1984

The Perplexing Borders of Justification and Excuse

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COLUMBIA LAW REVIEW

VOL. 84 DECEMBER 1984 NO. 8

THE PERPLEXING BORDERS OF JUSTIFICATION AND EXCUSE

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INTRODUCTION

Most reasons why otherwise criminal acts, such as *A*'s intentional shooting of *B*, may be noncriminal fall roughly into the categories of justification and excuse.[1] 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.

Anglo-American law and scholarly writings about that law recognize a distinction between these two sorts of claims,[2] but generally do not do so in any systematic way. For example, a moderately close examination reveals that particular defenses such as self-defense and duress reach instances of both justification and excuse. No very precise theory is advanced to distinguish between justifications and excuses, and most scholars and reformers evince little concern over this sloppy state of affairs.

Crying in the wilderness, however, are a few possibly prophetic voices,

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1. Paul Robinson suggests three categories of defenses in addition to justifications and excuses. Of those, failure of proof defenses and offense modification defenses relate to the basic elements of the offense as defined. See Robinson, Criminal Law Defenses: A Systematic Analysis, 82 Colum. L. Rev. 199, 203 (1982). What Robinson calls nonexculpatory public policy defenses, such as statutes of limitations, however, are genuine exceptions to the idea that *all* defenses constitute justifications or excuses. See generally, id. at 229–32. These defenses are "not based on a lack of culpability of the defendant. They are purely public policy arguments." Id. at 230. I do not consider such defenses in this Article.

2. See Model Penal Code art. 3 (Proposed Official Draft 1962) (Justification); id. art. 4 (Responsibility); id. §§ 2.08–2.10 (Intoxication, Duress, Military Orders); W. LaFave & A. Scott, Jr., Handbook on Criminal Law 268–413 (1972).

Though the Model Penal Code was reformative in many of its efforts to rationalize the criminal law, most of its crucial provisions have been followed in enough jurisdictions so that they now represent major themes in the law of the United States. Since the aims of this Article are mainly theoretical, I frequently cite provisions of the Model Penal Code without attempting to trace their acceptance in particular jurisdictions.

among which the loudest and most eloquent is George Fletcher's.[3] He tells us that in distinguishing justification from excuse our own practices and level of understanding compare unfavorably with those of legal systems in the civil law tradition, and that this failing correlates with deeper and more pervasive attitudes, such as "fiat" thinking and legal positivism.[4] He proposes techniques for common law jurisdictions to remedy their present inadequacies in dealing with justification and excuse. The linkage of these inadequacies to more comprehensive attitudes, however, may dampen hope that much improvement on this narrow subject will precede broader enlightenment.

This Article's central theme is that Anglo-American criminal law should not attempt to distinguish between justification and excuse in a fully systematic way. I explore three possible bases for drawing the distinction: (1) a distinction between warranted and wrongful conduct; (2) a division between general and individual claims; and (3) a distinction based on the rights of others. I show why none of these bases yields a clear and simple criterion for categorization. The difficulty rests largely on the conceptual fuzziness of the terms "justification" and "excuse" in ordinary usage and on the uneasy quality of many of the moral judgments that underlie decisions that behavior should not be treated as criminal. Beyond these conceptual difficulties, there are features of the criminal process, notably the general verdict rendered by lay jurors in criminal trials, that would impede implementation in individual cases of any system that distinguishes fully between justification and excuse. Though I sketch some of the broader implications of my comments on justification and excuse, I do not pursue in depth what they signify about the openness of natural language, the appropriate relationship between the criminal law and moral judgment, and the nature of practical moral judgment itself.

Although I emphasize borderline problems, I firmly believe that the basic distinctions between justification and excuse are important in the law. My thesis does not deny any of the following propositions: that the distinction between justification and excuse is a fundamental one for moral judgment; that there is value in the law reflecting fundamental moral categories, including, when it is clear, the distinction between justification and excuse; that scholarly attention to the distinction in analysis and criticism of the

3. See, e.g., G. Fletcher, Rethinking Criminal Law 759-875 (1978); Fletcher, The Right and the Reasonable, 98 Harv. L. Rev. (forthcoming March 1985) [hereinafter cited as Fletcher, Right & Reasonable]; Fletcher, The Individualization of Excusing Conditions, 47 S. Cal. L. Rev. 1269 (1974) [hereinafter cited as Fletcher, Excusing Conditions]; Fletcher, Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?, 26 U.C.L.A. L. Rev. 1355 (1979) [hereinafter cited as Fletcher, Prison Conditions]. Other observers have also argued strongly for a clearer differentiation. See Robinson, supra note 1, at 291; Note, Justification: The Impact of the Model Penal Code on Statutory Reform, 75 Colum. L. Rev. 914, 960-61 (1975).

4. Professor Fletcher makes these points explicitly in Fletcher, Right & Reasonable, supra note 3, at pts. I & II; and in G. Fletcher, supra note 3, at 768.

criminal law can be fruitful;[5] that in most circumstances when justification and excuse are plainly distinguishable, questions of justification have a kind of natural priority over questions of excuse.[6]

My thesis is modest in other senses. Its acceptance does not require one to take a position on the proper role of objective and subjective factors in the determination of criminal liability, on the disagreement between retributivists and utilitarians over the reasons for punishment, or on the general jurisprudential questions that divide legal positivists, natural lawyers, and those who conceive the rich fabric of the created law and its underlying rationales as providing answers to all legal questions.[7]

Before I proceed to defend my thesis in relation to proposals for rigorous distinctions between justification and excuse, I need to say a little bit more about the basic lines on which such distinctions may be drawn, about the possible aims of a program to induce greater systematization, and about the levels at which such a program might be carried out.

A. *Distinctions*

When one focuses on paradigm cases, the difference between justification and excuse is pretty straightforward. For example, a driver of a fire engine rushing to a fire is justified in exceeding the speed limit. Even with sirens wailing, the speeding engine may raise slightly the danger of a traffic accident, but the risks of harm are greater if time is lost getting to the fire. The driver's behavior is not wrongful; it is warranted. Members of society expect, indeed hope, that other persons placed in the same position will act similarly. In contrast, a worker who is experiencing extreme distress at home and who, in a fit of uncontrollable rage, strikes a blameless fellow

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5. Indeed, I think a scholar may usefully apply a particular moral philosophy and precise conceptual apparatus to categorize every imaginable case as justification or excuse, though I do not believe the law itself should attempt to do so.

6. The idea of natural priority is that one determines whether behavior is justified before one considers whether it is excused. Generally it is desirable to decide what behavior is wrongful before one decides what excuses for that behavior will be accepted, and often it will be impossible to evaluate claims of excuse without attending to the precise behavior that is sought to be excused. The natural priority of justification is not, however, absolute. When an actor is a psychotic who has behaved like a "wild beast," someone applying the law might recognize the presence of an excuse-like defense before examining the wrongfulness of the particular act.

7. Though my basic thesis is compatible with any plausible version of these various views, I do not undertake the extensive analysis required to support that position. I do not deny that one's positions on these broader issues might incline one to accept my thesis more or less easily.

My presentation does proceed on the assumption that academic constructions of underlying principles are not a *part* of the law, a position that is accepted almost universally in common law jurisdictions. My major points would be unaffected by rejection of this view, but some of them would need to be formulated differently, in terms of the limits to which statutes and judicial opinions should go. A similar reformulation might be needed if the law were understood to incorporate all the soundest principles on which present statutes and decisions might be rationalized, see R. Dworkin, Taking Rights Seriously (1977), since these ideal principles might include some systematic differentiation between justification and excuse.

employee is not justified in doing so, but his emotional state might constitute a total or partial excuse. His act was wrong, he and others hope it will not be replicated; but he was not fully responsible and is less blameworthy than someone else who performs a similar act.

Some of the typical features of justification and excuse may be generalized in the following way.[8] Justified action is warranted action; similar actions could properly be performed by others; such actions should not be interfered with by those capable of stopping them; and such actions may be assisted by those in a position to render aid. If action is excused, the actor is relieved of blame but others may not properly perform similar actions; interference with such actions is appropriate; and assistance of such actions is wrongful.

Though these respective features of justification and excuse often coalesce, they do not always do so. Their imperfect correlation raises the question of what is—or should be—regarded as the central distinction between justification and excuse in ordinary legal discourse.[9] That question underlies some disputes over whether particular defenses are justifications or excuses. A resolution of this issue is necessary to evaluate any program to introduce more rigor into the law's treatment of justification and excuse. The virtues and drawbacks of drawing the line in terms of one set of opposing features might be quite different from those of drawing the line in terms of another.

I evaluate two major alternatives: that the crucial distinction is between warranted and unwarranted action and that the crucial distinction lies—or should lie—in terms of rights of resistance and assistance. I more briefly consider the possibility that the central ground of distinction is that justifications are general or objective, while excuses are individual or subjective.

B. *Aims*

Systematic distinctions between justifications and excuses might be recommended to further two objectives: (1) producing authoritative determinations of whether persons escaping liability have presented justifications or only excuses and (2) achieving theoretical clarity in the criminal law. The first, more ambitious, goal cannot be fully realized in any system that relies upon a general verdict by lay jurors for tried cases. When only a single ground of acquittal is presented, a not guilty verdict will reveal the ground of the jury's judgment,[10] but if jurors who return a verdict have been

8. See G. Fletcher, supra note 3, at 760-61; Eser, Justification and Excuse, 24 Am. J. Comp. L. 621, 622-23 (1976).

9. One might, of course, take the position that no one distinction can be central, and that in drawing the line between justification and excuse one must have regard to multiple factors. Many of the objections I raise to a fully systematic differentiation in the law would apply if one tried to employ some complicated multifactor criterion. Moreover, the claimed benefits of analytical clarity would be diminished were such a complex approach used.

