to do: it specifies an individual and a description of behavior, and it asserts that the individual is to blame for the behavior without specifying any particular mental attitudes that may or may not have accompanied it.¹⁶

The virtue of formulating moral accusations broadly is that doing so facilitates a more general moral evaluation. When accusations are formulated broadly, what is at issue is the accused's overall blameworthiness in relation to a questionable act or event. Thus, the moral defenses that are offered and considered lend themselves to a more general moral evaluation of the accused's conduct. If accusations were allowed to take a narrow form, then the accused could offer a moral defense that completely exonerates her of that specific variety of wrongdoing without indicating whether she may have committed some other variety of wrongdoing relative to the event in question. So in Example #1, if the accusation were to take the narrow form "B maliciously broke A's vase," then B could categorically deny doing *that* even if, in fact, she broke A's vase carelessly. Thus, the defense that is offered to a narrow accusation would leave the accuser uncertain regarding the accused's overall degree of blameworthiness. Therefore, since an objective theory of moral defenses is concerned with an overall moral evaluation

¹⁶ For the same reasons, we must eschew the use of verbs like "murdered" or "stole" in the formulation of accusations. Instead of evaluating the claim "B is morally blameworthy for murdering A," we should instead evaluate the claim that "B is morally blameworthy for A's death." Similarly, instead of evaluating the claim that "B is morally blameworthy for stealing A's property," we should instead evaluate the more broadly formulated claim that "B is morally blameworthy for taking A's property."

of an actor in relation to an act or event, it will make sense for us to formulate accusations broadly.

1.3.3.2 Multiple Accusations. Even though broadly constructed accusations help to facilitate an overall moral evaluation of the accused in relation to an event, that “overall” evaluation is still relative to the event’s description. If the same event can have multiple descriptions, each resembling a different type of wrongdoing, then multiple accusations will be necessary to account for all of the aspects of blame that may attach to that single event. The following example (Example #1b) will demonstrate my point. Suppose that things are as described in Example #1 except for the fact that B has brought her own vase to A’s dinner party, and it is B’s vase, not A’s, which is destroyed. When A arrives in the living room to investigate the crash, B defends herself by saying, “Don’t worry, this is my vase, not yours.” A responds, “That may be, but look at the mess you’ve made! And the kids are trying to sleep upstairs!” In this case, the defense B offers to A is effective against the (potential) accusation that B is blameworthy for the destruction of the vase (because, although B is indeed the one who broke the vase, she deserves no *blame* for doing so because the vase was hers to begin with.) However, A makes it clear that the breaking of the vase may have caused other types of harm for which separate accusations are appropriate. In other words, aside from accusing B of destroying her property, A can also make the following accusations: B is blameworthy for creating a mess in the living room, and B is blameworthy for making a noise loud enough to wake the children. Even though, in an objective sense, B only did one thing – break a vase – A can make three different accusations relating to that single event. B has

a fully exculpating moral defense for the first accusation, but it remains to be seen whether she has a defense for the other two.

1.4 Types of Moral Defenses. At this point we know what a moral defense is, when it is appropriate to offer a moral defense, and how to abstract from offering a moral defense to having a moral defense. However, we have said almost nothing so far about what kinds of moral defenses there are. In this section we will identify and describe four different types of moral defense – denial, justification, excuse, and mitigation. Denial, justification, and excuse are different varieties of complete defense whereas mitigations are partial defenses.

1.4.1 Denials. All fully exculpatory (i.e., complete) moral defenses falsify the charge of blameworthiness inherent in the accusation, but denials do so in a particular way, namely, by denying that the accused did the presumptively wrongful act of which she is accused. Put more simply, denials are rejections of the claim that the accused did what she is suspected of doing. Essentially, all denials involve an implicit assertion that the accuser has made a mistake of some kind in formulating the accusation. Example #1 above is intended to demonstrate a denial. In that example, B defends herself by asserting that she had nothing to do with the destruction of the vase. B's denial communicates to A that she would be *mistaken* if she thought that B is to blame for breaking the vase. That is, if A were to make such an accusation, it would be because she has incorrectly inferred on the basis of circumstantial evidence that B had something to do with the vase's destruction.

1.4.1.1 Types of Denials. There are three potential types of denials. The first type is by far the most important and the most familiar. Let's call it the *not-me* denial. This type of denial simply denies that the accused had anything to do with the undesirable event specified in the accusation. In Example #1, B offers A a *not-me* denial. The second type of denial exonerates the accused by denying that the undesirable event took place at all. Let's refer to this second type of denial as a *didn't-happen* denial. To illustrate this type of denial, consider the following example (Example #9). Suppose that A cannot find her favorite sweater. She feels certain that her roommate, B, must have taken it without asking. She turns to B and asks accusatorily, "What did you do with my favorite sweater?" B replies, "I didn't do anything with your favorite sweater. It is right in your suitcase, where you left it." In this case, A accuses B of taking her sweater (or at least of moving it) without consent, and B defends herself by denying that there was any such taking. While the *not-me* denial rejects the accused's blameworthiness by denying her involvement with the undesirable event, the *didn't-happen* denial rejects the accused's blameworthiness by denying that there was an undesirable event in the first place. The third type of denial does not deny that the event took place or that the accused is responsible for the event; rather, it denies that the event is morally undesirable or morally suspect. Let's refer to this type of denial as a *so-what* denial. To illustrate this type of denial, suppose basketball novice A were to morally accuse B of taking the ball away from her during a basketball game (Example #10). To this accusation, B might reply, "You're right, I did take the ball away from you, but that is permitted by the rules of the game. It's called a 'steal'." In this case, A thought that B's taking of the ball was unfair, inconsiderate, unsportsmanlike and, hence, morally wrong. B defends her

behavior by admitting that she did what she is accused of doing, but denying that there is anything wrong with that kind of behavior. Recognizing *so-what* denials is useful because doing so facilitates the dismissal of moral accusations that are patently absurd, such as “B is morally blameworthy for dyeing her hair blue.” Other things being equal, the color of one’s hair is irrelevant to moral evaluation. (Translated into the terminology I have used above, there is nothing morally undesirable about dyeing one’s hair an unusual color.)

In sum, all three forms of denial maintain that an accusation of wrongdoing would be fundamentally in error. *Not-me* denials charge the accuser with an error about who is to blame, *didn’t-happen* denials charge the accuser with an error about what has occurred, and *so-what* denials charge the accuser with an error about whether the act in question is morally evaluable.

1.4.1.2 The Relevance of Denials. Although denials are a legitimate form of moral defense, they will only be of limited value to us in the investigation that follows. Denials have their greatest relevance in situations like the one in Example #1 where the accuser or potential accuser did not actually witness the undesirable event. When the accuser has witnessed the event (as in Example #4), *not-me* denials and *didn’t-happen* denials will rarely be relevant. Recall that as we develop an objective theory of moral defenses, we will often be making use of hypothetical accusers. Since hypothetical accusers have all the information a reliable witness would have, the hypothetical accuser will have observed whether the accused performed an action leading to the undesirable event and whether the undesirable event took place at all. Thus, *not-me* denials and *didn’t-happen* denials will be irrelevant in situations that employ a hypothetical accuser.

And, of course, we may also assume that hypothetical accusers only formulate morally coherent accusations. Therefore, *so-what* denials will be of little value to us, as well. In conclusion, although denials are a legitimate form of moral defense, they will only be of incidental interest to us as we develop an objective theory of moral defenses.

1.4.2 Justifications. Justifications are fully exculpatory moral defenses in which the accused admits performing an action which led to the morally undesirable event mentioned in the accusation but also insists that taking that action was morally appropriate under the circumstances. In other words, offering a justification involves the assertion that there were decisive moral reasons in favor of performing the action even in light of any harm the act may have caused (or even in spite of the fact that the type of action in question is typically morally prohibited). One who offers a moral justification acknowledges that the act in question may resemble a type of action that is typically morally prohibited, but asserts that there are special circumstances that render the action morally acceptable all-things-considered. A simpler way of describing justification defenses is that they involve an acceptance on the part of the accused that her action was *presumptively* wrongful but a denial that the action was wrongful *in fact*.

1.4.2.1 Examples of Justifications. Example #2 is intended as an example of justification. In that example, the haggard-looking stranger (B) explains to A that he had to break into her cabin in order to obtain food and shelter without which his life and health would have been at risk. Because of these reasons, B's unauthorized entry into A's cabin and his unauthorized consumption of A's food were morally appropriate actions, *in spite* of the violation of her property rights. Normally, it is justifiable to violate property rights in order to prevent the death or serious injury of human beings.

Put more generally, actions that sacrifice lesser moral interests for interests of greater moral significance are usually justified. Other examples of behavior that is typically considered to be morally justified include the use of necessary force in defense of oneself or others, the exercise of a right, acting with the consent of the injured party, and good faith attempts by government officials to carry out their official duties.

1.4.2.2 Theoretical Claims about Justification. As simple as all this may sound, there are significant theoretical disagreements about how best to characterize justifications, about which defenses count as justifications, and about what follows from identifying a particular defense as a justification. For instance, some theorists claim that a presumptively wrongful act must in fact be commendable or meritorious in order to qualify as justified.¹⁷ Others believe that a presumptively wrongful act is justified just so long as it is in fact morally permissible.¹⁸ Some theorists would count as justified those presumptively wrongful acts committed due to a mistake about the existence of justifying circumstances.¹⁹ Others insist that all honest mistakes of fact – including mistakes about justifying circumstances – are at best excused, not justified.²⁰ Most theorists maintain that in order for an act to be justified, an actor must be aware of the circumstances that justify it at the time she performs it.²¹ Others think awareness of the justifying

¹⁷ Fletcher is perhaps the best known proponent of this view. See George P. Fletcher, “The Right Deed for the Wrong Reason: A Reply to Mr. Robinson,” UCLA Law Review 23 (1975): 293 ff.

¹⁸ This view is widely held. For an argument in favor of this view, see Douglas N. Husak, “Conflicts of Justifications,” Law and Philosophy 18 (1999): 41-68.

¹⁹ Greenawalt supports this position. See Kent Greenawalt, “The Perplexing Borders of Justification and Excuse,” Columbia Law Review 84 (1984): 1897 ff.

²⁰ Robinson is insistent on this point. See Paul H. Robinson, “Chapter 5: General Defences,” Structure and Function in the Criminal Law (Oxford: Clarendon Press, 1997), 69-124.

²¹ This view is widely held. For example, see Greenawalt, “The Perplexing Borders of Justification and Excuse”.

circumstances is irrelevant.²² Some theorists claim that an act's being justified entails that it is permissible for others to assist in the completion of the act and impermissible for others to interfere with it.²³ Others maintain that an act's being justified has no bearing on what others may or may not do.²⁴ Many of these issues regarding the nature of justification will be discussed in greater depth in the following chapter.

1.4.2.3 Prior Justifications. Unlike the other three types of moral defense, there is nothing particularly strange or unusual about imagining someone who offers a justification for an act *before* it is performed. Let's refer to these as *prior justifications*. Of course, such justifications would not be moral defenses in the way we have understood that term unless they are offered relative to some accusation, either real or hypothetical. For the most part, moral accusations allege blameworthiness for something that has already occurred, and it is for this reason that I generally assume that justifications are being evaluated *after* the act has been performed. However, there is no principled reason why accusations cannot be formulated (and defenses offered) concerning actions that have yet to take place. Consider the following example (Example #11). Suppose youngster B informs his sister A that he plans to take an unauthorized cookie from the cookie jar. A objects that doing so is against the rules and promises to 'tell on' B if he follows through with his plan. In this situation, we can understand A to be making a moral accusation about B's future behavior. We could express the accusation as follows: "B *will be* (or would be) blameworthy for taking an unauthorized

²² Robinson is the most ardent proponent of this position. See Paul Robinson, "A Theory of Justification," UCLA Law Review 23 (1975): 266 ff.

²³ Fletcher is the most noteworthy proponent of this view. See George P. Fletcher, "The Right and the Reasonable," Harvard Law Review 98 (1985): 949 ff.

²⁴ For example, see David Dolinko, "Intolerable Conditions as a Defense to Prison Escape," UCLA Law Review 26 (1979): 1126-1182.

cookie.” B explains to his sister that the cookie is not for himself; rather, it is for a lost and hungry dog that B has found wandering the neighborhood. In this case, B has offered a (putative) justification for an act he has yet to perform. This justification is a legitimate (putative) moral defense because it is offered in response to a hypothetical accusation concerning his future behavior. We may conclude that there is no problem counting a prior justification as a moral defense as long as we can imagine some hypothetical accusation to which it is a response.

1.4.3 Excuses. Excuses are also fully exculpatory moral defenses. However, they are not quite as easy to characterize as denials and justifications are. Since excuses are not denials, they do not deny that the accused did something presumptively wrongful. And since excuses are not justifications, they do not assert that there was a decisive moral reason in favor of behaving as the actor did behave. Put very simply, excuses encompass all those complete defenses which are not denials or justifications.²⁵ However, there are patterns of similarity among some excuse defenses that lend themselves to categorization by type. The following type-based categorization of excuses is very rough and is not intended as a complete partition of all possible excuse defenses. So, although each type has clear exemplars, some excuse defenses may seem to fit into more than one type, and others do not fit neatly into any type at all. Still, it is useful to catalog some of the more widely recognized types of excuse.

²⁵ Although some theorists have attempted to promulgate unified theories of excuse, these theories are so controversial that others (including myself) have been drawn to the conclusion that there is no single theory that accounts for the exculpatory effect of all excuses. For instance, Victor Tadros writes, “Excuses are best seen as defences that mop up where an application of the other rules of the criminal law would not adequately serve its principles. No further ordering of excuses is possible.” [Victor Tadros, “The Characters of Excuse,” *Oxford Journal of Legal Studies* 21 (2001): 495.]

The most rudimentary type of excuse (Type I) asserts that the accused's behavior was not really an act in the robust sense at all because physical circumstances have intervened which prevent the individual from acting as she wishes to act, and therefore the act is not a proper subject of moral evaluation at all. Forced action resulting from some kind of physical compulsion is perhaps the clearest example of a Type I excuse. A second type of excuse (Type II) involves the claim that the accused was so different from most people in terms of her mental capacities at the time of the action that it is inappropriate to judge her by the same standards that others are typically judged. Insanity is the clearest example of a Type II excuse. A third type of excuse (Type III) involves the claim that the accused's act was performed under circumstances so emotionally trying or so morally ambiguous that it would be unreasonable for us to expect the accused to avoid acting as she did. Acting under duress is perhaps the clearest example of a Type III excuse.

1.4.3.1 Examples of Excuses. Example #3 above is intended to represent a simple case of excuse. In that example, B claims that she is not to blame for the automobile accident. The automobile accident was caused by oil under her tires, which prevented her car from stopping in a timely fashion. Assuming that B did nothing that contributed to the accident in a morally relevant way, B is correct in claiming that she is not morally blameworthy for the accident.²⁶ This example is an instance of a Type I excuse. The oil on the road was a physical circumstance that prevented B's pressing of the car's brakes from stopping the car (as B intended). Since these external physical circumstances interfered with B's ability to execute her will, B is not morally

²⁶ Of course, it may be that, B is legally liable to pay A for the damages caused to A's vehicle. But this legal conclusion has no bearing on our moral evaluation of B and her act.

blameworthy for the accident. This is a case in which physical circumstances rendered B's action (stepping on the brake pedal) impotent. However, sometimes physical circumstances can interfere with one's behavior itself. These circumstances also produce Type I excuses. For example, bodily movements caused by reflex responses, bodily movements caused by seizures, and bodily movements caused by external forces also have the effect of excusing the subjects of the harmful results of these movements. The accused will likely have a Type II excuse if, at the time of her questionable behavior, she was sleepwalking, insane, under hypnosis, suffering from a neurological defect²⁷, involuntarily intoxicated, or very young. In each of these cases there is something unusual about the accused's psychology and decision-making capabilities that render her blameless for acts that would otherwise be wrongful. Acting under duress, acts of desperation to prevent personal injury, and actions based on faultless mistakes of fact are the best examples of Type III excuses. In each of these examples, we sympathize with the actor's plight and are subsequently reluctant to blame the actor for doing what we might have done ourselves under similar circumstances.

1.4.3.2 Theoretical Claims about Excuse. Many theorists have assumed that there must be a single, unifying explanatory account of how excuses exculpate defendants. Some theorists describe excuses as involving a disability or incapacity on the part of the actor,²⁸ or they claim that excuses are grounded in identifiable mental

²⁷ Here I am thinking of neurological defects that affect behavior like the mini-stroke we imagined in Example #6 in section 1.3.1 above. However, notice that the more detail we have about the neurological mechanism of the psychological condition, the more the difference between Type I cases and Type II cases breaks down. That is, if we can identify the physical condition that is causing the questionable behavior, the excuse seems more like physical compulsion and less like insanity.

²⁸ For example, see Robert F. Schopp, "Self-defense," *In Harm's Way: Essays in Honor of Joel Feinberg*, ed. Jules Coleman and Allen Buchanan (Cambridge: Cambridge University Press, 1994), 255-289.

conditions.²⁹ Clearly, such theories are focused almost exclusively on Type II excuses. As one might imagine, these theories struggle (implausibly) to present the first and third types of excuse as special cases of the second type. Despite the fundamental nature of this controversy between those who take the field of excuse to be theoretically unified and those who take it to be theoretically discrete, other controversies have received more scholarly attention. For instance, although some theorists disagree,³⁰ many theorists claim that if an act is excused, it follows that the act itself was wrongful.³¹ Some of these theorists go on to assert that, since excused acts are necessarily wrongful, it is always impermissible for informed third parties to assist in the completion of an excused act and always permissible for them to interfere.³² Of course, others disagree.³³ Examining these theoretical controversies and producing a more reasonable account of excuses is the primary purpose of this dissertation. As such, this topic will receive a great deal more attention in subsequent chapters (particularly chapters 2 and 4).

1.4.4 Mitigations. Mitigations are partial defenses. Since mitigations do not eliminate all blame for the event in question, they do not falsify the accusation. Rather, mitigations function by amending the accusation to include information relevant to a final moral evaluation of the actor in relation to her act. Essentially, mitigations acknowledge that what the accused did was wrongful, but insist that it was not as bad as it could have been, or as bad as one might otherwise assume. Typically, a mitigation involves the claim that the accused's action took place under special circumstances that serve to

²⁹ For example, see chapter 2 of H.L.A. Hart's Punishment and Responsibility.

³⁰ For instance, see Terry L. Price, "Faultless Mistake of Fact: Justification or Excuse?" Criminal Justice Ethics 12 (1993): 14-29.

³¹ For instance, see Robinson, "A Theory of Justification."

³² Fletcher is by far the most vocal proponent of this view. See Fletcher, "The Right and the Reasonable."

³³ Although many have stated opposition to this view, Greenawalt's response is probably the most well-known. See Greenawalt, "The Perplexing Borders of Justification and Excuse."

reduce her degree of blameworthiness. In general, mitigation is the opposite of aggravation; a mitigating factor frequently demonstrates the absence of an aggravating condition³⁴ like acting in a premeditated fashion or in a way that is purposefully hurtful.

1.4.4.1 Examples of Mitigations. The moral defense offered in Example #4 above is intended as an example of mitigation. The daughter caught hitting her brother explains that she did it because he wouldn't stop picking on her. The daughter is claiming a defense of provocation; she is claiming that the brother knew (or should have known) that his taunting would arouse her anger and incite a violent response. As such, he is at least partially responsible for her wrongful act.³⁵ Other commonly encountered mitigations include negligence, recklessness, voluntary intoxication, and acting in response to strong emotions. The following examples illustrate these other mitigations. Suppose a negligent gun owner chooses to transport a loaded handgun in a cluttered duffel bag. Over the course of a long trip, the gun is jostled quite a bit, causing the safety to disengage. After even more jostling, the gun eventually discharges, injuring a fellow traveler. Surely, the gun owner is (at least to some extent) deserving of blame for the traveler's injury. However, the fact that she caused this harm *negligently* (rather than intentionally) significantly reduces her degree of blameworthiness. In other words, a person whose gun discharges due to negligence and injures a bystander is not as

³⁴ It was Austin who first pointed out that what he called 'partial excuses' are often nothing more than the rebuttal of an aggravating condition. See J.L. Austin, "A Plea for Excuses," in Justification and Excuse in the Criminal Law, ed. Michael Louis Corrado (Hamden, CT: Garland Publishing, 1993), 5. [Originally published in Proceedings of the Aristotelian Society 57 (1956-7): 1 ff.]

³⁵ It is worth noting that most children (and even some adults) offer defenses of provocation as if they were complete defenses. Apparently, such people believe that the willfully inconsiderate acts of others serve to completely exonerate them for their wrongful acts of retaliation. This is one of those points at which it is useful to distinguish moral defenses as they are offered from moral defenses as they actually exist. Although much more could be said about the nature of provocation, I think we are on firm moral ground when we reject the claim that two wrongs make a right. Consequently, provocation is best understood as a mitigation, not an excuse or a justification.

blameworthy as a person who shoots a bystander intentionally. The person who begins firing a gun for pleasure on a public street would be recklessly blameworthy for any harm that might be caused. Although she is not quite as blameworthy as someone who intends to harm others, she is still deserving of a significant amount of blame. The individual who strikes another while voluntarily intoxicated is slightly less blameworthy than if the individual had done so while sober. Similarly, if a woman strikes her husband in a fit of rage, she is slightly less blameworthy than if she had purposefully struck him without being influenced by such strong emotions.

Other, less commonly encountered (and perhaps more controversial) mitigating factors include providing uncoerced restitution to the victim, taking measures to avoid unnecessary suffering, and acting in pursuit of admirable goals. For instance, suppose B steals money from A in order to place a bet on a hockey game. When B wins the bet, she promptly returns the money that she stole – minus the winnings, of course. (B conceptualizes what she has done as “borrowing” rather than as stealing.) B is certainly still to blame for taking A’s money, but returning what she had taken reduces the amount of harm she has inflicted overall and thereby also reduces her degree of blameworthiness. The armed robber who goes to great lengths to make her victims feel at ease during a hold-up may be less blameworthy than the armed robber who terrorizes her victims as well as stealing from them.³⁶ Finally, the mother who steals \$80 to pay for her daughter’s Scholastic Aptitude Test (SAT) may deserve less blame than the mother who steals the same amount of money to buy herself a new pair of shoes.

³⁶ The case of the reassuring robber is due to Husak. See Douglas N. Husak, “Partial Defenses,” Canadian Journal of Law and Jurisprudence 11 (1998): 191.

1.4.4.2 Moral Mitigation vs. Legal Mitigation. It is worth emphasizing that mitigation as we are using that term refers to those conditions and circumstances that serve to *reduce an individual's degree of moral blame* for the commission of a presumptively wrongful act. This means that any facts which are unrelated to the accused's blameworthiness are not mitigations in our sense of the word. This point requires special attention because in the criminal law some things are routinely counted as mitigating factors that would not count as mitigations as far as a moral evaluation of an individual's act is concerned. For instance, prior good acts, providing helpful information to the authorities, and being an indispensable caregiver or financial provider for a dependent family member might all count as mitigating circumstances before the criminal law. However, facts like these have no bearing on the degree of blame that an individual deserves for a particular wrongful act; rather, they influence our assessment of whether punishment would be prudent or productive. This point exposes the fundamental difference between moral mitigation and legal mitigation: in the law 'mitigation' refers to anything that reduces the severity of *punishment* whereas moral mitigation is concerned with those facts which reduce an individual's *blameworthiness*. Just because a reduced sentence may be appropriate in a given case, that does not mean that the accused is any less deserving of blame for what she has done.³⁷

1.4.4.3 Partial Excuses and Partial Justifications. Some mitigations are strikingly similar in their exculpatory rationales to complete defenses like excuse and justification. For instance, the mitigation defense offered by the mother who steals to pay for her daughter's college entrance examination bears a resemblance to a justification

³⁷ The points in this section (1.4.4.2) are due to Douglas Husak who distinguishes between desert-based mitigating circumstances and those that are not desert-based in the context of the criminal law. (See Husak, "Partial Defenses," 169 ff.)

defense of necessity (in which the defender argues that the accused's act was necessary to avoid disastrous consequences). Similarly, offering a mitigation defense of voluntarily intoxication bears an obvious resemblance to an excuse defense of involuntary intoxication. The accused's judgment was clouded in both instances; the only difference lies in the determination of whether the accused was the cause of that clouded judgment. Accordingly, some theorists have found it useful to refer to those mitigation defenses that resemble justifications as *partial justifications* and those mitigation defenses that resemble excuses as *partial excuses*.³⁸

However, this terminology can be confusing in that it can lend itself to the interpretation that partial justification is a variety of justification and partial excuse is a variety of excuse. There are good theoretical as well as conceptual reasons to avoid such an interpretation. Maintaining a distinction between partial defenses and complete defenses is theoretically preferable because not all mitigations bear similarities to excuse or justification defenses. For instance, it is not obvious that providing uncoerced restitution after a theft resembles either an excuse or a justification for stealing.³⁹ It is also debatable whether provocation more closely resembles excuse or justification.⁴⁰ If there are partial defenses which cannot be categorized as either partial justifications or partial excuses, then we will still need a separate category to describe those defenses which are merely partially exculpatory, lacking an affinity for either excuse or

³⁸ Austin seems to be the originator of this terminology in "A Plea for Excuses" (*op. cit.*).

³⁹ Husak suggests that this defense resembles a denial more closely than it resembles either a justification or an excuse. (Husak, "Partial Defenses," 191)

⁴⁰ Austin claims that provocation, like other mitigation defenses, "hovers uneasily between partial justification and partial excuse." (Austin, "A Plea for Excuses," 5) See also Joshua Dressler, "Provocation: Partial Justification or Partial Excuse?" *Modern Law Review* 51 (1988): 467-480.

justification. If we will need a separate category for partial defenses anyway, then why not avoid ambiguity and just distinguish between complete defenses and partial defenses?

There are also questions about the conceptual coherence of claiming that an act is partially justified or partially excused. What might we mean by saying that an act is only *partially* justified or *partially* excused? There is no doubt that justifications and excuses can be compared in terms of their strength. For example, we can say that an individual has a poor excuse or a compelling one, or we can say that an act is barely justified or amply justified.⁴¹ There is also no doubt that some elements of a course of action can be justified or excused while other elements are not.⁴² For example, we might say that the Israelis are justified in responding forcefully to terrorist attacks but unjustified in bulldozing the homes of Palestinian civilians, or we might say that a kleptomaniac has an excuse for stealing but no excuse for assaulting the security guard who tries to stop her.⁴³ However, when we wish to make a final evaluation of a single act⁴⁴, it may not make sense to say that the act is partially justified or partially excused. Some have maintained that, ultimately, an act is either justified or it is not justified, excused or not excused. In other words, justification and excuse involve an all-or-nothing moral evaluation. (This claim does not deny that there are types of moral evaluation that indicate degrees of blameworthiness; the point is simply to deny that “justification” and “excuse” are the terms that ought to be used to describe them.) The binary nature of justification is supported by Suzanne Uniacke who writes, “[A]lthough justification admits of degrees,

⁴¹ Suzanne Uniacke, Permissible Killing: The Self-Defense Justification of Homicide (Cambridge: Cambridge University Press, 1994), 13.

⁴² *ibid.*

⁴³ The kleptomaniac example is due to Husak. Douglas N. Husak, “The Serial View of Criminal Law Defenses,” Criminal Law Forum 3 (1992): 389.

⁴⁴ Here I mean to distinguish a single act from what I have called “a course of action.” As we have seen, a course of action may involve multiple elements and some of those elements may receive different moral evaluations. (In other words, “a course of action” may be separated into a string of related “single acts”.)

justification is a threshold concept which involves an overall judgment about whatever is said to be justified.”⁴⁵ Similarly, Kent Greenawalt writes,

The conceptual difficulty is that the term justification has an either-or quality that makes people hesitant to speak of a partial justification when no aspect of the action is fully justified. ... Describing an action as partially justified when it is *less inappropriate* than it would otherwise be is theoretically useful, but it is important to note that this usage strains ordinary concepts.⁴⁶

Sanford Kadish states flatly, “[C]ompassion and mitigation are not incompatible with blame. Excuse is.”⁴⁷ These authors are claiming that, conceptually speaking, justification and excuse are properly thought of as complete defenses, not partial ones.

For both of these sets of reasons (theoretical and conceptual), I will use the terms “justification” and “excuse” to refer exclusively to complete defenses, and I will eschew the use of “partial justification” and “partial excuse” altogether.

1.5 Resources. There are two primary resources that are useful in an investigation of the nature of moral defenses. The first is ordinary language and the second is criminal law. However, the information gained from these sources can be misleading and must be carefully examined before it can be usefully employed.

1.5.1 Ordinary Language. In section 1.2.4, we observed that offering and evaluating moral defenses are important components of everyday social interaction. As social beings, we frequently have opportunities to consider the degree to which individuals should be blamed for their behavior. Hence, the categories we have come up with in our ordinary language to describe different defenses and our common judgments

⁴⁵ *ibid.*

⁴⁶ Kent Greenawalt, “Distinguishing Justifications from Excuses,” Law and Contemporary Problems 49 (1986): 92.

⁴⁷ Sanford H. Kadish, “Excusing Crime,” California Law Review 75 (1987): 289.

concerning the viability of particular defenses in particular situations should be taken seriously. Unfortunately, as is well known, ordinary language concepts and judgments develop primarily to accommodate the standard types of cases that one is most likely to encounter. Ordinary language concepts and judgments usually lack the sophistication necessary to make the subtle distinctions necessary to deal with hard and unusual cases in a theoretically satisfying way. Additionally, the terminology of ordinary language often finds ways of overflowing its banks and finding use in other domains of discourse that are sometimes only analogically related to the domain of origin. Sometimes this use of identical terms in similar but distinct domains of discourse results in a kind of linguistic cross-contamination. That is, sometimes the connotations of a term as it was used in its original domain become influenced by the new connotations that the term has acquired in related domains. For instance, central terms like “justification” and “excuse” are not exclusive to moral discourse. They are terms that are used commonly throughout the English language and are particularly prevalent in the domains of epistemology and etiquette, respectively. The philosopher who is interested in using ordinary language as a resource has the difficult task of finding a principled way to distinguish legitimate usages and connotations of a term in a specific domain from illegitimate, merely analogical usages and connotations. This task can rarely be achieved in thoroughly convincing and uncontroversial ways. At a minimum, though, the philosopher who wishes to make use of ordinary language evidence must be clear about what assumptions she is making about proper usage. That is, at the very least she must announce which usages she takes to be standard (and instructive) and which she takes to be non-standard (and misleading) so that others can more easily assess the alternatives.

1.5.2 Criminal Law. Evaluating the defenses offered by those who are accused of wrongdoing is a fundamental aspect of the practice of criminal law. Because of the importance of defenses to the criminal law, legal theorists have been particularly concerned with noticing important distinctions between different defenses, grouping them into different categories, and theorizing about their fundamental natures. By far, legal theorists have been much more interested in investigating, cataloging, and describing defenses than moral theorists have. To that extent, what legal theorists have had to say about defenses will be an important resource for those who interested in a theory of moral defenses.⁴⁸ Luckily, the differences between the moral and legal defenses are far less troublesome than one might initially imagine. In general, the criminal law is concerned with determining when legal norms have been violated and punishing the violators. However, the criminal law recognizes that some people who have violated the letter of what the law commands do not deserve punishment. The most important function of legal defenses in a system of criminal law is to ensure that those who are not to blame for violating the law escape punishment. Even though violating a legal norm is often quite different from violating a moral norm, the legal and moral notions of blamelessness are quite similar. As such, legal defenses parallel moral defenses very closely, and we can

⁴⁸ Feinberg endorses the careful examination of legal concepts in the process of clarifying their moral analogues. He writes,

When a philosopher wishes to analyze or elucidate a legal-like ethical concept, such as ‘moral right’, he should use the law as a kind of model, as well as a kind of contrasting background for his understanding. ... The legal model will reveal fundamental analogies, and only then should one hunt for the fundamental contrast usually signaled by the word ‘moral’. I urge this procedure only as an aid to analysis, not as a guide to judgment. [Joel Feinberg, Doing and Deserving (Princeton: Princeton University Press, 1970), 40.]

expect to learn a great deal about moral defenses from reading what legal theorists have had to say about legal defenses.⁴⁹

However, there are still some important differences between legal theories of defenses and moral theories of defenses that must be kept in mind. Some of these differences involve what will count as a defense. One important formal difference is that the law does not consider what we have called mitigation to be a proper type of defense at all. As far as the law is concerned, the term “defense” is reserved for complete defenses. There are no partial defenses, only lesser included offenses and mitigating factors (considered at sentencing). We have already encountered a second important difference between legal defenses and moral defenses in section 1.4.4.2 above. There we saw that the law’s emphasis on punishment can sometimes lead to a divergence of understanding between legal and moral defenses: the law would include some things as mitigating factors which would not be included in an account of moral defenses.⁵⁰ A third important difference that we have already encountered is that legal defenses are

⁴⁹ Registering his agreement with the proposition that “the concepts of justification and excuse should function in law at least roughly in the way they do in everyday life,” Duff writes, “Some such belief is certainly right: if the criminal law is to be justified in condemning and punishing as wrongdoers, its crimes must be genuine, unjustified wrongs, and it must allow those who commit them to avoid conviction and punishment by offering an appropriate justification or excuse for their conduct.” By way of clarifying, he endorses the following related proposition: “[T]he factors which exculpate in our extra-legal moral practices should, at least in principle, also exculpate in the criminal law....” [R.A. Duff, “Excuses, Moral and Legal: A Comment on Marcia Baron’s ‘Excuses, Excuses’,” *Criminal Law and Philosophy* 1 (2007): 49-50.] This fundamental relationship between moral and legal defenses is what makes attention to defenses in the criminal law relevant to an investigation of moral defenses.

⁵⁰ Of course, another important difference between the legal defenses and moral defenses is that (desert-based informal) mitigations are not considered to be any kind of defense under the law. They are simply factors that may or may not be considered by sentencing authorities to determine an appropriate punishment for the convicted criminal. One can speculate that it is the law’s failure to conceptualize (desert-based informal) mitigations as defenses that leads to the policy allowing sentencing authorities to disregard mitigating circumstances when imposing punishment. I suspect that the prevalence of plea-bargaining and the backstop provided by prosecutorial discretion (along with whatever remains of judicial discretion) play compensatory roles which, in practice, alleviate the injustices that might otherwise occur due to this policy.

made in response to formal charges while moral defenses need not be.⁵¹ Because legal charges are commonly formulated in what we have called a “narrow” fashion, legal defenses sometimes take a different form than moral defenses would take in similar circumstances. This point can be restated in the following way: the function of a legal defense is much more dependent on the offense with which one has been charged and on the definition that the criminal code provides for that offense than moral defenses are or can be.⁵² For example, if one is charged with murder and murder is defined in the criminal code as the intentional killing of another human being, then a defense of provocation will serve only as a mitigation. However, if murder were instead defined as the premeditated killing of another human being, then a defense of provocation could serve as a complete denial rather than a mere mitigation. Our assumption in section 1.3.3.1 that moral accusations are formulated broadly is intended to avoid this sort of legalism in moral defenses. Lastly, there are important differences in the sorts of grounds that may legitimately be offered in support of moral theories of defense and legal theories of defense. While it is perfectly respectable for a legal theorist to support her theory of a particular legal defense by claiming that it provides the best explanation of legal precedent, such a style of argument will not have an obvious analogue as far as a theory of moral defenses is concerned. Therefore, when we examine the work of legal theorists we must be careful to distinguish arguments that are relevant from a moral perspective from those that are not.

⁵¹ See section 1.2.2 above.

⁵² This point is meant to encompass what Husak calls “code-relativity” and “offense-relativity.” (Husak, “Partial Defenses,” 175)

1.6 Conclusion. In this chapter, we have identified the basic conceptual structure that all moral defenses share, extended that conceptual structure to facilitate an objective understanding of moral defenses, described the four fundamentally different types of moral defense (denial, justification, excuse, and mitigation), listed the most common examples of those defense types, introduced various theoretical controversies surrounding them, and looked briefly at the resources available to the theorist interested in moral defenses. In particular, this chapter has demonstrated the centrality of moral accusations to a theory of moral defenses. Now we are ready to begin focusing our attention more specifically on the nature of the difference between justification and excuse defenses. However, as has already been mentioned, excuse is often defined in contrast to justification. Therefore, in the next chapter, we will begin to explore the difference between these two complete defenses. In particular, the next chapter will critically examine the claims that are often assumed to be uncontroversial about the difference between justification and excuse. The negative conclusions we reach in that chapter will help us to develop a positive theory in chapter 4.

CHAPTER TWO

Distinguishing Justification and Excuse: The Received View

2.0 Introduction. It is commonly assumed that all fully exculpatory moral defenses (i.e., complete defenses) fall under one of two headings, justification or excuse.⁵³ This chapter will examine the common explanations that are given by legal theorists and philosophers for how justification and excuse differ. For most of this chapter I will restrict my focus to those first approximations that are used as starting places for more developed theories, those propositions which theorists present as uncontroversial facts about the nature of justification and excuse. I will refer to this common starting place as *the received view*. Despite the fact that the received view is usually presented as uncontroversial, we will see that most articulations of the received view add or subtract elements that are theoretically non-trivial. My first task in this chapter will be to find where these expressions of the received view agree, i.e. to identify the content that is held in common by most formulations of the received view. The purpose of doing this is to establish a truly uncontroversial, neutral starting point for the development of any subsequent theory. Next, I will identify several propositions that theorists have frequently used to expand on that kernel of agreement that all theorists seem to share. I will use the standard categorization of defenses (cataloged in sections 1.4.2 and 1.4.3 above) as a benchmark against which to criticize these supplementary propositions. I will demonstrate that each of these supplementary propositions is

⁵³ This common understanding disregards denials. For the remainder of this chapter, we will follow this common understanding in assuming that the defendant did indeed perform the *prima facie* wrongful behavior with which she has been accused.

inconsistent with the standard categorization of defenses, one way or another. This work opens the door for the consideration of novel approaches to conceptualizing justification and excuse. Such novel approaches might involve changes to how defenses are routinely categorized, new ways of describing the difference between justification and excuse, or both. My own novel approach will be detailed in chapter 4.

Having cleared the ground in this chapter for novel approaches to the theoretical difference between justification and excuse, the next chapter will investigate whether and to what extent our use of the terms “justification” and “excuse” in ordinary language place constraints on how a theory may correctly employ these terms. That is, the third chapter tries to identify the point after which a theory is no longer talking about “justification” and “excuse” at all – at least, in any way that speakers of ordinary language would recognize. These two chapters together provide a foundation for the subsequent presentation of my own theory of moral defenses, found in chapter 4.

2.1 Variations of the Received View. Interestingly, the received view of the difference between justification and excuse is rarely described in exactly the same way by two different theorists. Although each theorist seems to be asserting only what is universally accepted, each one also adds or subtracts from previous formulations. Below we will review four different formulations of what is supposed to be obvious and widely accepted about justification and excuse. Our initial task will be to identify the content that is held in common by all the formulations as well as what is different about each formulation.

2.1.1 Comparison of Formulations. The first philosopher to devote serious attention to the subject of justification and excuse also offered one of the simplest formulations of the difference between them. J. L. Austin wrote, “In the one defense [justification], briefly, we accept responsibility but deny that it was bad: in the other [excuse], we admit that it was bad but don’t accept full, or even any, responsibility.”⁵⁴

Two decades later, prominent legal theorist Paul H. Robinson wrote,

The theoretical distinction between justification and excuse is well established. Justified behavior is correct behavior and therefore is not only tolerated but encouraged. ... A successful defense of excuse represents a legal conclusion that although the act was wrong, liability is inappropriate because some characteristic of the actor vitiates society’s desire to punish him.⁵⁵

Notice that Robinson’s account differs from Austin’s in that, while Austin simply denies that justified conduct is bad, Robinson maintains that justified conduct is positively good. So clearly the two theorists disagree with regard to the nature of justification. The extent to which they agree about the nature of excuse is questionable. Austin claims that those who are excused must deny some degree of responsibility for their actions. Robinson doesn’t mention responsibility explicitly, but he does locate the source of excuses in some characteristic of the actor. However, they both agree that an excused act is wrong.

Almost contemporaneously with Robinson’s formulation of the received view, legal theorist Jerome Hall wrote,

What is common to both concepts [justification and excuse] is that an injury or damage has been caused by a human being. The difference is that in the former, the actor did the right thing in the circumstances, e.g. he defended himself against an assailant or destroyed property to save life; while in ‘excuse’ the rectitude of

⁵⁴ J.L. Austin, “A Plea for Excuses,” in *Justification and Excuse in the Criminal Law*, ed. Michael Louis Corrado, (Hamden, CT: Garland Publishing, 1993), 5 ff. [Originally published in *Proceedings of the Aristotelian Society* 57 (1956-7): 1 ff.]

⁵⁵ Paul H. Robinson, “A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability,” in *Justification and Excuse in the Criminal Law*, ed. Michael Louis Corrado (Hamden, CT: Garland Publishing, 1993), 289. [Originally published as “A Theory of Justification,” *UCLA Law Review* 23 (1975): 266 ff.]

the actor or his action is simply irrelevant. What is relevant in excuse... is that for reasons either of incapacity or of extreme pressure, such as the threat of immediate death, the actor should not be held criminally liable; instead he is excused.⁵⁶

Hall's description of the received view seems to agree with Robinson's claim that justification entails good conduct. However, Hall's version differs substantively from Robinson's in its account of the foundation of excuses. Robinson claimed only that excuses arise due to some characteristic of the actor without specifying what kind of characteristic it would have to be. Hall specifies that the relevant characteristic of the actor is "incapacity." Hall also arguably⁵⁷ expands on Robinson's account by adding "extreme pressure" as an additional foundation for excuses. One might understand Hall's view of excuse to be specifying two potential sources of an actor's lack of responsibility. That would be consistent with one part of Austin's account of excuse. Notice, however, that Hall's description of excuse differs significantly from both Austin's and Robinson's in that Hall denies that an excused act is wrong. He insists that the rectitude of an excused action is "simply irrelevant."