10. This proposition is not precisely accurate given the jury's ability to acquit despite its

presented with claims amounting to justifications and excuses, the legal system will have produced no authoritative determination *why* liability is not imposed. In most American jurisdictions, a jury that acquits on the ground of mental disease must say that it is doing so, its specific verdict providing the basis for civil commitment; but this practice is not followed for most other excuses or for justifications.

The general verdict is not an inextricable feature of lay juries, and a critic might object to that device since it provides the community with incomplete guidance as to how to regard an acquitted defendant.[11] Were juries asked to indicate their precise reasons for acquittal, the great majority of cases might yield authoritative determinations about justifications and excuses, failure occurring only when jurors agreed upon acquittal and differed in their reasons.

This hypothetical system would carry costs. Although providing authoritative determinations, the special verdict has disadvantages, most notably the elimination of the latitude the general verdict affords jurors to exercise leniency by overriding strict legal instructions. The introduction of specific verdicts, or specific findings, for a broad range of cases would encounter considerable resistance and might well be regarded as unconstitutional in the United States.[12] Short of this radical shift in how juries operate, authoritative determination of justification and excuse in particular cases can be achieved only to a limited extent.

The general verdict is hardly a complete answer to the call for greater rigor in the classification of criminal law defenses,[13] however, for precision can serve other objectives. The educative force of a criminal code may be furthered by a labelling of justifications and excuses that promotes in citizens proper views about how to make difficult choices and how to regard the behavior of others.[14] Clarity in distinctions can enhance understanding of the criminal law and its purposes among those who think about that subject, and can help lay the groundwork for intelligent reform. Although the boundaries of grounds of defenses should be determined in light of all

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finding that a defendant is guilty under the law. A jury might, for example, decide that a proffered justification does not correspond with the facts but acquit because for some reason outside the law it does not want to impose liability.

11. Cf. Robinson, supra note 1, at 245–47 (suggesting the desirability of more specific verdicts for claims of justification and excuse).

12. See United States v. Spock, 416 F.2d. 165, 180–83 (1st Cir. 1969). In that case the court held that the use of special findings was prejudicial error. It relied on its supervisory power and made reference to the particular inappropriateness of special findings in a sensitive first amendment case, but much of its language casts doubt on the constitutionality of special verdicts or special findings in ordinary criminal cases.

13. It is relevant here that only a very small percentage of criminal charges are actually disposed of by jury trial.

14. Clarity about what behavior the law declines to punish may sometimes conflict with the law's aim of affecting the conduct of ordinary citizens. See Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 Harv. L. Rev. 625, 630–41 (1984). I do not explore whether clarity about the distinction between justifications and excuses could ever be similarly counterproductive.

relevant considerations, not dictated by abstract legal definitions of justification and excuse, exploration of the nature of justification and excuse still may affect perceptions about what the overall scope of defenses should be.[15] Finally, conceptual clarity and comprehensiveness may be worth striving after for their own sake. Although I acknowledge the genuine virtues of clarification of what counts as a justification and what counts as an excuse, I shall show why pursuit of that objective within the law becomes, after a certain point, misconceived or unwise.

C. *Levels*

Clarity about justification and excuse can be introduced at different levels; and clarifications at one level may be promising even if clarifications at some other level are not. At the most obvious level, each specific defense in a criminal code could be either a justification or an excuse. In that event, jury instructions would sharply distinguish between the two kinds of defenses even if the resulting general verdicts did not plainly indicate the grounds of acquittal. At another level, the criminal code could provide a general definitional distinction between justification and excuse; such a distinction might coexist with more specific formulations of defenses, such as duress, that covered both justification and excuse. Whether judges would use these definitional sections to instruct jurors could be resolved either way. The third level at which clear distinctions might be achieved would be in authoritative judicial opinions. Appellate judges might build systematic theories about justification and excuse from the rough materials of the criminal code, from more general principles of law, and from prevailing moral conceptions. A judicially constructed theory that won acceptance would form a part of the law though not found directly in any criminal statute. Finally, the job of theory building might be done by scholars rather than judges.[16] In the Anglo-American tradition, scholarly constructions would not become a part of the law unless they won legislative or judicial acceptance, but they might nevertheless have explanatory power about the implicit values of the law and inform discussions of legal reform.

Given my own view that the blurred edges of the basic concepts and the diversity of moral judgments underlie the crucial restrictions on complete distinctions between justifications and excuses, I do not think at this stage of our legal and cultural development that achieving such distinctions is a sound aim for the law itself. But scholars explaining the law have greater freedom to adopt definitions and moral positions that deviate from

15. Indeed, the accomplishment of specific reforms could actually be the motivating force behind a proposal for clarification (or the adoption of a vocabulary more sympathetic to the reform). I do not address that possible basis for systematic clarification, since the main advocates of such clarification have not relied on it.

16. Given the present state of interest and understanding in the United States, one cannot realistically expect busy judges resolving particular cases to develop full blown distinctions between justifications and excuses; such a development would be likely to take place only if preceded by more intensive scholarly endeavors.

common understandings than that properly assumed by those who make the law. Moreover, insofar as systematic clarification contributes to intelligent reform of the law, that illumination does not require embodiment of every subtle distinction in the criminal law itself. Thus, my reservations about systematic clarification within the law do not apply to scholarly endeavors to distinguish rigorously between justification and excuse.[17]

I. WARRANTED AND UNWARRANTED BEHAVIOR

From the perspective of ordinary English language, the central characteristic of justified action is that it is warranted, not wrongful.[18] Whatever may be true about analagous words in other languages, "justified" is most definitely not a special legal term.[19] In discussions of ethies, justified action is morally proper action. "Justification" is also used in relation to the reasons one puts forward for one's choices; an action is "justified" in this sense when one has defended it with sound arguments. An essentially similar sense is employed when people speak of opinion writing as a process of legal justification. In epistemology, reference is made to "justified" belief—that is, a well-founded belief about facts. What joins these various senses is the idea that to be justified is to have sound, good reasons for what one does or believes. An inquiry into whether a person's acts or beliefs are justified is not centrally about what other people may do in respect to that person. Although the conclusion that someone is justified often bears importantly on judgments about the permissible actions of others, those judgments are analytically separate from the initial conclusion.

If the law's central distinction between justification and excuse is to follow ordinary usage, it will be drawn in terms of warranted and unwarranted behavior. That, indeed, is the central distinction in existing American law insofar as one can be discerned; and exploration of the desirability of greater precision sensibly begins with it.

A. *Troubling Borderlines*

The major barriers to precise classification along this line lie in two uncertain borderlines between justified and excused action and in divergences of moral evaluations of why actors should escape criminal convic-

17. Interestingly, the Penal Code of the Federal Republic of Germany is not generally more systematic in distinguishing justification from excuse than the Model Penal Code. As I learned at the Freiburg Workshop on Basic Problems in Criminal Theory, the efforts to formulate completc and categorized distinctions arise in scholarly writings, which themselves disagree on critical points. If German law is viewed as having attained a much richer division of justifieation from excuse than American law, the attainment is in these scholarly endeavors, which are more ambitious in this respect and have a higher status in the legal community than American scholarly efforts.

18. As George Fletcher puts it, "A justification speaks to the rightness of the act; an excuse, to whether the actor is accountable for a concededly wrongful act." G. Fletcher, supra note 3, at 759; accord Eser, supra notc 8, at 629.

19. Hall, Comment on Justification and Excuse, 24 Am. J. Comp. L. 638, 639 (1976) (" 'Justification' and 'excuse' . . . have long been parts of everyday speech.").

tion. The price of much greater rigor in the law would be to press concepts beyond their natural capacity, to generate avoidable disagreements or submerge controversies with misleading labels, and, likely, to complicate the tasks of jurors.

1. *Permissible Acts that are Less than Ideal.* — If *A* performs the morally best possible act in the circumstances, he is morally justified. If he performs an act that is wrongful, he is not justified, though he may have an excuse. Regrettably, these two categories do not necessarily exhaust acts that are subject to moral evaluation.

An act may be thought to be morally permissible even though it is not the best possible among the available alternatives. A person may act in a manner that reflects what most people would do or that in some sense is "within his rights,"[20] although a different response would be morally preferable. For example, after Bruce betrays Al's confidence, Al refuses to speak to Bruce. One may acknowledge that Al's anger and hostile response are "natural" and that Al has not wronged Bruce, while at the same time believing that Al would have acted in a morally preferable way if he had forgiven Bruce.[21] How are we to summarize such an evaluation? Blaming Al may not be appropriate; his claim that his response was normal and consonant with Bruce's wrong is not really an excuse. Yet we may feel uncomfortable about calling Al's behavior *justified.* What we have, in fact, is a claim in defense of action that may not fit smoothly into either of the two categories.

The perplexity here not only concerns the common problem of classifying situations at the edges of competing categories; it goes much deeper, raising fundamental questions about the exercise of moral evaluation. People who accept some version of perfectionist ethics—for example, that a person should always act to promote the greatest happiness or should always act with loving concern—will tend to view Al's claim as an excuse. All of us fall short of what we should do and Al's yielding to his natural emotional feeling, though an instance of ordinary human shortcoming, is not a justification for what he has done. On the other hand, people who believe that ethical "oughts" mainly concern duties involving minimal requisites for behavior toward others, will tend to regard Al's claim as justificatory, bringing his actions within the wide range of morally permitted behavior.[22] Innumerable other examples raise similar questions about evaluation, but the most pervasive instances involve the pursuit of one's own interests at the expense of the greater interests of others.[23] Ordinary social morality and

20. I am speaking here of some loose sense of moral rights, not of legal rights.

21. Al's forgiveness of Bruce might be considered a supererogatory act, not something Al "ought" to do but something that it would be appropriate to praise him for doing if he did it. See D. Heyd, Supererogation 154–64 (1982).