Almost a decade later, in a seminal paper which functioned as a springboard for further critical examination of prevailing assumptions about the nature of justification and excuse, Kent Greenawalt wrote,

If A's claim is that what he did was fully warranted – he shot B to stop B from killing other people – A offers a justification; if A acknowledges he acted wrongfully but claims he was not to blame – he was too disturbed mentally to be responsible for his behavior – he offers an excuse.⁵⁸

⁵⁶ Jerome Hall, "Comment on Justification and Excuse," American Journal of Comparative Law 24 (1976): 639.

⁵⁷ Robinson might say that "extreme pressure" is just another characteristic of the actor. However, this view seems extremely implausible to me. We will discuss the actor-oriented view of excuse later in this chapter.

⁵⁸ Kent Greenawalt, "The Perplexing Borders of Justification and Excuse," in Justification and Excuse in the Criminal Law, ed. Michael Louis Corrado (Hamden, CT: Garland Publishing, 1993), 341. [Originally published in Columbia Law Review 84 (1984), 1897 ff.]

In this account, Greenawalt's use of the word "warranted" to describe justified behavior seems to be an attempt to avoid the debate regarding whether justified behavior is good or merely not bad.⁵⁹ Instead, this term seems to focus more on the acceptability of the actor's reasons for acting. Greenawalt, like Austin, also avoids offering an account of the sources of excuse. Like Austin and Robinson, Greenawalt asserts that excused behavior is wrongful. However, Greenawalt does not insist that excuse is a result of lack of responsibility on the part of the actor (like Austin and Hall). Instead, he asserts only that excused actors are not to blame.

2.1.2 Minimal Content of the Received View. At this point, it might be useful to summarize what we have learned from surveying these four different formulations of the received view. The logical intersection of the four versions of the received view we have examined seems to be the following.

Prima facie wrongful behavior is justified only if that behavior is actually not wrongful all-things-considered, and *prima facie* wrongful behavior is excused only if the actor is not blameworthy for committing the act (for some reason other than that the behavior is actually not wrongful).

This statement represents the proposition that all four formulations of the received view clearly agree on. Henceforth, I will refer to this statement of the difference between justification and excuse as *the minimal content of the received view*.

2.1.3 The Disputed Propositions. The following is a list of propositions that are included in some versions of the received view examined above but are disputed (or at least not explicitly endorsed) by others.

⁵⁹ Of course, a definition of what makes an act warranted might definitively place Greenawalt on one side or other of this debate. However, he seems reluctant to define this term in a way that would eliminate the ambiguity. His desire to sustain ambiguity should not be surprising, though, since he claims that the border between justification and excuse is inherently fuzzy and that any attempt to try to distinguish the two concepts sharply would be artificial at best.

- 1.) All justified acts are positively good (commendable, meritorious, etc.) rather than merely not bad (acceptable, permissible, etc.).
- 2.) All excused acts are wrongful.
- 3.) All excuses are grounded in characteristics of the actor.
- 4.) All excuses arise from lack of responsibility.⁶⁰

These four propositions appear to be potential sources of controversy or disagreement among the four formulations of the received view examined above. Henceforth, I will refer to these as *disputed propositions*.

2.1.4 Corollaries. Derived from these disputed propositions are three commonly encountered doctrines about justification and excuse. I will refer to these propositions as *corollaries* of the received view. Each corollary can be derived from⁶¹ the minimal content of the received view along with the corresponding disputed proposition.

2.1.4.1 Conflicting Parties Cannot Both Be Justified. The first corollary of the received view is that it is impossible for two conflicting acts to be justified.⁶² For instance, if one person, A, is acting with the purpose of achieving a particular goal and another person, B, is acting with the purpose of preventing A from achieving her goal, we might say that B's act conflicts with A's act, or that the two acts are in conflict.⁶³ The first corollary states that, in such a case, it is not possible for both A's act and B's act to be justified. This view depends upon a version of the received view, which includes the

⁶⁰ See section 2.2.2.4.4 below for a more detailed discussion of Hall's disjunctive account.

⁶¹ The term "derive" is used loosely here. Perhaps it would be more accurate to say that each claim I am referring to as a corollary is "commonly associated with" (rather than "derived from") the corresponding disputed proposition.

⁶² Fletcher is the most prominent defender of this view. See George Fletcher, "The Right and the Reasonable," *Harvard Law Review* 98 (1985): 975.

⁶³ This is only intended as an illustration of conflicting actions, not an analysis. Husak demonstrates the difficulties involved in providing a convincing analysis of what it means for actions to "conflict." See Douglas N. Husak, "Conflicts of Justifications," *Law and Philosophy* 18 (1999): 41-68.

first disputed proposition, i.e., that justification involves positively good conduct. In fact, it depends upon a particular interpretation of that disputed proposition, namely, an objective interpretation. That is, an act is justified only if the act has good or beneficial results; benevolent intentions or motivations do not suffice.

2.1.4.1.1 The Canonical Example of Justification. To see why an objective interpretation of the claim that justification involves good conduct is necessary to derive the first corollary, we will make use of an example of justified behavior which I will subsequently refer to as *the canonical example of justification*. A forest fire springs up suddenly in windy conditions and begins moving rapidly in the direction of a town. Person P realizes that, unless action is taken quickly, lives and property will be jeopardized by the quickly approaching fire. P intentionally sets fire to a farmer's field on the outskirts of town in order to create a firebreak. The tactic works; many lives and much property are saved by P's quick action.⁶⁴ P's behavior is a prime example of a justified act: it is a *prima facie* wrongful act – the nonconsensual destruction of the farmer's property – which is the right thing to do under the circumstances because it protects the lives and property of the people living in town.

2.1.4.1.2 Conflicting Actions. Now let's change the canonical example a bit to create a conflict. Another person Q sees P set fire to the farmer's field and then leave. Q is not aware of the oncoming forest fire. Q knows that the field does not belong to P. Consequently, Q believes that P has acted wrongfully by setting fire to the farmer's field. Q attempts to put out the fire that P has started. Now we have a case of conflict: Q is acting with the intention of thwarting P's intent, which is to burn the field. Q thinks she

⁶⁴ This example is found in the Model Penal Code, but Robinson makes extensive use of it: "Suppose that a forest fire is raging toward a town, and that the only possibility of stopping it is to start another fire in an adjacent field to create a firebreak." (Robinson, "A Theory of Justification," 291)

is acting justifiably since she is acting to protect another person's property from (what she takes to be) unlawful destruction. Suppose that Q succeeds in putting out P's fire. As a consequence, no firebreak is created and the town is significantly damaged by the oncoming forest fire.

2.1.4.1.3 Objective View of Good Action. Was Q's act justified? Q had every reason to believe it was. More importantly for our purposes, was Q's act good? It was certainly good subjectively, i.e., it was motivated by good (honorable, praiseworthy) intentions. However, the act was not objectively good because it did not have a beneficial result. If the first disputed proposition states only that justified actions must be subjectively good, then there is no inconsistency in saying that both P's action and Q's action were justified.⁶⁵ Such a subjective interpretation of the first disputed proposition would not entail the first corollary. In order to explain the intuitions of those who hold the first corollary, justified actions must be objectively good. Accepting an objective conception of an action's goodness leads quickly to the conclusion that it isn't possible for both P and Q to be justified when their actions conflict. If P's act is objectively good (i.e., would have beneficial results), then it can't be objectively good for Q to interfere with P's act (i.e., to prevent those beneficial results). Similarly, if Q's act of interference is objectively good, then P's original act can't be objectively good. Hence, on an objective conception of an act's goodness, it is impossible for two conflicting acts to both be good. Therefore, it is impossible for two conflicting acts to be justified.⁶⁶

⁶⁵ Husak writes, "If Jones' attempt to kill Smith is justified because he reasonably believes that he is justified, as subjectivists contend but objectivists deny, then conflicts of justification almost certainly occur." (Husak, "Conflicts of Justifications," 50)

⁶⁶ Accepting the disputed proposition that justified acts are positively good is not necessary strictly-speaking in order for this argument to work. In footnote 46 of "Conflicts of Justifications," Husak suggests that one could achieve the same result by denying the possibility of conflicting permissible acts. However, such a position would require an exclusive, all-things-considered notion of permissibility on which, if act X

2.1.4.2 Mutual Exclusivity of Justification and Excuse. The second corollary of the received view is that it is impossible for an act token to be both justified and excused. The idea is that if an act is justified, then it is not wrongful all-things-considered. But if an act is justified and therefore not wrongful, then there is nothing that needs to be excused. Therefore, a justified act cannot also be excused.⁶⁷ To be persuasive, this argument requires an implicit premise; in particular, it relies on a version of the received view which includes the second disputed proposition, i.e., the claim that all excused acts are wrongful. Now the argument is much clearer. It is impossible for an act to be both justified and excused because justified acts are not wrongful while excused acts are. Since the same action token cannot be both wrongful and not wrongful, the same action token cannot be both justified and excused.

2.1.4.3 Act-Oriented vs. Actor-Oriented. The third corollary of the received view is that justification is “act-oriented” while excuse is “actor-oriented.”⁶⁸ In other words, when determining whether an act is justified, one need only look at the circumstances of the act; one need not inquire about attributes pertaining to the actor. Alternatively, when determining whether an act is excused, an evaluation of the act itself will not help; rather, what is needed is an investigation of whether the actor suffers from an excusing condition. This corollary follows from the received view if it includes the third disputed proposition, i.e., the claim that excuses are grounded in characteristics of the actor. If justified acts are *prima facie* wrongful acts that are actually not wrongful all-

is permissible, then conflicting act Y could not be permissible and vice versa. Either way, an exclusive notion of some kind has to be in play for the argument to succeed.

⁶⁷ This logical incompatibility between justification and excuse in combination with the separate claim that the question of justification is conceptually prior to the question of excuse is known as the serial view of moral defenses. Robinson is the originator of the serial view of legal defenses. See Paul H. Robinson, “Criminal Law Defenses,” *Columbia Law Review* 82 (1982): 232.

⁶⁸ For instance, this view is explicitly espoused by Robinson. See Robinson, “A Theory of Justification,” p. 289.

things-considered, then what is important in determining justification is an evaluation of the act (e.g., its wrongfulness), not an evaluation of the actor. On the other hand, if excuses are grounded in characteristics of the actor (as the third disputed proposition maintains), then what matters for excuse is not an evaluation of what the actor did, but of the actor herself.

2.1.4.4 Summary. At this point there are a lot of claims in play as well as a lot of stipulated terminology. Below I present a table that is intended to help the reader keep track of all of the terms I am using as well as the relationships between them.

Table 1: Variations of the Received View

<i>Minimal content</i> – those claims about justification and excuse that are found in all variations of the received view	<i>disputed propositions</i> – claims about justification and excuse that are found in some but not all variations of the received view	<i>corollaries</i> – other commonly encountered propositions that can be derived from specific disputed propositions
MCJ: A <i>prima facie</i> wrongful act is justified only if the act is not wrongful all-things-considered.	DP1: All justified acts are positively good rather than merely not bad.	C1: It is impossible for two conflicting acts to be justified.
MCE: A <i>prima facie</i> wrongful act is excused only if the actor is not blameworthy for so acting (for reasons other than the act's permissibility).	DP2: All excused acts are wrongful.	C2: It is impossible for an act token to be both justified and excused.
	DP3: All excuses are grounded in characteristics of the actor.	C3: Justification is "act-oriented" while excuse is "actor-oriented."
	DP4: All excuses arise from lack of responsibility	

2.2 Casting Doubt on the Disputed Propositions and Corollaries. In this section, I will show that the corollaries of the received view may be useful generalizations that work well in a large number of cases, but none of them accurately accounts for the full range of cases in which we typically count behavior to be justified or excused. So, I will not be “refuting” these claims so much as I will be trying to show that they are inconsistent with our typical judgments regarding what conduct is justified and what conduct is excused. As a result of casting doubt on the corollaries, I will show that the disputed propositions that spawned them are also problematic.

2.2.1 Problems with the Third Corollary. Let’s go in reverse and begin with an examination of the third corollary, i.e. the claim that justification is focused on acts (i.e., act-oriented) and excuses are focused on actors (i.e., actor-oriented).

2.2.1.1 Grammatical Observation. First, allow me to speculate that adherence to this view may be generated (at least in part) by grammatical patterns in the way we typically use the words “justified” and “excused” in English. It is indeed customary for English-speakers to say that an act is justified rather than a person.⁶⁹ Similarly, it is more common to say that a person is excused rather than an act. But these habits of sentence construction do not by themselves support an inference to the third corollary of the received view, especially if our practice regarding excuse and justification runs contrary to that inference. That is precisely what I intend to show.

2.2.1.2 Type of Act Relevant to Determinations of Excuse. To begin with, we should notice that it is often impossible to determine whether an actor is excused without

⁶⁹ It is true that we sometimes say that A was justified in doing X. But even in this case, one could argue that the true object of justification is X, not A. See chapter 3 for an extensive discussion of the uses of “justification” and “excuse” in ordinary language.

reference to the nature of the act that was performed. This is because it is rare for a person to have what might be called a “blanket defense,” that is, an excusing condition that exonerates the actor no matter what act is performed. For example, while a kleptomaniac may have an excuse for a given instance of shoplifting, she will not necessarily have an excuse for an instance of assault as well.⁷⁰ The mental disorder that impairs the kleptomaniac’s self-control with respect to instances of shoplifting does not (usually) extend to instances of other kinds of wrongdoing as well. Hence, we will often need to know what kind of action was performed in order to determine whether the actor is excused.

A proponent of the third corollary would concede that in most cases it is impossible to determine whether an actor is excused without knowing what sort of act she is accused of, but that was never in doubt. The third corollary doesn’t deny the need for an initial accusation of wrongdoing; the third corollary merely denies that we need to look into the circumstances of the act insofar as we are interested in determining whether the actor has an excuse for her *prima facie* wrongful conduct. While I agree that the accusation is logically prior to the defense, the point still stands that a description of the act itself is essential to any determination of whether relevant excusing conditions existed at the time of the act.

2.2.1.3 Duress as Counterexample. There are other occasions when examining the circumstances of the act is crucial to determining whether an actor is excused. Take duress, for instance. It is widely recognized that a person who commits a wrongful act under the pressure of coercive threats is excused for that wrongdoing (as long as the

⁷⁰ Husak makes a similar point in the legal context. See Douglas N. Husak, “The Serial View of Criminal Law Defenses,” *Criminal Law Forum* 3 (1992): 389.

wrongdoing isn't grossly disproportionate to the threatened harm). So for example, if a bank robber threatens to break a bank manager's leg unless she reveals the combination to the bank's vault, we would normally judge the bank manager to be excused if, under this kind of coercive pressure, she revealed information which she otherwise had a duty to keep secret. However, when we make the determination to excuse the actor in this kind of case, what we need to investigate is not the actor but rather the circumstances of the act. In this kind of case, we can assume that the bank manager's personal characteristics do not differ significantly from other members of the population. What affords the bank teller her excuse are the coercive *circumstances* of her act.

A proponent of the third corollary might respond that the characteristics of the actor are indeed the primary factor that is relevant in our moral evaluation of what the bank teller did. When she was credibly threatened with serious bodily injury, the bank teller naturally became fearful, and it is the presence of this overpowering fear which made it impossible for the bank teller to make the right decision in the situation described. Hence, it is indeed the state of the actor (i.e., her fear) that is relevant in determining the excuse of duress after all.

While it may be true that fear overwhelms the decision-making abilities of some victims of coercive threats, there is no reason to assume that this is *always* the case. It is certainly *possible* that the bank teller remains calm when faced with the threat of bodily injury and simply makes a rational judgment to comply with the bank robber's demands. If the bank manager would still be excused even though she made a calm, rational decision to comply with the robber's instructions, then the excuse of duress involves investigating the circumstances of the act rather than characteristics of the actor. What

matters in cases of duress is not what the actor was feeling when she chose to accede to the robber's demands, but the nature of the coercive threat itself – its credibility, its severity, whether it could be escaped or avoided, etc. These factors are circumstances of the act, not characteristics of the actor. Thus, the third corollary to the received view does not accurately describe the way we commonly use and understand moral defenses.

2.2.1.4 Facts about the Actor that are Relevant to Justification. Even if the third corollary doesn't accurately describe our use of excuses, perhaps it does accurately describe our use of justifications. Is it the case that one need only examine the circumstances of the act to determine whether an act is justified? First, it depends on whether the beliefs and motivations of the actor count as circumstances of the act. Almost all theorists agree that actors who are unaware of justifying circumstances or who only accidentally achieve a positive result are not justified.⁷¹ Investigation of the actor's mental states does not seem to be what theorists generally have in mind when they say that determining justification depends only on an investigation of the circumstances of the act. Second, suppose that one could establish that, due to some mental defect, a particular actor could not have anticipated the consequences of her action or could not have understood the nature of the justifying circumstances. Surely evidence of mental defects and incapacities is related to an investigation of the actor not the act (otherwise insanity would not count as an excuse). However, this kind of evidence would be relevant to a determination of justification. If the actor could not have been aware of the justifying circumstances or was unable to foresee the consequences of her action, her act

⁷¹ Robinson, who is a thorough-going objectivist, is a notable (but lonely) exception. For a recent affirmation of this position (which he has maintained in numerous publications for decades), see Paul H. Robinson, "Justification Defenses in Situations of Unavoidable Uncertainty: A Reply to Professor Ferzan," Law and Philosophy 24 (2005) 775-784.

would not be considered justified. Hence, if evaluation of the actor's knowledge and intentions is required in order to establish a claim of justification, then the third corollary fails for justifications as well as excuses.

2.2.1.5 Casting Doubt on the Third Disputed Proposition. Notice that the considerations we have used to cast doubt on the third corollary to the received view would cast an equivalent degree of doubt on the disputed proposition from which it was derived, namely, the proposition that excuses are grounded in characteristics of the actor. If the circumstances surrounding the act are sometimes the determining factor rendering an actor excused for her act, then it is not true that all excuses are grounded in characteristics of the actor. It is worth pointing out that the same considerations would also cast doubt on a related supposition, namely, that the existence of an excuse depends on the actor experiencing abnormal or debilitating psychological conditions or events.⁷²

2.2.2 Casting Doubt on the Second Corollary. The second corollary to the received view states that an act token cannot be both justified and excused. This viewpoint is motivated by the disputed proposition that all excused acts are wrongful. This corollary, like the third corollary, is also vulnerable to counterexamples. I will present three such cases. Each involves self-defense – a defense that is often taken to be the paradigm case of justification – along with an added element which normally renders the actor's behavior excused. A raises a gun at B with a clear intent to shoot at B. B raises her own gun and fires first in an effort to protect herself. On most theories, B's

⁷² H.L.A. Hart expresses a position approaching this one when he writes, "But where killing (e.g. accidental) is excused, criminal responsibility is excluded on a different footing [from that of justification]. What has been done is something which is deplored, but the psychological state of the agent when he did it exemplified one or more of a variety of conditions which are held to rule out the public condemnation and punishment of individuals." H.L.A. Hart, Punishment and Responsibility (Oxford: Clarendon Press, 1968), 13-14.

shooting of A would be justified. But now let's add different elements to the example and see whether it is impossible for B to also have an excuse for shooting B. Variation #1: Suppose B is five years old. It is true that B fired in self-defense, but it is also true that B is excused for her behavior due to her extreme youth.⁷³ Variation #2: Suppose B is delusionally insane and believes A to be the anti-Christ who will destroy the world unless he is killed. In this case, it is true that B is firing in self-defense, but he is also firing because of his delusional belief that killing A is necessary to save the lives of everyone on Earth. B is justified for firing in self-defense, but she also seems to have an excuse of insanity available to her. Variation #3: Suppose that C had placed a loaded gun to B's head and had convincingly threatened her that if she did not shoot A, C would shoot and kill B instead. In this case, it is true that B is firing against A in self-defense, but it is also true that B is being coerced to shoot A. So, once again, B has both a justification and an excuse for her shooting of A.

2.2.2.1 Infancy. An opponent might argue that Variation #1 can be eliminated from consideration if we are careful. After all, either five-year-old A has all the relevant mental capacities to comprehend the need to defend herself, the likely consequences of shooting at A, and the moral gravity of those possible consequences, or she does not have those mental capacities. If she does possess them all to the required degrees, then her shooting of A is justified. After all, one's age is itself of no intrinsic moral importance. The reason we normally take youth into consideration in our moral evaluations is that it is highly correlated with the development of important mental faculties that are relevant to

⁷³ This example is employed by Douglas Husak on page 387 of "The Serial View of Criminal Law Defenses." (See footnote 70 above.) While this example is perfectly persuasive in the legal context, we will see that it may be less so in the moral context.

responsible moral choice.⁷⁴ If this particular five-year-old is an early-bloomer and the relevant moral faculties were present in her at the time of the shooting (even though, we may assume, they are not present in most five-year-olds), then her act is justified. If those faculties were absent in this particular five-year-old (as in most others), then the child cannot be held responsible for her act, and the act is excused. In either case, though, the child in this variation is not *both* justified and excused – or so the opponent would allege. I think this objection relies on a forced choice between options that are not mutually exclusive. I think it is reasonable to expect that a child might be able to comprehend the need to defend oneself and may understand that shooting her attacker would serve that purpose without fully comprehending all of the other morally relevant aspects of firing her gun. For instance, A might think that firing the gun will only temporarily incapacitate the aggressor. If it is plausible that a child might understand that firing a gun at an aggressor would protect herself without understanding the full causal and moral ramifications of shooting another human being, then it is still possible that the

⁷⁴ Of course, as a matter of practice, we do not always excuse the young simply because of their lack of cognitive development. We may believe that life experience is an important component of sound moral judgment such that, even when a person's mental equipment is functioning at normal levels, one cannot be expected to make responsible choices without a certain amount of experience. And of course, experience comes with age. This would still be a desert-based reason for excusing the young. Alternatively, we may excuse the young for reasons that have nothing to do with their desert. For instance, we may have subconscious reasons for excusing the young. We may simply not be able to stomach the idea of inflicting the cruelty of punishment on children because we are biologically programmed to protect children and empathize with them. These evolutionary drives result in an increased subconscious desire to forgive children. A more plausible story, though, is that we excuse children for their wrongdoing for policy reasons. We recognize that young people are more likely to make significant changes to their behavior and thought patterns (i.e. their characters) over the course of their lives than adults are. So, even though a young person has committed a wrongful act, the likelihood that the offender's personality will change and the young person will develop into a responsible citizen outweighs the likelihood that they will offend again. In other words, society sees it to be in its own long-term interest to excuse children. Perhaps an even more plausible story is that it would just be too difficult to reliably determine which children have the requisite mental capacities for moral responsibility and which do not. Therefore, we have adopted a blanket policy of excusing them all. For a discussion of the interplay between moral and policy grounds for a criminal defense of Infancy, see Gerry Maher, "Age and Criminal Responsibility," The Ohio State Journal of Criminal Law 2 (2005): 493 – 512 as well as the response provided by Kimmo Nuotio, "On Becoming a Responsible Person," The Ohio State Journal of Criminal Law 2 (2005): 513 – 520.

child's act would be justified as an act of self-defense while also excused due to the child's incomplete comprehension of her act. However, for the sake of expediency, I'm willing to concede this point to my opponent and divert our attention instead to the other two Variations which seem to present stronger counterexamples.

2.2.2.2 Overdetermination of Reasons. Variations #2 and #3 are not as easy to dismiss because they both involve an *overdetermination* of reasons for action.⁷⁵ By that, I mean that in both of these situations, B has more than one reason to shoot A. Perhaps she is shooting A *solely* because of the desire to defend herself against A's attack, i.e., she is completely unmotivated by the mental delusion she suffers from (in Variation #2) or the coercive threats made against her (in Variation #3). If self-defense is her *sole* motivation, then I think we would agree that the act is only justified and not excused. But motives are not always so easily separable. It seems plausible to believe that human beings sometimes take an action for more than one reason. For example, I stopped at the bank today *both* because I wanted to access my safety deposit box *and* because I wanted to deposit a check. There seems to be nothing wrong with saying that I had two reasons for going to the bank. If so, then why not say that B had two reasons for shooting A in Variations #2 and #3? If it is possible that B acted for more than one reason in each case (as I think it clearly is), then these two counterexamples succeed in demonstrating that the same action token can be both justified and excused.⁷⁶ This refutes the second corollary to the received view. Notice that if an excused act can also be justified, then

⁷⁵ Husak also discusses the possibility of overdetermination. See Husak, "The Serial View...", 390. See also Douglas N. Husak, "On the Supposed Priority of Justification to Excuse," *Law and Philosophy* 24 (2005): 575.

⁷⁶ In a similar vein, Hall writes, "It seems evident that even if these concepts [justification and excuse] were clear, precise, and sharply distinguished, both of them would be operative in many situations." (Hall, "Comment on Justification and Excuse," 640)

such excused acts are not wrongful according to the received view. Hence, this argument also serves to cast doubt on the second disputed proposition, which claims that all excused acts are wrongful.⁷⁷

2.2.2.3 Does Non-Exclusivity Threaten the Project? One might think that accepting this previous point would be undesirable for someone who is interested in exploring the distinction between justification and excuse. After all, if some action tokens can be both justified and excused, then one might conclude that there can be no viable, sufficiently clear distinction between justification and excuse; if the two categories overlap, then it will be impossible to develop anything like a clean distinction between the two. This concern is ill-founded. What we are interested in is not a way of separating *cases* of justification from *cases* of excuse. Rather, we are interested in clearly describing the difference between those *factors* that render an act justified and those *factors* that render an act excused. The possibility that some act tokens are both justified and excused does not threaten this project.

2.2.2.4 Casting Doubt on the First Corollary. Next we turn to the first corollary of the received view which states that it is impossible for two conflicting actions to both be justified. Recall that this view arises from the first disputed proposition – the proposition that justified acts are positively good – along with an objective conception of what makes an act good. However, the understanding of justification inherent in this corollary seems to run afoul of certain examples of the way we are accustomed to using the term justification.⁷⁸

⁷⁷ We will discuss the second disputed proposition in greater detail below in sections 2.3.1 – 2.3.3.

⁷⁸ The following examples are adapted from those found in Joshua Dressler, “New Thoughts about the Concept of Justification in the Criminal Law,” UCLA Law Review 32 (1984): 61-99. In particular, see pages 82, 88, 94, and footnote 168.

2.2.2.4.1 Conflicting Self-Defense Claims. Case 1: Suppose X is rushing her father to a nearby hospital because the father is suffering from a heart attack, and X is aware that prompt medical care is essential for her father's survival. In her rush to get to the hospital, X violates the speed limit and (cautiously) runs red lights along the way. A police officer observes this unlawful behavior and instructs X to pull her car over. X ignores the officer's instructions, and after a few minutes (and a few more red lights), the officer determines that it is her duty to stop the vehicle before innocents are hurt. The officer forces X's car off the road and brings it to a stop (without serious risk of injury to the people within the car). Here again we have a case of conflict – the officer is trying to prevent X from doing what she is trying to do – yet both parties seem to be justified. X is justified in doing what is necessary to save the life of her father without unnecessarily risking harm to others. On the other hand, the officer seems justified in carrying out her duty to prevent traffic violations.

Case 2: We normally say that a soldier's shootings (or attempted shootings) of belligerent enemy soldiers during wartime are justified. But if this is the case, then it is not too difficult to create a case of conflict where both parties are justified. Soldier A has been given the task of taking and securing a particular hill. Soldier B has been given the task of defending the same hill against attack. By shooting at each other, both soldiers are using lethal force in an attempt to prevent the other from reaching his objective. Hence, we clearly have a case where two parties' actions are in conflict yet their *prima facie* wrongful behavior is commonly deemed justified. (Notice that in this case, it would not be difficult to flesh out the example in such a way that neither soldier's actions are

objectively good. That is, we could easily rig the case so that neither action will be beneficial if successful.)

Case 3: Suppose Driver is driving a heavily-laden 18-wheel semi along a one-way, one-lane mountain road. (The sheer face of the mountain is on one side of the truck and a steep drop-off is on the other.) Driver comes down around a curve (below the posted speed limit) and suddenly sees a man who is clearly alive but immobile in the middle of the road. Driver knows that there is no way that she can stop in time to avoid hitting the man. She is also aware that, because of the narrowness of the road, the only alternative to hitting the man is driving off the road and plummeting down the side of the mountain (which would lead to her own certain death). She must choose whose life will be saved, her own or that of the man who lies in the road. In choosing to save her own life, she has no choice but to run the man over. The man in the road observes a large truck barreling toward him and realizes that his life is in grave danger. In order to save his own life, he picks up the disintegration rifle which is (conveniently) lying next to him and aims it at the truck. Seeing that the man lying in the road intends to kill her, Driver pushes down on the accelerator in order to pick up speed, hoping that she can run over him before he can pull the trigger. Here we have another clear case of conflict where both parties are acting in self-defense against someone who innocently threatens his or her life. It is generally agreed that those who kill in self-defense are justified when there were no other options available to save one's own life. Therefore, we have another case where common usage would dictate that both parties are in conflict but both actions are justifiable. (Again, notice how awkward it would be in this case to suggest that either action will be objectively good or have beneficial results.)

Case 4: Suppose Swimmer S and Swimmer T are survivors of a ship that has recently sunk in the ocean. Both S and T see a plank of wood at the same time, and they both start swimming for it. They both reach it at the same time, and they simultaneously grab opposite ends of the plank. They quickly discover that the plank will not support both of them, and there are no other floatation devices available. Presumably, both S and T are justified in trying to shake the plank loose from the other's grip and take sole possession of it. If so, this is yet another example of a conflict in which both parties are justified. (Yet again, it seems strained to contend that either action will yield beneficial results.)

2.2.2.4.2 Potential Responses. If the proponent of the first corollary is to maintain her position, she must deny the intuitions and the common practice that support our judgments in all of these cases. In Case 1, the proponent could say that since X is trying to save a life, her action is objectively justifiable. Hence, the officer's attempt to stop her is not justified despite the fact that stopping the car is what the officer's training mandates in those circumstances (let's say). However, maintaining this position would require abandoning the commonly held position that an officer of the law is always justified in carrying out her duty in good faith. In Case 2, the proponent of the first corollary could maintain that only one of the combatants can be justified. Perhaps the proponent would insist that it is the one whose side is fighting justly.⁷⁹ Of course, it seems unlikely that all wars have one and only one side that is fighting justly. If there are some wars in which neither side is fighting justly (as seems highly plausible), then that would mean that soldiers fighting in such wars do not act justifiably when they harm enemy forces in battle. Such a view would seem to be dictated by the proponent's view

⁷⁹ Let's put aside whether "fighting justly" refers to just war aims, just combat practices, or both.

and violate common assumptions about justification. But intuitions regarding the justification of acts during wartime are likely to be fuzzy. Consequently, we will not rest our case here.

In Case 3 and Case 4, both parties are in a struggle for survival which only one of them can win. I assume that neither of the parties in either case is responsible for the situation they find themselves in and that neither of the parties is morally required to sacrifice her life for the other. In these two cases, the proponent of the first corollary seems to have nowhere to hang her hat. There is no way to differentiate the two parties so that one of them can be deemed the one who is objectively justified. The proponent of the first corollary has no choice but to insist that neither party is justified in trying to save his or her own life. This conclusion would violate the common practice of treating self-defense as justifiable. Hence, we may conclude that the first corollary fails to adequately account for our common usage of “justification” and “excuse.” To the extent that Cases 3 and 4 cast doubt on the first corollary, they also serve as counterexamples for the first disputed proposition which asserts that justified acts are objectively good.⁸⁰

2.2.2.5 Casting Doubt on the Fourth Disputed Proposition. All that remains now is to consider the fourth disputed proposition, i.e., that excuse arises from lack of responsibility. This was Austin’s original claim about the nature of excuse, and it is perhaps the most intuitively plausible of the bunch. This view seems to receive unanimous confirmation from the most obvious examples of excuse that come to mind – insanity, infancy, accident, compulsion, and duress. Surely one cannot be held responsible for those wrongful acts one performs while insane (assuming the wrongful

⁸⁰ Notice that all four of the cases of conflicting justifications relied on the fact that self-defense is typically considered to be an instance of justification. Any theorist that is wedded to the first disputed proposition or the first corollary could maintain consistency by rejecting self-defense as a justification.

act is appropriately related to the type and severity of the insanity). Similarly, young children cannot be held responsible for their wrongful behavior. It doesn't seem right to hold people responsible for the things they do by accident, and it is even clearer that those whose bodies move as a result of physical, psychological, or physiological compulsion (e.g., being shoved, acting under hypnotic command, reacting reflexively, respectively) cannot be held responsible for what they do. Finally, if someone threatens you with serious harm unless you perform a wrongful act, surely you are not responsible for what you are forced to do.

2.2.2.5.1 Conceptual Dilemma. However, things may not be as simple as these appearances suggest. Notice that in many of the cases mentioned above, saying that one can't be held responsible is practically synonymous with the claim that one can't be blamed, and if lack of responsibility amounts to nothing more than blamelessness, then the fourth disputed proposition is vacuous because it adds nothing to what is already contained in the minimal content of the received view. But I think most theorists who accept the view that excuses arise from lack of responsibility take that claim to be an explanation for *why* it is inappropriate to blame in such cases. If so, then the meaning of the phrase "can't be held responsible" must mean something other than just that the person can't be blamed. Although there is little doubt that the notions of blame and responsibility are closely linked, if the fourth disputed proposition is to be informative, we will need a more precise idea of what is meant by the term "responsibility" in the context of moral defenses.

2.2.2.5.2 Hart on 'Responsibility'. There is a great deal of ambiguity in our usage of the term "responsible" and its cognates in ordinary language. H.L.A. Hart

writes a little story to illustrate the variety of different ways that we use the word “responsible.”

As captain of the ship, X was responsible (1) for the safety of his passengers and crew. But on his last voyage he got drunk every night and was responsible (2) for the loss of the ship with all aboard. It was rumoured that he was insane, but the doctors considered that he was responsible (3) for his actions. Throughout the voyage he behaved quite irresponsibly (4), and various incidents in his career showed that he was not a responsible (5) person. He always maintained that the exceptional winter storms were responsible (6) for the loss of the ship, but in the legal proceedings brought against him he was found criminally responsible (7) for his negligent conduct, and in separate civil proceedings he was held legally responsible (8) for the loss of life and property. He is still alive and he is morally responsible (9) for the deaths of many women and children.⁸¹

Hart identifies five different senses of the word “responsibility”: role-responsibility, causal-responsibility, legal liability-responsibility, moral liability-responsibility, and capacity-responsibility.⁸² Role-responsibility relates to those duties one is expected to perform as a result of one’s station in some social group. One is said to be responsible in this sense if one is known as the type of person who is concerned about performing one’s duties correctly and appropriately and who performs those duties reliably. We invoke this sense of “responsible” when we say, for example, that someone is a responsible citizen or a responsible employee. We also invoke this sense of “responsible” when we say, for example, that the prison guard is responsible for making sure the prisoners don’t escape. Also noteworthy is the fact that this seems to be the only sense of “responsible” whose antonym is “irresponsible.” The first, fourth, and fifth appearances of “responsible” in Hart’s story correspond to this sense of the word. Causal-responsibility relates to a judgment of priority or importance among causal factors influencing some specific event. The person that is singled out as the cause of an event is said to be

⁸¹ H.L.A. Hart, Punishment and Responsibility (Oxford, Clarendon Press: 1968), 211. [Numeration added.]

⁸² *ibid.*, 211-230.

“responsible” for the event in this sense. We invoke this sense of “responsible” when we say that someone is responsible for a specific harmful act or state of affairs. For example, when we say that she is responsible for the death of her mother, we are saying that she (i.e., her actions or inactions) are the morally relevant causes of her mother’s death. The second and sixth appearances of “responsible” in Hart’s story correspond with this causal sense of the word. Legal liability-responsibility (or just legal liability) involves a judgment that an individual is eligible to have a legal punishment, a legal penalty, or the payment of legal compensation enforced upon her. These days, this sense of “responsibility” is much more frequently encountered in the guise of the term “liability”; it is much more common to hear it said that someone is (legally) liable for something (e.g., damages) than that someone is (legally) responsible for something. The seventh and eighth appearances of “responsible” in the story above correspond to the legal version of liability-responsibility. Moral liability-responsibility (or just moral responsibility) involves the judgment that someone is deserving of blame for something she has done. As we noted in the previous paragraph, we commonly invoke this sense of “responsibility” when we say that someone can or cannot be held responsible for doing something. For example, it is this sense of “responsible” that appears in the following sentence: “You can’t hold parents responsible for what their children do.” In Hart’s story above, the ninth appearance of “responsible” corresponds to the moral version of liability-responsibility. Finally, capacity-responsibility involves the judgment that normal moral evaluation is appropriate for a given person. This judgment usually entails assessing the person’s mental capabilities with regard to comprehension of moral norms, practical reasoning skills, and conscious control over physical behavior.⁸³ Generally, if

⁸³ Hart writes, “In most contexts... the expression ‘he is responsible for his actions’ is used to assert that a

any of these mental faculties are significantly below normal functioning levels, we commonly say that the person is “not responsible for her actions” or “not responsible for her own behavior.” This kind of language is the hallmark of capacity-responsibility. The third appearance of “responsible” in the story above corresponds to this sense of the word.

Hart’s discussion of responsibility and its different usages in ordinary language is instructive in that it helps us focus on what the fourth disputed proposition must mean by the term “responsibility.” It vindicates our earlier concern that, at least in some usages, “responsible” is synonymous with “blameworthy.” Since we are interested in evaluating a version of the fourth disputed proposition that is stronger than the minimal content of the received view, we can (temporarily) eliminate moral liability-responsibility from consideration. Since our subject is moral defenses, it is apparent that legal liability-responsibility will be of no help to us either. Causal-responsibility can’t be what the fourth disputed proposition is about since no one denies that the actor is causally responsible when she is excused due to insanity, infancy, accident, or mistake. Role-responsibility cannot be what we are looking for either. After all, when a theorist says that excuses arise from lack of responsibility, the theorist does not mean that those who are irresponsible are excused!

2.2.2.5.3 Capacity-Responsibility. Consequently, in order for the fourth disputed proposition to have explanatory power – to have content beyond what is expressed by the minimal content of the received view – it must refer to what Hart calls capacity-responsibility. So, the fourth disputed proposition states that excuses arise from

person has certain normal capacities. ... The capacities in question are those of understanding, reasoning, and control of conduct: the ability to understand what conduct legal rules or morality require, to deliberate and reach decisions concerning these requirements, and to conform to decisions when made.” (*ibid.*, 227)

a lack of capacity-responsibility, i.e., from not being responsible for one's own actions. In Hart's terms, a person lacks capacity-responsibility if that person exhibits abnormal mental faculties of the sort that render one ineligible for moral evaluation. The idea is that those who are psychologically deficient in the relevant ways do not count as legitimate moral agents. Thus, it is inappropriate to blame them in much the same way that it is inappropriate to blame animals.⁸⁴ Because of their psychological limitations, it is illegitimate to expect animals to be able to conform their behavior to moral standards. Following the same logic, if a person suffers from a mental defect which makes it impossible for her to conform her behavior to moral norms, then that person will be excused when she commits otherwise wrongful acts. This is the intuition behind the fourth disputed proposition.

However, if Hart's mental abnormality view of capacity-responsibility is correct, then we have already refuted the fourth disputed proposition. Recall that we have already refuted the third corollary (i.e., that excuses are "actor-oriented") along with the disputed proposition that supported it (i.e., that excuses are grounded in characteristics of the actor). The arguments we used against those positions will work just as well against the fourth disputed proposition if lack of responsibility is understood in terms of mental abnormality.

2.2.2.5.4 Hall-Inspired Disjunctive Account. So, if the fourth disputed proposition is to be anything more than a nonstarter, we will need to see whether our understanding of "lack of responsibility" can be expanded in some way to include more

⁸⁴ Sanford Kadish writes, "Insane people are *just* beyond responsibility, and that is why they are so disturbing. Nevertheless, blaming them commits an anomaly (we would say an 'injustice' as applied to people) similar to that entailed in blaming a rock for falling or a dog for barking." Sanford H. Kadish, "Excusing Crime," California Law Review 75 (1987): 280.

than just mental defects and diseases. Perhaps we can find a blue-print for doing this in Hall's work. Recall that in Hall's version of the received view, excuses arise from either incapacity or extreme pressure.⁸⁵ Perhaps we could use these ideas to support a theory of responsibility that could be used as the basis for the fourth disputed proposition. It might go something like this: an individual is not responsible for her actions if she suffers from some sort of incapacity *or* if she acts under extreme pressure. This disjunctive account of the meaning of "lack of responsibility" would subsume Hart's mental abnormalities approach under the auspices of "incapacity" while also accommodating cases of excuse that involve unusually stressful situations, like duress.

Since mental abnormalities inherent in infancy and insanity would presumably count as "incapacities," we can see that insanity, infancy, and duress could be handled relatively easily on the Hall-inspired account. Psychological compulsions that result from brain defects or mental diseases would also clearly count as mental abnormalities and would probably also fall under the category of "incapacity." Although instances of physical and physiological compulsion do not result from mental abnormality, they also seem to represent a certain sort of incapacity. If someone breaks a lamp because she was shoved into it, then she was most likely incapable of doing otherwise. The same is true if someone breaks a lamp because her leg jerked out reflexively when hit with a rubber mallet. But what about the other common examples of excuse: accident and mistake? Can our new account deal with these other examples as easily?

2.2.2.5.5 Mistake. Let's start with mistake. In order to create a case of mistake, we will adapt the canonical example of justification. P is aware of the approaching forest fire, sees the need for a firebreak, and burns the farmer's field to save the town.

⁸⁵ Hall, "Comment on Justification and Excuse," 269. See text accompanying footnote 56 above.