22. Suggestions that when conduct is justified, the benefits of it necessarily outweigh the harms, see Robinson, supra note 1, at 203, are shown by this example to involve serious oversimplification.

23. For a broad discussion of how our moral sense falls short of a rigorous utilitarian

moralities focused on narrow rights and duties leave considerable scope for egoistic behavior that versions of perfectionist ethics deem unjustified.

Members of liberal societies have widely differing views about these fundamental questions of ethics. That much is obvious. What may be less obvious are the ways in which variant perspectives can combine in the same individuals. Many persons who accept a version of perfectionist ethics intellectually and who may feel emotionally committed to such ethics in their "best" moments nonetheless revert to a more minimal, less demanding approach as they struggle through their daily existence.[24] Lest such examples be dismissed as involving simple failures to live up to ideals, we need also to recognize that the two kinds of moral views can be joined in a coherent set of beliefs. A person might think that basic social relations should be grounded in a minimalist morality that concedes large areas of autonomy.[25] On this view, what people in society can reasonably expect and demand of each other would appropriately be defined in terms of broad individual rights. The same person might also believe that he and others should be guided in their actions by a perfectionist ethic, say, of loving concern, and that for some purposes evaluation of other people in light of such an ethic is appropriate.[26] If someone with these views tried to be very precise, he might say something like this about Al's behavior: "From the standpoint of what Bruce and society could fairly expect of Al, what Al did was justified; from the standpoint of the perfectionist standards that should guide us all, he was only excused."[27]

The criminal law does not demand ideal behavior from people. Basic definitions of criminal behavior leave untouched many actions that fall below even modestly rigorous standards of moral acceptability, and privileges to engage in otherwise criminal acts also make concessions to the realities of human nature.

Permissions to use physical force in self-defense are an example. Even when a person knows he can retreat safely and fears no damage to his property, he may use deadly force rather than retreat from his home in the face of an assailant who threatens his life, and in many jurisdictions he can use

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perfectionism that demands that we always do the best possible act, see S. Scheffler, The Rejection of Consequentialism (1982).

24. I believe that many seriously religious persons roughly fit this description.

25. See, e.g., G. Fletcher, supra note 3, at 770, 860.

26. My emphasis here is on the application of such a morality to the acts of others and as a basis of judgments about those acts. Perfectionist principles are sometimes aspirations individuals accept only for themselves, but often they are not. Since the minimalist morality governing social relations might admit of praise for generous acts that go beyond the required minimum, the shift in perspective to the perfectionist ethic will produce a shift in judgment only if one uses terms like "ought not" and "blame" for acts permissible under the minimalist morality.

27. Some Christian accounts would not even concede that Al's action was excused, treating it rather as a sin for which he stands in need of forgiveness. The idea of "justification by faith" represents the understanding that we are all subject to condemnation according to our actions alone; our conduct is neither justified nor excused.

deadly force rather than retreat from a public place as well. Many people would say that safe retreat is morally more commendable than attempting to take an enraged assailant's life. A legal privilege not to retreat might be supported on the ground that those defending their rights have a basic moral right not to retreat, or that nonretreat deters future aggressions,[28] or that factfinders are incapable of judging when retreat would clearly be safe, or that the law should accommodate the outraged feelings of victims of aggression.

Imagine that a jurisdiction in which the rule of retreat for dwellings is being considered believes that precise classification of justifications and excuses is an important objective of the criminal code. One member of the legislative drafting committee thinks refusal to retreat is positively desirable, deterring aggression and symbolizing the sacredness of dwellings. The second thinks that refusal to retreat is morally less desirable than retreat, when retreat can be carried out safely, but that refusal to retreat is within the range of morally permissible responses. A third member thinks refusal to retreat is decidedly wrong and doubts whether a person aware that retreat would be safe has even a moral excuse for using deadly force instead; yet this member is hesitant to impose his moral conviction and demand behavior many people find unnatural, and he is also skeptical of the capacity of jurors to determine when someone knows he can retreat safely. Each legislator agrees that criminal liability should not be imposed on people who decline to retreat from their homes; the first plainly thinks failure to retreat is justified, the second regards it as justified only in the broad sense of morally permitted, the third thinks that the actor who declines to retreat when he knows he can do so safely has only an excuse, an excuse based on common human weakness and administrative difficulties. If the legislators believed that the law had to label precisely what constituted an excuse and what constituted a justification, they would somehow have to iron out that troublesome issue in respect to retreat. On the other hand, if the law's approach to that distinction does not purport to be rigorous, they would not need to worry too much about whether the privilege received one label or another, or indeed received either label. In this instance, since the general privilege to use deadly force in self-defense is a justification, any provision for retreat could be handled most conveniently within that category.

At the very least, resolution between justification and excuse would be likely to take a lot of time and energy. Whatever decision was made, a powerful minority view would be submerged by the law's choice, and if the dominant or centrist position is that of the second legislator, namely that failure to retreat is morally permissible but less commendable than retreat, either label would fail even to reflect fairly the prevailing view, unless justifications were very carefully defined to include all morally permitted acts.

What effects would the exercise in classification produce? Let us sup-

28. Eser, supra note 8, at 632, notes the individualistic and social function grounds of self-defense.

pose that the law labels failure to retreat justified if the home dweller is in danger, but only excused if he could retreat safely. Whether or not retreat would have been safe, the jury in an actual case should acquit if the other requisites of self-defense are made out; so the general verdict will not reveal the jury's judgment about this matter. Knowing all this in advance, should the judge permit evidence and argument about the safety of retreat? That seems highly doubtful. Juries have had a hard enough time sifting through everything that is directly relevant to what they must decide; cluttering trials with evidence that is irrelevant to what they must decide is not a good idea. If evidence and argument about the safety of retreat were not admitted, the law would be left then with a legally authoritative pronouncement having no bearing on the conduct of actual criminal trials.[29]

The payoff of such precise labelling might appear so meagre that legislative cynicism would set in. The purported seriousness of fine distinctions in the law between justification and excuse might continue to hold sway among legal scholars, but drafters would concentrate on more crucial problems.

The other side of the coin is the positive benefit from the law's lack of rigor. Drafters can sensibly attend to what matters most without worrying too much about labels, and observers can acknowledge the conflicting perspectives that may yield acceptance of a particular defense. In that event, aspects of privileges, such as the retreat aspect of self-defense, can simply be dealt with in sections appropriate for the main privilege, without inordinate worry about whether particular circumstances turn what would ordinarily be a justification into what is *only* an excuse.

2. *"Mistakes" in Judgment.* — People often engage in conduct that would be justified if the actual facts were precisely as they believed them to be, but would not be justified if the actual facts had been fully comprehended. How should such acts be characterized?[30] Does that depend on

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29. I do not mean to deny that such a pronouncement could retain some educative and clarificatory value even if it does not affect actual trials.

30. A similar question arises if the conduct would be wrongful on the facts as the actor perceived them, but would be justified if all the actual facts had been fully comprehended. Sam shoots Victor because Victor's cnemy has paid him $10,000 to do so; completely unknown to Sam, Victor is just about to detonate a bomb that will kill scores of people at the moment Sam kills him. In this context, the conceptual issue is not whether Sam's shooting of Victor is justified or excused, but whether it is justified (because desirable) or wrongful and unexcused (because the product of aims and appraisals that involve no excuse from blame).

I do not address this question in the body of the essay, since most modern American statutes, endorsed by George Fletcher, see G. Fletcher, supra note 3, at 557, 559–60, 564–65, do require a subjective belief in justification for the defense to succeed. Paul Robinson, however, argues strongly for a totally objective approach to justification, cites authority for that proposition, and construes statutory formulations that include belief as not requiring that one have a subjective belief in justifying circumstances. See 2 P. Robinson, Criminal Law Defenses § 122 (1984).

In contrast to many questions of labelling concerning persons who have mistaken beliefs in justification (who may be free of liability altogether whether called justified or excused), the decision about characterization of Sam's act directly affects what he is guilty of and his

whether the factual mistake involves some fault of the actor? If, as I contend, the act based on a faultless mistake of fact should be regarded as justified by the law, should the law try to distinguish the faultless misperception from one that is faulty but will still relieve the actor from liability?

I begin with a situation in which from the standpoint of all existing human knowledge an action appears to be desirable, but unforeseeable consequences make it turn out to be undesirable.

> Employing the most advanced techniques for predicting wind patterns, Roger decides that a fire in a national forest that threatens human lives can be halted only by carefully burning out a section of the forest that is in the path of the fire. That section is burned on Roger's orders; shortly thereafter the wind shifts in a wholly unexpected way that halts the forest fire before it reaches the burned section.

We may hesitate to classify a situation like this simply as an instance of justification or excuse,[31] and our natural language is rich enough to convey the reasons for our hesitation. We may say, "the risk Roger took was justified," or, somewhat more precisely, "the actor, but not the act, was justified," or more precisely yet, "Roger's choice and action were justified, but what they actually produced turned out fortuitously not to be justified." Such language conveys succinctly our evaluation of what has transpired.[32]

Despite the difference between this situation and paradigm examples of justification, that the law should treat Roger's defense as one of justifica-

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potential liability. If his act is justified, he has committed only attempted murder; if it is not justified he has committed murder. Whether Sam was careful or careless in failing to realize what Victor was about to do is irrelevant. If he thought he was killing Victor without any semblance of justification, the degree of his diligence in his reaching that conclusion would not bear on his blameworthiness.

Conceptually we can distinguish five major positions on mistakes about justifying circumstances: (1) that the actual circumstances control; (2) that the circumstances believed by the actor control; (3) that circumstances reasonably believed by the actor control; (4) that the act must be justified under *both* the actual and the believed circumstances; (5) that the act may be justified under either the actual or the believed circumstances.