However, just as the forest fire is about to reach the firebreak, a freak (i.e., unpredictable) rainstorm douses the forest fire. In this version, creating the firebreak wasn't necessary after all. Since P had no way of knowing that it would begin to rain, perhaps we can think of P's mistake as a kind of incapacity since it wasn't possible for her to have discovered her error. But what if it had been possible for P to discover her error? Let's alter the scenario yet again. Suppose she saw the approaching fire and assumed that the darkness in the sky was due to rising smoke. In fact, though, if she had been more careful, she would have realized that the darkness in the sky was actually caused by dark thunderheads. Had she noticed the dark clouds and seen that they were approaching even faster than the fire, she would have realized that there was no need for a firebreak. In this example, P is overly hasty in her judgment that a firebreak is needed, but (let's say) she is not negligent or reckless. My intuitions are that she is still excused for burning the farmer's field, but now it is harder to classify her action as being caused by an "incapacity." After all, in this case P had the capacity to prevent her mistake. Maybe we could interpret "incapacity" more loosely here so that false beliefs themselves incapacitate, regardless of whether it would have been possible to avoid those false beliefs. Along these lines, we might say that, given P's false beliefs, she was incapable of refraining from burning the farmer's field. But this seems to be quite a stretch. After all, even given her false beliefs, she still could have avoided burning the farmer's field by simply being less altruistic. Surely it is not right to say that P was *incapable* of just running away from the fire and leaving the town to fend for itself. I conclude that cases of mistake don't fit well with the model of incapacity.⁸⁶

⁸⁶ Some might be tempted to argue that it is not incapacity that relieves P of responsibility when she is mistaken about the necessity of creating a firebreak. Rather, it is the extreme pressure of the situation that

2.2.2.5.6 Accident. There seem to be similar problems with accident. When I accidentally bump into someone on the street, there is no sense in which I was under extreme pressure. A partisan of the Hall-inspired account might be tempted to say that apparently I was unable to avoid colliding with the other pedestrian, otherwise I would have avoided her. Hence, there is incapacity, and this incapacity grounds the claim that I was not responsible for my action. Again though, this seems to be an uncomfortable stretching of the concept of “incapacity.” After all, surely it was *possible* for me to avoid the other pedestrian? All I had to do was pay greater attention to where I was going – or stop walking entirely and let the pedestrian walk around me! It seems that only a hard determinist can sincerely say that I was incapable of avoiding the pedestrian, but if we are determinists, incapacity comes easily; as far as a determinist is concerned we are incapable of doing *everything* that we don’t actually do. Surely, the Hall-inspired account does not intend that we are automatically excused for *all* our *prima facie* wrongful acts.

2.2.2.5.7 Responsibility for Actions Taken in Response to Coercive Threats.

So maybe using Hall’s ideas as the basis of an account of what it means to lack responsibility was on the wrong track after all. But in rejecting the Hall-inspired account, all we have done is cast doubt on that one *version* of the fourth disputed proposition; we have not cast doubt on the proposition itself. In order to do that, we need to find a problem with the whole idea that lack of responsibility is the foundation for excuses, and we need to do this independently of any specific account of what it means to lack

relieves P of responsibility for her actions. However, I don’t think this suggestion will pan out. We can easily imagine that P feels herself to be in no danger from the fire. (She has a car and is confident that she can outrun the flames when she needs to.) What exactly is the source of the pressure she is under? The pressure to do good? Again, concepts seem to be stretching uncomfortably.

responsibility. I think such an argument is possible. Consider a case of duress. A criminal threatens to break both D's legs unless D helps her steal a car. D succumbs to the threat and gives the criminal the assistance she asks for. The fourth disputed proposition claims that, since D is excused for what she has done, D must not have been responsible for her action. But now let's imagine a slightly different scenario. A criminal threatens to break both of E's legs unless E helps her steal a car. We can assume that E feels the same fear that D felt, but nonetheless E resists the threat and refuses to help the criminal. Is E responsible for her act of defiance in the face of extreme pressure? The obvious answer is that E is indeed responsible for her actions. Many would say she is deserving of praise for her bravely principled act. But how can we explain the asymmetry between the responsibility of D and E? They both faced the same coercive threat and felt the same fear. They were under identical amounts of pressure, so how can we explain why one is responsible for her action and the other is not? Perhaps we could explain it in terms of differences in the characters of D and E – D is morally weak-willed while E is strong. To avoid that possibility, let's now assume that D and E are the same person on different days. (Let's call this person DE.) On Monday DE succumbs to the threat, but on Tuesday DE resists. There doesn't seem to be anything left to explain why DE is not morally responsible for her behavior on one day but is responsible on another day except for the decision itself. But why should the decision DE makes be relevant to our evaluation of whether she is responsible for her actions? It seems to me that the right thing to say is that DE is a responsible moral agent both on Monday and on Tuesday. It is true that DE has an excuse for helping the criminal steal a car on Monday, but this is

not based on a lack of capacity-responsibility. DE's capacities were the same in both cases. Therefore, lack of responsibility isn't the basis of her excuse.

2.2.2.5.8 More Asymmetries. I suspect that similar cases of moral asymmetry can be constructed using accident and mistake. Suppose that on Monday J jostles a pedestrian walking down the street, but on Tuesday – in amazingly similar circumstances – J just barely manages to avoid jostling the same pedestrian. Why would it make sense to say that J is not responsible for her actions on Monday but she is on Tuesday? We can assume that there is no difference in her capacities on these two days, so what can be the basis of the claim that she lacks capacity-responsibility on Monday? The same goes for mistake. Suppose that on Monday, P creates a firebreak based on the *mistaken* belief that it is necessary to save a town, and on Tuesday, P creates a firebreak based on the *correct* belief that doing so is necessary to save a town. How can it make sense to say that P is responsible for her actions on Tuesday but not on Monday? These mysterious asymmetries of moral evaluation provide strong evidence that the fourth disputed proposition is the wrong way to think about excuses, regardless of which account of capacity-responsibility it employs.

Aside from the potential asymmetries, consider how strange it sounds to be told that P is not responsible for her actions when she (mistakenly) creates a firebreak to save a town. Consider how insulted she might be to be informed that she was not actually a moral agent when she was acting with the intention of saving lives and protecting property – that the moral value of her action was comparable to that of an animal's behavior. If mistakes are excuses, then this case seems to represent a clear

counterexample to the claim that excuses arise from lack of capacity-responsibility, casting severe doubt on the viability of the fourth disputed proposition.

2.2.2.5.9 Austin's Doubts. It may surprise some readers to learn that even Austin was dubious about the prospects of an account of excuse based solely on responsibility, despite the fact that his account is perhaps the most famous one to employ that notion explicitly! In a frequently ignored passage, Austin wrote, "If ordinary language is to be our guide, it is to evade responsibility, or full responsibility, that we most often make excuses, and I have used the word myself in this way above. But in fact 'responsibility' too seems not really apt in all cases: I do not exactly evade responsibility when I plead clumsiness or tactlessness, nor, often, when I plead that I only did it unwillingly or reluctantly, and still less if I plead that I had in the circumstances no choice: here I was constrained and have an excuse (or justification), yet may accept responsibility."⁸⁷ The fact that even the originator of the responsibility account of excuses thinks it probably won't pan out in the final analysis puts the final nail in the fourth disputed proposition's coffin, as far as I am concerned. In conclusion, either the fourth disputed proposition has no content beyond what is contained in the minimal content of the received view or it is vulnerable to counterexamples.

⁸⁷ Austin, "A Plea for Excuses," 8. The reservations that Austin expresses here – as well as his original formulation of the difference between justification and excuse – indicate that Austin may be using a different sense of "responsibility" than the one we have been assuming. Previously, we argued that if any sense of "responsibility" could support a definition of excuse beyond what is contained in the minimal content of the received view, it would have to be capacity-responsibility. In this quote, Austin seems to be using the sense of "responsibility" that is invoked when we accept or deny blame. This notion of responsibility seems more closely tied to Hart's moral liability-responsibility than it does to capacity-responsibility. If so, then Austin's account of excuses would reduce to the minimal content of the received view.

2.3 A Critical Examination of the Minimal Content as an Analysis. So far this chapter has demonstrated that all three corollaries of the received view and all four disputed propositions (on which the corollaries depend) fail to accurately describe our common understanding and usage of justification and excuse.⁸⁸ This leaves us with just the minimal content of the received view, i.e., the logical intersection of the statements of the received view that we examined at the beginning of the chapter. When all the disputed propositions are stripped away, only two propositions remain: a *prima facie* wrongful act is justified if and only if that act is not wrongful all-things-considered, and an actor has an excuse for committing a *prima facie* wrongful act if and only if the actor is not blameworthy for committing the act (for reasons other than the permissibility of the act).⁸⁹ In this section, we will critically examine the adequacy of this minimal statement of the difference between justification and excuse.

2.3.1 The Return of DP2. Notice that the minimal content is quite minimal indeed. In particular, it tells us next to nothing about the nature of excused acts. As far as the minimal content is concerned, excuse seems to be nothing more than a catch-all category intended to accommodate all the complete defenses that are not justifications. However, despite the sparseness of the minimal content, it may seem that the minimal

⁸⁸ One might object at this point that it has been unfair of me to hold what I called the four disputed propositions and the three corollaries up to such scrutiny. The basis of this objection would be that these propositions were never intended to be used as the basis of a careful analysis of the distinction between justification and excuse. That is, they were not intended to be able to account for every case. Rather, these statements represent mere illustrations or first approximations of the difference between justification and excuse. Although in some cases, I believe that this suggestion is demonstrably false, there is no need to quibble here. At the very least the results of the first half of this chapter will have served to remind readers not to overestimate the value of these generalizations.

⁸⁹ Notice that I have changed what were originally “only ifs” into “if and only ifs.” That is, I have changed what were merely necessary conditions into necessary and sufficient conditions. The reason for phrasing them as necessary conditions in the first place was to remain neutral regarding which disputed propositions to include. Since we have eliminated all of the disputed propositions, we will treat the minimal content as a theory in its own right. In order to explore the possibility that the minimal content is all we need for a successful analysis, it makes sense to treat its conditions as both necessary and sufficient, for the time being.

content entails the disputed proposition that all excused acts are wrongful (DP2). The reasoning would run as follows. The propositions of the minimal content guarantee us that all justified acts are not wrongful. The opposite proposition – that all excused acts are wrongful – is not explicitly guaranteed by the minimal content. But suppose that there is an excused act *Z* such that *Z* is not wrongful. If act *Z* is not wrongful, it is morally permissible for an actor *A* to perform *Z*. Suppose *A* performs *Z*. *A* cannot be blamed for performing *Z* because *Z* is permissible. But to offer as a defense that one's behavior was permissible is to *justify* that behavior. Therefore, if there is any *prima facie* wrongful act *Z* which is not in fact wrongful, then that act is justified rather than excused.⁹⁰ Hence, contrary to our initial assumption, there are no excused acts that are not wrongful; all excused acts are wrongful. Since we have already shown this view to be incorrect above, it is important that we diagnose what is wrong with this argument.

In light of the counterexamples we gave to the second corollary, one logical flaw of the previous argument might be apparent. The argument assumes that no justified act can also be an excused act. In section 2.2.2 above, we offered examples of act tokens that are both justified and excused. Thus, one spurious assumption in the previous argument is that if act *Z* is justified, it can't also be excused. But this doesn't really get us as far as we'd like. If this were the only thing wrong with the argument, then the argument's conclusion could be amended as follows: the only excused acts that are not wrongful are those acts which are also justified. Hence, any excused act that is not also justified is wrongful. Is this right? If not, where does the amended argument go wrong?

⁹⁰ Husak makes an argument similar to this one in the legal context. See Douglas N. Husak, "Justification and the Criminal Liability of Accessories," *Journal of Criminal Law and Criminology* 80 (1989): 499-501. We will examine this argument in greater detail below starting in section 2.3.3.6.

2.3.2 (Unjustified) Excused Acts that are not Wrongful. It would be a mistake to conclude that all excused acts that are not also justified are necessarily wrongful. As an example, consider what is perhaps the most common of excuses: inadvertence, or accident. You are walking down a crowded street and accidentally bump into a stranger. You say, “Excuse me,” and continue on your way. In this case, assuming you were not walking carelessly and didn’t intend to bump into anyone, you are morally excused for what you did. But, despite being excused, it doesn’t seem quite right to say that your bumping into the stranger was *wrongful*. After all, what you did was just an accident, a misstep, a mistake. So, even though what you did is an instance of excused behavior, there is reason to resist the implication that the behavior was necessarily wrongful.⁹¹

⁹¹ Husak considers a similar case and lends some support to the common sense view that accidental jostlings are not wrongful. He writes,

Certainly the speaker who asks to be excused after she accidentally jostles someone on a subway train would be dismayed to learn that her words imply that her act was unjustified and wrongful. More likely, she believes that she did nothing wrong at all. The theorist may be puzzled about how the speaker could believe an excuse to be appropriate in these circumstances, since no wrongful act was performed and so nothing remains to be excused. But as long as the criterion of accuracy is what speakers of English say, it is the theorist, and not the speaker of English, who should be puzzled. (Husak, “The Serial View...,” 381.)

Husak’s ultimate purpose in this quote is not perfectly clear to me. He may simply wish to point out the difficulties of maintaining the view that excused acts are wrongful in the face of contrary ordinary language evidence. On the other hand, he may hope to persuade his reader that ordinary language evidence has little intrinsic value since it leads to conceptual confusion. If it is the latter, then it seems to me that the confusion Husak points to is only apparent.

Assuming Husak means to suggest that there is confusion in ordinary language, his argument can be reconstructed as follows. Ordinary language tells us that accidental jostlings are excused. Ordinary language also tells us that accidental jostlings are not wrongful. But “since no wrongful act was performed... nothing remains to be excused.” Hence, the accidental jostling is not excused after all. Therefore, it appears that ordinary language leads us to say that accidental jostlings both are and are not excused, and this contradiction demonstrates that ordinary language evidence should not be relied upon to inform matters related to justification and excuse.

It seems to me that ordinary language is not the culprit here; rather, I suspect an equivocation. Husak’s argument (as I have reconstructed it) confuses *prima facie* wrongfulness with wrongfulness all-things-considered. Even though we may judge that the accidental jostling is not wrongful all-things-considered, that does not mean that the act was not *prima facie* wrongful. Hence, offering an excuse is still appropriate to explain why the *prima facie* wrongful jostling is actually not wrongful all-things-considered. Utilizing the distinction between acts which are *prima facie* wrongful and wrongful all-things-considered allows the judgments of ordinary language to remain consistent in this instance.

Can we find other examples of excused behavior that is not wrongful? I think we can. Take the case of a five-year-old who picks up a loaded gun, thinking it is a toy, and playfully fires it at a friend. The friend is gravely injured. Was the five-year-old's act wrongful? As in the case of the accidental jostling, ordinary language seems to resist that inference. The five-year-old was only trying to play with her friend and could not have suspected what would happen. If her action was completely innocent, how can it be wrongful? However, despite the fact that it doesn't seem right to call the five-year-old's action wrongful, there is nothing at all awkward about calling it excused. Other examples are also possible. Take physiological compulsion, for example. A doctor strikes your knee with a rubber mallet to test your reflexes. Involuntarily, the bottom of your leg kicks forward in an unexpected direction and strikes the doctor painfully in the shin. Again, clearly your behavior is excused in this case, and almost as clearly, it would be strange to say that what you did was wrongful. Finally, suppose you have promised to attend an uncle's birthday party. However, on the way to the party your car breaks down. (Assume that the breakdown of the car was not predictable and did not involve negligence on your part.) Since your car has broken down in a rural area, there is no bus or taxi service which could get you to the party, and you are unable to reach nearby acquaintances by phone to ask them to drive you. Clearly, in this situation, you have an excuse for breaking your promise, but it does not seem right to say that your failure to attend the party was *wrongful*.

2.3.3 Meaning of 'Wrongful'. The previous counterexamples demonstrate the importance of taking a closer look at what it means for an action to be wrongful. In chapter 1, we found it important to distinguish between acts that are *prima facie* wrongful

and those which are wrongful all-things-considered. An act that is *prima facie* wrongful is an act that might appear to resemble an act of genuine wrongdoing to an uninformed observer. So, for example, in the canonical example of justification, the burning of the farmer's field is *prima facie* wrongful because someone who lacked all the pertinent information about the circumstances might suspect that the act is an instance of arson. However, when all the facts are brought to light, it turns out that the act is not wrongful at all. That is, the act is not wrongful all-things-considered. Thus, it is the notion of wrongful all-things-considered that we need to examine more closely. DP2 claims that excused acts are always wrongful all-things-considered, but in the previous paragraph, I presented examples that seemed to contradict that claim.

What is the sense of wrongfulness that the adherent of DP2 has in mind when she claims that all excused acts are wrongful all-things-considered? Perhaps it is something like the following: a *prima facie* wrongful act is also wrongful all-things-considered unless there is a moral justification for performing the act. But such a conception of wrongfulness all things considered would be purely stipulative at best and circular at worst. It has been my assumption that the adherent of DP2 is claiming that the wrongfulness of excused acts is a feature that distinguishes them from justified acts. If the adherent of DP2 merely wishes to stipulate that all excused acts are wrongful, her view is not very interesting and can simply be ignored. Assuming that DP2 is a substantive claim rather than a stipulated one, what might this sense of wrongfulness be that allows us to distinguish excused acts from justified ones? As a first approximation, it seems safe to say that wrongful acts are those acts which (morally) should not be performed. But how can the adherent of DP2 identify such acts in a way that is not

stipulative or circular but which produces the desired result, namely that all excused acts are wrongful and all justified acts are not? We will take a short detour to investigate this question.

2.3.3.1 Consequentialist Sense of ‘Wrongful’. One obvious candidate for an independent foundation for a conception of wrongfulness would focus on the consequences of the act in question. Those acts whose consequences are negative or morally undesirable would be wrongful all-things-considered, while those acts whose consequences are positive or morally desirable (or morally neutral) would not be wrongful. For example, in the case of the five-year-old who plays with a gun and harms her friend, her act would be wrongful on a consequentialist conception simply because it has undesirable consequences – the act results in unnecessary physical injury. Similarly, the patient’s kick causes the doctor pain and (possibly) minor injury in the form of bruising. Finally, the failure to show up at a birthday party as promised has negative consequences because it reduces the uncle’s enjoyment of his party and also jeopardizes the sense of trust between the two family members. It seems that all of these cases of excused behavior have negative consequences. Perhaps negative consequences like these could be the basis for the claim that excused acts are wrongful.

However, on just a moment’s reflection it becomes clear that such a simplistic view could not possibly accomplish what the adherent of DP2 needs it to accomplish. In particular, it is quite easy to come up with acts that are typically counted as justified (i.e. not wrongful) but whose consequences are negative. A pedestrian is attacked by three gang members wielding knives who threaten his life. The pedestrian shoots them all in self-defense, a justified series of actions on most accounts. Already we seem to have

negative consequences because three lives are lost instead of one, but if that is not counted as a negative consequence in this case since the dead people were the aggressors, we can adjust our example to compensate. Imagine that the innocent pedestrian had lung cancer and was going to die in a week anyway, while the three gang members were married fathers, the wives and children of whom will now be plunged into extreme poverty in the absence of monetary support from the deceased gang members. It seems that with enough ingenuity, the case can be rigged so that the world would have been a better place if the pedestrian had died rather than the attackers. Conversely, it is not too difficult to imagine situations where an act is typically considered to be excused but the consequences of the excused act are fortuitously positive. Suppose a schizophrenic suffering from dementia kills someone whom he believes to be the Anti-Christ. It turns out that the schizophrenic's victim was in fact a serial killer who would have continued killing innocent victims at random if he had not met his own untimely end. The schizophrenic is excused for his homicidal act due to dementia, but the act has positive consequences overall. No doubt, an imaginative mind could continue spinning such yarns in impressive variety.

Suffice it to say that a simplistic consequentialist view cannot be the correct view of wrongfulness all-things-considered (or at least, the one required by the adherent of DP2). Of course, sophisticated consequentialist theories have been proposed that endeavor to improve consistency between the theory and the moral data that the theory is supposed to fit.⁹² But the more sophisticated the theory is and the more it has been tailored to fit our judgments of when behavior is justified and excused, the less it will be

⁹² See J.J.C. Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge: Cambridge Univ. Press, 1973). See also its extensive annotated bibliography for additional references.

acceptable as an independent source of determining whether an action is wrongful or not. Thus, such a sophisticated consequentialist view of wrongfulness – containing all the distinctions, exceptions, and qualifiers necessary to get the data right – will not be a suitably independent, non-circular means of distinguishing justified acts from excused ones. Still, even though the consequences of an act do not by themselves suffice to produce a useful theory of wrongfulness, it is still possible that examination of consequences could be part of a more complete theory.

2.3.3.2 Rights Conception of ‘Wrongful’. An alternative way of conceptualizing wrongfulness is that an act is wrongful when someone is wronged by the act. An obvious interpretation of wronging someone is to violate their rights in some way. So, an alternative conception of what it means to be a wrongful act is that it is an act which violates its victim’s rights. But this conception is just as prone to counterexample as the consequentialist view. Assuming that people have a right not to be killed, the individual who is killed when the trolley runs him over to save five people on the other track has his rights violated as much as the person who is killed by the demented lunatic (as much as the person killed by the calculating evildoer). Thus, in the absence of sophisticated distinctions, exceptions, and qualifiers, a conception of wrongfulness based on violation of rights does not seem particularly likely to provide the primitive conception of wrongfulness that the adherent of DP2 requires. Of course, highly sophisticated theories containing importantly subtle distinctions and caveats are available⁹³, but, again, these theories were designed to fit the moral data, including moral data about when behavior is justified and excused. Such sophisticated theories detailing

⁹³ See Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1992). See also her critics and commentators, who make revisions and adjustments to her theory, e.g., Larry Alexander, “Self-Defense, Justification and Excuse,” *Philosophy and Public Affairs*, 22 (1993): 53-66.

when and under what circumstances rights are forfeited, overridden, and superceded are poor candidates to serve as an independent (non-circular) source for determining whether an action is wrongful or not. However, as before, it is still possible that the notion of rights violation could be part of a more complete theory.

2.3.3.3 Agent-Perspectival Sense of ‘Wrongful’. A third alternative for capturing the meaning of what it means for an act to be wrongful all-things-considered is what I would be tempted to call a subjective sense of wrongfulness but what might more aptly be termed *agent-perspectival wrongfulness*.⁹⁴ An act is agent-perspectively wrongful if it would be judged morally inappropriate in light of the agent’s state of mind at the time of the act, including her reasons for acting, her awareness of the facts related to the act, her motives, and her intentions. When we judge an act to be agent-perspectively wrongful, we are judging the act in terms of what the actor was trying to do under the circumstances as she perceived them. Under this conception an act is wrongful if the actor had a suitably ‘guilty mind’, or *mens rea*. My intuition that the five-year-old who innocently fires a gun at her friend has not acted wrongfully is clearly being driven by such an agent-perspectival interpretation of wrongfulness. I resist the claim that the five-year-old’s act is wrongful because I recognize that the child’s intentions were perfectly innocent and because she could not have understood the likely consequences of her action. The agent-perspectival view of wrongfulness also seems to do a better job accounting for my intuitions in the other cases described in section 2.3.2 above as well. There is no evil intent in either the case of the doctor’s reflex test or the missed party, and this fact led to my intuition that the acts are not wrongful. Since the

⁹⁴ My use of the term “agent-perspectival” is due to Uniacke who contrasts objectively right acts with those that are merely agent-perspectively right. See Suzanne Uniacke, Permissible Killing: The Self-Defense Justification of Homicide (Cambridge: Cambridge University Press, 1994), 17.

agent-perspectival sense of wrongfulness supports my intuitions that the excused acts I described are not wrongful, it is not likely to be a good source for the adherent of DP2, who must reach the opposite conclusions. Still, agent-perspectival elements could be utilized in a more complete theory that the adherent of DP2 would accept.

2.3.3.4 Feinberg’s Account of ‘Wrongfulness’. In the course of trying to identify how the term “harm” should be understood in the context of the Harm Principle, Joel Feinberg developed a theoretical account of what it is for a person to wrong another which might be of use to us. Feinberg writes,

One person, *A*, can be said to *wrong* another, *B*, when he treats him unjustly. More precisely the injustice occurs when *A*’s act or omission has as its intention to produce an adverse effect on *B*’s interests, or is negligent or reckless in respect to the risk of such an effect; and *A*’s conduct is morally indefensible; and *B*’s set-back interest is one that he has a *right* to have respected.⁹⁵

This formulation includes all three of the candidates we discussed above. It refers to negative consequences (or something very much like them) when it talks about “an adverse effect on *B*’s interests.” It refers to rights explicitly when it says that the “set-back interest is one that he has a right to have respected.” However, this formulation clearly places the greatest emphasis on the agent-perspectival interpretation when it insists that the actor in question must have an *intention* of producing adverse effects in order to wrong another. If we were to use something like Feinberg’s theory as the basis of a theory of what it means for an act to be wrongful, it would simply bolster my own viewpoint and would be of little use to the adherent of DP2.

⁹⁵ Joel Feinberg, Harm to Others (New York: Oxford University Press, 1984), 107-8. (Emphasis his.)

It is interesting to notice that Feinberg's account rules out morally defensible conduct as being potentially wrongful.⁹⁶ He clarifies this position in the subsequent paragraph: "I use the phrase 'indefensible conduct' as the most generic term for actions and omissions that have no adequate justification or excuse."⁹⁷ He makes an even clearer statement on the subsequent page: "Excused or justified wrongdoing is not wrongdoing at all...."⁹⁸ So, it turns out that on Feinberg's view, neither justified *nor* excused conduct is wrongful all-things-considered. While the adherent of DP2 claims that *all* excused acts are wrongful, Feinberg claims that *none* are.⁹⁹ Although Feinberg may be correct, I have no need to embrace his more general conclusion. All I need to establish is that there are at least some excused acts that are not wrongful. I have articulated the basis of my intuitions supporting that conclusion, shown that those intuitions are bolstered by Feinberg's theory, and have not been able to identify a possible foundation for my opponent's conception of wrongfulness. Consequently, I feel confident in concluding that there are some (unjustified) excused acts which are not wrongful.

2.3.3.5 Minimal Content Does Not Provide Sufficient Condition. It is worth pointing out that the existence of (unjustified) excused acts which are not wrongful demonstrates that the minimal content alone does not provide necessary and sufficient conditions for justification and excuse. Interpreted as an analysis, the minimal content would state that a *prima facie* wrongful act is justified if and only if it is not wrongful.

But we just established that there are some excused acts which are also not wrongful. If

⁹⁶ Obviously, if something like Feinberg's account were to serve as a primitive theory of wrongfulness – one that allows us to identify wrongful acts independent of a determination of justification or excuse – then we would have to remove the condition that the actor's conduct is morally indefensible from that account. Doing so would still leave us with a coherent, viable theory.

⁹⁷ *ibid*, 108.

⁹⁸ *ibid*, 109.

⁹⁹ I owe this observation about the implications of Feinberg's view to Terry L. Price, "Faultless Mistake of Fact: Justification or Excuse?" *Criminal Justice Ethics* 12 (1993): 15-16.

there is such an excused act which is not also a justified act (as all of the examples in 2.3.2 are intended to be), then lack of wrongfulness cannot be a sufficient condition for justification, and the minimal content of the received view does not represent a successful analysis of justification (at least). It is probably no surprise that the minimal content does not suffice as a successful analysis of justification and excuse, but it is worth pointing out that this fact has now been definitively established.

2.3.3.6 Substituting Permissibility for Lack of Wrongfulness. The adherent of DP2 might not be willing to give up just yet. Perhaps difficulties like the ones encountered above could be avoided if we were to make a minor substitution of concepts. What if we altered the minimal content so that justified acts are described as “permissible” acts rather than acts which are “not wrongful.” Accepting such a switch might help us to avoid potential counterexamples like the ones discussed above. Describing justification in terms of permissibility is the way that Douglas Husak, a prominent author in the literature on justification and excuse, prefers to frame the issue. Husak concludes an argument on the nature of legal justification with the following sentence: “Thus the biconditional is true that acts are justified if and only if they are permissible.”¹⁰⁰ He holds this biconditional as analytically true. In a subsequent article, he writes, “I now propose the following as a further conceptual truth about those acts that are not actually wrongful all things considered: These acts are permissible. So all presumptively wrongful conduct that is not actually wrongful all things considered is permissible.”¹⁰¹ Of course, if Husak is right and it is indeed analytically true that permissible conduct is not wrongful and vice versa, then making such a switch should

¹⁰⁰ Husak, “Justifications and the Criminal Liability of Accessories,” 501.

¹⁰¹ Husak, “Conflicts of Justifications,” 52-53.

make no difference at all to our previous conclusion, since we would merely be exchanging synonyms. Still, it is worth investigating whether casting justification in terms of permissibility will be more successful than casting it in terms of lack of wrongfulness.

Before we begin such an investigation, let's take a look back and notice the role that the concept of permissibility played in the argument that led from the minimal content to DP2. Recall that one crucial step in that argument was the following statement: "If act *Z* is not wrongful, it is permissible for an actor *A* to perform *Z*." The examples we identified of excused acts which are not wrongful give us reason to wonder whether this statement is true. If the term "permissible" is used in a sense which is more objective than the agent-perspectival sense of "wrongful," then it would be easy to find cases where an act is not wrongful yet still impermissible. For instance, we can use the case of the five-year-old once again. If permissibility were a more objective notion than wrongfulness, then it might be correct (or at least conceptually coherent) to assert that the five-year-old's shooting of her friend was impermissible while still not wrongful. Is it possible to pull apart the notions of permissibility and lack of wrongfulness in such a way? Or is Husak right that the two concepts are identical and, consequently, extensionally equivalent? Getting an answer to this question is worth another short digression.

2.3.3.6.1 A Theory of Permissibility. As we investigate our judgments regarding the correct application of the term "permissible," we will attempt to develop a rudimentary theory of how to judge the permissibility of an act. This theory is not meant to trump intuition. Rather, it is intended only to capture it and regiment it so that we can

ensure that our uses of the term are consistent in similar cases. Therefore, it should be kept in mind in the paragraphs that follow that the development of a rudimentary theory of permissibility is simply a tool designed to help give direction, focus, and concrete expression to common intuitions. Acceptance of the theory of permissibility which I present below is not necessary for acceptance of other theoretical claims found in the remainder of this dissertation. This is a theoretical path that I find appealing, but it is not integral to the rest of this work. The reader can “take it or leave it” at will.

2.3.3.6.2 Exploring Intuitions. While I had no trouble with the claim that the five-year-old’s shooting of her friend in play was not wrongful, it does not feel quite right to say that the shooting was permissible. This suggests that our use of “permissible” is not agent-perspectival in the same way that our use of “wrongful” is. However, “permissible” does not seem to be straight-forwardly consequentialist either. For example, suppose we change the canonical example of justification so that the person who sets the farmer’s field on fire does so because of her hatred for the farmer and with no knowledge of the oncoming forest fire. The fact that the burned field ends up saving the town is just a lucky accident. We might call this the case of the Lucky Arsonist (or Lucky Arsonist 1): the lucky arsonist (LA) means to do evil but inadvertently does good. Is her act permissible? Intuitively, the right answer seems to be no.¹⁰² Maliciously burning someone else’s property when no beneficial result is intended or anticipated is not a permissible act. However, since P’s action has (unintended) beneficial results, a consequentialist account of permissibility would say that LA’s act is permissible. Hence, it is clear that our intuitions regarding permissibility are not consequentialist (or at least,

¹⁰² Paul Robinson famously takes the opposite position (at least with regard to the law). See Robinson, “A Theory of Justification,” 297.

not straight-forwardly so). But if they are not agent-perspectival and they are not consequentialist, then what are they?

2.3.3.6.3 The Logical Structure of Permission. In order to get a clearer understanding of permissibility, it should be instructive to start at the beginning. The root of the adjective “permissible” is the verb “permit.” In most cases, permission involves more than one person, the permission-giver and the permission-seeker. Usually, the permission-giver must be in a position of authority such that it is within the giver’s legitimate powers to grant permission to the seeker. Permission is usually granted or withheld with respect to some set of rules or norms of conduct. Obviously, we are interested in moral permissibility here. So, when we inquire whether a given act is morally permissible, it might be helpful to think of asking permission on behalf of the actor from some hypothetical moral authority figure who makes accurate judgments with regard to moral norms. When we are deciding whether a given act is permissible, we should do our best to play the role of this hypothetical moral authority and decide as she would decide.

2.3.3.6.3.1 The Presumption of Intentionality. Furthermore, notice that permission-seeking and permission-giving most naturally take place *ex ante* – before the act in question is performed. This fact is reflected in the common saying: “Sometimes it is better to ask for forgiveness than to ask for permission.” Forgiveness is something we seek after we have done something, whereas permission is typically sought before action is taken. However, in the current context – the context of moral defenses – it will be most common for the investigation of permissibility to take place after the fact. This will affect how the request for permission may properly be framed, as we will see below.

When one asks for permission, one normally asks, “May I *X*?” where *X* is a description of some act. Notice also how sensitive our judgments of permissibility are to the description of the act. If one were to ask simply “May I shoot my friend?” with no further elaboration, then the answer would clearly be “No, that is impermissible.” On the other hand, if one were to ask “May I play cops and robbers with my friend?” the answer would clearly be “Yes, that is permissible.” However, if one were to ask “May I unintentionally shoot my friend while playing cops and robbers?” there seems to be no clear answer. I submit that the lack of a clear answer in this case is because it makes no sense to ask for permission to do something unintentionally. Judgments of permissibility are not appropriate for conduct which is unintentional (for example, due to accident or ignorance) because when a person asks permission to do something, that person is articulating a desire to act in a certain way. Following through on that desire would amount to acting *intentionally*. Thus, asking for permission to act unintentionally is nonsense as far as the linguistic practice of seeking and obtaining permission is concerned. This leads to the following hypothesis: permissibility involves a *presumption of intentionality*.¹⁰³ In other words, when trying to determine the permissibility of an act, one must consider the act as it was actually performed and ignore unintentionality. When we ignore unintentionality, the question whose answer was previously unclear becomes: “May I shoot my friend while playing cops and robbers?” Now an answer does not seem so difficult; the answer is no.

2.3.3.6.3.2 Framing the Question as a *Prima Facie* Wrongful Act. So now we know how to handle unintentional acts, but we have not yet resolved how to frame the

¹⁰³ This presumption of intentionality is dictated by the fact that permission is an intrinsically *ex ante* notion.

question in such a way that we get a determinate answer. For example, if LA is able to frame the question herself, she will (retrospectively) ask, “May I create a firebreak in order to save the town?” even though LA had no intention of creating a firebreak. The answer to this question seems clearly to be yes, but if our theory regarding the determination of permissibility is to avoid falsification, it must return a “no” answer to the permissibility of LA’s act. To eliminate this problem, we need to find a non-arbitrary way to phrase the question. So let’s begin anew: why are we asking for permission in the first place? We are retroactively asking for permission specifically because the act that was performed was *prima facie* wrongful. After all, if there were nothing *prima facie* wrongful about the act, there would be no reason to ask for permission in this context, i.e., the context of moral defenses. Consequently, given the context of the request, it makes sense to insist that the act be described in a way that preserves the sense of its *prima facie* wrongfulness. In the case of the Lucky Arsonist, the appropriate question would be “May I burn the farmer’s field?” Of course, any hypothetical permission-giver would need to know more in order to answer the question. We can imagine the hypothetical permission-giver asking, “*Why* do you want to burn the farmer’s field?” Now, when LA replies that she wants to burn the farmer’s field because she hates the farmer, it should be clear that the Lucky Arsonist’s act is impermissible. Notice though that it is important that the permission-seeker’s response be limited to her actual (explanatory) reasons; she may not offer potential (guiding) reasons that did not actually motivate her.¹⁰⁴

¹⁰⁴ The distinction between guiding reasons and explanatory reasons is due to Raz. [Joseph Raz, Practical Reason and Norms, 3rd ed. (Oxford: Oxford University Press, 1999) 16-20.] However, Gardner is primarily responsible for introducing this distinction to the literature on justification and excuse. [John Gardner,

So we now have a two-stage decision procedure involving a request to do what is *prima facie* wrongful and a giving of the actual reason for doing it. The hypothetical permission-seeker asks if she may perform the *prima facie* wrongful act. The permission-giver will not answer immediately. First, she will ask whether the permission-seeker has any good reason for wanting to do that which is *prima facie* wrongful. If the permission-seeker has a reason for performing the *prima facie* wrongful act *qua prima facie* wrongful act – that is, if the permission-seeker performs the act intentionally – then the permission-seeker gives her actual reason for so acting, and the act is judged accordingly. However, if the *prima facie* wrongful act is performed by the permission-seeker unintentionally, then the permission-seeker must respond that she has “no reason” and the permission-giver will withhold permission under the presumption that the permission-seeker is acting intentionally without adequate reason. Of course, the result of this procedure will be that all unintentional *prima facie* wrongful acts are impermissible. Let’s see how this procedure would work on the case of the five-year-old. We ask on behalf of the five-year-old, “May I shoot my friend?” The hypothetical permission-giver asks “Why?” and the five-year-old’s hypothetical representative answers on the child’s behalf, “I have no good reason for doing so.” Since requests for permission function under a presumption of intentionality, the answer will be “No, you may not. That is impermissible.”

2.3.3.6.4 Testing and Refining the Decision Procedure. So far, our theory seems to be working just fine. Let’s test it on a few more cases. Take for example the accidental jostling case. While we determined that an accidental jostling is not wrongful,

“Justification and Reasons,” in *Harm and Culpability*, A.P. Simester and A.T.H. Smith eds. (Oxford: Clarendon Press, 1996), 103-129.]

it also seems right to say that it is impermissible. And that is precisely the result that our decision procedure yields. (“May I bump into a stranger?” “Why?” “No reason.” “No, that is impermissible.”) The knee jerk and missed party cases will work out in exactly the same way. (Knee jerk case: “May I kick my doctor?” “Why?” “No reason.” “No, that is impermissible.” Missed party case: “May I break my promise?” “Why?” “No reason.” “No, that is impermissible.”) Aside from fitting our intuitions, the decision procedure has the added benefit of having been derived from the logic of permission-seeking in more familiar contexts. To construct it, all we had to do was abstract from more mundane instances of what we do when we request permission from someone.

2.3.3.6.4.1 Overdetermination Cases. So far our decision procedure has performed well, but it has only faced a few very similar examples. We need to test whether the hypothesis produces the right conclusions in more difficult types of cases. The hypothesis as it is currently structured renders judgments on the basis of the actor’s actual reasons. So one way to create a difficult case for the hypothesis is to construct a case in which the actor has more than one reason. (Recall that when we discussed the second corollary, we concluded that an overdetermination of reasons for acting is possible.) In order to construct such a case, let’s modify the Lucky Arsonist case. Once again, LA really hates the farmer and wants to harm her in some way. After much brooding, LA’s malice finally spills over into action. She decides to burn the farmer’s field, and she drives there with this firm intention. However, on the way there, she spots the forest fire and realizes the need for a firebreak. Even though she hates the farmer, she still cares for the other people in town and wishes to protect them from harm. So in this

example, LA has two equally operative reasons for burning the field: her hatred of the farmer and her desire to create a firebreak. Let's call this case Lucky Arsonist 2.

First of all, what does intuition tell us about the permissibility of burning the field in this case? Is LA's burning of the field permissible? My intuition tells me it is.

Second, how would our procedure deal with this case? As we have stated previously, the crucial step in our decision procedure is the second step, the request for a reason. In this case, since LA has two reasons for acting, she will have to give two answers. Since one of the reasons is legitimate, it seems that the hypothetical permission-giver can (and should) deem the act permissible. This shows that only one actually-operative good reason (i.e., one explanatory guiding reason) is needed to render an act permissible, even in the presence of equally motivating bad reasons. So far the hypothesis is holding up.

2.3.3.6.4.2 Prior Awareness of Guiding Reasons. However, perhaps if we make LA a bit more despicable, things will get more difficult for our theory. Let's modify the Lucky Arsonist case once again. As in the previous case, let's suppose that LA hates the farmer, has decided to maliciously burn down the farmer's field, and has set out with the firm intention of doing so. When LA notices the forest fire quickly approaching the town, she realizes that she is in luck! Now she can burn down the farmer's field using the town's need for a firebreak as cover for her dastardly act of destruction! She sets the field alight and dances for joy as she watches the farmer's field burn, secure in the knowledge that the justifying circumstances will protect her from punishment. We may suppose that, in this case, LA doesn't care at all about the residents of the town. So saving them by creating a firebreak was really no part of her motivation. The only reason

she started the fire was because of her hatred for the farmer. Let's call this case Lucky Arsonist 3.

What is our intuition with regard to the permissibility of LA's act in this case? My intuitions are certainly less clear in this case than they were in any of the previous cases. I feel certain that LA's act is wrongful, but I am much less clear about the permissibility of her act. Nevertheless, if I am playing the role of the hypothetical permission-giver, then I have to make a choice. Grudgingly, I have to admit that my intuition tells me that the burning of the field is probably still permissible in this case, despite LA's foul intentions and despicable character.¹⁰⁵ How would our decision procedure deal with this situation? Once again, the crucial stage of the decision procedure is the permission-giver's request for a reason. In this case, P's reason is her hatred for the farmer. Since LA doesn't really care at all about the safety of the townspeople, their protection was not motivating her. (She was aware of a guiding reason that did not function as an explanatory reason.) Thus, she has only one (explanatory) reason for burning the field and it is a bad one. The decision procedure as it is currently constructed is bound to produce the judgment that LA's act is not permissible, contrary to our (admittedly weak) intuition.

We have encountered an inconsistency between our intuition and the decision procedure that was supposed to embody it. Is there a way to fix the procedure to bring the two back in line with one another? What we need is to allow that the protection of the town can be counted as a legitimate (guiding) reason, eligible for use in the decision procedure, even though protecting the town is no part of what actually motivated LA to

¹⁰⁵ Notice that if this intuition is correct, then Lucky Arsonist 3 may present a case in which an act is both wrongful and permissible. If so, this would provide further ordinary language evidence that "wrongful" and "impermissible" are not synonyms.

act (i.e. it is not an explanatory reason). Consequently, we must abandon the requirement that the reasons given in the decision procedure must be those that are actually operative (i.e. explanatory). What we must require instead is that the reasons that are eligible for use in the decision procedure are those (guiding) reasons that the actor was aware of prior to committing the act. This rule would ensure that the act of the first Lucky Arsonist – the one who had no knowledge of the approaching forest fire at all – would still be judged impermissible while allowing the third Lucky Arsonist to burn the farmer’s field even though she did not act for the right reasons.