31. The problem here closely parallels the preliminary concern in judging the morality of actions: whether the reasonable perceptions of the actor or the actual facts are to govern. Depending on which perspective one adopted, for example, one might say that what Roger did was a proper action from a utilitarian point of view or that it was not.

32. Lest it be thought that because this example involves unforeseeable consequences after the conduct, it does not involve factual mistake, let me state the assumption implicit in the text: that if the actor had complete knowledge of the present circumstances and complete knowledge of general causal relationships, he would have been able to predict these presently unforesecable consequences. The example thus rests on the general idea that future natural events are "determined" by present conditions. Since in the example the unexpected consequences do not rest on an exercise of human will, the example does not require determinist assumptions about human choices.

The force of the example would not be altered by an assumption that Roger's critical judgment more directly involved a present state of facts, for example, the dampness of the wood in a remote section of the forest. Imagine that Roger makes the best possible judgment about that and concludes that a fire break is needed; but two days earlier a highly localized

tion seems plain, at least if the law's crucial distinction is to be between warranted and wrongful action.[33] In respect to Roger's behavior, society would expect and hope that a similar actor with a similar set of available facts would make the same choice. And society's view of the morality of the manner in which he acted, its moral judgment about him, should not be affected by the unfortunate outcome. Roger is not asking to be relieved of responsibility for his choice because of some personal inadequacy like mental disturbance; rather, he has acted as the most competent practitioner in his field would have acted.[34]

When a mistake about the facts results from conscious indifference to relevant information or from inadequate care or effort in acquiring information, and the misperception produces an act that would clearly have been wrong had the perceivable facts been understood, then the actor's fault has contributed to the act. Should the actor offer his factual assumptions as the reasons behind his act, he would be offering an excuse—one that might not wholly eliminate his moral blameworthiness, but might be sufficient to preclude legal liability or reduce its gravity.

Some intermediate cases are less simple to classify. Suppose that Roger is dealing with a situation that requires a quick on-the-spot choice. He makes a choice that is the best possible under the circumstances, but one that could correctly have been seen as wrong in advance by experts using sophisticated weather-predicting equipment. Whatever else the law may allow, certainly any choice that is the best that could be expected in the circumstances must be regarded as justified.

A more troublesome question is how much the inherent talents and training of the particular person making the choice should count. Suppose Roger is careful and conscientious, but he makes what turns out to be the

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and unreported storm had dropped so much rain on the intervening part of the forest that the fire stops short of the break.

Another straightforward instance of mistaken appraisal concerning existing facts is when a policeman with probable cause arrests a person who is innocent. See, e.g., infra note 77 and accompanying text.

33. My view about this stands in opposition to suggestions by those who propose rigorous distinctions between justification and excuse that acts that would be wrong if all the true facts had been known are never justified, only excused. See Fletcher, Right & Reasonable, supra note 3, at pt. III; Robinson, supra note 1, at 224, 239; Note, supra note 3, at 918; cf. G. Fletcher, supra note 3, at 762–68 (Model Penal Code, in permitting factual mistakes to give rise to justification, supports the supposed paradox that two actors in confiict could both be justified).

34. At a higher level of subtlety this position might be contested. It might be argued that if people are regarded as excused rather than justified when things turn out badly, actors generally will be more careful, and that such labelling will somehow better satisfy the feelings of those who are injured by fortuitously unfortunate acts. The plausibility of this position may well vary among different classes of actions and the optimal labelling for moral judgment would not necessarily coincide with the optimal labelling for legal judgment. In any event, those who have argued that claims resting on factual mistakes can only be claims of excuse, see supra note 33, have yet to put forward any such complex theory of moral judgment; rather, they seem to believe that their position is self-evident.

wrong choice because he is less skilled or experienced than most other forest rangers with such responsibilities. His actions are the best that could be expected of him but are not the best that could be expected of the average ranger. Given the law's inability to make infinite gradations in skill and experience, it should not label the behavior in a manner that will encourage emulation. This consideration points in favor of calling Roger's factual misperception an excuse. How society should regard him is less clear. In a sense his choice has rested on a personal inadequacy, but one that does not involve the carelessness or diminished responsibility associated with typical excuses. I shall not try to resolve this particular borderline problem, which relates to the more general issue of how far legal elements of justification and excuse should be cast in objective or subjective terms.

Yet another intermediate case is a choice based on a factual perception that is reasonable, but is not the very best of which the person was capable. Is the reasonableness of a perception enough to make an act based on it justified, or would the possibility of a yet more accurate perception leave the actor with only an excuse?

However these cases are treated, the crucial point for our purposes is that were the law to attempt precise categorization, some actions grounded in factual mistake should be viewed as justified, others as only excused. The critical question is whether for cases in which the criminal law is to relieve actors of liability in either event, it should try to distinguish justifications from excuses. Suppose that negligently setting a forest fire is not a crime and that ordering a fire with a negligent belief in justifying circumstances is also not a crime.[35] To exonerate Roger of possible liability, a jury would have to decide that he sincerely believed that the justifying circumstances existed and saw no need to check further.[36] The jury would not need to decide if he was reasonable or negligent in forming his belief. As indicated already in respect to retreat, there are good reasons for not burdening jurors with instructions and evidence that do not touch issues they necessarily have to determine.[37] Including provisions covering negligent belief about

35. The Model Penal Code systematically correlates the standards of culpability for possible justifying circumstances, such as negligent belief, to the standards of culpability for the underlying offense. See Model Penal Code § 3.09(2) (Proposed Official Draft 1962). In some jurisdictions a belief in justifying circumstances does not relieve one of liability unless the belief is reasonable. I do not discuss here the possible arguments for treating action based on a negligent belief in justifying circumstances more severely than action based on a negligent belief that no legally cognizable harm will be caused.

36. An awareness that he should check further might amount to recklessness, see Model Penal Code § 2.02(2)(c) (Proposed Official Draft 1962), making him liable if recklessly starting a fire is criminal. If only intentionally starting a fire were criminal, Roger's honest belief in justifying circumstances would be a defense even if he had been consciously reckless in forming that belief.

37. In one important respect, however, the evidentiary setting here is likely to be different than in the retreat example. See supra text accompanying notes 28-29. If the prosecution tries to prove that Roger knew that the justifying circumstances did not exist or was reckless as to the possibility, a part of its evidence is likely to be that a belief in justifying circumstances would have been highly unreasonable. The jury would then have before it

justifying circumstances in criminal code sections that reach true belief and faultless mistaken belief makes considerable practical sense.

A further illustration of how the common law system works strengthens this conclusion. Sue shoots at what she thinks is a deer but the object turns out to be another hunter who is hit in the arm. Sam shoots in the arm a person he wrongly believes is trying to shoot someone else. Each instance presents a potential question whether the factual misperception was negligent or reasonable. Whether Sam's misperception was reasonable or negligent will determine whether his conduct was justified or excused. In either case, no criminal liability will be imposed. If the commission of assault requires an intentional or reckless wounding, Sue's is not, in *present* legal terminology, a case of justification or excuse since the basic elements of the crime have not been made out.[38] Whatever evidence has been introduced at her trial, the jury is instructed that she simply has not committed assault unless she has been at least reckless. When the basic elements of a crime are not satisfied, Anglo-American law does not concern itself with whether the actor has displayed *some* moral failing or even acted in a way giving rise to tort liability.[39] In a moral sense, the same question about justification or excuse—whether a factual misperception is negligent or reasonable—that arises in Sam's case also arises in Sue's. If the law really should be precise and label as excuses all negligent beliefs about justifying circumstances, then it should also label as excuses negligent perceptions about likely harm to legally protected interests. The logic of a program for systematic clarification of justification and excuse thus reaches how primary bases of liability are treated as well. Conversely, if it is acceptable not to resolve the reasonableness of a mistaken perception that negates a required intention or recklessness concerning the basic elements of an offense, then the absence of resolution for mistaken perceptions about justifying circumstances is also acceptable. That the present approach to primary bases of liability is so widely perceived as unobjectionable supports the view that the law need not always differentiate between reasonable and unreasonable beliefs about justification.

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evidence bearing on negligence even if negligence were not directly an issue. But the jury would not need to sift and resolve that evidence if it was convinced that Roger was fully persuaded that he needed to order the fire.

38. The Model Penal Code makes negligence a basis for liability when one wounds with a gun. See Model Penal Code § 211.1(1)(b) (Proposed Official Draft 1962). Under such a provision, the line between negligent and reasonable action is crucial to liability. For injuries not inflicted with deadly weapons, recklessness is the lowest level of culpability. Id. § 211.1(1).

39. If a country's tort law generally made negligent action a sufficient basis for recovery, but not a sufficient basis for imposing criminal liability, *and* criminal actions and tort actions were not discrete, then in cases of potential criminal liability involving a victim with a potential tort recovery, fact-finders would need to decide if mistakes were negligent. In such a system, asking fact-finders to distinguish reasonable from unreasonable actions would not impose unnecessary burdens.