2.3.3.6.4.3 Adjusting the Decision Procedure. This change requires us to change the decision procedure as follows. At the second (crucial) stage of the decision procedure, the hypothetical permission-giver no longer asks “Why do/did you want to do X?” (where X is a description of the *prima facie* wrongful act); now the permission-giver must be understood to ask “What (guiding) reasons are/were you aware of for doing X?” When the question is asked this way, the third Lucky Arsonist will be free to mention the fact that burning the field would save the town even though that (guiding) reason is not the (explanatory) one that motivates her.

What is crucial though in this adjusted account is that permission-seekers may only offer reasons for doing X that they were aware of *prior* to performing the act. Once again, I think this squares well with the logic of permission, namely, its intrinsically *ex ante* character. In just the same way that it is conceptually incoherent to ask for permission to act unintentionally, it is also conceptually incoherent to suggest that information that an actor was unaware of at the time of the action can be relevant to whether that action was permissible. Again, if we think about the analogy with actual

requests for permission, such requests are only appropriate *before* the action is taken and, thus, before all the factors which will affect the outcome of the action are known.¹⁰⁶

2.3.3.6.4.4 More Hard Cases. Let's apply our newly modified decision procedure to a few more types of examples. So far, our hard cases have come from situations where there is bad intent and good results; what about cases involving good intent and bad results? Recall the modified version of the canonical example of justification in which a sudden rainstorm puts out the forest fire just before it reaches P's firebreak. (Let's call this *the canonical example of mistake*). In this case, P burns the farmer's field because of her mistaken belief that doing so is necessary to save the town. First of all, what is the right result in a case like this? Was it permissible in this case for P to burn the field under these circumstances? My intuition is that it must be permissible. After all, this case differs from the canonical example of justification in only one way: the sudden appearance of an unpredictable rainstorm. If what P did was permissible in the absence of the rainstorm, then it must also be permissible when unknown and unknowable circumstances render P's act unnecessary. This result is dictated by what we said earlier about the *ex ante* character of permission. Does the decision procedure yield the correct result in this case? Yes, it does. The reason that P offers for burning the field (i.e., saving the town) is a good one, making the act permissible.

How about cases of duress? Recall DE, who is threatened with severe pain and serious bodily harm (two broken legs) unless she helps a criminal steal a car. Is helping someone to steal a car permissible in such a case? If you are like me, your bare intuition

¹⁰⁶ The actor's *awareness* of the relevant reasons is important for similar reasons. When one asks for permission to do something that is otherwise wrongful, one is expected to have good reasons for doing so. *Having* good reasons involves (at a minimum) being aware of them. Therefore, permissibility cannot depend on information that the actor is not aware of at the time of the action.

gives you little guidance in a case like this one. It is at times like this that it is handy to have a decision procedure to help clarify matters. According to our decision procedure, the crucial question in this case is whether avoiding severe pain and serious injury is a good (guiding) reason to help steal someone else's property. After considering the question this way, my intuition tells me the answer is yes.¹⁰⁷ Here we see the value of having a decision procedure to refer to. It has helped us to clarify our otherwise confused intuitions and to reach a definitive answer: yes, helping to steal the car is permissible in this instance.

2.3.3.6.4.5 Satisfactory Account. Of course, at this point we can see that a lot of weight is resting on our intuitions about what counts as a good reason. However, exploring that concept would lead us much further than we really want to go. If we wanted to, we could also concoct and explore more troublesome cases. For instance, I'm sure we could create cases in which it is questionable whether an act was performed intentionally or unintentionally. But again, there is no need. Our purpose here was merely to clarify how our intuitions make use of the concept of permissibility, and our discussion up to this point has accomplished that task. To summarize that discussion, judgments of permissibility seem to involve a two-stage process. In the context of moral defenses, we start with the *prima facie* wrongful action that was performed, and we ask whether the actor intended to perform that action. If the act was performed unintentionally, then we automatically return a verdict of "impermissible." (This is the presumption of intentionality.) If the act was performed intentionally, then we ask what (guiding) reasons for performing the act the actor was aware of prior to acting. If the

¹⁰⁷ Avoidance of pain and injury might count as a good reason because it represents the lesser of two evils. Alternatively, it may count as a good reason (i.e. a reason we ought to accept) because most of us would have made the same choice under similar circumstances.

actor (or her hypothetical representative) can give at least one good (guiding) reason for performing the act that she was aware of prior to performing the act, then the act is deemed permissible. If the actor (or her hypothetical representative) can offer no good (guiding) reasons for performing the *prima facie* wrongful act, then the act is deemed impermissible. We have seen that this decision procedure can be instrumentally helpful by allowing us to focus on the relevant questions when we are otherwise unsure what to say about a given act's permissibility.

2.3.3.6.5 Use of the Theory in the Minimal Content. We are now ready to investigate the question with which we began this subsection, namely, does substituting permissibility for lack of wrongfulness in the minimal content of the received view make it a more successful theory of justification and excuse? It does help us to eliminate the counterexamples which plagued the account based on wrongfulness. We saw that many instances of excused behavior that are not intentional acts (like accident, compulsion, and infancy) would not count as wrongful if wrongfulness is an agent-perspectival notion (as is suggested by intuition and by Feinberg's account). Hence, the minimal content would not function as a successful analysis because both justified acts and excused acts are not wrongful. However, unintentional acts (acts whose bad consequences are unintentional) will automatically be deemed impermissible when we use the decision procedure for permissibility. So far, it does seem to provide the required separation between justified acts and excused acts. However, we saw that excused behavior which is the result of intentional action, like some cases of mistake and duress, may yet be permissible on our new account.¹⁰⁸ Consequently, even on the revised version of the minimal content that

¹⁰⁸ It is for related reasons that some theorists prefer to recategorize some mistake and duress defenses as justifications rather than as excuses. For example, see Kent Greenawalt, "The Perplexing Borders of

replaces lack of wrongfulness with permissibility, there are still some excused acts which have the same quality that justified acts have. Therefore, neither version of the minimal content functions as a successful analysis of justification because both versions fail to provide a sufficient condition for justification.

2.4 Summary. We began the chapter by listing some of the most common theoretical claims made about the nature of justification and excuse. One by one, we rejected four disputed propositions as well as three corollaries to those propositions. Having pared away these controversial claims, we were left with what we called the minimal content of the received view, i.e., those few propositions that are universally agreed upon, or the logical intersection of the most common formulations of the differences between justification and excuse. We inquired whether that minimal content could stand alone as a successful theory of justification and excuse. This quickly led us to consider a more robust defense of the second disputed proposition – the claim that all excused acts are wrongful (DP2). First, we identified apparent counterexamples to the view that all excused acts are wrongful. Then we attempted (unsuccessfully) to find an account of wrongfulness that would do what the adherent of DP2 needed it to do. Finally, we examined an account of wrongfulness developed by Feinberg in a different context and found that it supported our intuitions (and did not provide support for the kind of theory required by the adherent of DP2). From this, we concluded that there are

Justification and Excuse,” *Columbia Law Review* 84 (1984): 1897 ff.; Peter Westen and James Mangiafico, “The Criminal Defense of Duress: A Justification, Not an Excuse,” *Buffalo Criminal Law Review* 6 (2003): 833-950; Marcia Baron, “Justifications and Excuses,” *Ohio State Journal of Criminal Law* 2 (2005) 387-406; and Re’em Segev, “Justification, Rationality and Mistake: Mistake of Law is No Excuse? It Might Be a Justification!” *Law and Philosophy* 25 (2006) 31-79. I recognize that producing a coherent, attractive, productive, and useful theory of the difference between justification and excuse may require us to change the way that we typically categorize defenses.

indeed excused acts that are not wrongful. Consequently, the minimal content could not succeed as an analysis of because it does not provide a sufficient condition for justification.

This caused us to try modifying the minimal content of the received view to help it avoid the problems we had discovered. We inquired whether the minimal content would be more successful as an analysis if it defined justification in terms of permissibility rather than lack of wrongfulness. We found that the logic of permission-seeking dictates an *ex ante* perspective. This *ex ante* perspective requires a presumption of intentionality in cases where the act is performed unintentionally as well as a focus on the (guiding) reasons for action that the agent was aware of prior to acting. The differences in the accounts of wrongfulness and permissibility indicated that the two concepts are not identical and that they will not both give same verdict in every case. Indeed, unintentional actions that have negative consequences (whether due to compulsion, accident, infancy, etc.) will often present cases of impermissible acts that are not wrongful. Conversely, evildoers who are aware of the fortuitous existence of good (guiding but not explanatory) reasons for their actions will often present cases of permissible acts that are also wrongful. If there are indeed such cases in which wrongfulness and impermissibility do not track one another, then an important premise of the argument in favor of DP2 is false.¹⁰⁹

¹⁰⁹ For clarity's sake, let's briefly review the structure of that argument.

- 1.) If a *prima facie* wrongful act is not wrongful all-things-considered, then it is not morally prohibited.
- 2.) If a *prima facie* wrongful act is not morally prohibited, then it is morally permissible.
- 3.) If a *prima facie* wrongful act is morally permissible, then it is justified.
- 4.) Therefore, if a *prima facie* wrongful act is not justified, then it is wrongful all-things-considered.
- 5.) Therefore, all (unjustified) excused acts are wrongful all-things-considered.

Neither the concept of wrongfulness nor the concept of permissibility will serve to make the minimal content a successful analysis. Under neither regime does the minimal content provide a sufficient condition for justification. The minimal content of justification states that a justified act is a *prima facie* wrongful act which is not wrongful all-things-considered (or, on the modified version, that justified acts are permissible). While both versions may be true of all justified acts, it does not distinguish them from excused acts, which we saw are sometimes also not wrongful all-things-considered and sometimes permissible. The minimal content of excuse states that an excused act is a *prima facie* wrongful act for which the actor is not blameworthy (for reasons other than those which would render the act justified). The minimal content tells us almost nothing about the nature of excuses other than that they are not justifications. Since the minimal content does not offer a sufficient condition for justification and does not tell us much of anything at all about excuse, it clearly will not succeed on its own as a theory of justification and excuse. However, as we will see (particularly in chapter 4), the minimal content is a useful foundation upon which to build a more theoretically satisfying edifice.

By finding instances of impermissible conduct which are not wrongful, we have shown that either premise 1 or premise 2 must be false. Because wrongfulness is largely an agent-perspectival notion, there is no necessary connection between the wrongfulness of an act and its status as morally permitted or prohibited. Consequently, it is premise 1 which I find to be at fault (which is good, since premise 2 is analytically true). Allow me to emphasize once again, though, that the legal analogue of this argument may still be sound, for all I know. I only claim to have shown that the argument fails for *moral defenses*, not legal ones.

CHAPTER THREE

Justification and Excuse in Ordinary Language

3.0 Introduction. In the previous chapter, we discovered that it is very difficult to generate a theory of moral justification and moral excuse that is able to account for common judgments regarding what behavior is typically considered justified and what behavior is typically considered excused. In fact, after exploring various criticisms of the received view, we found that we were left with very little that we could say definitively about the nature of justification and excuse. The lesson that I take from our largely negative conclusions in the previous chapter is that the received view of justification and excuse is too flawed and unsystematic to support a useful theoretical distinction. Since it is our goal to provide such a distinction, we will need to consider how the judgments that make up the received view can be altered so as to better support a useful theoretical distinction.

However, there is a danger in undertaking such a revisionist project. When one begins revising the way terms are correctly applied, one must be careful to ensure that the revisions do not outstrip the original concepts. That is, we need to be sure that we are indeed modifying the common conceptions of justification and excuse rather than abandoning those concepts entirely in favor of new ones. This means that we will need some sense of the borders and contours of those concepts, so that we will have some way of knowing whether our proposed revisions have overstepped the bounds of justification and excuse. Developing an awareness of these borders is the purpose of this chapter.

Hence, in order to ensure that our revised understandings of justification and excuse do not become something else entirely, we need to examine the different contexts in which we commonly use the terms “justification” and “excuse” in ordinary language.¹¹⁰ Doing so will allow us to explore the limitations that ordinary language imposes on a potential theory of moral justification and moral excuse. Of course, I am not claiming that everything that is needed to construct a useful theory of the difference between moral justification and moral excuse can be found in the ordinary language uses of “justification” and “excuse.” However, I do think that exploring the various contexts in which “justification” and “excuse” are used in ordinary language will help to ground our attempt to produce a theoretical account of those terms in the moral context. By identifying the various ways that “justification” and “excuse” are used in ordinary language, we will perceive a set of conceptual boundaries for the way the same terms can be used in the moral context.

This chapter will be divided into two essentially disconnected sections, one dealing with the ordinary language uses of “excuse” and the other dealing with “justification.” Because the section on excuse is longer, more original, and more important for the work in future chapters, I will begin with that section. A shorter section on justification follows.

¹¹⁰ Many authors express a conviction that such a project cannot possibly be worth pursuing. For example, Jeremy Horder writes, “The use of the term ‘excuse’ may work in a particular way, linguistically, where it does not work, morally. So there may be less to learn from linguistic usage, morally speaking, than theorists in the past have supposed.” [Jeremy Horder, “Excuses in Law and in Morality: A Response to Marcia Baron,” Criminal Law and Philosophy 1 (2007): 42.] In a harsher tone that characterizes much of the antagonism to ordinary language analysis found in the literature, Heidi Hurd writes, “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...” [Heidi M. Hurd, “Justification and Excuse, Wrongdoing and Culpability,” Notre Dame Law Review 74 (1999): 1557.] However, my purpose in exploring the ordinary language use of “justification” and “excuse” is not to limit theoretical use of those terms to *only* those uses that can be found in ordinary language. Rather, my purpose is to identify what is core to those concepts so that we can be sure that what we end up with is indeed a theory of justification and excuse and not something else entirely.

3.1 Excuse. Although I acknowledge at the outset that our use of the term “excuse” has many different senses, it is worth inquiring whether there are any underlying similarities among these different senses or, alternatively, whether these different uses of “excuse” are merely homonyms – different words with the same spelling. I will begin working under the assumption that the different senses of the term ‘excuse’ are not mere homonyms, that there are intrinsic similarities between these usages that explain why they are all called by the same name. The similarities that we find will guide us as we attempt to articulate a satisfactory theory of the difference between justification and excuse. Accordingly, I will begin by dividing examples of how we commonly use the word “excuse” and its cognates in American English into different senses. I will present these different senses in increasing order of development and complexity, from the most colloquial and common uses to those uses that are more obviously related to the moral context. When all is said and done, we will observe that ordinary language places very few constraints on the use of the term “excuse.” In fact, we will see that ordinary language supports no particular distinction between excuse and justification.

3.1.1 Excuse Me (Sense 1). The term “excuse” has a surprising variety of uses in ordinary language. Perhaps its most common use, though, is as a social lubricant in circumstances where someone has inadvertently done something that might otherwise be considered rude, inconsiderate, or even just startling. For instance, one might say “Excuse me” as a result of bumping into someone, in order to get someone’s attention, after sneezing, or to signal that one did not hear what another just said. When it may not

be clear from context what one wishes to be excused for, the speaker can specify the particular action, trait, or state of affairs for which one wishes to be excused. For instance, one might say, “Excuse me for interrupting,” “Excuse my curiosity,” or “Please excuse the mess.” I will refer to these uses of “excuse” which are related mainly to etiquette and good manners as *social excuse*.¹¹¹

3.1.1.1 Pardon. One linguistic feature worth noticing about social excuse is that, without significant loss of meaning, we can substitute the verbs “pardon” and “forgive” for the verb “excuse.” For example, after jostling someone accidentally on the street, one might say “Pardon me” or “I beg your pardon” instead of “Excuse me.” Similarly, when someone did not hear or understand what another has just said, one might say “Pardon me” instead of “Excuse me.” Furthermore, we might say “Pardon me for interrupting” instead of “Excuse me for interrupting,” or “Forgive the interruption” instead of “Excuse the interruption.” These examples indicate that the meaning of the term “excuse” in this context is closely related in meaning to the terms “pardon” and “forgive.”¹¹²

¹¹¹ Many authors are wary of placing undue emphasis on social excuse in any understanding of moral (or legal) excuse. In her recent paper on the ordinary language uses of “justification” and “excuse,” Marcia Baron writes, “We need to be cautious about inferring much from such [polite] utterances, and it is not at all clear that we should count ‘Excuse me’ as requesting (or offering) an excuse.” [Marcia Baron, “Excuses, Excuses,” *Criminal Law and Philosophy*, 1 (2007): 24.] Of course, immediately after writing this, Baron embarks on a brief investigation of exactly those kinds of utterances related to rules of civility (section 3 of her paper, beginning on p. 24). I will heed Baron’s warning and tread with caution, just as she does.

¹¹² However, that is not to say that these terms are completely synonymous. Baron does an excellent job exploring the structural differences between “excuse,” “forgive,” and “pardon.” (*ibid*, 26-29) She summarizes the difference between these terms as follows: “...I can only be forgiven or pardoned by someone. Excusing is different, at least in this respect: I can have an excuse without anyone giving it to me; I have it because excusing conditions apply.” (*ibid*, 33) However, in two footnotes (#26 and #28) she acknowledges that she can make this claim only by rejecting pleas such as ‘excuse me’ as legitimate cases of excuse. Furthermore, on the following page, Baron herself casts doubt on her claim by acknowledging that some excusing behavior based on compassion and/or humility is indeed discretionary in much the same way that forgiving and pardoning are. (*ibid*, 34) Consequently, I think it is safe to compare excusing to forgiving and pardoning, recognizing that there are still important differences.

3.1.1.2 The Object of Excuse. At this point, I wish to make a quick observation regarding the object of the verb “excuse.” In many cases, the linguistic form in which people ask to be excused seems to indicate that people, not actions, are the objects of excuse. For example, in sentences like “Excuse me,” “He excused himself,” and “Please excuse my son,” the object of the verb “excuse” is a person. However, in many cases, it is perfectly acceptable for an action (or, by extension, a character trait or a state of affairs) to serve as the object of “excuse.” For example, “Please excuse the interruption,” “Please excuse my son’s carelessness,” and “Please excuse the lack of refreshments” are all perfectly acceptable sentences in which the direct object of the verb “excuse” is an action (or the cause or result of an action), not an actor. Thus, we may conclude that ordinary language does not support the claim that only actors are excused. This point deserves emphasis because some theorists have placed heavy emphasis on the claim that actors are excused and acts are not.¹¹³ It is worth recognizing that this claim is not borne out by the grammar of the verb “excuse” in ordinary language. In other words, if that particular theoretical claim is to receive support, one will have to look beyond ordinary language to find it.

3.1.2 Asking to be Excused/Dismissed (Sense 2). Another context in which people commonly ask to be excused is when they wish to be allowed to leave. Consider the following examples. A host who is drawn away from her guests for some reason might be expected to say, “Would you please excuse me for a moment?” Similarly, a child seeking permission to leave the dinner table before others are finished eating might

¹¹³ Among others, Paul Robinson places great emphasis on the (alleged) fact that *acts* are justified and *actors* are excused. For example, see Paul Robinson, “A Theory of Justification,” *UCLA Law Review* 23 (1975): 266 ff. I do not believe that distinguishing between justification and excuse in this way is correct or instructive. See section 2.2.1 and its subsections above.

ask, “May I please be excused?”¹¹⁴ Of course, even though these requests are stated in the form of a question, they do not always require responses. Sometimes, as in the first example above, the host’s request is merely a social nicety for which a response is neither required nor expected. In that case, asking to be excused is just a matter of good form. In the other example, however (in which a child asks to be excused from the table), the child is actually seeking permission from a parent or other adult authority figure. In most cases, the child will only leave the table once her request to be excused has been approved.

Although these examples are still instances of what I would call *social excuse*, they are different enough from the first type of excuse to be worth identifying as a distinct sense. The most salient difference between this use of the verb “excuse” and the previous one is timing. In the first sense of “excuse,” one generally asks to be excused *after* one has done something. However, one normally uses the second sense of “excuse” *before* acting.

3.1.2.1 Prior Excuses. This second sense of “excuse” is particularly interesting for a theorist of moral defenses because it involves asking to be excused for behavior that has yet to be performed. This is noteworthy because traditionally, moral and legal theorists have assumed that it is inappropriate to offer an excuse for an act prior to performing it. While theorists generally have no problem countenancing prior justifications,¹¹⁵ prior excuses are usually considered to be morally unacceptable. Presumably theorists reject the tenability of prior excuses because they assume that, if

¹¹⁴ This sense of “excuse” (sense 2) also seems to be operative when, at the end of a trial, a judge says, “The jury is excused with the thanks of the court.” Here the word “excused” could be replaced with the word “dismissed” without loss of meaning.

¹¹⁵ The moral acceptability of prior justifications was discussed in section 1.4.2.3 above.

one recognizes the need to formulate an excuse for one's behavior, then one must also recognize that behavior as undesirable or inappropriate. And if one can recognize one's potential behavior as morally inappropriate, then one ought to refrain from engaging in it. Of course, even if this argument were sound, it would not rule out prior excuses offered by third parties. For example, suppose a psychologist who works in a mental hospital sees one of her patients arguing with someone. She knows that, due to the patient's mental condition, the argument will almost certainly escalate into violence. However, she is unable to stop the impending fight, perhaps because she is too weak or too far away. In such a case, the health care worker could offer an excuse for the patient's behavior (insanity or mental defect) even before that behavior takes place. It is somewhat more difficult, though, to present a (non-controversial) example of an individual who legitimately offers a prior moral excuse with regard to her own behavior.¹¹⁶ However, regardless of what one thinks about the ultimate legitimacy of prior excuses in the moral context, the examples that illustrate the second sense of "excuse" demonstrate that there is no reason to rule them out from the perspective of ordinary language usage. To the contrary, ordinary language *supports* the acceptability of prior excuses.

3.1.2.2 Violating Rules of Conduct. Let's return to the examples of the second sense of "excuse" that we introduced in section 3.1.2. In particular, let's see what points

¹¹⁶ Of course, a bit of science fiction always helps. Suppose an individual's body is being controlled by an evil scientist, but she remains aware of her body and her surroundings. Her voice also remains under her own control. She senses that the evil scientist is directing her to attack her husband. As she menacingly approaches her husband, she cries out, "I can't help what I'm about to do! My body is being controlled by someone else!" In this case, the woman offers an excuse for behavior that she has yet to engage in. Although I expect this example would be uncontroversially accepted as a legitimate instance of prior excuse, it is so far removed from practical experience that it is not very useful. However, the question whether prior excuses can be morally legitimate is interesting to me because it will turn out that on my view of excuse, examples of prior excuses can be constructed much more easily.

of similarity can be found between the examples of the first sense of “excuse” and the examples of the second sense. After examining examples of the first sense of “excuse,” we concluded that that sense is intimately related to the notions of pardon and forgiveness. Can we extend those notions to the examples of the second sense of “excuse” as well? I believe so. Speaking loosely, there is indeed a sense in which both the host who is drawn away from her guests and the child who wishes to leave the table are asking to be “pardoned.” Namely, they are both seeking to avoid condemnation, censure, or other negative social reactions¹¹⁷ for failing to perform a specific social obligation. Normally, it is the host’s duty to entertain her guests. By asking to be excused, the host is asking to be momentarily exempted from that obligation, or alternatively, to be forgiven in advance for failing to perform it. In the other example, proper etiquette and/or family rules demand that a child wait for others to finish eating before leaving the table. By asking to be excused from the table, the child is asking to be exempted from – or pardoned in advance for failing to perform – this social obligation.

To put the point more abstractly, both speakers are asking to be forgiven for failing to adhere to identifiable rules (or expectations) of conduct. In the first case, we can interpret the host’s social obligation to entertain her guests as the rule that (other things being equal) one should attend to one’s guests. Her need to leave them for a moment represents a violation of that general rule of etiquette, and she asks to be excused for the violation accordingly. In the second case, we can interpret the child’s social obligation to remain at the table as the rule that (other things being equal) one should remain at the table until others are finished eating. The child’s intention to leave the table

¹¹⁷ Henceforth, when I use the terms “pardon” and “forgive” in this chapter, I will be using them in this loose manner.

early represents a violation of this rule of conduct, and she asks to be excused for the violation accordingly.

A skeptical reader might be wondering, “Is there really a rule of conduct that says that a host should remain with her guests at all times?” As long as it is understood that the rule has numerous exceptions, my answer would be yes, there is such a rule. Other things being equal, a host is expected to remain with, attend to, and entertain her guests. We can interpret that expectation in terms of a rule of conduct. Of course, this rule of conduct is not particularly weighty or important, and as such, its force is easily overcome by other needs or desires. Almost any legitimate reason will suffice to excuse her violation of this rule. In fact, one might speculate that this is why the host does not even bother to give a reason for her departure and does not bother to wait for approval before she leaves. Since it is understood that the weight of this rule of conduct is minimal, offering reasons has (as a matter of fact) become superfluous in this context. Although one might wonder what practical sense it makes to speak of a rule of conduct that is so easily overcome by countervailing interests, formally speaking, I see no difficulty in thinking of these maxims of good manners as rules of conduct.¹¹⁸ Hence, I maintain that asking to be excused requires the violation of some such general rule of behavior, even though the rule in question may be easily overcome by other interests (or may be prone to countless exceptions, depending on how one conceptualizes rules).

¹¹⁸ Feinberg warns against “treat[ing] what are essentially *noninstitutional* facts as if they were some kind of *special* institutional facts. This is the same sort of trick as that performed by those who treat unselfish acts as a special species of selfish ones or unreal things as a special, spooky kind of real thing.” [Joel Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970), 4.] However, he also allows that “[t]here is no harm in calling statements of generalized advice ‘rules’; indeed, it is consonant with usage to do so. But it is important to notice that these rules do not enjoin, prohibit, or confer obligations and duties. ... [T]hese are rules of thumb rather than ‘laws’ on some jural or institutional model.” (*ibid.*, 16) My claim above about rules of etiquette is intended to be of the latter ‘rule of thumb’ variety, not the former, more problematic kind that Feinberg is concerned to avoid.

Returning to the first sense of “excuse,” we can identify violations of rules of conduct in those examples as well. We ask to be excused after bumping into someone in part because, in doing so, we have violated a rule of etiquette which states that (other things being equal) we should avoid touching other people when such touching is unwelcome. We ask to be excused when we seek to get a stranger’s attention in part because doing so violates a rule of etiquette which states that (other things being equal) we should not interrupt, startle, or distract people, nor should we invade their privacy. We ask to be excused after we sneeze in part because, in doing so, we have violated rules of etiquette that dictate that (other things being equal) we should avoid audible bodily functions and we should avoid startling others with loud noises. Finally, we ask to be excused when we did not hear what someone else has just said either because we wish to seek pardon for failing to pay close enough attention to the speaker or because we wish to seek pardon for inconveniencing the speaker by asking her to repeat what she said. Our preliminary conclusion, then, is that the ordinary language use of the verb “excuse” seems (at least interpreted loosely) to involve a request that others forgive a violation of a (sometimes trivial, often *prima facie*) rule of conduct.

3.1.3 Written Excuses (Sense 3). Another common use of the term “excuse” in ordinary language revolves around the practice of providing teachers or employers with written excuses for absences from some institution like school or work where attendance is mandatory. This variety of excuse is unique in that the standard case involves someone offering an excuse on another’s behalf. The prototypical example would be a note written by a parent or doctor that conveys something like the following message: “Please excuse Anne’s absence from class on Friday. She was too ill to attend school. Please

allow her to make up whatever work she may have missed.” In special circumstances, though, other authority figures – like coaches, clergy, and judges – might be found writing such notes as well. Although such excuses are typically encountered in written form, they might also take the form of a phone call or a face-to-face verbal exchange. So rather than referring to this sense of “excuse” as *written excuse*, I will prefer the term *attendance excuse*.

3.1.3.1 Reasons. Attendance excuse is noticeably different from the two other senses of “excuse” that we have encountered so far because the defender (the person offering the excuse) is expected to offer a *reason* for why the accused (the person who was absent) ought to be excused. Notice that the reasons that would be valid in this context overlap to some degree with the reasons that would be valid in the moral context as well. For example, suppose Anne had *promised* her teacher that she would come to school on Friday. In that case, her failure to do so would require a moral defense (because it is a failure to perform a self-imposed moral duty). The same reasons that Anne might offer to excuse the breaking of her promise, such as being ill or attending a funeral, would also support her request to be excused for missing class. Of course, not all the reasons for which one might be excused for an absence from school are also reasons why someone might be excused for breaking a promise. For instance, a student might be excused for missing class in order to participate in a sporting event. Usually, this would not be sufficient to excuse the breaking of a promise. Hence, we can see that moral excuses are at best a subset of attendance excuses. Nevertheless, it is worth recognizing that, because attendance excuse typically involves the offering of *reasons*, it bears a

much greater similarity to moral excuse than the examples we encountered in the first and second senses of “excuse.”

3.1.3.2 Institutional Defenses. In some ways, asking to be excused for an absence bears a greater resemblance to legal excuse than to moral excuse. An important part of the purpose of offering a legal excuse is to avoid the formal penalties associated with a particular kind of proscribed behavior. Similarly, an important part of the purpose of offering an excuse for an absence is to avoid the penalties incurred for an unexcused absence. For instance, students typically receive no credit for work they missed during an unexcused absence, and in some classes, the attendance rate itself is factored directly into the student’s final grade. In secondary schools, there might also be punitive responses to unexcused absences, such as detention. To ask to be excused in this context is (at least in part) to offer a reason why penalizing the student for the absence would be unwarranted or inappropriate. Thus, the function of penalty avoidance represents an important similarity between attendance excuse and legal excuse.

Penalty avoidance also represents one hallmark of what I will refer to more generally as *institutional defenses*. When one offers a (purely) moral defense, one is concerned primarily with the reactive attitudes and moral judgments of others. One offers a moral defense in order to prevent others from adopting critical, resentful, or retributive attitudes towards one as a result of one’s behavior. As such, one might say that moral defenses are aimed primarily at others’ psychological states. Of course, preventing negative psychological states may in the long run also help one to avoid negative consequences like reprisals or social isolation, but of course, moral censure does not always involve such adverse consequences. Moral defenses can still be appropriate

even when the accused can be sure of suffering no negative consequences as a result of others' condemnation.¹¹⁹ As such, it is fair to say that the correction of others' attitudes and mistaken judgments is the primary function of moral defenses.

In contrast, the primary function of institutional defenses is the avoidance of a prescribed penalty. Institutional defenses are offered in response to accusations that one has violated the rules of conduct of a specific institution. Such institutional rule violations need not be moral violations. For instance, in a college class, a student may be penalized for using MLA citation style in a paper if she had been instructed to use APA style. In such a case, the penalized student might defend her use of MLA style by reference to vague or inconsistent wording in the directions. The purpose of such an institutional defense would be to avoid the penalty she would otherwise receive for her prohibited behavior. In this case, it is clear that the rule, its violation, and the subsequent defense all have nothing to do with morality.

Aside from drawing on different types of conduct rules, institutional defenses also differ from moral defenses in that they tend to be more formal. That is, they are usually offered to someone in an institutional position of authority in response to allegations of having violated specific publicized rules. Moral defenses are more informal in that they can be relevantly and appropriately offered to anyone who might have the wrong idea about one's behavior. By contrast, institutional defenses are generally offered only to those people who are capable of enforcing penalties. Referring to the example in the previous paragraph, it would make no sense for the student to offer her defense to her mother or her classmate (except as a form of commiseration). In that example, the

¹¹⁹ In section 1.2.4, I discussed how people generally seem concerned with offering moral defenses even they can be assured of no adverse consequences if others are allowed to view their actions disapprovingly.

defense is offered directly to the one responsible for enforcing the penalty – the teacher. Legal defenses are clear examples of institutional defenses, as are defenses offered for behavior that violates school rules, workplace rules, sport rules, etc.

3.1.4 Having an Excuse (Sense 4). In previous sections, we have encountered contexts in which use of the term “excuse” has some special meaning or function. This subsection will explore more generally the various ways in which one might be said to have (or lack) an excuse for something. The reader will notice that this fourth sense incorporates moral excuse as well as most forms of institutional excuse.

3.1.4.1 Examples. Consider the following common examples of how we use the noun “excuse” and its cognates in everyday speech. After an individual has caused harm or has violated some well-publicized rule, she might be asked, “Do you have any excuse for what you’ve done?” Alternatively, when the inquirer is particularly upset or disappointed, she might demand ominously, “You had better have a good excuse!” When what has been done is particularly egregious, one might insist, “What you have done is inexcusable!” When one wishes to reject the explanation that another has offered for a particular item of questionable behavior, one will often say, “That is no excuse!” When an individual believes that her behavior is being illegitimately compared to someone else’s, she will explain the reasons for her own behavior and then rhetorically ask the other person, “What’s *your* excuse?”

3.1.4.2 Observations. The most important thing to notice about these expressions is that – like the third sense of “excuse” – they all refer implicitly or explicitly to reasons why the accused ought to be pardoned or exempted from blame. To ask whether an individual has an excuse or to insist that the excuse had better be a good one is to inquire

whether the individual has a (sufficiently compelling) exculpatory explanation for her behavior. (An exculpating explanation would constitute a *reason* why the individual ought to be excused.) Similarly, to say that an act is inexcusable or to insist that one's explanation is no excuse is to say, respectively, either that no reason could suffice to merit pardon or that the reason that was offered was insufficient. Finally, to rhetorically ask about another's excuse is to invite a comparison of reasons for action (with the insinuation that one's own reasons will have superior exculpatory force). Therefore, just like attendance excuse, the fourth sense of excuse entails the offering of *reasons*.

Notice further that each of these expressions would be at home in contexts where the suspected wrongdoing is moral in nature, but they would be equally appropriate when the suspected wrongdoing is a violation of some conventional or institutional rule of conduct. For example, under the right set of circumstances, each of the expressions mentioned above could just as easily be directed to someone who has arrived late to work as it could to someone who has committed an act of moral wrongdoing.

3.1.4.3 Making Excuses. For the sake of completeness, it is worth pausing to acknowledge a slightly ironic variation of the fourth sense of "excuse." Sometimes our use of the noun "excuse" takes on a decidedly negative or cynical connotation. In these contexts, the speaker insinuates that the "excuse" in question is merely a rationalization for improper behavior, lacking any exculpatory force. Consider the following examples. When someone is frequently unable to accept responsibility for the harm or inconvenience that she causes others, it is common to hear others say disparagingly, "She has an excuse for everything!" When such an individual has done something wrong, she might be asked sarcastically, "What's your excuse this time?" Someone who has become

impatient with what she takes to be false or inadequate defenses of inappropriate behavior might remark dismissively, “You are just making excuses for yourself!” Finally, when an individual’s defense of her inappropriate behavior becomes tedious or implausible, a listener might be heard to mutter wearily, “Excuses, excuses....” In each of these examples, the speaker is expressing skepticism regarding the validity of the excuse in question, or the speaker is suggesting based on inductive evidence that any excuse that might be offered is likely to be deceptive. In examples like these, the speaker believes that the excuse being offered (or the excuse that might be offered) is false, misleading, irrelevant, lacking in important details, or otherwise insufficient to exonerate the accused.¹²⁰

3.1.4.4 Parts of Speech. We have noticed before that the word “excuse” can be used both as a noun and as a verb. Notice, though, that the noun form of “excuse” becomes appropriate only in those contexts that involve the offering of *reasons*. Consider the grammatical differences between the first two senses of the word “excuse” and the last two. In the contexts that correspond to the first two senses, the word “excuse” is used almost exclusively as a *verb* (e.g., “Excuse me.” “She excused herself from the conversation.” “May I be excused?”).¹²¹ It is only in the latter two senses of “excuse” – the senses in which reasons are typically offered for why one ought to be excused – that we begin to see “excuse” used primarily as a *noun*. Writing an excuse, having an excuse, offering an excuse, making up an excuse, listening to an excuse, etc., all involve presenting or considering *reasons* why one ought to be pardoned for some behavior. When we talk about excuses (nouns), we are referring to reasons to exculpate.

¹²⁰ See section 1.2.7 for a discussion of inaccurate defenses in the moral context.

¹²¹ Here I am counting the participle “excused” as a verb-form.

Hence, it follows that in those contexts in which one rarely provides reasons for why one should be excused (for instance, the first and second senses above), “excuse” is rarely used as a noun.

Whether a given instance of excuse typically requires the offering of reasons (and, correspondingly, whether the noun form of “excuse” is typically used) appears to be an important axis along which to distinguish different ordinary language senses of “excuse” from one another. However, I maintain that the social excuses (i.e., the senses of “excuse” that do not typically involve the offering of reasons) are actually just vestigial forms of their more complex, reason-oriented cousins.¹²²

3.1.5 Conclusions. Now that we have identified some of the most common ways that the word “excuse” is used in American English, we can begin to draw some conclusions about what is and what is not an element of our common concept of excuse.

3.1.5.1 Discrepancies. Although our purpose in this chapter so far has been to explore the meaning that ordinary language gives to the term “excuse,” a skeptical reader may resist the conclusion that all of the senses of “excuse” we have examined above have anything in common at all. This reluctance may seem well-founded when we recall the numerous differences between what we called social excuse (senses 1 and 2) and what we might call *rational excuse*¹²³ (senses 3 and 4). First, in cases of social excuse, the word “excuse” is used almost exclusively in verb form, whereas, in cases of rational excuse, the word “excuse” is used primarily in noun form. Second, in cases of social excuse, people do not typically provide a reason for *why* their behavior ought to be excused, whereas, in cases of rational excuse, reasons are essential. Third, in most cases of social

¹²² Part of the argument for this view can be found in section 3.1.2.2 above.

¹²³ I call these senses of excuse “rational” because they involve offering *reasons* for why one ought to be excused. By choosing this term, I do not mean to imply that social excuses are irrational.

excuse, the person asking to be excused will not expect a response from the person to whom the request is directed, whereas, in cases of rational excuse, defenders are typically interested in waiting for responses from those who would judge their behavior. For example, when one asks to be excused for leaving an ongoing conversation, typically one will not wait to see whether the other members of the conversation are inclined to actually pardon that behavior. Rather, one will simply ask to be excused and then walk away. However, when the tardy office worker offers her boss an excuse for why she is late, she will typically await a response from the boss that indicates whether or not the excuse has been accepted.

After surveying these differences, a skeptic might be tempted to conclude that social excuse and rational excuse are actually two separate things. The suggestion is that, while it may be true that social excuse and rational excuse make use of the same word in English, actually these terms are merely homonyms – two different words that happen to be spelled the same way. However, claiming that social excuse and rational excuse are mere homonyms would be methodologically premature. Concluding that two uses of the same term are actually different terms with the same spelling should not be adopted at the first sign of discrepancy. The fact that the same word is used in both contexts is strong *prima facie* evidence that the two uses are related. Only in the absence of any plausible account of what unifies the various senses of excuse can we legitimately conclude that there is no fundamental relationship between them. Indeed, we have already seen one obvious similarity between social excuse and rational excuse: in both types of excuse,

the defender seeks pardon for behavior that violates rules of conduct.¹²⁴ Thus, there seems to be a foundation of similarity that should not be cast aside quite so easily.

3.1.5.2 Unified Account of Excuse in Ordinary Language. So how might we explain the discrepancies in a way that preserves the sense that social excuse and rational excuse are two varieties of the same thing? The best explanation for the discrepancies mentioned above is that the rules of conduct which are being violated in the cases of social excuse are of such trivial importance that providing a reason and awaiting a response have become practically unnecessary. Put another way, because the rules of conduct in the context of social excuse are of such minimal weight, almost any reason will suffice to merit pardon for violating them. Since almost any reason will suffice to pardon violations of these rules, one can safely assume that one will be excused when one asks to be. Consequently, neither party expects a reason to be offered in these contexts. Similarly, since one who asks to be excused in these contexts expects that she will be excused without offering a reason, there is no point for her to wait for a reaction from others. Finally, one can explain the differences in parts of speech in much the same way. The noun form of the word “excuse” is rarely used in the context of social excuse because of the fact that reasons are so rarely offered. In lieu of any reasons for why one ought to be excused, there are no things, no nouns – no “excuses” – to refer to. Hence, the noun form of “excuse” is typically absent in the context of social excuse.

When we look at social excuse in this way, we perceive that it is just an abbreviated form of rational excuse. Certain elements that are common to rational excuse, such as providing reasons for why one deserves to be pardoned and waiting to see whether the excuse is acknowledged, have atrophied away in the context of social excuse.

¹²⁴ See section 3.1.2.2 above.

However, it is not difficult to imagine how those elements could theoretically be reincorporated into social excuse. For instance, the host who asks to be excused when she needs to leave her guests presumably has a reason for doing so. Perhaps she needs to check on something that is cooking in the kitchen, perhaps she wants to check on her children upstairs, perhaps she needs to use the restroom, or perhaps she simply wants a moment alone. She could (conceivably) offer these reasons for why she should be excused, and her guests could (conceivably) reassure her that they will not think less of her for leaving them. Of course, because there is so little at stake, actually doing these things would be rather tedious. But that is exactly the point. In principle, we can imagine people offering reasons for why they deserve to be excused when they breach minor rules of protocol, and we can imagine them waiting to see if those reasons are accepted by those to whom they are directed. These things are not typically done in the context of social excuses simply because doing so would be a waste of time. However, the lack of these practices in the context of social excuse does not prevent us from interpreting social excuse as having the same fundamental structure that rational excuse has. The difference is that social excuse functions in an abbreviated form that rarely displays those elements of the structure that are no longer doing any work.

Sometimes the need to offer reasons and await a response has atrophied away because the rules being violated are so insignificant. Other times the atrophy occurs because the reasons that would be offered are so predictable. This leads to a slightly different model of social excuse – as rational excuse on the honors system. For example, when a stranger brushes up against a commuter on a bus and says, “Excuse me,” the commuter simply takes it for granted that the contact was accidental and that the

commuter deserves pardon. In a situation like this one, we simply take the reason (e.g., accident or physical compulsion) for granted. However, it is entirely possible that there is no explanation for the contact that would merit pardon. Perhaps the stranger is actually a sexual deviant who gets thrills from illicit contact with strangers. He says, “Excuse me,” because he wants the commuter to believe that the contact was accidental, but in fact it was not. In this situation, the commuter may be fooled into pardoning the illicit behavior only because she has trusted that the person asking to be excused actually deserves to be excused. This example helps to demonstrate that, even in social situations where no reason for pardon is typically offered, reasons are still implicit in the request to be excused. I conclude that, even though social excuse may seem to be conceptually different from rational excuse, they share a fundamental structure.

3.1.5.3 The Nature of Excuse. Having concluded that there is a shared fundamental structure to the most common uses of the term “excuse” in ordinary language, it is now time to characterize that structure more precisely. There are four fundamental characteristics that seem to be had in common, either explicitly or implicitly, by all of the senses of “excuse” we have examined. First, excuse requires the *violation* of an expectation of proper behavior, or a *rule of conduct*. Second, excuse involves a request that one be *pardoned* for that violation. Here, the term “pardon” is being used loosely to mean consciously withholding critical, condemnatory, or censorious judgments of another’s behavior. Third, at least implicitly, excuse involves a normative judgment that pardon is appropriate or *deserved* under the circumstances.¹²⁵ Typically, we say that

¹²⁵ I recognize that pardon and forgiveness are usually not thought of as deserved. Again, I am using the term “pardon” loosely here. More appropriate words might be “exoneration” or “exemption,” but these words are foreign to the ordinary language context of “excuse” that I am trying to explore. However, no harm would be done in substituting them for “pardon” if the reader found them to be more felicitous.

someone is excused or has an excuse when that individual does not deserve condemnation for a given act (relative to the standards for judging actions of that kind).¹²⁶ And fourth, at least implicitly, excuses are *reasons*; they are reasons why an individual does not deserve condemnation for a given action.

Putting these characteristics together in one sentence, we get the following definition of excuse in ordinary language: one *has an excuse* (or *is excused*) when there is a reason (or when it is presumed that there is a reason) why one ought to be pardoned (or ought to avoid censure) for violating a particular rule of conduct. Correspondingly, an *excuse* (in ordinary language) is an explanation that is (or could be) offered to an accuser in an effort to demonstrate that a particular individual ought to be pardoned for violating a rule of conduct. (Of course, not all excuses are effective. That is, not all excuses succeed – or should succeed – in convincing the accuser that the accused deserves pardon.)

3.1.5.4 Excuse in Relation to Justification. Perhaps the most fundamentally important observation about the ordinary language conception of “excuse” is that it does *not* support the way that moral and legal theorists typically distinguish between justification and excuse. Typically, moral and legal theorists use the term “excuse” as a competitor to the term “justification.” That is, in moral and legal theory, if a given defense is classified as an excuse, then it is understood that the same defense cannot also be a justification (and vice versa). However, the terms “justification” and “excuse” are not used in such a dichotomous fashion in ordinary language. This point can be made quite simply using the fourth sense of “excuse” discussed above. Notice that in almost all of the expressions that we encountered as examples of the fourth sense, we could easily

¹²⁶ I am using “deserves/ought to be pardoned” and “deserves/ought not to be condemned” interchangeably.

replace the noun “excuse” with the word “defense” without any loss of meaning. (“Do you have any *defense* for what you’ve done?” “You had better have a good *defense*!” “What you have done is *indefensible*!” “She has a *defense* for everything!” “That is no *defense*!”) This evidence indicates that, as far as ordinary language is concerned, the term “excuse” is synonymous with the term “defense.” And since justifications are defenses, too, it turns out that, in ordinary language usage, justification is a subset of excuse, not a competitor.

We can illustrate this fact in terms of each of the four senses of “excuse” discussed above. Let’s begin with the fourth sense and work our way back. Consider all the different ways that the person who is late to work could reasonably respond to the boss who exclaims, “You had better have a good excuse!” Suppose the tardy worker responds, “I’m sorry I’m late, but my mother had a heart attack this morning, and I had to give her CPR until the paramedics arrived.” Surely, this response would satisfy the boss’s demand for a “good excuse.” However, in moral terminology, this explanation would constitute a *justification* for being late for work, not an *excuse*.¹²⁷ We can find similar examples using the other three senses of “excuse” as well. Suppose Anne’s mother writes the teacher a note asking that Anne be excused for missing class on Friday because she was observing a religious holiday. Elsewhere in this dissertation, we would refer to this kind of explanation as a justification for missing class, not an excuse.

Suppose a dinner guest asks to be excused from an ongoing conversation in order to call

¹²⁷ Introducing a similar example, Baron writes, “It is striking how often civility calls for offering an excuse for one’s conduct even though one believes that one was justified.” (Baron, “Excuses, Excuses,” 25) In his comment on Baron’s paper, Duff agrees and cautions that “given the dual use of ‘excuse’ – in a broad sense that includes justificatory exculpations and a narrower sense that excludes them – we must take care not to classify as non-justificatory excuses that are actually offered and understood as justificatory pleas.” [R.A.Duff, “Excuses, Moral and Legal: A Comment on Marcia Baron’s ‘Excuses, Excuses’,” Criminal Law and Philosophy 1 (2007): 51.]

the police and report a break-in she just witnessed through the dining room window. Again, this sort of defense seems closer to what we had previously called a “justification” than to an “excuse.” Finally, suppose a policeman enters a college classroom in the middle of a lecture and says, “Excuse me for interrupting, but we have received a bomb threat targeting this building. I have to ask you all to exit the building quickly and calmly.” Surely, the policeman’s interruption of class is justified despite the fact that he asks to be excused. These examples demonstrate that all of the different ordinary language senses of the term “excuse” we have identified above can also be used to refer to defenses that a moral or legal theorist would conceptualize as justifications.¹²⁸ Hence, as far as ordinary language is concerned, justification is just one variety of “excuse” – justifying one’s behavior is just one way of “excusing” it.¹²⁹

3.1.5.5 Implications for the Use of “Excuse” in Moral and Legal Theory. The fact that ordinary language does not support the distinctions that are commonly made between justification and excuse is interesting to us for at least two reasons. First, the fact that the term “excuse” has been drafted by moral and legal theory to serve artificially as a competitor to the term “justification” helps to explain why there has been no satisfactory unified account of moral excuses. Since the use of the term “excuse” as an alternative to justification is fundamentally artificial, it should be no surprise that that

¹²⁸ According to Diana Hsieh, social psychologists Sigmon and Snyder, who studied the lies that people tell to avoid accepting responsibility for their actions, count “justification” as a particular type of “excuse.” They break excuses down into two primary categories – linkage-to-act and valence-of-act – and they classify justification as a specific kind of valence-of-act excuse. [Sandra Sigmon and C.R. Snyder, “Looking at Oneself in a Rose-Colored Mirror: The Role of Excuses in the Negotiation of Personal Reality,” in *Lying and Deception in Everyday Life*, Michael Lewis and Carolyn Saarni eds. (New York: The Guildford Press, 1993), 151-160 as described and footnoted in Diana Mertz Hsieh, “False Excuses: Honesty, Wrongdoing, and Moral Growth,” *Journal of Value Inquiry* 38 (2004): 172.] The fact that professionals in other fields find it natural to count justification as a special type of excuse provides further evidence that ordinary language does not itself support a mutually exclusive justification/excuse dichotomy like the one commonly employed in moral and legal theory.

¹²⁹ This point is also emphasized by Michael Corrado. See Michael Corrado, “Notes on the Structure of a Theory of Excuses,” *Journal of Criminal Law and Criminology*, 82 (1992): 483.

heading turns out to encompass a variety of distinct defense types.¹³⁰ This conclusion provides support to the hypothesis that excuse is merely a catch-all category encompassing all complete defenses that are neither denials nor justifications.¹³¹

Second, the fact that the traditional distinction between justification and excuse is a theoretical artifact rather than a matter of analytic necessity affords the theorist who is inclined toward conceptual reform a great deal of flexibility. Although it may be theoretically convenient for us to continue distinguishing different types of defenses, calling some “justifications” and others “excuses,” the conclusion that no specific account of the distinction between justification and excuse can receive support from ordinary language gives us latitude to modify the way those terms have traditionally been understood, if doing so is theoretically productive. Of course, the ways in which “justification” and “excuse” are used in moral and legal theory have developed a life of their own in those specific contexts. So, even if the usage of those terms in moral and legal theory does not receive the authority of ordinary language, modifications to the way those terms have been traditionally used should nonetheless be made sparingly. Still, it is important to recognize that the final arbiter of the moral distinction between justification and excuse need not be tradition alone. Although traditional usage carries some weight, theoretical considerations such as simplicity and theoretical utility are important as well.

¹³⁰ This conclusion was predicted in section 1.4.3 above.

¹³¹ This view of excuse as merely the remainder of all those fully exculpatory defenses left over after the removal all other complete defenses has recently been gaining popularity. It has been explicitly adopted by Peter Westen who writes, “‘Excuse,’ as I define it, is a category that encompasses all exculpatory defenses that do not consist of either ‘absence of *actus reus*’ or ‘justification’.” [Peter Westen, “An Attitudinal Theory of Excuse,” *Law and Philosophy*, 25 (2006): 309.] Jeremy Horder’s argument that there can be no single, unified account of excuses in the criminal law also indicates support for this view. [Jeremy Horder, “Criminal Culpability: The Possibility of a General Theory,” *Law and Philosophy* 12 (1993): 193-215.]

3.2 Justification. Now, we turn to a brief examination of the uses of the term “justification” and its cognates in ordinary language. Luckily, “justification” does not have a variety of different senses, like “excuse” does. While it may find use in a few specialized contexts (like epistemology and the law), for the most part, “justification” and its cognates are used rather uniformly throughout the English language. This fact should make our job here somewhat easier than it was in the first part of this chapter since there will be no need to synthesize a uniform conception of “justification” from various, apparently disconnected contextual uses. Accordingly, it will be useful to begin by surveying what I hope is a representative sample of the ways that we use the term “justification” and its cognates in ordinary speech, taking note of those elements that these uses have in common.

3.2.1 Examples. The following common examples of the way we use the term “justification” and its cognates are numbered for ease of reference.

1. The ends justify the means.
2. I don’t have to justify my actions to you!
3. How can you justify spending \$500 on new clothes when you still haven’t paid last month’s rent?
4. Did the boss offer any justification for firing Cooper?
5. The police’s use of pepper spray on the non-violent protesters was completely unjustifiable.
6. Biologists have ample justification for their acceptance of evolution as the primary explanation for Earth’s biological diversity.
7. Israel’s policy of destroying the homes of suicide bombers’ families is an

unjustified form of collective punishment.

8. The rape victim's strong feelings of anger and her desire for revenge are perfectly justified under the circumstances.

3.2.2 Observations. Using these examples, we can make the following observations about our common conception of what is meant by "justification."

3.2.2.1 Objects of Justification. Because of our previous examination of moral defenses, we are already aware that actions (and omissions) are things that are often said to be justified or unjustified. The previous examples demonstrate that a variety of other things are often said to be "justified" as well. In particular, all manner of authoritative pronouncements seem to be prime candidates for justification. Examples 4, 5, and 7 indicate that official policies, rules, laws, and decisions are all frequently judged to be either justified or unjustified. Justification also crops up in relation to one's beliefs. We know from epistemology that individual beliefs can be objects of justification. By extension, scientific theories can be said to be justified or unjustified, depending on the evidence for or against them, as seen in example 6. Example 3 demonstrates that justification also finds a home in the domain of rational decision making. A decision that is well-suited to one's goals will usually be deemed justified, while a decision that is poorly suited to one's goals will be deemed unjustified. Example 8 seems to be slightly different from the other examples in the list. Still, it shows that mental states, like desires and emotions, can sometimes be objects of justification in ordinary language.

So ordinary language sanctions individual actions, decisions, authoritative policies, beliefs, theories, and possibly even mental states as potential objects of justification. What about people; can people be justified? Ordinary language seems to

indicate that they can. Each of the previous examples (except the first) can be rewritten so that the new sentence indicates that what is justified is a *person* (or a group of people).

Consider the following re-written examples.

2'. I don't have to justify myself to you!

3'. How can you be justified in buying new clothes when you still owe rent?

4'. Was the boss justified in firing Cooper?

5'. The police weren't justified when they pepper-sprayed the nonviolent protesters.

6'. Biologists are justified in their acceptance of evolution.

7'. Israel isn't justified when it bulldozes the homes of Palestinian families.

8'. The rape victim is justified in feeling angry and wanting revenge.

These formulations make approximately the same claims as the originals, with perhaps a slight change in focus.¹³² Granted, some of these altered versions sound slightly more awkward than the originals. Still, it is not difficult to craft sentences with a person (or group of persons) as the subject of justification (rather than actions, policies, decisions, and the like). Therefore, I think it is fair to conclude that claims of the sort

"...justifications focus entirely on actions, not agents"¹³³ do not receive support from ordinary language usage.¹³⁴

¹³² We will discuss the different possible shades of meaning created by changing the sentence structure of a justification sentence in greater detail in section 3.2.3 below.

¹³³ Douglas N. Husak, "Justifications and the Criminal Liability of Accessories," Journal of Criminal Law & Criminology 80 (1989): 497. Of course, in the quoted text above, Husak is making a claim about the way that justifications function in the criminal law. To say (as I do) that the claim is not supported by usage in ordinary language has no bearing whatsoever on the correctness of Husak's definition in its intended context.

¹³⁴ Of course, others have made this same observation about ordinary language. For a recent example, see Marcia Baron, "Justifications and Excuses," Ohio State Journal of Criminal Law 2 (2005): 392.

3.2.2.2 Normativity. Noticing the variety of different potential objects of justification leads to the further observation that justification always makes implicit reference to some set of normative standards. Sometimes the relevant standards are clearly articulated; other times the relevant standards are applied more intuitively. In example 1, one presumes that the relevant standards are those of morality. In example 2, the standards would most likely (depending on the context of utterance) be those of legitimate authority. In example 3, the standards are those of responsible financial decision-making. In example 4, the standards are those of just cause in employment decisions. In example 5, the standards may be any or all of morality, law, or police procedure (depending on the context of utterance and the intentions of the speaker). In example 6, the standards are those of scientific evidence. In example 7, the standards are those of law and morality. In example 8, the standards are those of emotional or psychological propriety. The point is that “justification” is an inherently normative term that can only be properly invoked in reference to specific standards of evaluation.

A corollary of this point is that justification is only asserted or ascertained in relation to something that is in apparent (or potential) violation of the particular norms in question. When there is no question about the propriety of something in relation to a set of standards, justification will be irrelevant for that object in relation to that set of standards. Using example 1 as an illustration, one would only attempt to justify the means by reference to the ends if the means were somehow morally suspect. In example 3, the expenditure of \$500 on clothes stands in need of justification because the agent’s apparently untenable financial situation makes this choice appear unwise at best and irresponsible at worst. Notice, though, that there are some settings in which justification

is always appropriate. That is, there seem to be some settings in which justification is always appropriate. For example, political theorists operate under the assumption that exercising authority by issuing commands backed by coercive threats always requires justification (as would be relevant to examples 4, 7, and probably 2 above.) Similarly, epistemologists operate under the assumption that beliefs are always amenable to justification.¹³⁵

3.2.2.3 Synonyms. Up to now, we have identified some of the ancillary factors that delineate the function of the term “justification” in ordinary language. In this section, we will investigate the meaning of the term “justification” more directly by considering different synonyms for that term and its cognate in the examples above. Identifying appropriate synonyms for “justify,” “justification,” and “justifiable” will help us to achieve a better understanding of the ordinary language meanings of those terms. The synonyms are presented in order from most general to most specific. The goal in this presentation is to continuously narrow our conception of justification until we have achieved maximal clarity and focus.

3.2.2.3.1 Explanation. In example 3, the best synonym for “justify” would seem to be the term “reconcile,” resulting in the sentence “How can you reconcile spending \$500 on new clothes when you still haven’t paid last month’s rent?” This substitution

¹³⁵ At first glance, epistemology appears to offer a counterexample to the claim that justification is only necessary when a norm has (at least potentially) been violated. After all, it seems strange to say that merely believing something violates a norm, even potentially. However, if we think carefully enough, I think we can come up with such an intelligible norm. Alston describes the ‘epistemic point of view’ as being “defined by the aim at maximizing truth and minimizing falsity in a large body of beliefs.” [William P. Alston, *Epistemic Justification: Essays in the Theory of Knowledge* (Ithaca: Cornell University Press, 1989), 83.] If we translate the aim that Alston describes into a rule for individuals to follow, we would have the following doxastic standard: other things being equal, one shouldn’t accept (or assert or assent to) a proposition unless one has sufficient evidence that the proposition is true. If a standard like this one is operative in epistemology, then epistemological justification does not represent a counterexample after all because justifying a belief would explain why the doxastic standard has not been violated in a particular case.

shows that the term “justify” means to explain in a way that makes sense. Similarly, in example 8, we could replace the term “justifiable” with the term “understandable.” The result would be: “The rape victim’s strong feelings of anger and her desire for revenge are perfectly understandable under the circumstances.” This example also shows that the term “justify” can mean to make sense out of something.

These examples illustrate that justification is a kind of explanation. To “make sense out of” something is to offer additional information about it in such a way as to reduce or eliminate another’s (or one’s own) perplexity about why it happened, usually by rendering it consistent with other data or expectations. In example 3, to make sense out of (i.e., to justify) the spendthrift’s actions would be to offer an explanation for why the spendthrift’s choices were not as financially irresponsible as they appear to be. In example 8, to make sense out of (i.e., to justify) the rape victim’s powerful negative emotions is to offer an explanation for why it is appropriate for this particular individual to experience them when it may be inappropriate for others to feel the same way. Thus, at a very general level, we may conclude that justification is a form of explanation.¹³⁶

3.2.2.3.2 Defense. Turning to example 2, we could easily replace the word “justify” there with the word “explain.” The result would be “I don’t have to *explain* my actions to you!” However, this replacement sentence does not completely capture the sense of the original. The person uttering the original sentence is indicating not just that no explanation is required, but also that she need not seek her interlocutor’s *approval*. That is, to justify something is to explain it in a way that also *defends* it from criticism, censure, disapproval, etc. This aspect of the meaning of “justification” in ordinary

¹³⁶ Of course, “making sense out of” something is not the extent of what it means to justify something. This point is emphasized in section 3.2.2.3.3 below.

language can also be demonstrated using synonyms. In example 5, “indefensible” and “inexcusable” seem to be the best substitutes for “unjustifiable,” although “unforgivable” and “uncalled-for” would both seem to fit quite nicely as well. Using the first alternative, the result would be “The police’s use of pepper spray on non-violent protesters was completely indefensible.” Identical terms could be used to replace “unjustified” in example 7, yielding the sentence “Israel’s policy of destroying the homes of suicide bombers’ families is an indefensible form of collective punishment.” These substitutions simply emphasize what we already knew, namely, that to justify an act or a policy is to offer a defense for it.

3.2.2.3.3 Good Reasons. By combining the “sense-making” explanatory qualities of justification with its defensive qualities, we can articulate another important aspect of “justification” in ordinary language, namely, that it requires the provision of good (or valid or compelling) *reasons* for whatever is to be justified. The link between justification and good reasons is demonstrated clearly in examples 1, 4, and 6. In example 4, the best replacement for the word “justification” is “good reason.” The result is: “Did the boss offer any good reason for firing Cooper?” Example 6 is similar. In that example, “ample justification” could easily be replaced with the phrase “good reasons,” yielding the sentence “Biologists have good reasons for their acceptance of evolution as the primary explanation for Earth’s biological diversity.” Finally, the best synonym for the term “justify” in example 1 is the word “validate.” Making that substitution yields the sentence “The ends validate the means.” To say that the ends justify or validate the means is to claim that one’s goal or purpose in performing a series of actions represents a *good reason* for performing those actions (regardless of the nature of the actions

themselves). Of course, what counts as a good reason varies from context to context, and it is certainly possible for reasonable people to disagree about what counts as a good reason.¹³⁷

3.2.2.3.4 Aberrant Usage. This is a good time to make a very important observation about the use of the term “justification” in ordinary language. Sometimes, it seems acceptable to say that offering *any* kind of reason for an action is a “justification,” even if that reason is not a good (or valid) reason in the sense described above. That is, there seem to be contexts in ordinary language that seem to take “reason” and “justification” to be synonyms. Consider the following ordinary language usage: “His justification for abandoning his wife and child was that he was tired of the hassles and restrictions imposed by family life.” In this case, the man’s desire to be free of “hassles” is being presented as a reason for his decision to abandon his family, but that hardly seems to be a *good* reason. That is, it hardly seems to be a *justification* of the deadbeat’s behavior (despite the occurrence of that term in the sentence).

We could just say that ordinary language does not always distinguish between successful justifications and putative justifications. However, I suspect that the problem is deeper than this. In particular, it seems that ordinary language will let us get away with calling almost any reason for action a “justification,” even when the reason in question is not even eligible as a putative justification. For instance, suppose that neither the utterer of the sentence nor the subject of the sentence (i.e., the deadbeat) believed that being tired of hassles was a good reason for abandoning his family. If that is true, then it can’t even

¹³⁷ Of course, if I were trying to provide an analysis of “justification” in terms of necessary and sufficient conditions, I would have to say much more about what counts as a good reason. However, my purpose here is only to establish the boundaries that ordinary language places on the correct use of the term “justification.”

be counted as an attempted but failed (i.e., merely putative) justification. Similarly, it does not strain the boundaries of ordinary language to say, “Hinckley’s justification for shooting President Reagan was to impress Jodie Foster.” Again, since it is well-known that Hinckley was insane at the time of the shooting, the “justification” referred to in this sentence cannot even be merely putative.¹³⁸ The conclusion is that ordinary language seems to let us call *any* reason for acting a “justification,” even if that reason could not possibly represent a justification in a more robust theoretical sense. Rather than accepting that all reasons for action are justifications in ordinary language, I think we are better off saying that these instances of reason-giving are no kind of justification at all, just a careless or defective use of language. As we continue our investigation of the distinction between justification and excuse, we must carefully guard against allowing this aberrant usage of the term to influence our final theory.¹³⁹

3.2.3 Guiding Reasons or Explanatory Reasons? The discussion of good reasons brings us back to a crucial question that we have encountered before in Chapter Two in connection with our discussion of permissibility. Namely, in order to have a justification for doing something, do the good reasons for acting (i.e., *guiding reasons*) have to be the reasons that actually motivated one to act (i.e., *explanatory reasons*)?¹⁴⁰ If only guiding reasons are needed to justify an act, must the actor be aware of the existence

¹³⁸ It is true that Hinckley’s insanity makes it impossible for the sentence to be talking about putative justification from the utterer’s perspective, but the utterer could still be using the term “justification” in the sense of putative justification from Hinckley’s perspective. Quite likely, it is the desire to be overly charitable to others that explains what I am calling the aberrant usage of “justification.” Any time someone offers a reason for their action, they can be interpreted as offering a putative justification for it. However, in cases like the ones I describe above, counting the reason given as even a putative justification is simply too much of a stretch; we are better off considering it mistaken.

¹³⁹ See section 4.2.1 below for more discussion of how this aberrant usage can infect moral and legal theory.

¹⁴⁰ This terminology of guiding and explanatory reasons is due to Joseph Raz. See Joseph Raz, Practical Reason and Norms, 3rd ed. (Oxford: Oxford University Press, 1990), 16-20.

of those good reasons prior to acting, or is it sufficient to justify one's behavior with reference to guiding reasons that one was unaware of at the time of action? Let's consider what light the use of the term "justification" (and its cognates) in ordinary language can shed on this issue.

3.2.3.1 Sentence Structure. It is at this point that it is useful to consider the slightly different shades of meaning inherent in different formulations of justification sentences. Suppose the boss doesn't like her employee Cooper very much and wishes to fire him. She is in possession of proof that Cooper has violated some minor company policy, say, using sick leave to extend a weekend vacation – a company policy that many other employees are also guilty of violating, including the boss herself. She uses this violation of company policy as a pretext¹⁴¹ for firing Cooper. Consider the minor differences in meaning between the following four sentences, uttered in reference to this hypothetical context.

9. Firing Cooper is justified.

10. The boss's firing of Cooper is justified.¹⁴²

11. The boss's firing of Cooper was justified.

12. The boss was justified in firing Cooper.

Sentence 9 might be uttered by someone who is considering whether or not Cooper should be fired. In order for this sentence to be true, there need only be a good (guiding)

¹⁴¹ Notice that there is a strong ordinary language impulse to replace the word "pretext" in this sentence with the word "excuse": "She uses this violation of company policy as an *excuse* for firing Cooper." This pejorative usage of "excuse" to indicate a non-genuine defense was discussed briefly in 3.1.4.3 above. Perhaps it is this pejorative usage of "excuse" that lends credence to the view that excuse is a form of defense that is, in some sense, an inferior, less desirable alternative to justification.

¹⁴² Although it sounds more natural in ordinary language to say, "The boss's decision to fire Cooper is justified," I was concerned that this phrasing might introduce ambiguity about what is being justified – the decision (i.e. the internal thought process) or the firing itself. Hopefully the reader will forgive the slightly awkward phrasing here.

reason for firing Cooper, regardless of whether the person who does the firing actually fires Cooper for that reason. That is, it seems to me that the structure of sentence 9 supports what some have called the *objective notion of justification* that only requires the existence of a guiding reason.¹⁴³ To say that Cooper's dismissal is justified is merely to say that there are good reasons for the dismissal regardless of whether those reasons are the motivating reasons for the act. A technical rephrasing of sentence 9 is: There are (compelling, undefeated) guiding reasons which can be offered in support of any firing of Cooper.

Sentence 10 differs from sentence 9 in that a specific action token is being referred to (rather than any action that fits the type). This sentence could be uttered prior to the actual firing or after it. For the purposes of comparison, let's assume that it is uttered after the actual firing. To my ear, the truth of this sentence uttered after the firing still depends only on the existence of a valid guiding reason. Here, the use of present tense in reference to a past event introduces a timeless quality to the assertion that lends itself to an objective evaluation of reasons, rather than a subjective evaluation of why the boss did the firing.

The only difference between sentences 10 and 11 is the change in tense from (timeless) present to past. Notice that this sentence is slightly ambiguous in meaning. Someone uttering this sentence could be saying that a public explanation was offered for Cooper's dismissal – that there was a public act of reason-giving.¹⁴⁴ Alternatively, this

¹⁴³ Paul Robinson is the most notable adherent of what I am here calling an "objective notion of justification" (although he does not use that terminology himself). He believes that the actor's awareness of good reasons for performing an act is irrelevant to an evaluation of the act as either justified or unjustified in the criminal law. He has defended this view consistently in the literature for over 30 years. For example, see Paul H. Robinson, "Competing Theories of Justification: Deeds vs. Reasons," in Harm and Culpability, A.P. Simester and A.T.H. Smith eds. (Oxford: Clarendon Press, 1996), 45-70.

¹⁴⁴ This meaning illustrates the aberrant usage of "justification" discussed above in section 3.2.2.3.4.

sentence could mean that the firing of Cooper had the property of being justified. Let's assume that the speaker intends the sentence to have the latter meaning. As in sentence 10, sentence 11 refers to the specific token of Cooper's actual firing, rather than any action of that type. However, it seems to me that the past tense used in this sentence changes the meaning slightly. It indicates that, regardless of whether the firing is justified now, it was also justified at the time. However, if locating a justification in time makes any sense at all, then it can only make sense with regard to matters of epistemology, what people knew and when they knew it. After all, if an act is justified in the timeless sense of sentence 10, then saying it *was* justified seems pointless unless some reference is being made to whether the actors in the situation had access to the relevant guiding reasons for action. Hence, I submit that in order for sentence 11 to be true in ordinary language, the boss must at least have been aware of a valid reason for firing Cooper at the time of the actual firing. That is, to say that an action *was justified* is to say that the actor had epistemological access to some subset of those guiding reasons that support the act at the time of the act. The use of past tense in sentence 11 seems to be introducing an element of subjectivity into the sentence's truth conditions.

Sentence 12 differs from sentence 11 in its focus on the boss as the subject of the sentence. To say that the boss was justified places the focus squarely on the individual doing the firing. It makes an evaluative claim about *her* based on what she did. To my ear, saying that she was justified is to say that, when she fired Cooper, she took that action at least partially *because* of the valid reasons for doing so. In that sense, sentence 12 is the most subjective in meaning of the four sentences because (at least to my ear) it requires not just knowledge of the existence of valid reasons but also that the action was

taken (at least in part) *for* those valid reasons.¹⁴⁵ That is, the boss was aware of guiding reasons that were also explanatory in relation to her act. Thus, in the case described above, since the boss was aware of the violation of company policy at the time of the firing and since the violation was a necessary condition for the firing, either all four sentences will be true or all four sentences will be false, depending on whether the violation of the company policy counts as a valid guiding reason.¹⁴⁶

3.2.3.2 Attempts to Falsify Sentence 12. To help demonstrate the subjective elements of the formulation found in sentence 12, consider the types of counter-evidence that one might offer to dispute it. For example, someone critical of the boss's decision might say, "No, she wasn't justified. She didn't find out about what Cooper did until after the firing." The possibility of such a response to sentence 12 in ordinary language indicates that the actor must (at a minimum) be aware of guiding reasons for acting in order to be considered justified. Furthermore, I submit that the guiding reason must also be an explanatory reason.¹⁴⁷

To establish the latter claim, we must find a way to distinguish between actors who are aware of valid reasons for acting without actually acting because of those reasons from actors who are aware of those reasons and who act because of them. (That is, we should try to distinguish actors who are merely aware of guiding reasons from those who whose guiding reasons are also explanatory reasons.) To create a case in

¹⁴⁵ These claims are defended in the following section.

¹⁴⁶ If it is true that many others in the company including the boss herself are guilty of the same violation, then I would argue that Cooper's similar violation is not a valid guiding reason for the firing and that the boss's action is unjustified. See section 4.2.3 below for the relevance of community standards in blaming.

¹⁴⁷ John Gardner also takes this to be a necessary condition. In an article surveying the general nature of justification, he writes, "No action or belief is justified unless it is true *both* that there was an applicable (guiding) reason for so acting or so believing *and* that this corresponded with the (explanatory) reason why the action was performed or the belief held." John Gardner, "Justifications and Reasons" in Harm and Culpability, A.P. Simester and A.T.H. Smith eds. (Oxford: Clarendon Press, 1996), 105.

which the guiding reason is neither necessary nor sufficient for the boss's action, imagine that the boss made the decision to act before learning of the guiding reason.¹⁴⁸ (Suppose that the boss had begun typing Cooper's letter of termination before learning of Cooper's violation of company policy.) In this case, we may suppose, Cooper would have been fired even if the boss had not learned of the valid reason for doing so. (Suppose that she learns of Cooper's violation of company policy as she is on her way to deliver the letter to Cooper's office.) This is a case where the actor's awareness of the valid reasons for firing Cooper is irrelevant to the action she took because she was going to take it anyway. Would sentence 12 still be true of the boss in this case? That is, would it still be correct to say that the boss was justified in firing Cooper? In this situation, the boss's critic might (excitedly) answer, "She was not justified at all! She fired Cooper purely out of spite. She didn't find out about his violation of company policy until she was already on the way to fire him!" The possibility of this response to sentence 12 provides evidence that there are some ordinary language formulations of "justification" sentences that require that the actor has acted for the right reasons in order to be considered justified.¹⁴⁹ That is, there is some ordinary language evidence supporting a subjective account of justification.

¹⁴⁸ This type of case is formally identical to Lucky Arsonist 3, discussed in chapter 2.

¹⁴⁹ Strictly speaking, all this counter-example shows is that, in order to be considered justified in the sense of sentence 12, an actor must be aware of valid reasons for acting *before* deciding to act (or beginning the act). However, if we tried to produce a counter-example in which the boss knew about Cooper's violation before deciding to fire him, there is no way in ordinary language (that I can see) to stipulate in a non-artificial way that her decision was not (at least partially) dependent on that information. However, this may turn out to be a distinction without a difference. At the end of the day, we may conclude that there is no practical difference between being aware of a valid reason for doing something prior to doing it and acting (at least in part) for that reason. (To say that an actor is aware of an undefeated *reason-for* doing something before she actually decides to do it may be, for all practical purposes, the same thing as saying that it is a *reason-why* she did it.)

An objectivist about justification might object at this point that the person who is responding to sentence 12 in my examples is simply mistaken about the nature of justification. The objectivist would say that if the boss is justified in firing Cooper in any of my examples, then she is justified in all of them. The boss's motivations for doing the right thing are irrelevant, as long as it was the right thing to do. However, such an objection would be ill-founded. I do not claim to be using ordinary language to settle this theoretical controversy about the nature of justification. All I am trying to do at this point is to show that ordinary language does not rule out the subjectivist position. There are some uses of "justification" in ordinary language that appear to support what we might call *weak subjectivism* about justification (i.e., that the actor is aware of at least one guiding reason for acting) as well as what we might call *strong subjectivism* (i.e., that at least one explanatory reason is also a guiding reason).

3.2.3.3 Conclusion about Reasons. The conclusion of this section is that different formulations of a "justification" sentence can produce slight differences in meaning. When the justification is made completely in the abstract (as in sentence 9), all that matters for the truth of the claim is that a valid (guiding) reason exists for performing the action (regardless of whether it was actually done *for* that reason). However, in sentence 12, the focus is firmly on the actor and her moral status. I submit that the truth of sentence 12 in ordinary language may depend not just on the *existence* of a valid reason, but on whether that reason was *operative* in motivating the actor to act.

3.2.4 Summary. In conclusion, while the term "justification" and its cognates may allow for a variety of different synonyms, all of the various contexts are united by the fundamental fact that a justification of something – an action, a rule, a law, a policy, a

belief, a theory, or a mental state – is an *explanation* that serves to *defend* its propriety (or legitimacy) in reference to some *normative* scheme by providing (or, at least, alleging to provide) *good reasons* for why that thing was done, believed, accepted, adopted, indulged, allowed, etc. It is controversial whether these good reasons need only to exist in order to successfully justify the action, or whether they need to actually motivate the actor. Ordinary language usage seems to support both possibilities. We also noted that, while some ordinary language contexts seem to support the view that to justify something is to provide any kind of reason for it (whether good or bad), these uses must be understood to be erroneous or sloppy. We should be on alert to exclude such a deficient conception of what justification requires in any careful account of justification.

3.3 Comparison of Justification and Excuse. Recall that in section 3.1.5.4 we concluded that the word “excuse” as it is used in ordinary language is virtually synonymous with the word “defense.” As far as ordinary language is concerned, if you have a defense of any kind for your behavior (including a justification), you also have an “excuse.” Is there anything special about the use of the term “justification” in ordinary language that would support a specific (separate) definition of justification in moral theory? That is, is “justification” just another synonym for “defense” in ordinary language (like “excuse”), or is there something in the ordinary language conception of justification that might be carried over to the specific context of moral theory which would help to distinguish it from other kinds of defense? At first glance, there seems to be little difference between the two. After all, we said that an excuse is a reason why an actor should be pardoned (or exonerated) for potentially objectionable behavior, and that

a justification is a defense that involves offering a good reason for taking action that might otherwise be considered objectionable. However, the key difference between the two resides in the requirement of “good reasons” for acting that is so central to justification. An excuse can be any reason why a hypothetical accuser shouldn’t blame the actor for her questionable behavior. For instance, a case of assault might be excused by the actor’s insanity. While insanity may be a *reason for exonerating* an actor, it does not provide the kind of *reason for acting* that is required by justification. Whether the “good reasons” required for justification need only be guiding or must also be explanatory can be left for now as a matter of dispute. Still, this distinctive feature of justification over and above excuse does indeed constitute ordinary language support for identifying a separate category of defenses as “justifications.”

Another way of putting this point is to say that the aberrant usage of “justification” identified above confuses a necessary condition of justification with a sufficient condition. The aberrant usage is inclined to treat all instances of reason-giving for behavior equally as “justifications.” While I agree that offering reasons for behavior is indeed a distinctive feature of justification – one that helps to distinguish it from other defenses – it does not by itself constitute justification.

3.4 The Road Ahead. In the next (fourth) chapter, I will make use of the conclusions reached in this and previous chapters to construct my own view of the best way to distinguish justifications and excuses, defend that view against competing views, and illustrate how to apply the theory in hard and easy cases. Then I will demonstrate

how my theory might be usefully extended to other theoretical contexts, such as social and political theory.

CHAPTER FOUR

A Reductive Account of the Difference Between Justification and Excuse

4.0 Review. Before presenting my own positive account of the best way to make a principled theoretical distinction between justification and excuse, it will be worth while to briefly review the progress we have made and the conclusions we have reached in previous chapters.

4.0.1 Chapter One. The focus of Chapter One was on locating the conceptual background of justification and excuse in the practice of offering moral defenses for actions. We noticed that people often defend their actions even when no formal accusation has been made. Still, we can imagine all defenses being made in reference to hypothetical accusations of wrongdoing. In order for such moral defenses to have any purpose, we must assume that the hypothetical accusation is made from a position of limited information. After all, an omniscient being would already have all the information required to make an accurate moral evaluation of the act and/or the actor. The information provided by the defense would be redundant for such a being. So, it stands to reason that defenses are offered to those who lack (or who might lack) important information necessary for making an accurate moral evaluation.

After situating moral defenses in the social practice of *offering* a defense against an accusation of wrongdoing, we abstracted away from this in order to construct a schema that could serve as a more objective notion of what it is to *have* a moral defense for one's actions. We established that all complete moral defenses are facts that serve to falsify sentences of the form "Person B is blameworthy for X," where X represents an act

(or a state of affairs that is thought to be the consequence of an act).¹⁵⁰ We divided complete moral defenses into three categories, denial, justification, and excuse.¹⁵¹ We also identified mitigations as partial defenses. Mitigations represent facts which do not falsify the claim that the accused is worthy of blame, but they do serve to reduce the amount of blame that might otherwise be assigned to the accused in the absence of the additional information. We rejected the claim that it is useful to think of all mitigations as either partial justifications or partial excuses. At the end of the first chapter, we emphasized the importance of recognizing the different goals pursued by moral and legal theories of justification and excuse. Hence, a rejection of a legal theory of justification and excuse in the context of moral theory should not be thought of as a criticism of the legal theory as originally presented.

4.0.2 Chapter Two. In the second chapter, we took a detailed look at some of the most common formulations of the difference between justification and excuse. In the course of this detailed examination, we were able to dispel some of the most persistent myths about the nature of justification and excuse. For instance, it is frequently claimed that excuses are grounded in characteristics of the actor - that excuses are “actor-oriented.” A similar claim found in the literature is that the existence of an excuse entails that the actor lacked responsibility for her actions. My suspicion is that both of these claims stem from an inappropriate focus on only certain kinds of excuse, of which insanity is the clearest exemplar. If one thinks of insanity as the prototype of excuses,

¹⁵⁰ Recall that, in this schema, X should not be formulated narrowly, i.e., in a way that includes reference to specific aggravating mental states, like “maliciously.” This is because narrowly formulated accusations permit the accused to simply deny that the act was done with that specific mental state while dodging the issue of his or her overall moral culpability. Since we are interested in evaluating to what extent the accused is blameworthy for what she did, we formulate what she did as broadly as possible.

¹⁵¹ Here we also referred to a number of theoretical claims that theorists have made in relation to justification and excuse. We will be returning to those claims and evaluating them in this chapter.

then it will be natural to claim that all excuses are grounded in characteristics of the actor or that excuses arise from the actor's lack of responsibility. However, insanity is only one kind of excuse. These two myths can be easily dispelled by recalling that duress is typically considered to be another kind of excuse. Suppose that a perfectly rational actor is threatened with death or severe bodily harm unless she commits (or assists in the commission of) a crime. If she submits to this threat, it is not because she has a characteristic that makes her different from the rest of us. Quite the contrary, she is excused because she acted exactly as *anyone* would have acted under the circumstances. The example of duress does not rule out the theory that excuses require lack of responsibility, for it is indeed common to say that one who acts under duress is not responsible for her actions. However, the responsibility theory of excuse seems to be equally prone to a different kind of counterexample. In cases where people are excused due to mistake of fact, it seems unusual to say that they weren't responsible for their actions. Imagine someone who thinks she has spotted a wanted criminal. She places herself at risk in order to confine the suspect until the authorities can arrive. When the police finally arrive, it turns out she has confined the wrong man. Surely, she has an excuse for her actions (honest mistake of fact), but to claim that she is not responsible for her behavior in this case seems strange (unless all that is meant by saying that she is not responsible is that she is not blameworthy). On the basis of these counterexamples, we rejected the common myths that excuses arise due to lack of responsibility or due to unusual characteristics of the actor.

A third claim about excuse that is encountered frequently in the literature is that all excused acts are wrongful. And, by "wrongful" here, the speaker must mean wrongful

all-things-considered, otherwise it would also be true that justified acts are wrongful (in the presumptive, or *prima facie*, sense). Part of Chapter Two was devoted to an investigation of what is meant when one says that an act is wrongful all-things-considered. If you kick someone as part of a reflex reaction to physical stimuli, surely you have an excuse (physical compulsion) for what you did, but it seems strange to say that what you did was wrongful. After all, a muscular reflex is not an *act* (in the philosophically robust sense) at all. Can one's behavior be counted as an instance of "wrongdoing" if one didn't *do* anything? I expressed similar reservations about calling the harmful acts of children "wrongful." I concluded that it is doubtful that all excused acts are wrongful all-things-considered.¹⁵²

In Chapter Two, we also took a critical look at the claim that all justified acts are (at least) permissible. If "permissible" is stipulated to mean "not wrongful," then the claim that justified acts are permissible means nothing more than that excused acts are wrongful (and justified acts are distinct from excused acts). However, if the meaning of the term "permissible" is *not* meant to be merely stipulative in this way, then we need to independently establish the meaning of the term "permissible" in order to evaluate the claim. After a short investigation of what it means to be "permissible," we concluded that since permissibility is an intrinsically *ex ante* notion of evaluation, it can only be evaluated in terms of reasons available to the actor at the time of the act. The consequence of this is that if some actions can be justified objectively, i.e., without reference to the actor's mental states or motivations, then it is not true that all justified

¹⁵² Alternatively, if it *is* correct to say that all excused acts are wrongful all-things-considered, then we will need a better account of what it means to be "wrongful all-things-considered."

acts are permissible. It also seems likely that some excused acts (like honest mistakes of fact) will be permissible as well.