B. *Simplicity of Categorization and Duress*

I have suggested in connection with retreat and factual misconceptions about justifying circumstances that simplicity in categorization is a virtue. That point has broader relevance, even when the moral status of variant actions is fairly clear. The crucial inquiry for the Anglo-American defense of duress falls along a line different from that dividing justification and excuse. Under the Model Penal Code, a person has the defense if he was coerced to commit criminal conduct by force or a threat of force that "a person of reasonable firmness in his situation would have been unable to resist."[40]

Though coerced persons are often rendered incapable of making rational judgments, the defense need not depend on one's inability to make a sensible choice. Someone who is fully rational can be coerced if the threatened harm is so great that he is no longer "free" to choose that harm. If Fred remains completely cool while he steals a diamond in response to a credible threat that three strangers will be killed if he refuses, his action falls within the defense. Here, Fred's choice is the best under the circumstances and is morally justified. If threats that incapacitated his judgment led Fred to sacrifice greater interests for lesser ones, duress would be offered as an excuse.[41]

The traditional defense of duress thus covers some behavior that is justified and other behavior that is only excused. In some jurisdictions, the general justification, or lesser evils, defense has historically been considered applicable only when natural events presented a choice between evils. Were Fred's theft committed someplace where that limitation is still accepted, his defense would have to depend on duress.[42] In other jurisdictions, the general justification defense is not so restricted, and Fred could make claims both of general justification and duress, the two defenses overlapping in their content.[43] Yet another possibility would be to prune the duress defense so that it reaches only unjustified responses to threats, leaving the general justification defense to cover all justified responses to threats.[44]

Were one to pursue the aim of clear distinction between justification and excuse, the last course would appear to be the best. Yet the difference between it and the course actually followed by the Model Penal Code and

40. Model Penal Code § 2.09(1) (Proposed Official Draft 1962).

41. When threats lead people to make understandable choices favoring family interest over the equal or more powerful interests of strangers, the moral appraisal is more doubtful, but the law properly regards such choices as only excused, not justified.

42. Were his theft clearly a response to a serious threat to kill three people, no prosecution would be brought, but one can imagine charges if the prosecutor disbelieved his story.

43. E.g., Model Penal Code § 2.09(4) (Proposed Official Draft 1962); see Hall, supra note 21, at 640.

44. See Eser, supra note 8, at 622 (discussing German Penal Code). The German law sensibly permits a defense of excuse for some responses that fall short of being justified to exigent natural circumstances. The Model Penal Code's failure to provide such a defense for "natural threats" as well as human threats is unsupported by any persuasive rationale.

many modern American jurisdictions,[45] is not great, since that course also indicates that submission to threats is sometimes justified and sometimes excused. Whether the defenses are overlapping or alternative, a general verdict will fail to reveal the basis for the jury's judgment if it has considered both defenses.[46] While the expansion of general justification purchases some increase in clarity without undue complexity, and thus is to be preferred to the practice of relegating all threat claims exclusively to the duress defense, having a single unified defense of duress that reaches justifications and excuses hardly constitutes a breach of any fundamental principle of what a criminal code should look like.[47]

C. *Overarching Principles of Justification and Excuse in a Criminal Code*

Instead of introducing sharp distinctions between justification and excuse in the definition of specific defenses, a jurisdiction might adopt general and abstract definitions of justification and excuse that would cut across specific defenses that themselves did not sharply distinguish the two general grounds of defense. Such abstract definitions might be developed by judges, but it is hard to imagine isolated cases in which judges would need to develop a full blown theory of justification and excuse. Moreover, incremental development that would also be consistent and systematic does not seem likely, especially in the present climate of relative undevelopment of theories of justification and excuse. Thus, I shall address the possibility of abstract definitions in the context of a criminal code.

Definitions designed to capture common understandings about justification and excuse would be too vague to resolve troublesome borderline cases. On the other hand, definitions precise enough to work clean distinctions between justified and excused actions would have to employ a sense of the terms that was partly creative. Since such definitions would provide no important guidance to juries resolving cases, the aim of such definitions would be to serve clarifying and educative functions.

Their possible value would depend on what exactly was "clarified" and what the basis of the clarification was. We have difficulty articulating our moral evaluation when action is based on a perfectly reasonable factual misperception, but sifting out the actual elements of the evaluation is rather simple. A legal categorization of such actions as justified or excused would not alter the evaluation or increase our understanding of it. The character

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45. See Model Penal Code §§ 2.09(1), 2.09(4), 3.02(1) (Proposed Official Draft 1962).

46. In some jurisdictions, e.g., N.Y. Penal Law § 35.05(2) (McKinney 1975), the judge must decide whether a claim of fact satisfies the defense of general justification. In trials in those jurisdictions, a judicial determination about the "balance of evils" may take that defense out of the case. But if the judge instructs that certain facts, if believed, would satisfy the defense, the jury verdict still might not reveal whether it found those facts or only some other facts that would amount to duress. For example, a defendant who aided a robbery testified that someone threatened to bomb a whole occupied building if he refused, but others testified that the only threat was that he would be badly beaten if he refused.

47. Cf. Robinson, supra note 1, at 240 ("[A] single defense should have a single classification.").

of other behavior, such as a failure to retreat safely, is subject to genuine dispute. For such behavior, a sharp classification by the law might achieve a resolution affecting to some degree how people would regard the behavior in the future, but the resolving definitions could not remain faithful to the complexity and diversity of a society's moral views.

There is a further problem with any legal "clarification." By selecting some crucial factors for examination, the law is bound to exclude others that will appear of moral relevance in some circumstances. Any definition of legal justification that is more specific than an open-ended reference to morally relevant factors is virtually certain to treat as justified some instances in which special factors would make the act only excused, at best, from a moral point of view (e.g., refusing to retreat when the aggressor is an angered spouse). The law's current lack of clarity itself may help foster the healthy notion that legal categorization does not determine moral appraisal.

If one conceives the criminal law as a proper and important medium for transmitting correct moral views to a confused public, despite certain inevitable variations between the optimal moral and optimal legal judgments, then departing from conventional understanding and existing moral consensus in defining justification and excuse will not be worrisome. One's opinions on how far the law should depart from conventional morality are likely to reflect a bundle of complex views about the role of law and the nature of moral understanding. Very roughly, we can put at one extreme the views that fundamental moral truth is discoverable by reason, that the proper dispositions of specific moral questions can be derived from abstract principles, and that the law should implement those dispositions. The other extreme set of views is that the law should reflect a community's present values and that moral understanding is not reducible to abstract principles but is eked out in not always comprehensible ways in the collective life of a culture.[48] Few people accept either extreme undiluted; but those who so adamantly argue that justifications and excuses must be sharply distinguished may be closer to the first view than those who are skeptical about that program. Drafters should have more room to implement enlightened moral perspectives when differentiating between justification and excuse for nonpunishable actions than when contemplating punishment for actions that many in the community believe are warranted. Nevertheless, I am dubious that the draftsman's sharp abstract categorization of justification and excuse is likely to improve on the present, more complicated understandings and to educate citizens in a constructive way.

While conceding that some value might derive from more strenuous efforts to distinguish warranted action from wrongful but excused action, I have argued that many, though not all, attempts to attain greater precision

48. This sentence fails to distinguish the relativist view that there is no such thing as moral truth that transcends particular cultures from the nonrelativist view that such a moral truth exists but cannot be grasped by reasoned analysis and abstract principles. For the particular purpose here, the distinction does not seem important.

in the law itself would be counterproductive in light of the overall aims of a system of criminal law. Though many of the comments made thus far also bear on distinctions between justification and excuse drawn along different lines, a closer examination of those distinctions is required for a judgment about their advisability. I turn now to that task.

II. JUSTIFICATIONS AS OBJECTIVE AND GENERAL; EXCUSES AS SUBJECTIVE AND INDIVIDUAL

Justifications typically arise out of the nature of the actor's situation, excuses out of the actor's personal characteristics.[49] Though this basic distinction works when one compares claims like self-defense and mental irresponsibility, it hardly serves as a general explanation for the crucial differences between justification and excuse. Legal categories drawn exclusively on this basis would not correlate completely with what is regarded as the important moral difference between a justification and an excuse.

What does it mean to say that excuses are individual and justifications general?[50] Roughly, the idea is that an excuse does not reach others who perform similar acts, but a valid justification would apply to anyone else in similar conditions. Exactly what this contrast amounts to is somewhat cloudy. In the broad sense of "universalizability" common to discussions of moral philosophy, excuses as well as justifications are general: all persons with similar mental disturbances committing similar acts would have a similar excuse based on mental illness. The point must be that excuses, but not justifications, are based on personal characteristics or subjective attributes.[51] But, however the distinction is understood, its fit with the distinction between justification and excuse is less than perfect.

Some justifications depend upon the social role of the actor or his relation to a person affected by the act. Police and parents, for example, have special authorizations to use physical force when others may not.[52] Traditionally, relatives of potential victims had greater rights than strangers to intervene against aggressors,[53] though the movement now is to eliminate this distinction.[54] If "the situation" is defined broadly enough, it may include roles and relational characteristics; so perhaps their relevance to justi-

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49. See G. Fletcher, supra note 3, at 761–62; Note, supra note 3, at 916, 960.

50. Insofar as the distinction refers to the rights of others to prevent or assist, it is discussed in the next section.

51. See Fletcher, Excusing Conditions, supra note 3.

52. E.g.,Model Penal Code, §§3.03, 3.07, 3.08 (Proposed Official Draft 1962).

53. Id. §3.05; W. LaFave & A. Scott, Jr., supra note 2, at 397 (1972).

54. Model Penal Code § 3.05(1) (Proposed Official Draft 1962). The relative's greater knowledge of background circumstances and of the character of one party to a struggle may still lead to his being justified in acting in a way that would not be proper for a stranger just coming upon the scene.

In other branches of law, including evidentiary privileges not to testify, see 2 J. Weinstein, Weinstein's Evidence §§ 505.01–.06 (1982) (husband-wife testimonial privilege), family relationships remain more directly critical.

fication is not at odds with the idea that justifications are general and objective.

One subjective characteristic of the actor is crucial, however, for justification in both ordinary usage and in the law: his belief in the presence of justifying circumstances.[55] If, unknown to Sue, David has begun to draw a gun to shoot her a split second before she shoots him, Sue's claim of self-defense is unavailing. Although the objective situation warranted her shooting in self-defense, Sue lacks that justification because she was unaware of the relevant facts when she shot.