We concluded Chapter Two by looking at what was left of the traditional accounts of justification and excuse when all the incorrect and doubtful claims were pared away. What was left was what we called the *minimal content*. The minimal content of excuse states that a *prima facie* wrongful act is excused only if the actor is not blameworthy for performing the act. We remarked that this minimal content of excuse is equivalent to the claim that the actor has a complete defense for her action. It does not provide any indication of what factors make excuses distinct from other defense types. The minimal content of justification is that a *prima facie* act is justified only if it is not wrongful all-things-considered.

4.0.3 Chapter Three. Since the traditional formulations of the difference between justification and excuse had been rejected in the previous chapter, and since the minimal content of justification and excuse could not itself serve as a satisfying theory of the difference between the two, a more robust theory of different defense types would be needed. However, in order to be fully consistent, such a new theory would almost certainly require some revisions in the traditional conceptions of justification and excuse. If significant revisions were to be made to our traditional conceptions of what counts as a justification and what counts as an excuse, would the theory remain a theory of justification and excuse at all, or would it be a theory of completely new and unfamiliar concepts? Chapter Three attempted to answer this question by exploring the range of cases in which we use the words “justification” and “excuse” in ordinary language. The

purpose was to provide some direction for our new theory as well as to establish the boundaries of what could still count as a theory of justification and excuse.

We began by identifying four senses of “excuse,” as regularly used in ordinary language. The first two use “excuse” primarily as a verb. We referred to these as social excuses because they are used primarily in matters of etiquette and politeness. The second two senses use “excuse” primarily as a noun. We referred to these as rational excuses because they involve offering reasons for why the subject should be held blameless. Despite the diversity of ways that “excuse” is used in ordinary language, we were able to synthesize a unified account that seemed consistent with all four senses of the word “excuse” that we had examined. That unified account stated that an individual has an excuse for doing something when there is a reason why that individual deserves pardon (or lack of condemnation) for it. Notice that this unified account of excuse in ordinary language is little more than a restatement of the minimal content of excuse identified in the previous chapter. The fact that the meaning of “excuse” in ordinary language is essentially the minimal content of excuse is bolstered by the finding that ordinary language does not seem to support a distinction between justification and excuse in that “excuse” and “defense” appear to be synonyms. That is, in ordinary language, one can be said to have an “excuse” for doing something by virtue of having a justification for it. We concluded that the distinction between excuse and justification found in moral and legal theory is a theoretical artifact, not a feature of ordinary language.

In the course of our investigation of the uses of “justify,” “justified,” and “justification” in ordinary language, we discovered that justifying something essentially involves offering good reasons for having done it. Sometimes ordinary language usage

seems to support the use of the word “justification” in reference to *any* kind of reasoning. However, we concluded that in moral theory, the term “justification” should be reserved only for situations in which someone offers (or at least claims to offer) *good* reasons (or guiding reasons) for one’s action. We also noticed that rearranging the sentence structure of a justification-sentence could produce importantly different shades of meaning. Consequently, ordinary language supports both an objective and a subjective notion of justification. (An action is justified in the objective sense when there are good reasons for doing it. An action is justified in the subjective sense when the actor was aware of the good reasons for doing it when she did, and she did it, at least in part, for those reasons.)

4.1 Genesis of a New Theory. In Chapter Two and in Chapter Three, we concluded that neither conventional wisdom among theorists nor ordinary language offer a successful account of excuse that explains how all excuses get their exculpatory force. In both chapters, all we were able to conclude is that those who are excused are not blameworthy for what they have done. But that fact does not distinguish excuse from justification, since those whose actions are justified are also not blameworthy. We might be tempted to despair that no coherent theory of justification and excuse is possible under these conditions. But what if we take this minimal lack-of-blameworthiness feature as the defining characteristic of excuse? We could still distinguish excuse from justification if justification required a higher standard than mere lack of blameworthiness. Acts that are commendable or praiseworthy would represent just such a higher standard. This leads to the idea that we could use the fundamental moral concepts of praise and blame as

the basis for the distinction between justification and excuse. In particular, we could say that a *prima facie* wrongful act is excused if and only if the actor is *merely* not blameworthy for doing it¹⁵³, and a *prima facie* wrongful act is justified if and only if the actor merits praise for having done it (and, consequently, also does not merit blame)¹⁵⁴. The remainder of this chapter will examine the reasons for adopting such an account of the difference between justification and excuse in terms of praise and blame. Henceforth, I will refer to this as the *praise/blame theory* of justification and excuse.

4.1.1 Support for Excuse as Blamelessness. Although, to my knowledge, no other theorist makes praise and blame the foundation for the distinction between justification and excuse, there is a great deal of general support for these ideas in the literature. This is particularly true of excuse. Many theorists describe excused acts as ones which the actor cannot be blamed for committing. For example, in the course of summarizing theoretical discussions of justification and excuse in the legal literature, Joshua Dressler writes, “Most advocates of excuses in the criminal law assert deontological moral theories which ultimately suggest that excused actors are persons who, although often dangerous, are not morally to blame for their conduct.”¹⁵⁵ Similarly, George Fletcher writes, “The focus in evaluating an alleged excuse is the blameworthiness of the defendant’s conduct.”¹⁵⁶ Kent Greenawalt agrees when he writes, “When something is fully excused, it is not warranted, but the person involved is

¹⁵³ By “merely not blameworthy,” I mean that the actor does not also merit praise.

¹⁵⁴ Here “praise” and “blame” are being used as all things considered evaluations of an actor for the performance of a specified act under a specific description. (See 1.3.3.2 for ways that the same event can give rise to multiple accusations.) Hence, it will be analytically impossible for an agent to be both worthy of blame and worthy of praise (at the same time) for the same action token under the same description.

¹⁵⁵ Joshua Dressler, “Justifications and Excuses: A Brief Review of the Concepts and the Literature,” *Wayne Law Review* 33 (1987): 1166. Importantly, Dressler’s very next sentence is “The question that remains, however, is under what circumstances is a person blameless for committing a harmful act?”

¹⁵⁶ George P. Fletcher, “Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?,” *UCLA Law Review* 26 (1979): 1366.

not blameworthy.”¹⁵⁷ In a similar vein, Sanford Kadish writes, “Excuse is one of those central concepts that serves to draw the line between the blameworthy and the blameless and so make a blaming system possible.”¹⁵⁸ And, again, Paul Robinson writes, “As with all excuses, the claim is: while what I did in fact violates the rules of conduct, I ought not be blamed for the violation.”¹⁵⁹ The preceding selection of quotes demonstrates the ubiquity of the claim that an excused act is a blameless act. However, each of these authors seems to feel that an adequate theory of excuse will explain what all excused acts have in common that render those acts blameless. That is where our accounts diverge. I believe that there are good reasons to think that there is no single unifying theory that explains what renders all excused actors blameless. Consequently, I believe that it is blamelessness itself which functions as the defining characteristic of excuse, not some other thing that explains the blamelessness.

This view that there is no single explanatory theory of excuses seems to be gaining some traction among the community of legal theorists. Jeremy Horder has argued against the possibility of a unified theory of criminal culpability. He writes,

It might be supposed that the very diversity of... excusing conditions would defeat any attempt to distill from them all a single unifying concept of responsibility that could provide the benchmark of criminal culpability. ... Nonetheless it is becoming increasingly popular to suppose that the insights of moral philosophy are capable of yielding an exclusive, unitary theory of criminal culpability. It is the notion that there might be such an exclusive unitary theory that I wish to criticize....¹⁶⁰

¹⁵⁷ Kent Greenawalt, “Distinguishing Justifications from Excuses,” Law and Contemporary Problems 49 (1986): 91.

¹⁵⁸ Sanford H. Kadish, “Excusing Crime,” California Law Review 75 (1987): 257.

¹⁵⁹ Paul H. Robinson, “Competing Theories of Justification: Deeds vs. Reasons,” in Harm and Culpability, A.P. Simester and A.T.H. Smith eds. (Oxford: Clarendon Press, 1996), 62.

¹⁶⁰ Jeremy Horder, “Criminal Culpability: the Possibility of a General Theory,” Law and Philosophy 12 (1993): 194.

In a similar vein, Mitchell Berman writes, “Instead, I argue, the distinction between justification and excuse for purposes of taxonomizing criminal law defenses is only this:

A justified action is not criminal, whereas an excused defendant has committed a crime but is not punishable.”¹⁶¹ If an action is not punishable when the actor is blameless, this statement is congruent with the excuse portion of the praise/blame theory of excuse.

More recently, Peter Westen defines excuses as merely “the residual set of exculpatory defenses that exist in law after defenses of *actus reus* and justification are fully accounted for.”¹⁶² This statement also corresponds with the praise/blame theory in that once the justifications are eliminated, anything else that renders a defendant blameless counts as an excuse. Although all of these statements come from the realm of legal theory, their analogues in moral theory lend support to the claim that it is simply blamelessness that is the hallmark of excuse, not some other thing that explains the blamelessness.

4.1.2 Support for Justification as Praiseworthiness. Although it is possible to find ample support for my theory of excuse in the literature, the number of authors who believe that justification requires praiseworthiness is relatively small. Still, this position has been given voice by some of the most prominent theorists in the literature. For instance, George Fletcher states that justified acts are those which are “right and proper,”¹⁶³ rejecting the proposition that justified conduct is “merely tolerable or permissible.”¹⁶⁴ Furthermore, Fletcher insists that the defense of justification is

¹⁶¹ Mitchell Berman, “Justification and Excuse, Law and Morality,” Duke Law Journal 53 (2003): 4.

¹⁶² Peter Westen, “An Attitudinal Theory of Excuse,” Law and Philosophy 25 (2006): 293. Of course, later in the same article Westen does articulate his attitudinal theory, but this is arguably a theory of blamelessness or culpability, not excuse.

¹⁶³ George P. Fletcher, “Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?” UCLA Law Review 26 (1979): 1357-8.

¹⁶⁴ *ibid.*, 1359. More recently, Fletcher has seemed to allow that some merely permissible acts may be justified when he writes, “Claims of justification concern the rightness, or at least the legal permissibility, of an act that nominally violates the law.” [George P. Fletcher, “The Right and the Reasonable,” Harvard

“available only to those whose intent is meritorious.”¹⁶⁵ Other things being equal, those whose actions are right and whose intent is meritorious will be deserving of praise. So, at least as stated here, Fletcher’s view of justification is consistent with mine. Similarly, Paul Robinson writes, “Justified behavior is correct behavior and therefore is not only tolerated but encouraged.”¹⁶⁶ This quote also lends support to the view that justification requires praiseworthy action. Other things being equal, behavior that is encouraged is behavior that is worthy of praise. More recently, Claire Finkelstein has claimed that “to call a violation of a prohibitory norm *justified* is to say not only that it is *permissible*, but that it is *encouraged*.”¹⁶⁷ This statement is also clearly consistent with the view that justification requires praiseworthy behavior.

Even those theorists who would not agree that *all* instances of justification require praiseworthy behavior would concede that the *clearest cases* of justification do. Indeed, this is Kent Greenawalt’s strategy in attempting to establish his conclusion that reasonable mistakes can generate justifications. Referring to a famous case where a man named Young used defensive force in defense of a young man whom he believed was under attack but who was really resisting arrest by plain-clothes police officers, Greenawalt wrote, “Young is to be praised, not blamed, for what he did, and members of society would wish that others faced with similar situations requiring instant judgment would act

Law Review 98 (1985): 954.] However, this quote may merely represent deference to conflicting viewpoints rather than a statement of his personal view.

¹⁶⁵ George P. Fletcher, “The Right Deed for the Wrong Reason: A Reply to Mr. Robinson,” UCLA Law Review 23 (1975): 295.

¹⁶⁶ Paul Robinson, “A Theory of Justification,” UCLA Law Review 23 (1975): 288.

¹⁶⁷ Claire O. Finkelstein, “Self-Defense as a Rational Excuse,” University of Pittsburgh Law Review 57 (1996): 624. Some important disclaimers are in order here. First, Finkelstein’s quote refers to her view about the criminal law. Her next sentence makes it clear that she thinks ordinary language supports the less stringent standard of permissibility. She also takes herself to be following Fletcher, and, to that extent, this quote represents additional, but not independent, support of the claim that justification requires praiseworthy action.

as Young did. A moral assessment of Young's act would treat it as justified."¹⁶⁸ Here Greenawalt is clearly treating the moral praiseworthiness of Young's behavior as a determinative reason for saying that it is justified. In response, Fletcher makes the following assessment, "The linchpin of Greenawalt's argument, however, is the move from not-blaming to praising."¹⁶⁹ While Greenawalt's preferred formulation of the nature of justification is in terms of the somewhat nebulous, purposefully non-committal phrase "warranted action,"¹⁷⁰ in other locations Greenawalt does seem to provide evidence for Fletcher's assessment, for example when he writes that "justified action is morally proper action"¹⁷¹ and that "the central distinction between justification and excuse... concerns the moral appraisals these sorts of actions call forth."¹⁷² To the extent that Fletcher's assessment of Greenawalt's argument is correct, Greenawalt's implicit view of the difference between justification and excuse may be very similar to my own.

Although relatively few theorists would endorse the view that justification requires praiseworthiness, most theorists would agree that justification is *better* than excuse. That is, one of the main assumptions that seems to underlie the theoretical discussions of justification and excuse is that it is morally better for one's act to be justified than to be excused. Justifications represent the preferred method of exculpation, whereas excuse represents exculpation of last resort. Doug Husak calls this ordering of the two defense types the Priority Thesis.¹⁷³ The praise/blame theory that I am proposing

¹⁶⁸ Kent Greenawalt, "The Perplexing Borders of Justification and Excuse," Columbia Law Review 84 (1984): 1919-20.

¹⁶⁹ George P. Fletcher, "Domination in the Theory of Justification and Excuse," University of Pittsburgh Law Review 57 (1996): 566.

¹⁷⁰ Greenawalt, "The Perplexing Borders of Justification and Excuse," 1900.

¹⁷¹ *ibid.*, 1903.

¹⁷² *ibid.*, 1919.

¹⁷³ Douglas Husak, "On the Supposed Priority of Justification to Excuse," Law and Philosophy 24 (2005): 557-594.

here accepts the Priority Thesis in both its normative and logical forms – not only are justified acts morally better than excused acts, but (by definition) an act that is justified is not excused and vice versa.

4.1.3 Simplicity. Aside from support from the literature, the praise/blame theory has other virtues that tend to recommend it as well. One such virtue of this theory of justification and excuse is immediately apparent, namely, its astounding theoretical simplicity. On the praise/blame theory, asking whether an actor is excused or justified for a given act is the same as asking whether that actor is merely blameless for having acted as she did or is instead worthy of praise. Occam's Razor suggests that, other things being equal, we should prefer simpler theories to more complicated ones. It is hard to imagine a simpler theory of the nature of justification and excuse than the one I am proposing. Of course, the theory's overall performance is even more important, and we will be investigating that in greater detail below.

4.1.4 Reductive. A related virtue of the theory I am proposing is its reductive nature. Although reductive theories have fallen on hard times in some areas of philosophy, it is hard to deny that a successful reductive theory is very intellectually appealing. The theory that I propose reduces the relatively more complicated moral concepts of justification and excuse to the relatively simpler and more familiar moral concepts of praise and blame. Explaining the less familiar in terms of the more familiar is exactly what we want a successful theory to do.

4.1.5 Consistency with Previous Conclusions. It is important to note that our theory is consistent with the conclusions we reached about justification and excuse in previous chapters. In Chapter One, we concluded that all complete defenses are facts that

falsify sentences of the form “Person P is blameworthy for X.” Justifications and excuses are complete defenses, and if they are understood in terms of the theory described above, they will serve that function. Obviously, if P is not blameworthy for X, that falsifies the claim that he is blameworthy. Similarly, if P is praiseworthy for X, that also falsifies the claim that he is blameworthy.¹⁷⁴

In Chapter Two, we concluded that the only account of justification and excuse that could withstand criticism was what we called the *minimal content* of those concepts. The minimal content of excuse was that a person is excused for X if he is not blameworthy for having done it. This conclusion is clearly consistent with the theory of excuse proposed above since the two are identical. The minimal content of justification was a necessary condition that a person has a justification for X only if performing X was not wrongful all-things-considered. This necessary condition is also consistent with the praise/blame theory; if an actor is praiseworthy for doing X, then it was not wrongful all-things-considered for the actor to do X.

In Chapter Three we concluded that when we search for a unified meaning of the word “excuse” in ordinary language we are brought back to what is essentially the minimal content of excuse – a person has an excuse for doing something if she is deserving of pardon (or not worthy of blame) for having done it. We also concluded that the correct use of the word “justification” in ordinary language requires that there were good reasons for doing something. This theory is certainly consistent with that

¹⁷⁴ When we discuss the praiseworthiness of action X, we will need to evaluate it wholly and not partially. For instance, some may want to say that elements of an action, such as the action’s intent, may be praiseworthy even though other aspects of the action, like the result, are not. Isolating praiseworthy elements of an act will not be sufficient to render the entire act praiseworthy, as far as this account is concerned. We will discuss this issue in greater detail below.

requirement (and adds more to it). If one deserves praise for doing something, then it stands to reason that there were good reasons for doing it.

4.1.6 Productivity. Another important consideration that is relevant to determining whether to accept a theory is its overall productivity. Later in this chapter, I will demonstrate how the praise/blame theory of justification and excuse can help us to resolve conflicts in other areas of moral, social, and political philosophy.

4.1.7 Fitting the Data. Normally, when evaluating a new theory, one of the most important factors in the determination of whether the theory is successful is the extent to which it fits the data. In this case, “fitting the data” means accurately categorizing defense types as justifications and excuses. However, it is not clear exactly what it means to categorize defense types accurately since judgments about which defenses are justifications and which defenses are excuses differ from theorist to theorist. So, the best that we have been able to do thus far, given this state of theoretical confusion, is to identify a theoretical consensus and judge theories based on the extent to which they are able to accurately reflect that consensus view. In Chapter Two, we saw that no theory which relies on typical assumptions about the nature of excuse will be able to successfully categorize defenses in a way that matches the consensus categorization of defenses. In the absence of a successful descriptive theory that adequately captures the consensus view’s categorization of justifications and excuses, some revision in that consensus view would seem to be required in order to produce consistency. That is, as a matter of reflective equilibrium, we may need to countenance some adjustments to our typical categorizations of defenses. Normally, changing the data to fit the theory would be a no-no, but in the case of justification and excuse, it is reasonable to think that at least

some categorization judgments are products of conceptual confusion (fostered by some of the linguistic confusions we identified in Chapter Three). Consequently, some revision of typical categorizations should not be taken as a sign of theoretical failure.

4.1.7.1 Reflective Equilibrium. At this point, I foresee the reader making the following objection. If it is acceptable to make revisions to the consensus view of which defenses count as justifications and excuses, then can't we make any view appear correct, if we are willing to make the necessary revisions? The honest answer to this question is yes. However, recall that in Chapter Three we concluded that ordinary language usage does not itself support a robust distinction between justification and excuse.¹⁷⁵ Therefore, any distinction that is made is bound to be stipulative to some extent, as far as ordinary language usage is concerned. That is, since the theoretical distinction between justification and excuse is linguistically artificial to begin with, we can choose to make the distinction in whatever way we deem most productive. Douglas Husak makes a similar point when he writes, "[T]he nature of justification and excuse is partly stipulative, and criteria to decide whether to accept one stipulation rather than another must be made by reference to their role in the theory of which they are a part."¹⁷⁶ So, the conclusion is that "fitting the data" is not a strong constraint on an acceptable theory of the difference between justification and excuse. Instead, a process of reflective equilibrium is required. If a theory is particularly simple and productive, making some minor revisions in the consensus categorization of defenses to fit that theory should be acceptable. In this chapter, I hope to show that the praise/blame theory is appealing in just such a way. If theorists are interested in eliminating the confusion inherent in the

¹⁷⁵ See section 3.1.5.4.

¹⁷⁶ Douglas N. Husak, "On the Supposed Priority of Justification to Excuse," *Law and Philosophy* 24 (2005): 574.

current state of justification and excuse, theorists must choose a theory and apply it consistently. My goal here is to convince the reader that the praise/blame theory is the theory that should be adopted. However, as a matter of “truth in advertising,” the reader should be made aware of the conceptual costs of adopting this theory so that they can be weighed against the theory’s many benefits. In my view, the praise/blame theory’s primary conceptual cost is that it requires us to re-categorize certain defenses.

4.1.7.2 Jettisoning “Justification” and “Excuse.” Some readers may be curious why the distinction between justification and excuse should be maintained in moral and legal theory at all. That is, why not jettison the use of these terms entirely in favor of completely new terms of art invented specifically for the purpose for which they are to be used? This strategy would allow us to avoid the difficulty of applying clear definitions to ordinary language concepts whose borders are naturally quite fuzzy. While there is nothing wrong with such a strategy in principle, it would represent a significant break with tradition in moral and legal philosophy. In addition, it might lead to an even greater fragmentation of the theoretical discussion of the issues related to moral and legal defenses in the literature than there already is. After all, if we all suddenly proposed our own technical terms describing importantly different kinds of exculpation, we would literally no longer be talking about the same things any more, and the debate would become increasingly more difficult to follow. In conclusion, while there would be nothing wrong with jettisoning the terms “justification” and “excuse” in favor of technical terms that more clearly describe what the theorist wishes to describe, I think this strategy should be avoided for pragmatic reasons. It should be employed only as a last resort.

4.1.7.3 Consensus Categorizations. In Chapter One,¹⁷⁷ we identified Consent, Necessity, Self-Defense, Defense of Others, and Law Enforcement as defenses that are typically thought of as justifications. We identified (non-negligent) Accident, Physical Compulsion, Insanity, Infancy, Involuntary Intoxication, Sleepwalking/Automatism, Hypnosis/Brainwashing, Duress, Acts of Desperation, and Faultless Mistake of Fact as defenses that are typically categorized as excuses.¹⁷⁸

4.1.7.4 Revisions Required by Praise/Blame Theory. Would a theory of justification and excuse based on praise and blame distinguish defenses in exactly the same way that the consensus view does? The answer is clearly no. Generally speaking, my theory would agree that almost all of the commonly accepted types of excuse would remain excuses. The only possible exception would be some cases of Faultless Mistake of Fact. It may be that an act of great personal sacrifice motivated by good intentions might be ultimately worthy of praise even though the act has unfortunate or undesirable consequences due to the actor's lack of information or imperfect ability to predict the results of her action.¹⁷⁹ But in most cases, Faultless Mistake of Fact would remain a type of excuse on the praise/blame theory.

4.1.7.4.1 Fewer Justifications. However, where my theory differs from the consensus categorization is that it would admit significantly fewer cases of justification. Under most circumstances, the fact that someone who has caused harm was acting with the consent of the injured party would not render the act worthy of praise. Therefore,

¹⁷⁷ Specifically, in sections 1.4.2.1 and 1.4.3.1.

¹⁷⁸ A similar breakdown is provided by Robinson when he writes, "Traditional examples of justification include necessity, defense of others, actions in an official capacity, and some cases of self-defense. Insanity, duress, infancy, mistake, and some forms of self-defense are typical examples of excuse." (Robinson, "A Theory of Justification," 280)

¹⁷⁹ Of course, it may also turn out that an actor is never praiseworthy when the results of her action turn out to be significantly worse than she intends due to mistakes of fact or mistakes of prediction. This determination will be dependent on the correct account of praise and blame.

(when considered generically) Consent would not remain in the category of justifications. Instead, being a complete defense, it would more accurately be counted as an excuse.¹⁸⁰ Similarly, defending oneself from attack would only be morally praiseworthy on rare occasions. Consequently, most instances of Self-Defense would be categorized as excuses rather than justifications on the praise/blame theory. On the other hand, Defense of Others would almost always count as praiseworthy action, so the vast majority of its instances would remain justifications. Many, instances of the Necessity defense (like the burning of a field to save a town) will count as praiseworthy (and therefore will be considered justifications). However, those instances of Necessity that are not praiseworthy would be considered merely excused. Whether Law Enforcement would remain a justification depends on whether we consider the good-faith execution of one's duties in the public service as praiseworthy no matter what the circumstances. Much like Faultless Mistake of Fact, I think this will often depend on the motivations, circumstances, and the consequences of the act itself. So, only Defense of Others would unequivocally remain in the category of justification. Instances of Necessity and Law Enforcement could turn out to be justifications depending on the circumstances of the specific cases. Instances of Self-Defense and Consent would almost always be relegated to the category of excuse.

It is interesting to notice that George Fletcher's "right and proper" view of justification encounters many of the same problems and requires many of the same

¹⁸⁰ There are times when Consent could function as a denial rather than an excuse. For example, if A is accused of stealing B's car, and A took the car with B's permission, then it is simply not true that A stole B's car. The consent of the owner would serve as a *didn't happen* denial. However, the broadly formulated accusation schema we settled on in section 1.3.3.1 suggests that the accusation should be formulated as follows: A is blameworthy for taking B's car. In this case, the defense of consent is not a denial. On the praise/blame theory, it will be an excuse.

adjustments. He wrote, “Self-defense appears to be better conceived as a necessary evil rather than as the bringing about of a state of affairs that is affirmatively desirable.”¹⁸¹ Consequently, it is questionable whether Self-Defense would count as a justification on Fletcher’s theory either. Similarly, Fletcher realized that other types of defenses that are routinely categorized as justifications might also have a less-clear-cut status on his view. He writes, “As we shall see, many instances of justification (consent, necessity) are in fact borderline cases. Further analysis is necessary before we can classify them one way or the other.”¹⁸² It is safe to say that any theory which conceives of justification as requiring a higher moral standard than excuse will be forced to reclassify certain defenses. Some defense types that had been classified as automatic justifications will be relegated to the status of excuses instead, and it is this need to reclassify defenses that poses the greatest obstacle for the acceptance of the praise/blame theory.

4.1.7.4.2 Tokens of the Same Defense Type. As was indicated above, not only will some entire defense types require reclassification (like Self-Defense and Consent), but individual tokens of the same defense type might end up being categorized differently depending on the circumstances of the act in question. The defense categories listed above are groupings of defenses that have certain features in common, but it is not the case that all act tokens falling under the same grouping will always be evaluated the same way. In other words, these broad defense categories admit of many different varieties, and there is nothing inconsistent in counting some instances as justifications and other instances of the same category as excuses. Of course, this will be true on many theories,

¹⁸¹ George P. Fletcher, “The Right Deed for the Wrong Reason: A Reply to Mr. Robinson,” UCLA Law Review 23 (1975): 306.

¹⁸² *ibid.*, 313. It should be noted that in this quote, Fletcher is talking about classifying these defenses between Definition and justification, not between justification and excuse.

not just mine. I take it that this is at least part of what Greenawalt refers to when he calls the borders between justification and excuse “perplexing.”¹⁸³ More specifically, Mitchell Berman writes,

It is a common move among criminal law theorists... to try to demonstrate that a particular defense is properly classified either as a justification or as an excuse. ... A classificatory enterprise of this sort is risky, for the unarticulated assumption that all the particular rules that fall within one of the broad doctrinal categories must be classified alike is simply false.¹⁸⁴

Although Berman is clearly writing about legal defenses, the same point is true of moral defenses. We should not be surprised to find some instances of a category counting as justification while other instances of the same category counting as excuse on any theory. One virtue of the praise/blame theory in particular is that it provides a relatively clear criterion on which to base this decision in any given case. That is, it provides us with a clear-cut method for arguing why an individual instance of a defense type counts as an excuse rather than a justification (or vice versa).

4.2 Notes on the Nature of Praise and Blame. At this point, some readers may be expecting the articulation of a full-fledged analysis of what it means to be worthy of blame and worthy of praise. However, this expectation would be wrong-headed. One of the primary virtues of the praise/blame theory’s reduction of excuses to those *prima facie* wrongful acts for which the actor is merely not worthy of blame is that it eschews the need for an explanatory theory of excuse. Identifying excuse with mere blamelessness and then carefully articulating a coherent explanatory theory of blame would be logically

¹⁸³ Greenawalt, “The Perplexing Borders of Justification and Excuse,” 1897 ff.

¹⁸⁴ Mitchell Berman, “Justification and Excuse, Law and Morality,” Duke Law Journal 53 (2003): 65.

equivalent to offering an explanatory theory of excuse directly.¹⁸⁵ I take it as a virtue of the praise/blame theory that it can remain agnostic about the “correct” moral theory of what causes a person to merit praise or blame. (It can also remain agnostic about whether there is such a thing as “the correct moral theory.”) Presenting the theory as a formal theory rather than a substantive one leaves the reader free to insert her own preferred theory of what creates blame and use that theory accordingly. Alternatively, the reader is also free to adopt an atheoretical position regarding the nature of blame. Indeed, the difficulties inherent in crafting an acceptable theory of praise and blame can help account for Greenawalt’s “perplexing borders” mentioned above.¹⁸⁶ So if the reader is expecting me to produce a coherent explanatory theory of praise and blame, she will be disappointed. Still, I am happy to present some notes on what elements I believe a substantive explanatory theory of praise and blame would most likely contain. However, I emphasize again that the reader is free to discard my substantive assumptions in favor of her own wherever we may disagree. To argue against the ways that I apply the praise/blame theory substantively would not be to argue against the praise/blame theory itself as a formal, reductive theory of the difference between justification and excuse.

4.2.1 Structural Constraints. The conceptual and epistemological structure of moral defenses (discussed in Chapter One of this dissertation) place certain constraints on

¹⁸⁵ In fact, this point is related to what I find (mildly) puzzling about the view of excuse that Peter Westen presents in “An Attitudinal Theory of Excuse.” [Peter Westen, “An Attitudinal Theory of Excuse,” Law and Philosophy, 25 (2006): 289 – 375.] Near the beginning of the article, he insists that excuse is nothing more than a fully exculpatory defense that is neither a denial nor a justification. He writes, “‘Excuse,’ as I define it, is a category that encompasses all exculpatory defenses that do not consist of either ‘absence of actus reus’ or ‘justification’.” (*ibid*, 309) But at the end of the article, he states his attitudinal theory of blame as follows: “...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.” (*ibid*, 374-5) Given the title of the article, I don’t understand why Westen fails to incorporate his attitudinal theory into his definition of excuse. Alternatively, why isn’t the article titled “An Attitudinal Theory of Culpability”?

¹⁸⁶ See note 183.

any theory of praise and blame that will be of use in distinguishing justifications from excuses. This structural constraint is that any useful theory must account for how and under what circumstances agents merit moral praise and blame for the *actions* they perform (or fail to perform). So, a theory that assigns moral praise and blame to individuals based on their virtues and vices, on their character traits, on their mental states, or on their attitudes would not be useful to the praise/blame theory of justification and excuse unless the evaluations that these theories make are mediated somehow by the *actions* taken by those individuals. For example, John Gardner believes that evaluations of a defendant's character are built into the law's excusatory doctrines,¹⁸⁷ but he also maintains that a person's actions constitute her character.¹⁸⁸ Consequently, since Gardner's theory does ultimately evaluate people for their actions, it does not violate the structural requirements of a theory of praise and blame.

4.2.2 Foundations of Praise and Blame. I am attracted to the view that full-fledged analyses of praise and blame may not be necessary in light of our intimate familiarity with these fundamental concepts by virtue of our participation in social interactions. In his seminal article "Freedom and Resentment," P. F. Strawson is primarily interested in demonstrating the compatibility of determinism with the concepts of moral responsibility, blame, and punishment.¹⁸⁹ Although the free-will/determinism debate is not something that is particularly relevant to this dissertation, Strawson's article is still relevant because of its ground-breaking approach which focused on the nature and

¹⁸⁷ John Gardner, "The Gist of Excuses," *Buffalo Criminal Law Review* 1 (1998): 576.

¹⁸⁸ Using cowardice as an example of a character trait, Gardner writes, "[T]here is no such thing as a cowardly action which does not show its agent in a cowardly light. ... Thus even if this cowardly action is my first, and is quite unprecedented, it necessarily counts constitutively and not merely evidentially against me whenever, thereafter, the question arises of whether I am a coward. And that is exactly what it means to say that my cowardly actions show me in a cowardly light." (*ibid.*, 577)

¹⁸⁹ P.F. Strawson, "Freedom and Resentment" in *Freedom and Resentment and Other Essays* (London: Methuen, 1974), 5-13.

experience of human social interaction, rather than on abstract logical argument. Strawson concludes that, regardless of the truth of determinism, participation in interpersonal relationships essentially involves experiencing reactive attitudes like gratitude and resentment in response to the actions of others. He identifies these reactive attitudes as the foundation of common moral concepts like blame, responsibility, and punishment. Strawson claims that even if it were possible for us to turn off these reactive attitudes, it would not necessarily be rational to do so, because doing so would result in a significant impoverishment of human life and experience.¹⁹⁰

4.2.2.1 Reactive Attitudes as Basis of Blameworthiness. Putting Strawson's view into a simple schema like the one we used in Chapter One results in the following explications of 'blameworthy' and 'praiseworthy': P is *blameworthy* for doing X if reactive attitudes such as resentment or indignation are appropriate in response to X; P is *praiseworthy* for doing X if reactive attitudes such as gratitude or admiration are appropriate in response to X. But what makes experiencing these reactive attitudes appropriate? Strawson suggests that reactive attitudes are appropriate in response to others' intentions and attitudes towards us in relation to their behavior as it affects ourselves or others. He emphasizes how much it matters to us whether the actions of others "reflect attitudes towards us of goodwill, affection, or esteem on the one hand or

¹⁹⁰ Strawson writes,

For the real question is not a question about what we actually do, or why we do it. It is not even a question about what we would *in fact* do if a certain theoretical conviction gained general acceptance. It is a question about what it would be *rational* to do if determinism were true, a question about the rational justification of ordinary interpersonal attitudes in general. ... And I shall reply, second, that if we could imagine what we cannot have, viz. a choice in this matter, then we could choose rationally only in the light of an assessment of the gains and losses to human life, its enrichment or impoverishment; and the truth or falsity of a general thesis of determinism would not bear on the rationality of *this* choice. (*ibid*, 9)

contempt, indifference, or malevolence on the other.”¹⁹¹ Illustrating this point, Strawson continues, “If someone treads on my hand accidentally, while trying to help me, the pain may be no less acute than if he treads on it in contemptuous disregard of my existence or with a malevolent wish to injure me. But I shall generally feel in the second case a kind and degree of resentment that I shall not feel in the first. If someone’s actions help me to some benefit I desire, then I am benefited in any case; but if he intended them so to benefit me because of his general goodwill towards me, I shall reasonably feel a gratitude which I should not feel at all if the benefit was an incidental consequence, unintended or even regretted by him, of some plan of action with a different aim.”¹⁹² This quote makes it apparent that acts which cause harm or benefit to ourselves or others are (usually) the triggers of reactive attitudes which are appropriate or inappropriate depending on the aim, purpose, or intent with which the actions were taken. If a beneficial action is taken with beneficent intent, then attitudes of gratitude or admiration are appropriate, and the actor is praiseworthy. If a harmful action is taken with malicious intent, then attitudes of resentment or indignation are appropriate, and the actor is blameworthy.

Of course, these are only the simplest of cases, but they hint at an intuition-based conception of praise and blame that is grounded in our own social and emotional experience of the way we react to the actions of others. I would like to emphasize at this point that my view is not committed to a simplistic, behaviorist Strawsonian theory on which our actual reactive attitudes to a given individual’s behavior determine or constitute that individual’s blameworthiness or praiseworthiness. It is certainly possible to question whether reactive attitudes are appropriate in a given case. Recall that my

¹⁹¹ *ibid.*, 7.

¹⁹² *ibid.* Of course, Strawson is not here offering a definition or analysis, but merely a group of examples that point to experiences with which we are already intimately familiar.

interest is in an objective theory of moral defenses in which a correct evaluation will require consideration of all relevant facts, even those which are potentially unknown to the parties involved. So praise and blame are not determined by the reactions of actual people but by the reactions of an omnisciently informed observer whose emotions and reactions are similar to our own. In sum, what matters most are not actual reactive attitudes but hypothetical reactive attitudes, or perhaps deserved reactive attitudes. Suffice it to say that reactive attitudes are not the end of the story, but I think they are the beginning of the story.

4.2.2.2 When Reactive Attitudes are Inappropriate. Strawson also presents occasions when it is appropriate to withhold reactive attitudes, or to adopt what Strawson calls the “objective attitude” toward someone. Strawson suggests that those who have severe psychological abnormalities (like untreated schizophrenics) or who are morally underdeveloped (such as young children or those with severe mental retardation) are inappropriate targets of reactive attitudes. We say that the behavior of people in this category is to be “tolerated,” “handled,” or “managed” and that the people themselves are to be “cured” or “trained.”¹⁹³ Strawson claims that we take the objective attitude towards such people because they are unable to participate fully in normal human social interactions.¹⁹⁴

¹⁹³ *ibid*, 8.

¹⁹⁴ He writes,

What I want to contrast is the attitude (or range of attitudes) of involvement or participation in a human relationship, on the one hand, and what might be called the objective attitude (or range of attitudes) to another human being, on the other. ... But it [the objective attitude] cannot include the range of reactive feelings or attitudes which belong to involvement or participation with others in interpersonal human relationships... (*ibid*)

Strawson admits that it is possible to adopt the objective attitude towards others for specific purposes, but only for a limited time. He writes,

We look with an objective eye on the compulsive behaviour of the neurotic or the tiresome behaviour of a very young child, thinking in terms of treatment or training. But we can sometimes

4.2.2.3 Moral vs. Non-Moral Evaluation. It is necessary to refine Strawson's account somewhat to recognize that not all reactive attitudes and blaming behavior are of the moral variety. Richard Brandt writes, "A praising statement, or an expression of blame, need not contain any special or particularly 'ethical' words. For instance, 'His garden is full of weeds' may do very nicely as a blaming statement, in some contexts."¹⁹⁵ Therefore, an account such as mine which relies on reactive attitudes to explicate praise and blame must distinguish moral contexts from non-moral contexts and focus on moral conceptions of praise and blame. However, it is not my intention to provide an independent account of what makes a context or an instance of normative evaluation specifically moral.

Although we have not provided a full analysis of when it is appropriate to experience reactive attitudes or of the difference between moral and non-moral reactive attitudes, we have indicated common circumstances in which these negative attitudes are appropriate (such as acts that are committed malevolently or that are committed with negligent disregard for others' well-being). We have also indicated types of people who are disqualified as objects of these negative attitudes (such as the deranged or the very young). Leaving things there (explicated, but not fully analyzed) allows us to proceed in what I call an "atheoretical" manner, utilizing shared intuitions regarding when praise and blame are merited rather than referring to a specific theory. This is my preferred method of operation, as it allows those readers that prefer a more fully developed

look with something like the same eye on the behaviour of the normal and the mature. We have this resource and can sometimes use it; as a refuge, say, from the strains of involvement; or as an aid to policy; or simply out of intellectual curiosity. Being human, we cannot, in the normal case, do this for long, or altogether. (*ibid*)

¹⁹⁵ Richard B. Brandt, "Blameworthiness and Obligation," in *Essays in Moral Philosophy*, ed. A. I. Melden (Seattle: University of Washington Press, 1958), 3.

substantive account of praise and blame the freedom to provide it for themselves and use it to supplement the discussions that follow.

4.2.3 Restrictions on Blaming. Strawson's account focuses our attention on the extent to which blame and blaming behavior are inherently social activities. A person is blameworthy on Strawson's account when that person's behavior elicits a certain type of negative response in others. This social nature of blaming places important constraints on blameworthiness, leading to potential avenues of exculpation. As noted above¹⁹⁶, Strawson identifies a number of situations in which we withhold reactive attitudes from individuals because they are unable to fully participate in social interactions. This provides the grounds for such exculpatory principles as Infancy and Insanity. However, I would also like to emphasize two other important principles of exculpation that arise from the social nature of Strawson's account.

4.2.3.1 Moral Hypocrisy. First, feelings of indignation cannot be appropriate towards an individual if that individual has acted in a way that those judging the individual's behavior would also have acted under similar sets of circumstances (assuming that the actor is not herself at fault for creating those circumstances). As much as we might dislike an individual's behavior, indignation (and hence blame) are inappropriate responses if we recognize that we would have fared no better in similar circumstances. Dressler registers a potential caveat to this principle in the context of the legal defense of Duress when he writes,

It is not inevitably hypocritical for a juror to concede that most people in the same situation, including the juror, would have acted as the defendant did, yet still believe that the coerced actor deserves to be punished. As long as the juror believes that the juror also would be deserving of punishment (and, presumably,

¹⁹⁶ See section 4.2.2.2.

would accept it) in the same situation, there is no hypocrisy. We avoid duplicity by only blaming others when we are prepared to blame ourselves.¹⁹⁷

This is a fair point, but I think its applicability is limited. It would require a situation in which most people would not only perform the action in question but would also hold themselves blameworthy for having done it. I find this set of circumstances difficult to imagine. Dressler helpfully illustrates his point by providing the following examples:

A majority of all citizens (let us assume) cheat on their taxes, drive above the speed limit, and steal trifles from their employers. It also may be provable that a majority of defense contractors overcharge the Department of Defense or cut corners in the production of military equipment. However, it is hardly self-evident that such wrongdoers are not responsible for their actions, or that the claim 'I'm only [a typical] human' should excuse.¹⁹⁸

Now, the empirical claims that Dressler makes about what people typically do may well be false, but, for the sake of argument, let's assume they are true. Let's assume that a large majority of people routinely cheat on their taxes. If this is so and it is well-known, is it likely that the same large majority hold themselves blameworthy for doing so? I sincerely doubt this. Indeed, if they were sitting in judgment of a specific individual for cheating on her taxes, I think they would most likely refuse to blame the individual unless the cheating were significantly different from the kind that most people do. The same goes for speeders and for those who take office supplies. Assuming that most people do these things routinely, I sincerely doubt that they would blame someone else who did the same, unless the action were significantly different in scale or kind. The Defense Contractor case is a bit murkier because we recognize ourselves as the victims of overcharging and service members as the potential victims of corner cutting. However, saying that most contractors do these things is not the same as saying most people would

¹⁹⁷ Joshua Dressler, "The Exegesis of the Law of Duress," Southern California Law Review 62 (1989): 1368-9.