A more complicated point involves judgments about justification that depend on the moral perspectives of the actor. A nonpacifist might say, "A person who believes that all killing is wrong is justified in not submitting to a draft." The nonpacifist regards refusal to submit as mistaken because he believes pacifism, from which refusal follows, is mistaken. Yet in another sense the nonpacifist thinks refusal is warranted because he believes people should act upon their firm convictions of what is morally right.[56] Claims based on peculiar moral views are not generally part of criminal law justifications,[57] but American law does recognize claims relating to exemption from military service under a special statutory privilege.[58] In addition, the Constitution has been interpreted to confer similar privileges in certain circumstances, such as exempting from forced jury duty those who have a conscientious objection to such service.[59] Though the law does not label these privileges either justifications or excuses, justification comes closer in my view.

Some excuses include features that are not individual and subjective. A person may be blamed morally for giving way to threats if the vast majority of people would have had the strength to resist. In most jurisdictions the duress defense has an objective component, formulated in the Model Penal

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55. E.g., Model Penal Code § 3.04(1) (Proposed Official Draft 1962); G. Fletcher, supra note 3, at 768; Note, supra note 3, at 917–18. Though this is the prevailing view, there are dissenters. See 2 P. Robinson, supra note 30, § 122. One who rejects the relevance of the actor's state of mind can plausibly maintain that justifications are exclusively objective. My rejection of this position is based on the sense that justification in law should correlate more closely with moral appraisal.

56. The outsider judging the actor is likely to take this position only if the actor's moral views fall within a certain range of acceptability. He will not say, "A Nazi is justified in trying to kill Jews."

57. However, whether a parental use of force is justified might in some circumstances turn on the parent's moral views. A parent who thought physical punishment helpful for the development of a child might have a justification that would be absent for a parent in objectively identical circumstances who believed that striking his child served no constructive purpose but struck him anyway out of irritation.

58. See 50 U.S.C. app. § 456(j) (1976). Previously this privilege applied mainly to people otherwise subject to the draft. Now, it governs applications by people presently serving in the military to be released from their commitment. See 32 C.F.R. §§ 75.1–.11 (1984).

59. See In re Jenison, 267 Minn. 136, 125 N.W.2d 588 (1963) (decided after the Supreme Court, 375 U.S. 14, vacated and remanded the Minnesota Supreme Court's initial decision).

Code as whether a "person of reasonable firmness" would have yielded.[60] Since one kind of situation in which this objective component matters is when a person is so overwhelmed that he makes a choice that would be indefensible for a cool and rational actor, the objective element obviously applies to duress as an excuse as well as to duress as a justification.

Although some excuses may now have an objective component, perhaps they are misconceived, because excuses *should* be exclusively individual and subjective. Such an argument might be mounted, but if it rested on wooden application of abstract bases of categorization, it would lack persuasiveness; and closer scrutiny reveals that whether duress should have an objective component is not intuitively obvious.

Whether a wholly subjective test for blame is practically comprehensible when a person has yielded to fear and committed an undesirable act is subject to some doubt.[61] Suppose that Fred has given in to a threat that is not great enough to make most people do what he did. If Fred has yielded because he cares less about doing the harm than most people, then he is blameworthy; if the threat has greater power over him, perhaps he is not; but can these two questions be separated? Unless Fred has some peculiarity,[62] does it make sense to speak of the strength of the threat as to him apart from his relative desire to avoid the harmful act? And assuming that the two inquiries can be separated, is it clear that moral blame is inappropriate if an actor is abnormally susceptible to threats? That susceptibility may reflect some moral failure; in any event, blaming Fred may help him and others become more resistant to threats.[63]

Even if one opts to resolve these troubling questions by sticking to a

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60. Model Penal Code § 2.09(1) (Proposed Official Draft 1962). Similar in this respect is the principle of mitigation (which might be viewed as a partial excuse or as a complete excuse from murder per se) that reduces intentional homicide from murder to manslaughter when the actor has suffered a provocation that most people would find extremely upsetting.

61. I use the word "practically" because for me the doubts concern standards of *human* judgment. The idea that divine judgment might be wholly individual is one that seems clearly comprehensible, and, if that is comprehensible, the possibility that human judgment could be similar is also comprehensible on some theoretical level. The issue from my perspective is whether this possibility is practically significant given human limitations.

62. Such a distinction plainly does make sense if some traumatic childhood experience or phobia makes a particular threat much more disturbing to Fred than it would be to other people.

63. Professor Fletcher makes the interesting point that when a duress claim is denied, a court may actually find the claim of duress in the next similar case more appealing, because the actor is aware that he will not escape legal penalties. See Fletcher, Excusing Conditions, supra note 3, at 1304. A similar point applies in respect to some claims of justification, the actor's assumption that he would not escape liability helping to demonstrate the urgency of the situation and the necessity of the steps he took.

Both points rest, of course, on an assumption that subsequent actors are aware of how cases have been decided, an assumption that is more plausible in some contexts than others. If one danger of duress and justification defenses is that awareness of their availability will encourage others not to perform legal duties when they should, there may be reason, as Meir Dan-Cohen has suggested, not to inform the public very precisely about the scope of exemptions from liability and to curtail defenses when the affected population, for example, prison-

wholly subjective standard for moral blame, the law's use of objective elements in excuses cannot be declared wrong in principle. The law must concern itself with judgments that strangers (members of a jury) are capable of making. Absent strong evidence that a particular actor is highly idiosyncratic, a jury must be largely guided by intuitive judgments about the resistability of threats, inferring a great deal about the actor's reactions from the normal reactions of most people. Those who develop the legal standard might reasonably conclude that instructing the jury to apply a completely subjective standard would make the jury's task too difficult, introduce too much uncertainty in application, provide some incentive for fraudulent efforts to establish that actors have inordinate susceptibility to threat or insult, and reduce the constraints on people who are strongly tempted to yield to powerful emotions. Whether such reasons for having objective elements are convincing may be debatable; but an abstract premise that excuses are individual and subjective would certainly not be adequate to dispose of them.

The discussion in this section has shown that although the distinction between justification and excuse may correlate substantially with the distinction between bases for relief from liability that are general and objective and bases that are individual and subjective, the latter distinction is not, and cannot reasonably be made, the central method for dividing justifications from excuses.

III. Distinguishing Justification and Excuse by Appropriateness of Defense, Intervention, and Support

A final possibility is that the crucial line between justification and excuse concerns the rights of others.[64] The idea is that a justified act may be supported but not stopped, whereas an excused act may be stopped, by its victim or an intervenor, but not supported.

What may be said on behalf of this line? First, as I have suggested earlier, if one began with some very rough categorization between justifications and excuses, the claimed consequences in terms of the rights of others would correlate pretty well with the respective desiguations. Second, this distinction is sharper and practically more significant than the distinction between warranted and unwarranted action. It is practically more significant because actual legal consequences would turn on the characterization of the defense as a justification or excuse; these legal consequences would not directly concern the law's treatment of the actor who offers the defense, but they would make a difference for the actual or possible actions of others. The distinction is sharp-edged because it admits of no gray area of uncer-

ers thinking about escape, is likely to learn of their scope. See Dan-Cohen, supra note 14, at 637–48.

64. This apparently is the distinction that George Fletcher would make the operative one. G. Fletcher, supra note 3, at 760–61, 830, 859; Fletcher, Prison Conditions, supra note 3, at 1357–58; see also Robinson, supra note 1, at 274–75 (lawful resistance or interference should be allowed for excused aggression, but never for justified aggression).

tainty of the sort that would exist between warranted and wrongful action; either others have a right to prevent an act or they do not. Third, the distinction appears to fit well with the idea that real justifications depend on accurate assessment of the facts; persons who know that their rights are being impaired because of the mistaken perceptions of others are generally allowed to defend those rights.

Despite these reasons in favor of a distinction drawn in terms of the rights of others, an effort to reform the law in this direction would be misguided, both because the distinction deviates from what is most fundamental about judgments of justification and excuse, and because it unravels. Rights of defense, intervention and support do not always correlate with each other or with the actual facts in the manner supposed. How the law should handle the intervention of others is too complicated a matter to be determined by initial characterization of a defense as a justification or excuse, and were that labeling to await careful judgment about intervention, legislatures or courts would be pushed to resolve immensely troublesome hypothetical issues that might never arise.

A. *The Rights of Others And the Basic Moral Distinction*

I have suggested that the central distinction between justification and excuse involves the difference between warranted actions and unwarranted actions for which the actor is not to blame, and concerns the moral appraisals these sorts of actions call forth. The rights of others is an inadequate substitute for this distinction. A well-known New York case illustrates the appeal of a distinction based on the difference between warranted and wrongful action and provides a useful context in which to contrast it with a "rights of others" approach.

> Young came upon two middle-aged men beating and struggling with a youth. Reasonably believing the youth was being unlawfully assaulted, Young went to his rescue, pulling on or punching at the seeming assailants. They turned out to be plain clothes detectives trying to make an arrest for disorderly conduct. One of them suffered a broken leg in the struggle.

Young's conviction for criminal assault was upheld by New York's highest court;[65] but the present New York statute privileges such behavior.[66] Actions like Young's should not be the subject of criminal liability, but the question here is whether they should be labelled justified or excused. 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 as Young did.[67] A moral assessment of Young's

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65. People v. Young, 11 N.Y.2d 274, 183 N.E.2d 319, 229 N.Y.S.2d 1 (1962), rev'g, 12 A.D.2d 262, 210 N.Y.S.2d 358 (1961). *Young* is commented upon in Recent Developments—Intervener Held Liable for Assault Despite Reasonable Belief That His Conduct Protected Another From Unlawful Harm, 63 Colum. L. Rev. 160 (1963).