¹⁹⁸ *ibid.*, 1364.

do these things if they were in the same situation. It is possible that there is a culture of corruption among contractors that does not exist among the general population. Due to the special responsibilities most of us feel toward those who serve our country in the armed forces, I find it difficult to believe that violating the public trust is something that most people would do when given the chance. But even if it is true that most people would indeed overcharge and cut corners if placed in the position of a defense contractor, then, again, I find it hard to accept that most people would find the same corruption blameworthy when done by others in the same circumstances. (But again, this example would require our society to be much more venal, corruptible, and unprincipled than I think it really is.)

Husak argues that if one accepts the exculpatory principle of duress (i.e., that it is unjust to condemn someone who succumbs to a threat of unlawful force that a person of reasonable firmness would be able to resist), then one should also accept a generalized version of the same principle: it is unjust to condemn someone who succumbs to *any* pressure that a person of reasonable firmness would not have been able to resist.¹⁹⁹ In order for Dressler's caveat to gain traction, the bar of reasonable firmness has to be higher than the bar of what most people would do in the circumstances. I have expressed doubt that the examples that Dressler mentions succeed in separating those two bars, and I am unable to imagine more conclusive examples on his behalf. Therefore, I conclude that since blame is a social activity on the Strawsonian conception, the moral imperfections of the members of that society place limits on any individual's potential blameworthiness. After all, it is unfair to hold others to higher standards than we hold ourselves, or to expect more from others than we expect from ourselves. However, to

¹⁹⁹ Douglas Husak, "The 'But-Everyone-Does-That!' Defense," *Public Affairs Quarterly* 10 (1996): 312.

give Dressler his due, if there were an action that most people would do but for which they would nonetheless hold themselves to be blameworthy, then it would not be inconsistent to hold others blameworthy as well. My suspicion, though, is that the set of such actions is close to empty.

4.2.3.2 Whose Standards? If we withhold reactive attitudes from those who are unable to fully participate in the complexity of social interactions, the flip-side of this is that we do engage fully with those who fully understand and can navigate the demands that societal norms of behavior place on us. This ability to deliberate and act appropriately comes only after a long period of inculturation during which social and cultural mores are learned and internalized. Simply put, we learn what actions are appropriate and inappropriate from the society around us. Therefore, when we judge an individual's actions, we must take seriously the societal norms that she has learned to guide those actions. Of course, learned societal norms are not incorrigible; given an opportunity and a reason to reflect, an individual can adopt new norms of behavior. In addition, people are able to suspend their internalized norms for a time, as for instance when they are visiting a different society whose norms are known to be different. However, when it comes to evaluating an actor for her act, I would like to register my agreement with Husak who writes, "The community morality must count. After all, persons form their conceptions of right and wrong by reference to the behavior of their peers. It seems harsh to blame and/or to punish persons for acting according to the conceptions they form in this way, however defective these conceptions may be."²⁰⁰ That is, it is unfair to expect individuals to exhibit the reflective and analytical traits necessary to transcend their own society's moral norms of their own accord, even if those moral

²⁰⁰ *ibid.*, p. 330.

norms would be deemed defective by outsiders. This is simply a matter of fairness. An individual cannot be held blameworthy for doing what her society has taught her is appropriate or acceptable, particularly if she has been presented with no reasons to think otherwise and/or has not had an opportunity to reflect on whether there may be such reasons. That is to say, the appropriateness of reactive attitudes of indignation should, by default, be determined in relation to the behavioral standards internal to that person's own society, not by standards external to that society. If people are to be held to account for their behavior, it cannot be appropriate to hold them accountable to foreign standards of behavior of which they are not aware. So, the second sense in which the social nature of Strawson's theory supports a restriction on blaming is that, absent other considerations, it is inappropriate to hold an individual to standards of behavior that are foreign to her.

Of course, at this point, it is tempting to become distracted by various puzzles of moral relativism. For instance, how do we individuate societies? What if there is significant disagreement within one society about which behavioral standards are correct? What if the moral standards of a sub-culture differ significantly from the moral standards of the dominant culture? What are we to say about the actor of conscience who acts at odds with her society's standards of appropriate behavior as a matter of principle? I would like to simply admit that I do not possess the answers to these riddles. My point is that the principle of treating an accused individual fairly demands taking her society's moral standards – the ones she has internalized – seriously. Although I recognize the importance of puzzles of moral relativism for a theory like mine that places emphasis on evaluation of individuals based on societal norms that can differ from time to time and place to place, I hope the reader will give me license to dodge those difficult issues here

in favor of explicating and clarifying the theory in reference to cases that involve members of the same moral community.²⁰¹ Issues of moral relativism are difficult for most moral theories. Hopefully readers will not fault me for failing to provide my own resolution of such thorny issues here.

4.2.3.3 Constraints Arising from the Social Nature of Reactive Attitudes. In Chapter 1, I defined blameworthiness by abstracting somewhat from the actual practice of blaming: A person P is blameworthy for X if a person in possession of all the facts surrounding X would still legitimately blame P for X.²⁰² In this section, I have provided some structure for what it means to “legitimately blame” someone. I have used Strawson’s theory of reactive attitudes as a basis for praise and blame. This theory is not presented as a full-fledged analysis, but rather as a useful starting point that allows us to proceed atheoretically, trusting our intuitions with regard to what behavior merits praise and what behavior merits blame. However, even this basic starting point imposes some limitations on how we may fairly blame individuals for their actions. Strawson identified those, like the very young and the mentally handicapped, who are not eligible for reactive attitudes because they are incapable of full participation in social relationships. I identified two additional constraints on blaming that arise from the social nature of the reactive attitudes, namely that people can’t be blamed for doing what others in their society would also have done in their position and that people can’t be held to moral standards of behavior that are foreign to them.

²⁰¹ Husak is forced to circumscribe his but-everyone-does-that defense in a similar fashion, presumably for similar reasons: “As I propose to understand the BEDT plea, it is made by members of a group to members of that same group.” (*ibid*, 309)

²⁰² See section 1.3.

4.2.4 Substantive Assumptions. Before I begin applying the praise/blame theory to familiar cases, it is fair for the reader to expect to receive some additional guidance regarding the bases on which I will determine whether an individual is worthy of praise or blame for a given action. As far as praise is concerned, my intuitions coincide with Fletcher's when he says that justification requires meritorious intent.²⁰³ Intent is meritorious (in my view) if it is primarily aimed at serving, protecting, or benefiting others. While one need not eschew personal gain in order to have meritorious intent, the primary motivation for a praiseworthy act is the benefit of others. Furthermore, I believe that the consequences of an action are relevant to its moral evaluation. If an action has desirable or beneficial consequences, that makes it more likely that the actor will be worthy of praise for having done it. However, desirable consequences are not a requirement of praiseworthiness; it is possible for an action to be praiseworthy even if it has unfortunate consequences. Another factor in the determination of an actor's praiseworthiness in relation to a specific act is the level of risk or sacrifice that the actor undergoes in pursuit of her beneficent goals. Again, personal risk or sacrifice is not required for praiseworthiness, but it helps. In sum, praiseworthiness requires good (non-selfish, non-malevolent) intent while good (desirable, beneficial) results contribute to praiseworthiness, as does personal risk or sacrifice.

Blameworthiness can be negated by a number of possible factors. Severe psychological or physical impairments of one's capacities for motor control, decision-making, perception, recognition, capacity to imagine alternatives, or comparative moral evaluation could render an actor blameless when they are relevant to an individual's failure to act appropriately. This is the impairment model of exculpation which has been

²⁰³ See footnote 165 above.

so prominent in the past. However, there are other models that can be of use as well. For instance, doing the best that one could under the circumstances is another exculpatory principle that does not rely on impairment. Similarly, doing what anyone might have done in similar circumstances (or doing no less than we could reasonably expect) is another exculpatory principle that does not rely on impairment.

4.3 Application. In this section we will survey how the praise/blame theory would be applied in slightly more detail. Again, I will proceed using a largely intuitive understanding of what behavior is praiseworthy and what behavior is blameworthy. Of course, those who have a different theory of praise and blame could apply the theory differently.

4.3.1 Three Sources of Confusion. Before attempting to apply the praise/blame theory in different contexts, it is worth pausing for a moment to emphasize the important differences between this theory and more traditional theories. Each of these topics was addressed in previous chapters, but it is worth emphasizing them again here. A clear understanding of these differences is crucial because they require us to jettison common heuristics which many people seem to use when categorizing defenses as justifications or excuses. There are three such important differences²⁰⁴ that require particular emphasis. We will see that they are closely related to each other.

4.3.1.1 Deliberative Action Implies Justification. The first heuristic principle that the praise/blame theory rejects is that, if an individual has acted deliberately (without any relevant mistakes of fact), then any defense offered on her behalf that refers to her reasons for acting must be a justification. Henceforth, I will call this principle the

²⁰⁴ I sometimes characterize these differences as *mistakes* made by the more traditional theories.

Defective Justification Heuristic, or *DJH*. Recall that in chapter 3, we said that offering a reason that motivated one to act as one did (an *explanatory reason*, or a *reason-for* that is also a *reason-why*) is a necessary condition of justification in ordinary language, but not a sufficient condition. At that time we warned against using the term “justification” synonymously with “reason for acting.” Indeed, we called this usage “aberrant.”²⁰⁵ I submit that DJH is infected by the aberrant usage of “justification.” It automatically treats all reasons for action (when offered as defenses) as pleas of justification.²⁰⁶

First, it is clear that DJH is inconsistent with the praise/blame theory. On the praise/blame theory, a *prima facie* wrongful act is justified if and only if the actor merits praise for having done it. There is no guarantee that a defense of one’s action that includes reference to the reasons why it was performed will (if successful) earn the actor praise. Furthermore, those offering such defenses do not necessarily intend to show the actor in a meritorious light; the defender’s reference to reasons may be intended to merely exonerate the actor. In that case, the reason would function as an excuse on the praise/blame theory, not a justification. Hence, DJH is clearly incongruent with the praise/blame theory.

DJH will be rejected on most traditional theories as well because it is inconsistent with traditional defense categorizations. Duress is typically categorized as an excuse, however it is quite clear that individuals acting under duress are not always overcome by fear. In at least some instances, those acting under duress reason clearly about the options they face and choose the option that is least undesirable. Suppose the actor’s

²⁰⁵ See sections 3.2.2.3.4 and 3.3.

²⁰⁶ Something very close to this principle is asserted by Fletcher when he writes, “It is true that a justified act is one that may be freely chosen; a claim of excuse, in contrast, presupposes an unreflecting reaction, a will that is overborne.” (Fletcher, “Should Intolerable Prison Conditions...,” 1367)

choice is between handing over \$100 from her employer's cash register or suffering a potentially maiming gunshot wound to the leg. Suppose also that the actor in the situation is not overcome by fear but simply reasons that handing over the money is the lesser evil and does so for that reason. In a case like this one, the actor is excused for handing over the cash even though it was her reason for acting that would be used in her defense. In conclusion, DJH will certainly be rejected on the praise/blame theory, but it would be rejected on most traditional theories as well.

4.3.1.2 Excuse Implies Wrongful Action. Another mistaken principle that seems operative in much of the literature on justification and excuse is the assumption that any act which is excused must be a wrongful act. This assumption was discussed at length in Chapter Two. While the meaning of wrongful is not always completely clear, it is safe to say that if an act is wrongful, then it is an action that is morally prohibited all things considered. It follows from this that an actor should not perform excused acts. If this conception of excuse were correct, then no individual could ever rely on an excuse for exculpation, because to know that an act is excused beforehand is to know that it is something that should not be done. Consequently, under this mistaken conception, if an actor has deliberated rationally about how to act (without making any important mistakes of fact), then her action is ineligible for excuse, because if the actor had a fair opportunity to consider the options yet still chose an action which is wrongful all-things-considered, then the actor cannot be blameless (and hence cannot be excused) for so acting.

Thus, the view that excused action is necessarily wrongful action produces what I will call the *Defective Excuse Heuristic* or *DEH*: if an individual has acted deliberately (without error), then her reasons for acting cannot constitute an excuse. Another way of

stating this principle is that there can be no (successful) prior excuses,²⁰⁷ or that it is conceptually incoherent for individuals to act relying on an excuse for exculpation.²⁰⁸ Notice that DEH and DJH are logically equivalent if justification and excuse are mutually exclusive moral defenses.²⁰⁹ So, if DJH should be rejected, so should DEH and vice versa. And, again, if acting under duress counts as excused behavior, then the case described above (in which an individual rationally chooses to hand over the money in the cash register rather than be shot) demonstrates that DEH should be rejected. The clerk behind the cash register can certainly act deliberately in this case while also presuming beforehand that handing over the money from the cash register will be excused. Finally, it is important to recognize that, since the claim that all excused acts are wrongful entails DEH, the rejection of DEH requires the rejection of the assumption that all excused acts are wrongful.

4.3.1.3 Excuse Implies Defect or Impairment. A principle that is closely related to DEH is the assumption that all excused behavior is attributable to some condition of the actor that renders her blameless for her *prima facie* wrongful act. That is, people are excused when there is something “wrong with them” that makes them inappropriate targets of blame. The condition can be stigmatizing or belittling in the sense that it denies the actor full status as an individual in society who is held to the same standards as everyone else. Insanity and infancy fit this decision principle quite well, and they are certainly the prototypical examples that help to motivate it. This principle is closely

²⁰⁷ See section 3.1.2.1 for more discussion of prior excuses.

²⁰⁸ Fletcher expresses this view when he writes, “Excuses apply only where the wrongful conduct is attributable substantially more to exigent circumstances than to the voluntary choice of the offender. So far as the actor expects to be excused and acquitted, his conduct takes on the contours of voluntary choice and planning.” [George P. Fletcher, “The Right and the Reasonable,” *Harvard Law Review*, 98 (1985): 971.]

²⁰⁹ Of course, the equivalence also requires that the defense being offered is not a denial. However, recall that denials become irrelevant in an objective theory of moral defenses. See 1.4.1.2 above.

related to DEH because it follows that if an individual's reason for action cannot be the basis of an excuse, then there must be something that prevents the individual's decision-making process from being relevant in the determination of blameworthiness. Perhaps the most obvious reason why an individual's reasoning process is irrelevant to the determination of blame is that the individual's reasoning processes are systematically faulty in some way, or at least not functioning properly in the particular circumstances. Thus, this principle is really just an instantiation, or specific variety, of DEH. For that reason, I will refer to it as *DEH'*.

DEH', the principle that excuse implies some defect or impairment of the actor that renders her actions ineligible for moral blame, was also discussed at length and rejected in Chapter Two. By way of review, recall that there are many excuses that provide counterexamples to *DEH'*. Those whose actions are results of Faultless Mistake of Fact do not suffer from any condition that makes them different from the rest of us. One might argue that the mistaken actor's lack of information is a "condition" or "defect" that renders him blameless. However, this seems to be quite a contortion. Being mistaken about facts is not a condition of the individual that serves to diminish responsibility in anything like the way that insanity or infancy does. Indeed, even those who are reasoning and acting in an exemplary fashion can fall victim to a faultless mistake. Consequently, it seems inappropriate to treat a mistake as a "condition" of the actor in the same way that insanity or infancy is a condition of the actor. Similarly, those who are excused due to Accident are not (necessarily) suffering from any impairment or defective "condition." When my car is unable to stop in time due to an undetectable patch of oil or black ice on the road, I am not suffering from any impairment or defect.

Rather, the circumstances themselves conspire to make it impossible for me to avoid causing harm. To cite yet another example, it is unclear to what extent there is anything “wrong” with those who act under Duress. Using the same example that we have referred to in previous paragraphs above, it is quite possible to act calmly and rationally under conditions of duress. There is nothing particularly “wrong” with the actor who simply chooses the lesser evil.

Of course, some theorists deny that duress is an excuse for just these reasons. Westen and Mangiafico advert to many of these same facts about the mental states of those who act under duress in support of their conclusion that duress is a justification.²¹⁰ However, it is precisely because they accept a principle like DEH’ that they arrive at their conclusion. They contend that

...it is a hallmark of excuse that an actor suffers from a defect or deficiency that either he cannot rely upon in planning his conduct (e.g., mistake of fact, insanity) or that the state believes he ought not rely upon in planning his conduct (e.g., immaturity). ... And in contrast to excuses, the trait that qualifies actors for defenses of duress is not a deficiency or defect but, rather, a ‘firmness’ that one can reasonably expect people to possess.²¹¹

It is the assumption that excuses depend on a “defect or deficiency” that (here) leads Westen and Mangiafico to the conclusion that duress is a justification. Thus, their acceptance of a principle similar to DEH’ is what causes them to suggest categorizing duress as a justification instead of as an excuse.

4.3.2 Cases. Having successfully rejected three of the most important mistaken heuristic principles that infect the literature on justification and excuse, it is easier to more clearly see how the praise/blame theory would be applied to specific cases.

²¹⁰ Peter Westen, and James Mangiafico, “The Criminal Defense of Duress: A Justification, Not an Excuse,” *Buffalo Criminal Law Review* 6 (2003): 833-950.

²¹¹ *ibid*, 898-899. Of course, this is not the extent of Westen and Mangiafico’s argument, but it is an important component.

4.3.2.1 Traditional Justification Defenses. We begin by briefly discussing those defense types that are typically considered justifications, namely, Consent, Necessity, Self-Defense, Defense of Others, and Law Enforcement.

4.3.2.1.1 Consent. Although the defense of Consent has been shown to be multifaceted in complicated and theoretically interesting ways,²¹² there is no need for us to closely examine the minutiae here. When consent functions as a (successful) defense to (apparent) wrongdoing, it is because the harm that was caused is not a genuine rights violation because the harm was willed or permitted by the “victim.” Consequently, as indicated previously,²¹³ most instances of consent will be excuses on the praise/blame theory since they will render the actor merely blameless for her harmful conduct (rather than positively praiseworthy). For example, the boxer who injures another boxer in the ring by throwing legal punches is blameless because, by voluntarily participating in the match, both boxers consented to being violently struck by their respective opponents. Similarly, an individual cannot be blamed for taking another person’s car if the car’s owner gave the individual permission to use the car.²¹⁴

Consent could function as a justification in some unusual circumstances (depending, of course, on one’s preferred theory of praise). For instance, one might think that assisted suicide is praiseworthy when done under the right circumstances. If a

²¹² See Peter Westen, *The Logic of Consent* (Burlington, VT: Ashgate, 2004). In response, see Heidi Hurd, “Was the Frog Prince Sexually Molested?” *Michigan Law Review* 103 (2005): 1329-46.

²¹³ See section 4.1.7.2.1 above.

²¹⁴ I foresee a potential technical objection with regard to the use of consent as a defense to rape. The objection is that in the case of rape, a defense of consent would constitute a denial rather than a justification or an excuse. After all, saying that the sex act was consensual is to deny that there was an act of rape at all. However, recall that in Chapter One, I insisted that accusations be formulated broadly enough to allow overall moral evaluations of the actor with respect to her act. So rather than responding to the accusation “B is morally blameworthy for raping A,” the defendant should respond to something like the following accusation: “B is morally blameworthy for engaging in sexual contact with A” (which avoids use of the conceptually loaded term “rape”).

terminally ill individual asks a close friend or family member for help ending her life to end terrible suffering, and if the helper does so in a manner that is particularly loving, tender, and humane, and if the helper selects a method that is itself easy and painless (and if the terminally ill patient is either physically or psychologically unable to perform the act herself), I think many people would find the helper's act of compassion worthy of praise. So it is conceivable that some instances of the Consent defense will count as justifications, but this will depend greatly on the circumstances and will be the exception rather than the rule.

4.3.2.1.2 Necessity. A great deal of confusion in the literature related to the criminal defense of Necessity is caused by the fact that many different types of activity fall under that monolithic heading. In what follows, I will divide these cases into three main categories: other-protecting, personal preservation, and acceptable partiality.

4.3.2.1.2.1 Other-Protecting. Recall the canonical example of Necessity in which an individual burns a farmer's field under emergency conditions in order to create a firebreak that will protect an entire town from an oncoming forest fire. In a case like this one, the action is necessary in the sense that it represents a lesser evil than the one which would have transpired without it. Assuming that the actor's motivations are sufficiently community-spirited and that the consequences of the act are sufficiently beneficial, the actor will deserve praise for her act. Cases of necessity like this one, in which an individual chooses a lesser evil in order to protect others, will typically count as justifications on the praise/blame theory. However, it is clear that not all choices of lesser evils will constitute complete defenses. The surgeon who chooses to kill one

healthy patient in order to save five others in need of organ transplants is neither praiseworthy nor merely blameless despite having chosen the objectively lesser evil.²¹⁵

Another controversial case of lesser-evil Necessity which has become more relevant of late²¹⁶ is the ticking time bomb scenario in which an individual deems it necessary to torture a terrorist to learn where the bomb is and how to defuse it, thereby protecting many others from harm. This is a harder case to evaluate because of all the uncertainties involved. The true efficacy of torture to obtain desired information from a foe who is committed to hiding that information may never really be known, since thorough scientific investigation of the practice is unlikely for ethical reasons. Consequently, all we have to go on is anecdotal evidence and *a priori* intuition regarding torture's effectiveness. It seems reasonable to think that a subject of torture is likely to say whatever she thinks it will take to get the torture to end, whether it is true or false. That being the case, even if the torturer is able to obtain information from the subject, she would still need to treat that information with a relatively low degree of confidence.²¹⁷ This uncertainty gets compounded with all of the other uncertainties involved, e.g., the chance of having misidentified the subject as a terrorist involved in the bomb plot, the chance of getting anything useful out of the subject at all, the chance of getting useful

²¹⁵ Westen and Mangiafico, "The Criminal Defense of Duress: A Justification, Not an Excuse," 891-894.

²¹⁶ For example, see Kimberly Kessler Ferzan, "Torture, Necessity, and the Union of Law and Philosophy," Rutgers Law Journal 36 (2004): 183-190 and Paola Gaeta, "May Necessity be Available as a Defense for Torture in the Interrogation of Suspected Terrorists?" Journal of International Criminal Justice 2 (2004): 785 ff.

²¹⁷ Even if the torturer has low confidence regarding the truth of what is learned, it may be objected that she could still use the information she obtains as a starting point and attempt to confirm it independently by other means. But the time pressures in the ticking time bomb scenario make independent confirmation (or falsification) unfeasible. And if there are no such time pressures, then methods other than torture could be used to obtain information in the first place.

information in time to successfully defuse the bomb, etc.²¹⁸ Considering this low overall probability of success in combination with the brutal nature of the actions that the torturer must perform causes me to doubt that an individual who tortures another can be completely blameless for that action.²¹⁹

The situation merits closer inspection. To my mind, it is clear that the torturer will definitely be worthy of blame if her acts of brutality are not effective in helping to stop the harm that would otherwise be caused by the bomb. But what if the torturer is successful? If I or my loved ones were saved by the actions of the torturer, I might experience the reactive attitudes of gratitude that are indicative of moral praiseworthiness. But in evaluating an action's praiseworthiness, we should probably eschew the reactions of those who are intimately involved in the scenario in favor of the reactions of those third parties who observe it more dispassionately. Would a third person observer feel reactive attitudes of admiration for the torturer? I might be wrong, but I am inclined to believe that the attitudes of third parties who were made aware of all the details would rather be ones of distaste mingled with relief. So my (admittedly uncertain) conclusion is that successful torturers in ticking time bomb scenarios are *at best* merely blameless for their acts of brutality. If this intuition is correct, then the best that the torturer can hope for is excuse, not justification. However, it is a distinct

²¹⁸ For a useful discussion of the role of epistemic uncertainty as it relates to the moral evaluation of acts, see Kimberly Kessler Ferzan, "Justifying Self-Defense," *Law and Philosophy* 24 (2005): 711-749.

²¹⁹ For similar reasons, Gaeta concludes that torture cannot satisfy the requirements of the legal defense of Necessity:

Putting aside any moral consideration, it is clear that when a person engages in acts of torture while interrogating a suspected terrorist, he cannot be certain that his victim: (i) is actually in possession of the information he needs; (ii) will give him the information he needs; (iii) will give him the correct information. ... Therefore, I do not believe that torture, if carried out for the purpose of obtaining a confession or information, can ever be excused or justified by the defence of necessity. This is so because one of the specific requirements of this defence, namely the unavoidable and necessary nature of the otherwise criminal act, can never be met. (Gaeta, "May Necessity Be Available...", 789)

possibility that the correct theory of morality would insist that individuals are always morally blameworthy for acts of torture, regardless of the desirable consequences the torture may have in some cases.

4.3.2.1.2.2 Personal Preservation. The literature on the Necessity defense also includes cases in which individuals act for personal preservation (rather than for the protection of others). An example whose pedigree goes back to Aquinas involves a starving man who breaks into a deserted house in order to find food. This case also involves the choice of a lesser evil, but the actor's self-interested motivations make his action ineligible for moral praise. In a case like this one, the actor is merely blameless and her defense would count as an excuse. Similarly, when a prisoner is threatened with death or with rape, and she is unable to protect herself by other means (like reporting the threats to the authorities), escaping from prison is seen as an act of Necessity. In this case as well, the actor is (at best) blameless for her behavior, and thus merely excused on the praise/blame theory.²²⁰ The basic difference in character between other-motivated and self-motivated acts of necessity has caused theorists like Fletcher to distinguish the latter as cases of 'personal necessity'.²²¹

²²⁰ Prison escapes were conceptually problematic for Fletcher because, when they were opposed by guards, they represented a potential conflict of justifications. Since prison escapes would be (at best) excused on the praise/blame theory, this would not be a case of conflicting justifications on my theory. However, even if it were, it would not be a problem because the praise/blame theory is not committed to Fletcher's conceptual claim that it is impossible for both parties to be justified in a situation where their goals conflict. I see no reason to suppose that two individuals cannot both be worthy of praise even though their actions oppose one another. [For an interesting discussion of what it means for actions to conflict, see Douglas N. Husak, "Conflicts of Justifications," *Law and Philosophy* 18 (1999): 41-68.]

²²¹ Fletcher, "Should Intolerable Prison Conditions..." 1369. However, his theory requires him to insist that all such acts of personal necessity be "unreflecting reactions" to dangerous situations because any escape that was freely chosen would not be excused. (See footnote 206 above.)

A related version of what is sometimes counted as an instance of Necessity is the famous plank case, discussion of which can be traced back to the ancient Greeks.²²² Two sailors have survived the sinking of their ship at sea. They are fighting over the same plank, which we must stipulate they both need to survive and cannot feasibly share. When one sailor deprives the other of the use of the plank, thereby causing the other sailor's eventual death, the first sailor is said to have a defense of Necessity for this act. In evaluating this defense, it is worth pointing out first that there is some disagreement over whether the first sailor is truly blameless in such a case. (After all, Dudley and Stephens were found guilty under similar circumstances.) However, most theorists have assumed that the sailor should indeed be held blameless under the described circumstances. An important consideration worth noticing is that a case like this one does not involve the choice of a lesser evil in the way that the previous cases do. As we will also see in some other cases that follow, the blameworthiness of the actor will depend on the specifics of what the actor experienced in the context of her act, i.e. the phenomenology of the act. If, in the actual situation, the defendant was literally overcome with fear (if she was so crazed by fear that her will was truly 'overborne'), then I would count this case as an Act of Desperation (which will receive separate treatment below) rather than as an instance of Necessity. However, if the sailor was not reacting from sheer, overwhelming panic but instead decided to save her own life at the expense of others, then this would be a legitimate case of personal preservation Necessity. Whether she is entirely blameless for this act might depend on other factors as well, e.g., whether she could have shared the plank, whether a morally appropriate decision

²²² Khalid Ghanayim, "Excused Necessity in Western Legal Philosophy," Canadian Journal of Law and Jurisprudence 19 (2006): 31-2.

procedure for distributing the plank (other than use of force) was obviously available, whether the sailor wrested control of the plank from another sailor who had already laid claim to it, etc.

4.3.2.1.2.3 Acceptable Partiality. A distinct but important type of Necessity defense that seems to lie somewhere between the other-protecting and personal preservation varieties are what we may call cases of acceptable partiality where the actor chooses the objectively greater evil in order to respect the demands of love or loyalty.²²³ Thomson's trolley cases²²⁴ introduce us to scenarios where individuals choose to sacrifice five strangers in order to save one beloved family member. Most theorists have agreed that, within certain hard-to-describe limits, it is inappropriate to blame individuals for choosing to save themselves or others whom they love, even when doing so causes greater harm to others. As in the previous case, if the circumstances make rational deliberation about alternatives impossible and the actor makes a purely emotional reaction to the situation, then this would be more like what I call an Act of Desperation than an act of Necessity. However, if her will is not 'overborne' and she chooses to save her daughter instead of five strangers, I agree that we would indeed hold her blameless under these circumstances. Consequently, her act would count as excused. The principle of exculpation in this case (and in some instances of the previous case) is what I call *understandable moral imperfection* – the view that we cannot blame an individual for acting the way she does when we recognize that we might not have performed any better

²²³ For an article that emphasizes the importance of partiality to a theory of justification, see Douglas N. Husak, "Justifications and the Criminal Liability of Accessories," Journal of Criminal Law and Criminology 80 (1989): 491-520.

²²⁴ See Judith Jarvis Thomson, "The Trolley Problem," Yale Law Journal 94 (1985): 1395-1409. Thomson considers trolley cases involving partiality. Trolley cases themselves are due to Phillipa Foot, "Abortion and the Double Effect," Oxford Review 5 (1967).

if we had been in the actor's shoes.²²⁵ This principle of exculpation is derived from the social restrictions on blaming behavior that we introduced above.²²⁶ The reactive attitudes associated with blame are an inappropriate response when most people (or the individual sitting in judgment) would not have performed any better in similar circumstances.

4.3.2.1.3 Defensive Force. As indicated above,²²⁷ the self-preserving motivation which is operative in all instances of Self-Defense makes this defense a poor candidate for justification. Since justification requires praiseworthy behavior and since defending oneself from harm is not particularly commendable (in and of itself), instances of Self-Defense that constitute complete defenses would almost always be characterized as excused rather than justified on the praise/blame theory. (Again, I recognize that this result of the theory is perhaps the most counter-intuitive and constitutes the biggest obstacle to its acceptance. Self-Defense is a paradigm example of justification defenses, so insisting that it be treated as an excuse represents a significant revision of concepts, the force of which must be overcome by the theoretical benefits that accrue when one adopts the theory.) On the other hand, an individual who successfully acts to protect others from harm (and who has the right motivations in doing so) is worthy of praise. Assuming that there are no deplorable ulterior motives for the act and assuming that the harm inflicted upon the aggressor is not significantly disproportional to the harm that was threatened, an

²²⁵ Something like this principle is supported by Fletcher. Evaluating the defense had by the driver in the mountain road case who chooses to run over two innocents lying in the road rather than drive off the road, Fletcher writes, "It is a form of excuse. It appeals to our sense of compassion for human weakness in the face of unexpected, overwhelming circumstances." [George P. Fletcher, "The Individualization of Excusing Conditions," *Southern California Law Review* 47 (1974): 1289.] However, in order to reach this conclusion, Fletcher must insist that the difficult circumstances make the driver's choice "involuntary." The praise/blame theory has a much easier time explaining why the driver is excused in this situation without the artifice that Fletcher's theory requires.

²²⁶ See section 4.2.3.1 above.

²²⁷ See section 4.1.7.2.1 above.

act that counts as Defense of Others will usually be worthy of praise, and hence an instance of justification, on the praise/blame theory. An act of Defense of Others may still be praiseworthy even if the act of protection is ultimately unsuccessful or only partially successful, assuming that the actor did everything that could realistically be expected to prevent the aggressor from succeeding. For example, Jim Brady's actions in defense of President Reagan are praiseworthy even though they were not completely successful in protecting the President from harm. Furthermore, I believe Brady would still have been worthy of praise for his actions even if Hinckley's bullet had resulted in the President's death because of the incredible sacrifice he made in pursuit of his selfless goal. However, results that are significantly sub-optimal or worse than expected may in many cases reduce the evaluation of the actor to merely blameless (or excused).

4.3.2.1.4 Law Enforcement. Duly empowered agents of the state are generally permitted to take actions that it would be unacceptable for others to take. For instance, police officers are legally permitted to invade privacy (when they conduct a search), force individuals to stop (when they pull a car over), and to physically restrain suspects (when they handcuff and arrest suspects). In most instances, if any of these actions were taken by a regular citizen, that citizen would be morally blameworthy for doing them. However, we may assume that when these actions are taken by law enforcement officers who have probable cause to suspect that a crime of some sort has been committed, the officers are not morally blameworthy for the restrictions of freedom inherent in these acts. Whether these actions are praiseworthy or merely not blameworthy will depend to a large extent on the nature of the circumstances in each specific case. It is fair to say that when the police officer is mistaken in her assessment that a crime has been committed,

her actions restricting the liberty of the suspect are (at best) merely blameless and hence excused. When the law enforcement officer's arrests stop criminals from perpetrating future harmful crimes or when the arrest initiates a chain of events that results in the demands of justice to being served, then they may be considered praiseworthy and hence be justified.²²⁸ However, when the officer interferes with a citizen's liberty to enforce relatively minor laws that are unlikely to significantly prevent crime or serve the demands of justice (such as administering a parking or jaywalking ticket), she will be blameless but probably not worthy of praise and thus merely excused for so acting. This represents a significant deviation from traditional theories which would view any action by a police officer in the line of duty as automatically justified.

Of course, we can imagine cases that are quite difficult to evaluate. Suppose the officer is ordered by superiors to arrest an individual whom she knows to be innocent. Or suppose the officer is asked to enforce a law or policy that she knows to be unjust or unconstitutional. In cases like these, taking a stand and refusing to arrest (at the risk of losing one's job) is certainly the more praiseworthy course of action (and would therefore be justified). But what if the officer does not take a stand and performs her "duty" anyway? Since the Nuremburg trials, people have been taught that 'just following orders' cannot excuse conduct that is known to be wrongful. Consequently, my (admittedly weak) intuition is that officers would not be completely blameless under such circumstances, but the case is a close one. And my judgments in cases like this are likely to be sensitive to changes in the particular circumstances of the example.

²²⁸ This is especially true when the law enforcement officer takes those actions at some risk of harm to herself.

Alternatively, suppose an officer witnesses a crime but makes no effort to stop the perpetrator. Can the officer remain blameless for looking the other way? Because law enforcement officers are trained and relied upon to enforce the law and protect the public from criminal acts, they have special moral obligations to respond to crime that most citizens do not have.²²⁹ Of course, enforcing some minor violations is discretionary. In such cases, the officer would clearly be blameless for exercising that discretion. In other circumstances, the officer might witness the crime in the course of an undercover investigation of an even more serious crime or criminals. For example, suppose that an undercover officer witnesses a car theft in the course of her effort to infiltrate an organized criminal organization. While law enforcement officers are duty-bound to enforce the law, in a case like this one, the officer would be blameless (and hence excused) for failing to perform that duty.²³⁰ However, if an officer fails to stop a criminal act for trivial reasons (e.g., because she doesn't want to spill her coffee), then officer may not be completely blameless. Alternatively, failing to enforce the law might be praiseworthy in a few extreme examples where, for instance, the law in question is unjust. In those few examples, the failure to act would be justified, but in most other cases where the officer is blameless, she would only be excused on the praise/blame theory.

4.3.2.2 Traditional Excuse Defenses. Next we will examine how the praise/blame theory would evaluate the various defenses that are traditionally categorized as excuses, namely, (non-negligent) Accident, Physical Compulsion, Insanity, Infancy,

²²⁹ Of course, there are limits to this special obligation. For instance, an officer does not have these obligations (or at least the same obligations) when off-duty.

²³⁰ Notice that in a case like this one, the officer is excused for doing what is, at least in some sense, the "right" thing. In this case, the officer makes the choice that we would hope/wish for her to make all things considered.

Involuntary Intoxication, Sleepwalking/Automatism, Hypnosis/Brainwashing, Duress, Acts of Desperation, and Faultless Mistake of Fact. As we indicated above,²³¹ those defenses that are typically considered excuses on the traditional categorization will remain excuses on the praise/blame theory.

4.3.2.2.1 Type I Excuses. In Chapter One, I divided excuse defenses into three basic types.²³² We said that in what we called Type I excuses, the individual is not truly “acting” (in the philosophically robust sense) at all because physical circumstances are preventing her from accomplishing what she is trying to do. Thus, in Type I excuses, the individual’s bodily movements (or the results of her bodily movements) are completely divorced from her will. Causing harm due to non-negligent accident and causing harm due to physical compulsion are examples of Type I excuses. To the extent that the individuals in these cases do not want, foresee, or intend the harm they cause, they are not morally blameworthy for that harm. Of course, they are not worthy of praise either; hence, they are excused on the praise/blame theory.

4.3.2.2.2 Type II Excuses. What we called Type II excuses allow that the individual is (at least in some sense) acting in accordance with her will but that something about her psychology at the time of action is importantly different or defective in such a way that blaming seems inappropriate. Put in Strawson’s terms, those who have Type II excuses are individuals from whom we withhold reactive attitudes and instead adopt the objective stance (at least for the duration of the non-standard psychological state). Those who suffer from certain kinds of insanity would obviously fall under this heading, as would those who are too young to understand the

²³¹ See section 4.1.7.2.1 above.

²³² See section 1.4.3 above.

consequences of their actions, those whose actions result from involuntary intoxication, those who act while sleepwalking, as well as those who act according to instructions given under hypnosis or brainwashing. Since the harmful actions taken under these abnormal psychological conditions are not amenable to blame (but are also certainly not praiseworthy), they are considered excused on the praise/blame theory. So, again, the praise/blame theory gets it right.

However, a few words of clarification are in order. As before, the overall moral evaluation of the actor will depend a great deal on both the phenomenology of the specific psychological state and the circumstances of the act. For instance, if an individual suffers from auditory or visual hallucinations but is otherwise unaffected in her capacities to distinguish right from wrong or to make rational choices about her own behavior, then such an individual may not be completely blameless when she causes harm. (Just because you hear voices telling you to kill someone, that doesn't mean you are blameless if you do.)²³³ Likewise, if an individual refuses to take medication that would prevent her from entering states of abnormal psychology, she will still be blameworthy for any harm she eventually does cause while in that state. Similar points can be made about the excuse of Infancy. If a 7-year-old's intellect is sufficiently developed so that she understands right from wrong as well as the likely consequences of her actions, then the fact that she is 7 years old when she intentionally causes harm does not itself render her morally blameless for what she does.²³⁴ The same point can be made about those who are involuntarily intoxicated: to the extent that they retain their

²³³ These comments are consistent with the rules that the court in the M'Naughten case adopted regarding how to treat delusional defendants under the law.

²³⁴ For a recent discussion of age as it relates to criminal responsibility, see Gerry Maher, "Age and Criminal Responsibility," *Ohio State Journal of Criminal Law* 2 (2005): 493 ff.

evaluative and decision-making capabilities, they are still morally accountable for the harm that they cause. That is, an objective moral evaluation of an actor who causes harm under the effects of involuntary intoxication would depend on the phenomenology of the specific symptoms of that intoxication – the extent to which the intoxication impaired her ability to recognize and avoid wrongdoing. The actor’s ability to accurately perceive her surroundings, evaluate and choose from among different potential courses of action, and control her own behavior are crucial to the moral evaluation of actors who are sleepwalking or under the effects of hypnotism or brainwashing. If such actors are completely unaware of, mistaken about, or unable to control their actions, then they may be blameless for what they do.²³⁵ However, to the extent that they understand what they are doing and can act as they choose, they will be accountable for the harm they cause. Of course, as an evidentiary matter, it may not be possible for others to determine the relevant facts about what it is like to be someone suffering from an abnormal psychological state. Still, to the extent that there is a fact of the matter (regardless of whether it is knowable or observable by us), that fact of the matter will determine the individual’s objective moral blameworthiness.²³⁶

4.3.2.2.3 Type III Excuses. Individuals may have Type III excuses when circumstances lead an individual to take actions for which it is not reasonable to assign blame since we recognize that any of us might have acted similarly in similar circumstances. When an actor has a Type III excuse, her action conforms to her will (unlike Type I excuses) and she does not suffer from any abnormal psychological

²³⁵ Notice that this is not the same thing as failing to remember the actions after the fact. What is important for moral evaluation is the actor’s mental capacities at the time of the action, not her memories of the event after the fact.

²³⁶ Recall that section 1.3 and its subsections discuss what it means to have a moral defense in this objective sense.

condition at the time of the act (unlike Type II excuses). Causing harm as a result of Faultless Mistake of Fact is an important example of Type III excuses. This category includes putative examples of many of the traditional justification defenses listed above.

Putative necessity: when an individual burns a farmer's field under the mistaken impression that doing so is necessary to save a town, she will be neither blameworthy nor praiseworthy for her blunder (assuming that her motivations were pure and her mistake was not her own fault).²³⁷ Putative consent: when a non-custodial parent believes she has the custodial parent's permission to take their children on an outing on a given weekend and it turns out that the permission had been given for a different weekend, the non-custodial parent will be neither blameworthy nor praiseworthy for taking the children (assuming the circumstances are just right). Putative defensive force: when an individual harms someone that she reasonably but mistakenly believes to be a threat to the life of herself or others, her actions will not be worthy of blame but neither will they be worthy of praise (again, assuming that the circumstances are just right). Of course, Faultless Mistake of Fact need not take place in the context of a putative traditional justification; it could also take place in the context of a common, everyday activity which goes awry.