66. N.Y. Penal Law § 35.15 (McKinney 1975).

67. There is an argument that Young should have been more careful in figuring out

act would treat it as justified. Yet the detectives were undoubtedly warranted in trying to fend off Young's intervention. They acted lawfully, even prior to identifying themselves, in resisting his acts.[68] If justification precludes a right of defense, then Young was only excused, not justified. This example shows how exclusive focus on the rights of others would blunt the clarity of the basic moral difference between justification and excuse.

Temporary escapes from jail to avoid serious harm at the hands of fellow prisoners illustrate the same point. The relevant law in the United States is somewhat unsettled, but let us suppose that the rule is that escaping confinement is privileged if one has a well-grounded fear of serious injury and if one intends to surrender at the earliest opportunity.[69] Does a prisoner who escapes under these circumstances have a justification or only an excuse? If the threat to the prisoner is great enough, say immediate loss of life, his choice to escape may be the best possible under the circumstances, yet the guards are not acting unlawfully in trying to stop him. By a right of intervention standard, the prisoner does not have a justification but only an excuse; and that indeed is the conclusion that George Fletcher has urged strongly for these situations.[70]

May guards always intervene when prisoners attempt to escape confinement? Presumably not. If a jail catches fire and guards are aware of that fact and orderly exit is no longer possible, we should expect guards not to use force to prevent prisoners from running out of the building. What distinguishes this situation from the escape to avoid a threat is that the relevant external facts and the prisoner's likely intent not to escape permanently are much more capable of appraisal by prison guards. The sensible rules about what prison guards should be allowed to do and told to do rest heavily on an assessment of such considerations; but these are remote from

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what was going on before he got involved. Further, in some societies, discouraging intervention by strangers who know they are not fully acquainted with all possibly relevant facts might be defensible, even to the extent of making them strictly liable for mistakes. Cf. Dan-Cohen, supra note 14, at 643–45 (analyzing "the vagaries of the 'act at your own peril' rule"). The sentence in the text rests on the implicit undefended assumptions that New York City does not constitute such a society, and that Young had no opportunity to be more careful *and* save the apparent victim.

68. They could resist even if they realized that Young's intervention was justified, given the facts as he reasonably understood them. Though this conclusion seems obvious, deriving it from controlling statutes may not always be simple. See, e.g., Model Penal Code § 3.11(1) (Proposed Official Draft 1962) (definition of unlawful force to which one can respond), discussed and criticized in G. Fletcher, supra note 3, at 763–66; Robinson, supra note 1, at 276–77.

69. See United States v. Bailey, 444 U.S. 394 (1980). As Justice Blackmun points out in dissent, a requirement that the escapee turn himself in even if he reasonably believes that he will continue to be subject to the same danger does not fit very well with the rationale of the defense. Id. at 426–27 (Blackmun, J., dissenting). No doubt one reason why courts are hesitant to be generous here is because of worries about the effects on other prisoners who learn that escape can sometimes be privileged. See Dan-Cohen, supra note 14, at 641–42; Greenawalt, Conflicts of Law and Morality—Institutions of Amelioration, 67 Va. L. Rev. 177, 196–97 (1981).

70. Fletcher, Prison Conditions, supra note 3, at 1359.

appraisal of the prisoner's actions in light of the facts available to him. To be guided exclusively by appropriate guard response and to label the prisoner escaping fire as justified and the the prisoner escaping threatened assault as only excused would be odd.

B. *The Absence of a Comprehensive Sharp-Edged Distinction*

Another reason why attempts to develop systematic distinctions between justification and excuse in terms of the rights of others are misguided is because no single sharp-edged distinction is capable of both capturing the rights of others and conforming with the facts as they actually exist rather than with how they are reasonably perceived.

Part of the force behind a search for such a distinction lies in the claimed anomaly of saying, as does the prevailing American approach, that both the prisoner's attempted escape and the guard's intervention may be justified. George Fletcher offers as an alternative what he calls the incompatibility thesis "that it is logically impossible for both sides in a confiict to be justified."[71] Support for this thesis is found in the oddity of speaking of both sides as justified. Such oddity as there is derives in large part from the general difficulty of talking about justification or excuse when action rests on a well-founded but mistaken view of the facts. I have already suggested, with the forest fire example,[72] that natural language is rich enough for people to differentiate between the justification of an actor's behavior and whether the consequences of that behavior turn out to be justified; and natural language can perform the same function with cases like Young's and prison escapes.

One argument against the view that behavior based on a mistake about facts can be justified is that when things turn out badly for innocent individuals, actors will feel remorse. The presence of this guilt-related emotion is taken as a sign that one can only be offering an excuse, rather than a justification.[73] This argument underestimates the complexity of our moral practices. We learn to feel guilt over causing certain kinds of consequences, and we cannot turn off these feelings on the unusual occasions when our actions causing the consequences are warranted. Moreover, the social life of the community may benefit in the long run from the presence of those feelings since they lead people to consider very carefully acts likely to produce the consequences. Feelings of remorse are quite compatible with claims that an action is justified.[74]

Interestingly, when people are in the regular business of making impor-

71. Fletcher, Right & Reasonable, supra note 3, at pt. III; see G. Fletcher, supra note 3, at 767; Fletcher, Prison Conditions, supra note 3, at 1360.

72. See supra text accompanying notes 30–34.

73. Fletcher, Prison Conditions, supra note 3, at 1363.

74. Indeed, even a sense of duty to apologize may be compatible with such claims. If I break an important promise in order to save a life, I may have a social duty to offer some kind of apology to the harmed promisee, but my failure to fulfill the promise was my moral duty and therefore justifiable.

tant judgments on incomplete facts, as are doctors, generals, and police officers, we do not expect, or wish, them to feel remorse every time things turn out badly. Continual remorse would cripple their effectiveness in a way that simple regret at the turn of events does not.

In supposing that justifications are present only if acts would be warranted upon the actual facts and only if no conflicting justification exists, Professor Fletcher links talk about justification with talk about whether a person has a right to perform the act he does.[75] My own sense of the English language is that saying "*A* had a right" connotes somewhat more strongly the absence of confiicting right and consonance with a true view of the facts than does "*A*'s act was justified." Careful focus on rights, however, reveals that rights are not always consonant with the true facts.

Fletcher has used "putative" self-defense as an illustration of the view said to be embodied in continental law that a use of force engendered by a mistaken view of the facts cannot be justifled, only excused.[76] Although he concentrates on self-defense, I understand his claim to have much broader applicability; yet its extension to some other circumstances shows its weakness and reveals that its plausibility for self-defense has something to do with the peculiar character of that use of force.

I shall approach the problem somewhat obliquely but in a manner whose relevance will soon be evident.

> Powerful evidence exists that Megan committed a murder. The prosecutor presents the evidence to a judge, who determines that probable cause exists of her guilt and issues a warrant for her arrest. A police officer executes the warrant. Were all the true facts known, Megan's innocence would also be known, but those facts are unavailable to the relevant governmental actors when the officer proceeds to arrest her.

Under American law, the officer, exercising a valid warrant, has a *right* to arrest Megan, using force or a threat of force that would otherwise be criminal. Megan has no right to resist although *she knows* she is the victim of mistaken identification and is wholly innocent. The same conclusion applies if the officer arrives on the scene of a just-committed murder and arrests Megan upon reasonable grounds for thinking she committed the crime.[77] Thus even when the police officer proceeds without an authorizing legal document and makes an on-the-spot factual judgment that proves to

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75. Fletcher, Right & Reasonable, supra note 3, at pt. III; Fletcher, Prison Conditions, supra note 3, at 1358.

76. Fletcher, Right & Reasonable, supra note 3, at pt. III; accord G. Fletcher, supra note 3, at 762–68. The Freiburg Conference revealed that German scholars themselves disagreed about the status of acts based on faultless mistakes of fact.

77. What is a topic of dispute is whether Megan is privileged to resist if she is the victim of an illegal arrest, that is, one not based on probable eause. Most jurisdictions adopt the position (mistaken in my view) that she cannot resist even then. Such a case is, in a way of speaking, the counterside of those in which both sides are justified. In this case, the police officer's arrest of Megan is not warranted and may be the basis of a tort action or even criminal penalties, but any resistance to the arrest is made criminal.

be wrong, the officer has a right to act as he does and the "innocent" object of those acts has no right to resist. Barring some complex and blatant distortion of common usage, one must conclude that existing law, sensible law, does give *rights* to use force that are not congruent with what would exist under the true facts completely understood.

Some readers may be tempted to dispose of this example by saying that it is not relevant because the law's standard here is *probable cause*, and that probable cause exists. That would be to miss the point. The point is that the standard reflects a view that the overall aims of the law are served by making rights to use physical force turn on a reasonable official view of probable facts given the limited facts currently available. There is no *logical* reason why the law could not similarly deal with putative self-defense, giving rights to those who correctly conclude that they have probable cause to think they are being attacked and denying any right to resist to the seeming attackers. That such a rule would be foolish I do not doubt, because ordinary people are not educated to exercise refined judgment, because seeming attackers will not usually instantly understand why others think they are attacking, and most emphatically, because submission to putative self-defense is likely to result in much more permanent damage than submission to arrest by someone who is plainly a police officer. But saying that a possible rule would be foolish is quite different from saying that it would offend some logic about rights.

Another way of avoiding the force of the arrest example would be to claim that it concerns official functions, and that when persons perform official functions, such as beginning procedures to determine guilt, they are justified in acting on a reasonable appraisal of the facts. But would not a uniformed policeman who intervened to stop a fight also be performing an official function? And might not private citizens trying to stop assaults and make private arrests also be performing a kind of public responsibility spread among citizens? These inquiries show that no neat conceptual distinction exists between the policeman's arrest and Young's intervention, to stop a perceived assault. If the law provides that the policeman's force may not be resisted but Young's may, the difference lies not in logic but in sound policy judgment.

The law may include some other instances in which persons must yield to adversaries with a mistaken view of the facts, although they would have a right of self-defense against similar adversaries who understood the facts completely. Under the Model Penal Code's attempt to work out sensible accommodations in much more detail than most statutory formulations, a person who knows he has a right to possess property may not use force to resist force used by a present possessor of the property if he also knows that the present possessor acts under a claim of right.[78] The rights to use force to

78. See Model Penal Code § 3.04(2)(a)(ii) (Proposed Official Draft 1962). This is so even though the present possessor's claim of right might be based on an erroneous view of the facts. The present possessor's force may be resisted if it is not backed by a claim of right.

retake property and to defend against a retaking are also sometimes dependent on one's belief whether an adversary has a claim of right.[79]

Even when the mistake concerns whether one person is a threat to another, we can think of at least one fantastic self-defense case not involving officials in which the apparent aggressor almost certainly may not use deadly force against someone mistakenly acting in self-defense.[80] Imagine that David, wishing to die as an apparent victim, has cleverly set things up so that Vicki will think David is trying to shoot her and will shoot him in return. As Vicki begins to draw her weapon, David suddenly decides he would like to live. Since he has intentionally created Vicki's misperception, he should not now be able to use deadly force to defend himself from a threat produced by that misperception. In this instance, at least, a right to use defensive force does not stem from David's knowledge of the true facts.

What could a stranger aware of all the true facts permissibly do in this situation? Unless David does try to defend himself, the stranger may not aid Vicki by shooting David, since he knows that David does not pose an actual threat; yet the stranger may not save David by shooting Vicki, since he knows that David has intentionally caused Vicki's misperception and that if one life is to be lost it should be David's. If classification of Vicki's act turned on the right of a fully informed "victim" to resist, the act would be justified, though not justified by the true facts. If the classification of Vicki's act turned on the right of an informed stranger to assist her, she would only be excused.

Another bizarre case demonstrates that even when a person has a justification based on all the relevant facts, a stranger's intervention to stop his justified act may be proper. John attacks Mike with a knife; Mike justifiably draws his own knife, and each raises his arm to strike. Both are very weak. Arnold, who is extremely strong, is capable of grabbing John and Mike by their wrists and forcing each to drop his knife. Certainly that action, which will adequately protect Mike's interests,[81] is morally preferable to stopping John's attack and permitting Mike's response to continue; and any decent legal system would privilege Arnold's use of moderate force against Mike.[82]

How might a defender of the view that justification always correlates with a right against interference respond to this example? He might claim that at the moment Arnold starts to intervene, Mike's act ceases to be justifiable, because he no longer has to hurt John to defend his interests. Transforming a movement of the arm that begins as a justified striking with a knife into an excusable striking when unexpected intervention occurs seems artificial. In any event, characterization as excuse does not alter the conclu-

79. See id. § 3.06(1)(b)(ii); id. § 3.06(3)(c).

80. See New York Penal Law § 35.15 (McKinney 1975), which apparently provides for this outcome, although the statutory language indicates that this situation was not envisaged.

81. John will be subject to tort and criminal liability for his initial assault.

82. I put the point this way because deriving that answer from the language of existing statutory schemes will not always be simple.

sion that an act undertaken justifiably may be stopped. Could it be argued that Mike's act was only excusable from the start, because if he had known that Arnold would intervene, no use of his knife would have been justified?[83] This argument is flawed at the outset by the faulty premise that justification must always be congruent with what one could do given all the true facts. Even were that premise accepted, the argument would not meet every contingency. For instance, Arnold might be a friend of John's who would not intervene if he thought John was in no danger.[84] In that event, Mike's response is actually necessary to stimulate Arnold's intervention.

C. *Excuses and the Rights of Others*

I now turn briefly to excuses to broaden the argument that the rights of others do not correlate perfectly with the distinction between justification and excuse. Although the law is not very clear on most relevant situations, it very well might in some circumstances condition a right to resist on the absence of a known excuse. If I would otherwise be killed, I may use deadly force against an aggressor who is insane or subject to duress; but perhaps I should be required to retreat if I know I can do so safely and I also know that the "aggressor" is not responsible.[85] One possible position about this issue is that the aggressor's excuse simply cannot affect one's right to resist. If that position does not depend on administrative simplicity, it must rest either on unsupported conceptual dogmatism or on a rights centered moral theory that is certainty disputed and is in my view highly implausible.[86] The second position is that rights of resistance can be affected. The third, middle position, assents to the practical consequences of the second position while clinging to the conceptual baggage of the first. It asserts that one has a right to resist regardless of the aggressor's known excuse but that resistance would be "an abuse of right" and therefore wrongful, possibly giving rise to civil damages or criminal penalties. Whether or not the third view enjoys any inherent conceptual superiority over the second, both recognize that *properly exercisable rights* can be affected by excuses as well as by justifications.[87]

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83. It would not be justified because it would involve greater force than that necessary to stop John.

84. If so, why when Arnold does intervene does he protect both John and Mike? Others watching the fight are aware that John is the aggressor and Arnold's intervention on his side will subject Arnold to criminal liability he is not willing to risk.

85. George Fletcher indicates that German law imposes a duty to retrcat from aggressors who are insane, but not from aggressors who are responsible. G. Fletcher, supra note 3, at 865-66.

86. Most American jurisdictions do not require retreat from one's dwelling, even when the aggressor is a member of the same household. Does anyone think that a person has a moral right not to retrcat when he knows he can do so safely and he also knows that the aggressor is a member of his family who is temporarily deranged? I briefly discuss the moral underpinnings of possible distinctions in rights of response to guilty and innocent aggressors in Greenawalt, Violence—Legal Justification and Moral Appraisal, 32 Emory L.J. 437, 449-56 (1983).

87. This problem is closely related to the issue of proportionate defense—whether one

D. *The Inadequacy of the Rights of Others As a Guide to Classification*

I have pointed out that justification and excuse would be unable to capture the kind of moral judgment that seems appropriate for the actor if they were identified by reference to the rights of others. For this reason alone, I would oppose the effort to transmute the ordinary significance of these terms in an effort to achieve legal clarity. I have also argued that the rights of others do not always depend on the true facts and may be combined in ways that a simple distinction between justification and excuse could not accommodate.

These complexities suggest further grave difficulties with any program to systemize justifications and excuses in terms of the rights of others. Suppose that drafters began such a program with a common sense classification of justifications and excuses and let exercisable rights of interference and support flow strictly from that, justifications always allowing support and barring defense and interference, excuses barring support and allowing defense and interference. The resulting law would then simply be insensitive to all the variations in circumstance that should be deemed relevant. Crude definition would be doing the work that should be done by open and careful examination of what the rights of others should be in different contexts. For some people, the fruit of such an examination might be the conclusion that correlations between interference and excuse and between noninterference and justification should be very high. Such persons might emphasize rights to be free of aggression, giving little importance to the responsibility of the aggressors. The point here is that the possible grounds for such a conclusion need to be explicated and defended on their own merits, not unthinkingly derived from a prior classification.

Alternatively, drafters could address questions of interference first and then let those answers determine whether a reason for exoneration will be considered a justification or an excuse. For example, if drafters decide that guards may permissibly try to prevent all threat-motivated escapes, such escapes could only be excused, not justified. It is highly doubtful whether attempts to carry out this program would actually produce greater clarity about the law.[88] Drafters would have to develop a terminology and conceptual apparatus to deal with mistaken perceptions of fact and with situations in which the possibilities regarding support and resistance do not correlate in the usual ways. In addition, actions that appear very similar from the actor's point of view might be labelled differently because of opportunities to acquire knowledge available to those who might resist. Thus, one instance of escape might be labelled justified, because guards could eas-

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can employ very grave force if that is the only way to stop a small wrong, such as the theft of an apple. In that context, Professor Eser has written that "it is of minor significance" whether one talks of " 'abuse' . . . or simply (and more honestly) . . . [of] 'proportionate' defense." Eser, supra note 8, at 633.

88. If enough situations were worked through, there might be more clarity about results for the highly trained lawyer; certainly the complexity of delineations would reduce the educative clarity for ordinary citizens.

ily perceive its basis, while another was only excused because they could not.

The most serious flaw in this approach may be that it puts the cart before the horse. It would require the initial resolution of immensely complex problems about the rights of outsiders before drafters were in a position to lay down the most basic defenses to liability. For many scholars following the common law tradition, an attempt to resolve all of a set of variations—the great majority of which are based on events that may never take place—would be misconceived.

CONCLUSION

Neither the rights of others nor any difference between general and individual claims provides an adequate basis for distinguishing between justifications and excuses. Rather, the central distinction between justification and excuse is between warranted action and unwarranted action for which the actor is not to blame. Although the law's failure to be as precise as it might in reflecting this distinction is partially due to correctible inattention or indifference, much of the imprecision is a consequence of the troubling borderlines of the two concepts, of legal rules that compromise disagreements about substantive morality, and of canons of convenience that support placing similar factual situations under the same rubric in order to focus the jury's efforts on the questions crucial to liability and nonliability.

Achieving greater clarity between justification and excuse is a laudatory goal, deserving the serious attention of scholars. I want to reemphasize this point, because my lengthy discussion of borderline problems may tend to obscure both my conviction that the basic distinction between justification and excuse is very important for moral and legal thought, and my hope that this essay will contribute to understanding some of the complexities of that distinction. A fully comprehensive system *could* divide up all instances of justification and excuse, but it could do so only by distorting of ordinary concepts or by employing some complicated subcategories reflecting significant policy judgments.[89] A program to achieve that objective is not an appropriate one for Anglo-American penal law.

89. I have in mind such conclusions as that a police officer's arrest of a suspect on probable cause will be deemed warranted and not subject to resistance even if the person arrested is innocent and knows himself to be so. See supra note 77 and accompanying text.