When a roommate eats food from the communal refrigerator that she mistakenly believes

²³⁷ Of course, it is possible to adjust the circumstances of the example to achieve different results. For instance, we could tell a story in which the mistaken actor is praiseworthy, if her efforts in protecting the town were particularly heroic and self-sacrificing and if the mistake she made was inevitable given the information that she had (or could have obtained). This sort of adjustment can be made to any of the examples which follow. As I emphasized in section 4.1.7.2.2, it is to be expected that different tokens of the same defense type might be categorized differently depending on the circumstances. Still, I assume that most cases of Faultless Mistake of Fact will be excused rather than justified. Indeed, to my mind, Greenawalt's example of Roger the park ranger who does the best he can but who ends up mistakenly burning a field unnecessarily is merely excused, not justified. (Greenawalt, "The Perplexing Borders of Justification and Excuse," 1908) However, I accept that reasonable people could differ about how to evaluate Roger for his act.

is her own, she will be neither blameworthy nor praiseworthy for doing so (assuming the circumstances are right).

Acts of Desperation are also an example of Type III excuses. Acts of Desperation are situations in which an individual finds herself in dire or dangerous circumstances and there is no opportunity for rational deliberation.²³⁸ The individual simply reacts to the circumstances in whatever way occurs to her first. We have already seen some potential examples of this defense type. When a starving man is so overcome by hunger that he can no longer think straight, when a woman's life depends on a split-second decision, when a dangerous situation fills a person's mind so full of fear that the person reverts to fight or flight instincts – these are situations that fall under the Acts of Desperation category. In situations like these, we hold the individual in question blameless (even though we might wish she had acted differently) because we acknowledge that the exigency of the circumstances makes it unreasonable to expect better. Anyone might have responded similarly if they had encountered the same trying circumstances. Consequently, the actors in these sorts of circumstances are excused. Or, even if the actor made an eccentric choice that most other people would not have made, we accept that she did the best that she could under the dire circumstances she faced, based on the options that presented themselves to her attention at the time.

Some readers may wonder why Acts of Desperation are not counted as Type II excuses. After all, we may be tempted to say that the individual acting under dire circumstances who has no time or capacity to deliberate about her options suffers from a kind of 'temporary insanity'. However, I think this move is inappropriate. After all, the

²³⁸ For an examination of how what I am calling "acts of desperation" ought to fit into the structure of legal defenses, see Michael D. Bayles, "Reconceptualizing Necessity and Duress," Wayne Law Review 33 (1987): 1191-1220.

claim is not that the individual suffers from some abnormal psychological condition that makes her different from the rest of us. Quite the contrary, we are saying that anyone in such circumstances would have had trouble making a better choice. Consequently, classification as a Type II excuse would be inappropriate.

Suzanne Uniacke makes the important point that it is the nature of the dire circumstances that produce the excusing condition, not (just) the intensity of emotion experienced by the actor.²³⁹ She points out that individuals who “snap” or “lose their tempers” for inappropriate reasons, like jealousy or annoyance, are still held responsible for the harm they cause. We expect those with explosive tempers to find ways to control themselves and moderate their reactions. Thus, it is important to recognize that not all “snap judgments” will automatically be excused.

Duress can also be an important example of Type III excuses. Duress involves situations where an individual performs a *prima facie* wrongful act at the behest of another individual who threatens harm unless the actor complies. Some theorists have preferred to treat Duress as an unthinking reaction in which the victim’s fear causes her will to be overborne. (In my terminology, that would be to treat Duress as an Act of Desperation.) This treatment has suited theorists whose theories require them to view excuses as involuntary, non-deliberative acts arising from conditions of the actor (i.e., theorists who accept principles like DEH and DEH’). However, the logical structure of Duress *presumes* rational deliberation under conditions where the victim’s options are artificially limited by coercion. Finkelstein writes, “Indeed, what the coercer does is to

²³⁹ Suzanne Uniacke, “Emotional Excuses,” *Law and Philosophy* 26 (2007): 95-117. See also William Wilson, “The Filtering Role of Crisis in the Constitution of Criminal Excuses,” *Canadian Journal of Law and Jurisprudence* 17 (2004): 387-416 who also emphasizes the importance of dire circumstances (i.e., “crisis”) for such excuses.

appeal to the deliberative faculties of the defendant: the coercer provides the defendant with particularly strong reasons for acting, and when the defendant complies, he acts *for those reasons*.”²⁴⁰ I do not deny that there may be some cases of Duress in which the victim is literally overcome by fear, making rational choice impossible, but I agree with Finkelstein that putting the victim in such a state is at odds with the coercer’s goal of forcing the victim to choose (under conditions where one option is significantly more appealing than all others). Consequently, conceptually speaking, Duress is a defense that is different from what we have called Acts of Desperation.

The simplest cases of Duress are like the simplest cases of Necessity – a choice of evils. For example, when the clerk hands over the money in the cash register to avoid getting shot, she is choosing the lesser evil under the circumstances. She is not worthy of blame nor of praise for assisting the thief, and is thereby excused on the praise/blame theory. Of course, not all cases of Duress are based on choosing the lesser evil. Some duress defenses involve cases of partiality where the greater evil is chosen. Robert Schopp introduces a case in which mobsters threaten to kill the child of a day-care center worker unless she reveals the identities of the children of a rival mobster (whom they clearly intend to kill). Schopp suggests that in such a case, the Duress defense would be available to the day-care worker despite the fact that she sacrifices two lives to save

²⁴⁰ Claire O. Finkelstein, “Duress: A Philosophical Account of the Defense in Law,” Arizona Law Review 37 (1995): 272. In a subsequent article, she writes,

There is a clear sense in which the coercer is presenting you with a choice: while he has severely restricted your options there are still two things you can do under the circumstances. The point of restricting your options is of course to make one course of action vastly more attractive to you than another. But this means that the coercer is relying on your intact powers of ratiocination, since he *wants* a particular course of action to recommend itself forcefully to your reason. Lack of rationality on your part would foil his plans.” [Claire O. Finkelstein, “Self-Defense as a Rational Excuse,” University of Pittsburgh Law Review, 57 (1996): 635.]

one.²⁴¹ Again, the day-care worker would be merely blameless in this case and hence excused on the praise/blame theory.

Of course, the defendant's blamelessness will depend on the extent to which the harm that is threatened is serious enough in comparison to the good that is sacrificed. For example, if the teller is threatened by the robber with insulting verbal abuse unless she opens up the register and hands over the money, she will not be held blameless if she gives in to this demand under such a weak threat. A certain degree of fortitude is expected of all of us when faced with difficult choices. As usual, moral evaluation of the actor will be highly sensitive to changes in the circumstances of the case.

Duress will rarely count as a justification on the praise/blame theory since circumstances in which succumbing to a criminal's coercive demands will rarely constitute commendable or admirable behavior. However, it is not impossible to imagine cases of Duress which would count as justified. Suppose Lex Luthor threatens to blow up Metropolis unless Superman hands over his supply of kryptonite, his most prized and guarded possession. Superman knows that once Luthor is in possession of the kryptonite, Luthor will use it against him in order to negate his superhuman abilities. Acceding to this demand saves many lives while also requiring great personal sacrifice from Superman. In circumstances such as these, an action taken under duress might be praiseworthy and thus justified on the praise/blame theory. However, most cases of Duress do not involve actions that prevent harm to others at great personal cost to the actor. Consequently, it is safe to say that most cases of Duress will count as excused on the praise/blame theory.

²⁴¹ Robert F. Schopp, "Self-defense," in *In Harm's Way: Essays in Honor of Joel Feinberg*, Jules Coleman and Allen Buchanan eds. (Cambridge: Cambridge University Press, 1994), 277.

4.4 Competing Formal Theories. Having explained and illustrated the praise/blame theory, I now turn to a comparison of this theory with the claims of some of its competitors. I will avoid the temptation of responding to each author who has made a substantive claim or categorization that contradicts one of mine. After all, I have already acknowledged that my theory is primarily a formal one and that those with different substantive moral theories of praise and blame could reach different substantive results. Consequently, I will focus my attention on those theories that offer a competing view of the structure of moral defenses. Strictly speaking, the competitors I will examine below are theories of *legal* defenses. Consequently, any criticism that I may make of these theories should be understood as somewhat misplaced. I acknowledge that it is unfair to criticize a theory for failing to do a job that it was never intended to do. Still, it is reasonable to consider whether these legal theories would be successfully if imported to the moral context. Furthermore, it is reasonable to think that the best theory of moral defenses would be reflected by (although not identical to) the best theory of legal defenses.

4.4.1 Rational Excuses. In an important series of articles,²⁴² Claire Finkelstein has defended a tripartite theoretical structure for defenses. Following Fletcher, she describes justifications as those *prima facie* wrongful acts that are worthy of emulation or social encouragement.²⁴³ She also follows Fletcher in suggesting that excuses are

²⁴² These include Finkelstein, "Duress: A Philosophical Account of the Defense in Law," 251-283; Claire O. Finkelstein, "Self-Defense as a Rational Excuse," *University of Pittsburgh Law Review* 57 (1996): 621-649; and Claire Finkelstein, "Excuses and Dispositions in Criminal Law," *Buffalo Criminal Law* 6 (2002): 317-359.

²⁴³ Finkelstein, "Self-Defense as a Rational Excuse," 624.

commonly understood as involving denials of responsibility.²⁴⁴ She then points out the rational qualities of Duress and the selfish motives underlying Self-Defense (as we have done) to suggest that these defenses lie somewhere between justification and excuse as traditionally conceived.²⁴⁵ Thus, she proposes a distinct type of defense known as ‘rational excuse’ that fills the gap. She writes, “Rational excuses thus share a characteristic with justifications: they apply to actions *done for a reason*, where the excuse itself provides the reason for the violation of the prohibitory norm.”²⁴⁶ Clearly, much of Finkelstein’s argument is similar to my own²⁴⁷ and the differences between our accounts are easy to explain. While she prefers to talk about three kinds of defenses – justifications, rational excuses, and excuses – I prefer to talk about just two defense types – justifications and excuses. However, at the end of the day, Finkelstein would agree that rational excuses are indeed excuses. Hence, the apparent structural difference between our theories is just an illusion. We both agree that there are two defense types, justifications and excuses; that some excuses involve deliberative, “rational” action; and that duress and self-defense are prime examples of such rational excuses. We differ in our substantive moral commitments – she espouses an Aristotelian character theory²⁴⁸ while I prefer a more intuition-based Strawsonian approach. She also does not explicitly endorse the reduction of justification and excuse to praiseworthiness and blamelessness as I do (although I would argue that this is implicit in her view). While Finkelstein does apply her theory to a discussion of Self-Defense in the context of Battered Women’s

²⁴⁴ *ibid.* (See also her “Duress: A Philosophical Account of the Defense in Law,” 252.)

²⁴⁵ *ibid.*

²⁴⁶ *ibid.*

²⁴⁷ Put in the terms I introduced above, her position and her arguments represent a forceful rejection of DEH.

²⁴⁸ Finkelstein, “Duress: A Philosophical Account of the Defense in Law,” 275-282.

Syndrome,²⁴⁹ as we will see in the following section, I am willing to apply the theory much more broadly. Since she is offering a theory of legal defenses, she has no need to consider the epistemology and structure of moral defenses more generally, as I do in Chapter One. So while our theories share a number of important characteristics, they are by no means identical.

4.4.2 The Oxford Consensus. Husak identifies a persistent school of thought among British legal theorists that places heavy emphasis on a taxonomy of reasons in the description and analysis of criminal defenses.²⁵⁰ (I employed some of this terminology above – “guiding” and “explanatory” reasons.) This emphasis on reasons is in large part due to the influence of Joseph Raz’s seminal work on the nature of practical reasoning. Prominent theorists whose views contribute to this school of thought are Duff, Gardner, Horder, Sullivan, and Tadros to name a few. The position paper which best represents a rallying cry for this school of thought (which I call the “Oxford Consensus”) is Gardner’s “The Gist of Excuses.”²⁵¹ There, Gardner writes, “Justifications and excuses are available only to those whose actions have intelligible rational explanations, i.e. whose actions properly reflected reasons for action that they took themselves to have....”²⁵² However, defining excuses based on the defendant’s reasons for action, forces Gardner to reject some defenses that are traditionally classified as excuses, like Accident, Insanity,

²⁴⁹ Finkelstein, “Self-Defense as a Rational Excuse,” 625-633.

²⁵⁰ In his review of Horder’s recent book on criminal excuses, Husak writes,

First, relatively few potential readers in the United States will be fluent in the latest Oxfordian distinctions between the various types of reasons that are central to Horder’s approach: explanatory reasons, guiding reasons, operating reasons, auxiliary reasons, exclusionary reasons, adopted reasons, and the like. Many British commentators (including Horder) are more persuaded than Americans that the key to solving many of the persistent problems in criminal law theory is to develop and apply a taxonomy of reasons.” [Douglas Husak, “A Liberal Theory of Excuses,” *The Ohio State Journal of Criminal Law*, 3 (2005): 287-299.]

²⁵¹ Gardner, “The Gist of Excuses,” 575-598.

²⁵² *ibid.*, p. 588.

Infancy, and Compulsion. Gardner writes, “But the focus on making sense of people's actions in the light of their reasons rightly brings to the surface the important point that those whose reasoning can't be made sense of in this way, whether because of profound mental illness or infancy or sleepwalking or (on some interpretations of it) post-hypnotic suggestion, are not responsible for their actions and therefore need no excuses for what they do.”²⁵³ Hence, the Oxford Consensus is forced to introduce a separate category to accommodate those defenses that aren't reasons-based. This leads to a tripartite structure of defenses: justifications, excuses, and denials of responsibility (what are sometimes called ‘exemptions’). Like Finkelstein's rational excuses, this view's emphasis of the role that reasons play in excuses represents a rejection of DEH. To that extent it is a step forward in the theory of moral defenses. However, the Oxford Consensus performs poorly in other ways.

Insanity is the prototype example of excuse in the literature on defenses. Fletcher writes, “Insanity is probably the clearest case of an excusing condition in the common law tradition.”²⁵⁴ So the fact that the Oxford Consensus is forced to deny that insanity is an excuse is a difficult conceptual pill to swallow. However, I am particularly ill-suited to make this objection since my theory also requires some difficult conceptual reorganization. My own theory is forced to reclassify Self-Defense, a prototypical

²⁵³ *ibid.* p. 589.

²⁵⁴ George P. Fletcher, “The Individualization of Excusing Conditions,” Southern California Law Review, 47 (1974): 1293. Indeed, in this paper written 35 years ago, Fletcher charges “common law writers” with precisely the same mistaken view that I am arguing against. He writes, “That courts rely on one index of dangerousness at one point in history [in the practice of civil commitments] hardly warrants the claim that the insanity defense does not perform an excusing function. Yet one is invariably struck by the widespread willingness of common law writers to reject the excusing function of the insanity defense.” (1295) Apparently, the phenomenon I attribute to the Oxford Consensus has a lineage that predates the work of Joseph Raz. Indeed, J.L. Austin's seminal paper “A Plea for Excuses” excuse is noteworthy for its failure to mention either insanity or infancy as a type of excuse. [J.L. Austin, “A Plea for Excuses,” Proceedings of the Aristotelian Society, 57 (1956/57): 1 ff.]

justification, as an excuse. Accordingly, I will drop this line of argument. Luckily, another line of argument is available, one which my theory is particularly well-positioned to make since it depends on the structure of moral defenses that I identified in chapter 1. The claim that the insane “need no excuse” radically misunderstands the purpose and logical structure of moral defenses. Recall that moral defenses are offered in response to accusations of wrongdoing and that these accusations are not made from positions of omniscience. (After all, if the accuser were omniscient, *no one* would ever need an excuse because the facts of the individual’s blameworthiness or lack thereof would already be known.) Consequently, because of its emphasis on the epistemological structure of moral defenses, my theory is uniquely qualified to criticize the Oxford Consensus’s insistence that insanity is not an excuse. Insanity is most definitely an excuse because it represents an explanation that a defender might offer to counter an accusation of blameworthiness. Claiming that insanity is not an excuse would represent a fundamental misunderstanding of the nature and purpose of moral defenses.

Of course, an obvious response that the adherents of the Oxford Consensus can offer to this argument is that they are offering theories of legal defenses, not moral defenses. It is good to remind ourselves from time to time that we are putting theories to use in contexts for which they were never intended. Still, the case for insanity as an excuse can also be made on a basis that even a legal theorist must respect. Recall that in the quote above, Gardner claims that since the insane are not responsible for their actions, they need no excuse for what they do. However, this cavalier dismissal treats insanity as if it were a blanket defense, rendering an actor blameless for anything he might do. But that can’t be right. It treats insanity as if it were a single monolithic condition rather than

a group of highly variable conditions that affect different people in different ways. First, as we noted before, kleptomania may excuse an individual's act of petty theft but not her act of assault. Saying that the insane "need no excuse" provides no mechanism for treating the kleptomaniac's two crimes differently in this scenario. Second, some forms of mental illness are treatable by medication. Saying that the insane "need no excuse" leaves society with no recourse when an individual suffering from some such treatable form of insanity refuses to take her medication because she doesn't like the side-effects and commits a harmful act as a result. Third, saying that the insane "need no excuse" leaves no room for investigating the specific experience of the defendant to determine if she could predict the consequences of her actions and could tell right from wrong. After all, we routinely incarcerate sociopathic serial killers who understand what they are doing and know (but don't "feel") that killing is wrong. Saying that the insane "need no excuse" makes the M'Naughton rules appear quite mysterious. In conclusion, the blanket rejection of insanity as a type of excuse fails to account for fundamental facts about the nature and variety of mental illnesses as they relate to culpability,²⁵⁵ even (I would argue) in the legal context.

4.5 Potential Theoretical Productivity of the Praise/Blame Theory. Along with its reductive simplicity, the chief appeal of the praise/blame theory of justification and excuse is its potential to help resolve long-standing theoretical puzzles and/or disputes. In this section I will briefly sketch how the praise/blame theory might be useful in helping to resolve the status of the Battered Woman's Syndrome defense, the moral

²⁵⁵ In section 1.3.2.2 above I argued that Gardner's view fails to respect the structure and function of moral defenses.

status of abortion, the role of culture in moral evaluation, and the moral foundation for criminal laws that are not justified by the harm principle. Finally, I will examine the extent to which the use of the praise/blame theory would be useful in the procedure of a criminal trial.

4.5.1 Battered Woman's Syndrome. What gives the praise/blame theory potential explanatory power over and above traditional theories is its rejection of heuristic principles like DJH, DEH, and DEH'. The praise/blame theory denies that excused actions are necessarily wrongful all things considered, denies that actors must suffer from some defect or impairment in order to be excused, and denies that excuse requires an "overborne will" that is incapable of deliberation or reflection. It is the traditional theory's acceptance of all these defective principles that creates the theoretical dispute over the status of Battered Woman's Syndrome as a defense. Introducing a symposium on Battered Woman's Syndrome, David Richards lays the groundwork for the debate by summarizing the traditional (I say mistaken) understanding of the difference between justification and excuse:

Self-defense is traditionally understood as a defense of justification as opposed to a defense of excuse. Thus understood, a person entitled to the defense, otherwise guilty of legal wrongdoing, has done nothing wrong. In contrast, a defense of excuse (for example, insanity) does not negative the wrongdoing of the act, but focuses on the lack of culpability of the offender (for example, the lack of basic capacities of deliberation and self-control required for culpability).²⁵⁶

Having thus accepted the principles that the praise/blame theory rejects, the nature of the theoretical dispute becomes clear. Battered women who kill their abusive spouses attempt to defend their actions using Self-Defense, but they do not technically qualify for it because the threat to their own life is not imminent. However, they often do not qualify

²⁵⁶ David A.J. Richards, "Self-Defense and Relations of Domination: Moral and Legal Perspectives on Battered Women Who Kill," University of Pittsburgh Law Review 57 (1996): 462.

for an excuse, either, because there is nothing wrong with the woman's basic capacities of deliberation or self-control. Consequently, the woman will be found guilty unless some legal fiction can be created by psychologists asserting that the woman suffered from some temporary mental illness at the time of the killing. Feminists take issue with this tendency to stigmatize battered woman killers by assuming that there must be something wrong with them for them to do what they did. On the contrary, they argue that the battered woman's response is completely sensible under the threatening circumstances they faced. As a result, feminist authors believe that the battered woman killers are justified in taking the action that they did.²⁵⁷

This dispute is completely dissolved by the praise/blame theory.²⁵⁸ The praise/blame theory would count the battered woman's killing as excused (assuming that all the facts line up correctly), but recall that Self-Defense is also an excuse on the praise/blame theory. So there is no reason to be concerned that the battered woman is being shortchanged by an inferior defense. Because my theory rejects DEH', excuse requires neither an admission of some defect or impairment nor an admission that the woman did something which was wrong thing all things considered. And because my theory rejects DEH, the fact that the woman deliberated about how to act and chose a rational course of action given her circumstances does not rule out the applicability of excuse. Consequently, there is nothing left for partisans to argue about other than the technical details of how best to make legal defenses accurately reflect moral defenses.

²⁵⁷ *ibid.*, 461-476.

²⁵⁸ Finkelstein argued similarly that her "rational excuse" designation was tailor-made for battered women who kill as a middle option between justification and excuse. (Finkelstein, "Self-Defense as a Rational Excuse," 634)

The praise/blame theory successfully resolves the moral debate surrounding battered women who kill.²⁵⁹

4.5.2 Abortion. The moral evaluation of a woman's decision to end a pregnancy has been a crucial part of the entire abortion debate. Since a woman who chooses abortion need not suffer from any defect or impairment related to her decision, she is clearly ineligible for an excuse defense on the traditional theory. Thus, defenders of abortion rights have been conceptually boxed-in, forced to argue that the decision to end a healthy pregnancy is morally justified.²⁶⁰ But even those who are sympathetic to abortion rights have had trouble swallowing the implication that there is nothing wrongful about destroying a fetus. Many people balk at the suggestion that there is no moral difference between abortion and having one's tonsils removed. The praise/blame theory opens up additional avenues for exculpation since it rejects the assumption that an individual must suffer some defect or impairment in order to be eligible for excuse. Having excuse available as a moral defense for abortion seems to fit well with the popular sentiment among prominent pro-choice politicians who say that they want to make abortion "legal, safe, and rare."²⁶¹ The obvious reason for wanting to make abortion rare is that abortion is something unfortunate, something to be avoided, something inherently undesirable. Partisans on both sides of the abortion debate have

²⁵⁹ The praise/blame theory can similarly dissolve other disputes that hinge on the acceptance of the defective heuristics, such as the debate over whether culture can function as a justification or an excuse. Complaining about the presumption that a cultural defense to crime can be no better than an excuse, Chiu writes, "The current excuse approach in the criminal law is especially harmful..." because it treats "...minority cultures as disabilities..." which "...denigrates these cultures and their values." [Elaine Chiu, "Culture as Justification, not Excuse," *American Criminal Law Review*, 43 (2006) 1369-1370.] Clearly, this claim is dependent on a disability view of excuse which the praise/blame theory rejects. Since Self-Defense counts as an excuse on the praise/blame theory, there is no reason to complain that a cultural defense is denigrated or demeaned when it is categorized similarly as an excuse.

²⁶⁰ The most famous and ingenious attempt at this is Thomson's "A Defense of Abortion." [Judith Jarvis Thomson, "A Defense of Abortion" in *Rights, Restitution, and Risk*, ed. William Parent (Cambridge, MA: Harvard University Press, 1986), 1-19.]

²⁶¹ From the Clinton era until 2008, a phrase like this one was included in the Democratic Party platform.

picked on this language. Some pro-life advocates have tried to present those holding the pro-choice position with a dilemma by asking why abortion should be rare *if* there's nothing wrong with it. Some more ardent pro-choice advocates have accepted this dilemma and have asked why abortion should be rare *since* there is nothing wrong with it. Both sides of this argument are doomed to talk past one another on this issue until they jettison the assumptions about moral defenses forced on them by the traditional theory. While the praise/blame theory cannot resolve the substantive moral issues that separate the two sides of this debate, it can at least draw focus away from justification as the only means of exculpation. The praise/blame theory allows that a woman can be excused for deciding to abort her pregnancy without it necessarily being the case that there is something wrong with her (some defect) or that what she has done is wrongful all things considered.

4.5.3 Cultural Evolution and Moral Evaluation. Recall that we concluded earlier²⁶² that blame is an inherently social concept and that, consequently, the morality of the society places limits on any individual's potential blameworthiness. This has the consequence that an individual's blameworthiness can change over time as the morality of the society changes. Far from considering this a defect in my account, I believe it fits the data quite well. As a case in point, consider the use of corporal punishment as a means of disciplining children. This is a topic about which our society's attitudes are rapidly changing. A generation or two ago, the right of parents to discipline children via corporal punishment was hardly in dispute. However, even during the span of my lifetime that attitude has changed dramatically. When I was a youngster, students could – and did on rare occasions – receive spankings as punishments in school. Today, corporal

²⁶² See section 4.2.3.1 above.

punishment is all but banned in public schools. Its use by parents is also heavily discouraged in the media (by popular television shows like Supernanny and by self-help programs like The Dr. Phil Show) as well as by organizations of child-care professionals, like the American Academy of Pediatrics.²⁶³

Striking one's child would not count as justified on the praise/blame theory because it is difficult to imagine circumstances under which striking a child is praiseworthy. And if corporal punishment is indeed counter-productive as most studies of the practice seem to indicate,²⁶⁴ then the only available method of exculpation for parents who administer corporal punishment would be the fact that it is common practice. If corporal punishment of children were a practice that most members of society participated in, then attitudes of indignation (and hence blame) would be inappropriate. However, the society we are moving towards now is one in which corporal punishment is the exception rather than the rule, and it is no longer true to say that spanking is something that most everyone does or would do. Consequently, attitudes of indignation towards those who spank their children are becoming more common. There was a recent news item that received some national attention about a parent in Iowa who received a ticket for endangering the welfare of a child when she publicly spanked her child at a parade.²⁶⁵ Over time, parents who continue to practice corporal punishment will be considered more and more blameworthy because their actions will no longer be protected by the fact that most other people in society do the same thing.

²⁶³ American Academy of Pediatrics Committee on Psychological Aspects of Child and Family Health, "Guidance for Effective Discipline," Pediatrics 101 (1998): 723–728.

²⁶⁴ *ibid.*

²⁶⁵ Susan Wagner, "PD Poll: Do You Spank?" Parent Dish, 14 July 2008 <<http://www.parentdish.com/2008/07/14/iowa-mom-ticketed-for-spanking-toddler/6>> (20 August 2008).

Of course, predicting exactly when such a cultural tipping point will be reached is not theoretically feasible, but one suggestion for empirically investigating when such tipping points actually do occur would be to correlate the decline in the societal smoking rate with the rise of laws prohibiting smoking in public buildings. Such a statistical analysis might provide us with a specific percentage of the population that must engage in a certain type of behavior before the rest of the society begins to condemn that behavior as blameworthy.

There may be good reasons for cultural conservatives to fear social change, since it has the power to transform behavior that was once blameless into behavior that is blameworthy. The consequence of this view is that it behooves individuals to try to stay “ahead of the curve” when it comes to participating in morally questionable behavior.²⁶⁶ Corporations seem to understand this fact instinctively. Some of the biggest companies are often careful to stay on the forefront of issues of social responsibility (e.g., sexual harassment, domestic partner benefits, recycling, CO₂ emissions, etc.). They understand that if they are left “holding the bag” after the rest of society has changed its standards, they are likely to be punished by customers, stockholders, and juries in civil law suits.

Another changing pattern of behavior that is of interest to some philosophers is the practice of vegetarianism. Vegetarianism is certainly more prevalent among the philosophers that I have encountered than it is among the general population. This is likely because they have been persuaded by the moral arguments of philosophers like

²⁶⁶ Feinberg makes a similar point about the consequences of a changing culture when he writes, “Thus, I could be in the uncomfortable position of making a case for the punishment of anti-war demonstrators in 1965 for parading a Viet-Cong flag (shocking!) while denouncing the punishment of other protestors in 1970 for doing the same thing (yawn). Rapid cultural change will always claim some victims in this way, and perhaps I should sadly conclude that some unfair martyrdom in the transitional stages is simply an inevitable, tragic fact of life. [Joel Feinberg, Offense to Others: The Moral Limits of the Criminal Law, Vol. II, (New York: Oxford University Press, 1985), 48.]

Peter Singer who insist that animals have rights that humans are morally obligated to respect.²⁶⁷ So far, I have not been moved by these arguments to forego the lifestyle that I grew up with and that is still common among my peers. I still order chicken dishes at restaurants, eat pepperoni on my pizzas, and occasionally enjoy a good cheeseburger. To the extent that I am blameless for my continued carnivorous eating habits, it is only because my behavior is similar to that of the rest of the general population. However, were those social eating practices to shift significantly, my consumption of meat products could indeed become blameworthy. As a matter of fact, I deem it likely that future generations will look back on carnivorous eating habits with reactions of indignation. If I were a morally better person, I would try harder to bring my culinary habits in line with my philosophical views. However, in the meantime, I am blameless due to understandable moral imperfection (fortunately enough for me).

4.5.4 The Moral Foundations of the Criminal Law. In his four-volume opus, The Moral Limits of the Criminal Law, Joel Feinberg, following John Stuart Mill, starts from the presumption that societal restrictions on individual liberty require moral defense. He writes, “Liberty should be the norm; coercion always requires some sort of justification.”²⁶⁸ Of course, this is a perfectly reasonable thing to say on the traditional theory of moral defenses. After all, on the traditional view, if an act is excused, that act must be wrongful all things considered – something that should not be done. Obviously, if a law is wrongful, it should not be enacted. However, since the praise/blame theory rejects the idea that excused acts are necessarily wrongful all things considered, this opens up the possibility that in some cases, coercive criminal laws might be morally

²⁶⁷ Peter Singer, Animal Liberation (New York: Random House, 1975).

²⁶⁸ Joel Feinberg, Harm to Others: The Moral Limits of the Criminal Law, Vol. I (New York: Oxford University Press, 1984), 9.

excused rather than justified. I think that this intriguing possibility could serve Feinberg's purposes by filling a lacuna in his argument that he himself acknowledges. Feinberg believes that a liberal should be willing to support not only the harm principle²⁶⁹ but also the offense principle²⁷⁰.²⁷¹ This places him at odds with those liberals who, following Mill, prefer to restrict themselves to just the harm principle. Thus, it is incumbent on Feinberg to produce a strong argument to support his inclusion of the offense principle. However, he acknowledges that he lacks the resources to do so when he writes,

There is a limit to the power of abstract reasoning to settle questions of moral legitimacy. The question raised by this chapter is whether there are any human experiences that are harmless in themselves yet so unpleasant that we can rightly demand legal protection from them even at the cost of other persons' liberties. The best way to deal with that question at the start is to engage our imaginations in the inquiry, consider hypothetically the most offensive experiences we can imagine....²⁷²

Feinberg then stokes our imaginations by inviting us to take "a ride on the bus" filled with passengers who engage in the most disturbing kinds of public behavior he can conjure. I submit that the praise/blame theory's notion of excuse may be precisely what Feinberg needs to help support his acceptance of the offense principle.

If we were perfect moral beings, then offensive sights, sounds, smells, and activities like the ones experienced on Feinberg's bus would not affect us the way that they do. By his own admission, the tamest and least disturbing example of offensive

²⁶⁹ Feinberg states the harm principle as follows: "It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting)...." (Feinberg, Harm to Others, 26.)

²⁷⁰ Feinberg states the offense principle as follows: "It is always a good reason in support of a proposed criminal prohibition that it is probably necessary to prevent serious offense to persons other than the actor...." (*ibid.*)

²⁷¹ Feinberg states the Liberal Position (which he subscribes to) as follows: "The harm and offense principles, duly clarified and qualified, between them exhaust the class of good reasons for criminal prohibitions." (*ibid.*)

²⁷² Joel Feinberg, Offense to Others, 10.

behavior that Feinberg describes is public nudity.²⁷³ He explores the phenomenology and psychology of how and why acts of public nudity invade and command our attention.²⁷⁴ Still, it is clear that these facts of phenomenology and psychology which cause the presence of nudity to intrude on our attention whether we want it to or not could be altered over time. For instance, if we lived in a nudist colony, those disturbed states of mind that Feinberg so carefully catalogs would become dulled due to desensitization in a relatively short amount of time. If we recognize that it is possible to change our psychological reactions to public nudity, it seems difficult to see why it is morally acceptable on a more traditional view to curtail the liberty of nudists. Why, morally speaking, does it make sense to demand that those who have freed themselves from their psychological “hang-ups” must accommodate those who haven’t? The praise/blame theory of moral defenses has the resources to answer this question. The praise/blame theory accepts that individuals are excused for their understandable moral imperfection when most of the people in that society would react in a similar fashion under similar circumstances. Consequently, even though laws against offensive behavior like public nudity may not be morally justified, they might instead be morally excused.

Extending the praise/blame theory of moral defenses so that it addresses legislative acts rather than individual acts requires some adjustments in the foundation of the theory. When we are considering whether a legislative act is justified or excused, it is clear that the Strawsonian reactive attitudes that have formed the foundation of the theory would have to be extended by analogy so that corporate entities like legislatures could be their objects. However, I don’t think it is too much of a stretch to suggest that people can

²⁷³ *ibid.*, 14.

²⁷⁴ *ibid.*, 17-19.

feel attitudes of indignation toward a legislature for passing a law. I can truthfully report that I experience such attitudes towards Congress on a regular basis. Still, it is important to acknowledge that extending concepts in this way moves us away from the aspects of social interaction which were the foundation of the theory. Those who find this extension of concepts implausible can instead interpret the blame as being directed to individual legislators for their individual voting acts. In any case, though, the praise/blame theory makes a great deal of sense out of Feinberg's position that both the harm and offense principles are morally acceptable limits on individual liberty. When the legislature enacts laws to protect people from harm caused by others, this is analogous to Defense of Others, which typically counts as a justification. However, when the legislature enacts laws to protect people from offense caused by others, this is analogous to acknowledging understandable moral imperfection, which is an excusatory principle. Again, it is important to emphasize that just because an action (or an act of Congress) is excused, that does not mean it is wrongful all things considered on the praise/blame theory. Thus, even though in a perfect world we would all train our psyches to better tolerate public nudity, there is nothing wrong all-things-considered with acknowledging our shared moral imperfection and prohibiting such offensive acts.

Some might object that, far from assisting Feinberg's project, acceptance of the praise/blame theory would represent a poison-pill for his liberal position because it would just as easily provide a basis for legitimizing paternalistic or moralistic laws. Since Feinberg is clear that only the harm and offense principles are consistent with political liberalism, he could not possibly accept the view I am offering. A potential response to this objection is that acceptance of my theory would not deprive Feinberg of the

argumentative resources he had available to reject those additional, non-liberal principles in the first place. If those arguments were compelling before, they should remain so even after accepting the praise/blame theory. However, my personal view is that the praise/blame theory is indeed capable of providing excuses for some existing paternalistic laws (like seatbelt laws, helmet laws, and insurance mandates), and since I would not shrink from that payoff, I am clearly not a thorough-going devotee of Feinberg-style liberalism.²⁷⁵

4.5.5 The Use of the Praise/Blame Theory in the Courtroom. In his seminal 1984 paper which arguably sparked theoretical interest in the concepts of justification and excuse over the past 25 years, Greenawalt expresses doubt that a clear distinction between justification and excuse would be of much practical use in the courtroom. He claims that codifying precisely what defenses constitute justifications and what defenses constitute excuses would require lots of time and energy by legislators as well as forced choices between competing moral viewpoints.²⁷⁶ Furthermore, Greenawalt thinks that since the jury will acquit the defendant regardless of whether the action is deemed justified or excused, asking the jury to determine which type of defense the defendant has would just add unnecessary levels of complexity to the jury's already difficult task.²⁷⁷ I agree with Greenawalt that the benefits of asking jurors to specify the type of defense when they deliver a not-guilty verdict would be minimal. Aside from granting the defendant public vindication, a finding of justification would do little more than serve as

²⁷⁵ To prevent the theory from legitimizing too much, it could be supplemented by additional principles which place restrictions on the sorts of laws that legislatures can properly enact, like, for example, those presented by Douglas Husak in chapters 2 and 3 of Overcriminalization: The Limits of the Criminal Law (New York: Oxford University Press, 2008).

²⁷⁶ Greenawalt, "The Perplexing Borders of Justification and Excuse," 1906.

²⁷⁷ *ibid.*, 1907.

a rebuke to the prosecutor for failing to exercise prosecutorial discretion. Conversely, I suppose that if a jury were to find a defendant not-guilty due to justification, that verdict could serve as the basis for a civil suit alleging wrongful prosecution. These two relatively minor potential benefits – public vindication for praiseworthy defendants and exposing potential prosecutorial misconduct – would have to be weighed against the additional difficulties imposed on jurors and lawmakers as well as potential misuse by jurors.

However, I disagree with Greenawalt that adding this extra layer to the juror's responsibilities would require significant time and effort by legislators or that it would be particularly difficult for jurors to decide. Greenawalt is assuming that complicated legalistic rules would have to be drafted and then applied in order to determine whether individual defendants are justified or excused. However, if we accept the praise/blame theory then no additional legal draftsmanship or careful application is required. Since justification and excuse are reduced to the fundamental moral concepts of praiseworthiness and blamelessness – concepts with which jurors are already intimately familiar – jurors should have no difficulty making such determinations in individual cases. Indeed, I submit that jurors are perfectly situated to do so. The only potential difficulty I can foresee is coming up with procedural rules for dealing with juries that are split on this issue. What should be done when four of twelve jurors voted not-guilty because they thought the government did not sufficiently prove the case, four jurors voted not-guilty because they thought the defendant was worthy of praise, and four jurors voted not-guilty because the defendant was merely not blameworthy? This problem is easily dealt with. Once the jury has agreed that the defendant is not-guilty (i.e. not punishable),

there is no reason to require the jury to reach a consensus regarding the reason for that verdict. Each individual juror's reason could simply be recorded for posterity regardless of whether the jurors were in agreement. Consequently, even though requiring jurors to explain their not-guilty verdict provides few potential benefits, the difficulty of including this requirement is so minimal that I think adopting this reform is worth while. I wish to emphasize, though, that my support of requiring jurors to explain their verdicts would be contingent on the law's explicit acceptance of the praise/blame theory of defenses.

Some legal theorists find the prospect of citizens using their native moral sensibilities in the jury box abhorrent. For example, in her criticism of Finkelstein's "rational excuse" proposal, Hibi Pendleton writes,

Finkelstein seems to want to give jurors' moral intuitions a larger role in determining when punishment is warranted. But moral intuitions unleashed and unguided are not the stuff of law; indeed, giving free rein to jurors' moral intuitions would undermine the rule of law. ... I believe that moral reflection more properly bears on the making of the law than on application of the law to particular cases.²⁷⁸

This view, that it is the job of legislators to consult morality and the job of jurors to consult the law, seems completely wrongheaded to me, indeed demonstrably so.

Pendleton's view makes the purpose of a jury trial quite mysterious. If common judgments about morality are irrelevant at trial, then what is the purpose of selecting twelve citizens at random who are virtually *required* to have no particular background or skill in applying the law to determine a defendant's guilt or innocence? If Pendleton's view were correct and the juror's job is simply to apply the law without bringing her own moral sensibilities to bear on the case at hand, wouldn't it make much more sense to have judges do this kind of work? After all, judges are specially trained to interpret the law

²⁷⁸ Hibi A. Pendleton, "A Critique of the Rational Excuse Defense: A Reply to Finkelstein," University of Pittsburgh Law Review 57 (1996): 668.

and apply its concepts to specific cases. So if the law were as Pendleton describes it, the point of giving defendants the right to a trial by a jury of her peers would be a mystery. In contrast, the praise/blame theory when applied to legal defenses makes perfect sense out of the concept of trial by jury. The reason that twelve random citizens are recruited to determine a defendant's guilt or innocence is that such an assembly's collective judgment will be a good (though imperfect) representation of the community standards of blameworthiness. The jury's purpose is to determine whether a particular defendant deserves blame in light of the judgments that normal people in the society would make. A defendant who is not to blame for her conduct is ineligible for punishment. Pendleton might ask what should happen when a defendant is guilty of the offense according to the wording of the law but is not to blame for the harm that was caused according to the jury's moral judgment. Again, my view is that the only way to make sense of the role of a jury in the criminal process is to ensure that those who are convicted of crimes are indeed worthy of punishment and the indelible social stigma that comes with it. Consequently, I believe that in such a case, the jury should not allow those whom it finds to be blameless to be punished. In summary, I contend that the praise/blame theory of moral defenses can explain the role and purpose of a jury in the process of the criminal law better than a view like the one expressed by Pendleton.

4.6 Conclusion. The praise/blame theory is the best theory of moral defenses for several reasons. First, it respects the epistemological structure which is the natural home of moral defenses. Second, it fairly reflects the ordinary language content of the terms “justification” and “excuse” with only minimal elaboration. Third, it reduces the

relatively more complex concepts of justification and excuse to the relatively simpler, more familiar concepts of praise and blame. Fourth, although the theory as I have articulated it here makes some important substantive claims, it is largely formal in that it allows the use of alternative theories of praise and blame. Fifth, although it requires some revision of the typical defense categorizations (some of which would also be required by competing theories as well), the praise/blame theory does a reasonably good job of “fitting the data,” in the sense that most defense types are categorized the same on the praise/blame theory as they are on more traditional theories. Sixth, the theory may be of use to legal theorists and reformers, for instance, in articulating the proper uses of the “reasonable person” and “strict liability” standards inherent in some criminal laws and in allowing for the individualization of excusing conditions.²⁷⁹ Seventh, the praise/blame theory seems ideally positioned to be used productively by political theorists interested in the moral limits of the criminal law because it effectively bridges the gap between abstract moral evaluation and evaluation of behavior in relation to social and cultural norms. In sum, the theory’s simplicity, familiarity, consistency with ordinary concepts, and potential theoretical productivity highly recommend it to the attention of those who are interested in the nature of moral defenses and, by extension, legal defenses as well.

²⁷⁹ See Fletcher, “The Individualization of Excusing Conditions,” 1269-1309.

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