The Individualization of Excusing Conditions

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The excusing conditions of the criminal law are variations of the theme “I couldn’t help myself” or “I didn’t mean to do it.” In this respect the defenses known as necessity, duress, insanity and mistake of law are but extensions of homely, routine apologies for causing harm and violating the rules of social and family life. While we use the plea “I couldn’t help myself” to cover the full range of excusing circumstances, each of the formal excuses of the criminal law has a limited sphere. As a general matter, these spheres are dictated by the type of circumstances rendering the conduct excusable. If the excusing circumstances are natural phenomena, the appropriate excuse is necessity. Standard cases are those of the starving man who steals a loaf...
of bread or the shipwrecked sailor who dislodges another man from the only life-sustaining plank at sea. If the excuse derives from intimidation exerted by another human being, the appropriate excuse is coercion or duress.\(^3\) Thus, if the actor steals or rapes only because a gunman threatens to kill him if he does not, the defense of duress would come to play. In a third type of case, the distortion in the actor's conduct is attributable neither to natural circumstances nor to another human being, but to his own psychological make-up. It is here that we speak of legal insanity as a defense. Whether the formula of insanity is the restrictive \textit{M'Naghten} rule\(^4\) or the more liberal \textit{Durham} test,\(^6\) the inquiry is the same: Is there something about the defendant's psychological condition that makes it credible for him to say, "I couldn't help myself."

The excuse of mistake of law warrants special notice. An individual might engage in seemingly innocuous conduct, such as carrying a pocket knife, and find himself in violation of the criminal law. Nothing compels him to carry the knife. If he has an excuse, it would

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3. \textit{4 W. Blackstone, Commentaries} \textit{*30} (considering \textit{duress per minas} as a species of necessity); StGB § 52; \textit{Model Penal Code} § 209 (Proposed Official Draft 1962). The French Penal Code has only one provision, C. Pén. § 64, which regulates both necessity and duress (excusing anyone "compelled to act by a force that he could not resist."). The Soviet Criminal Code does not provide for either duress or necessity as excuses. It provides only for the justification of lesser evils which covers a subset of the cases of necessity and duress. R.S.F.S.R. 1960 \textit{Ugol. Kod. [Crim. Code]} § 14. \textit{See text accompanying notes 62-67 infra.}
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4. \textit{M'Naghten's Case}, 8 Eng. Rep. 718 (H.L. 1843). The test is whether at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong. \textit{Id.} at 722.
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5. \textit{Durham v. United States}, 214 F.2d 862 (D.C. Cir. 1954), holding that an accused should not be held "criminally responsible if his unlawful act was the product of mental disease or defect." \textit{Id.} at 874-75. This test was rejected in United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972), and replaced by the standard proposed in \textit{Model Penal Code} § 4.01 (Proposed Official Draft 1962).
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6. There is another view of what the insanity defense is about; \textit{see text accompanying notes 74-80 infra.}
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be that he "didn't mean" to violate the law. In this type of case, the distortion of the actor's conduct derives not from internal or external pressures, but from ignorance—ignorance that might be beyond his control.

These four excusing conditions bear several common traits. They all speak in the idiom of involuntariness. The claim is not that there was no act at all (as if the actor suffered an epileptic seizure), but that the actor, in Aristotle's words, "would [not] choose any such act in itself." Were it not for the conditions of necessity, duress, insanity or ignorance of the law, the actor would not have violated the law. Therefore, his act seems to be attributable to circumstances rather than to his character. The act does not tell us what kind of person the actor is. The premise seems to be that if a violation of the law does not accurately reveal the actor's character, it is unjust to punish him for what he has done.

According to this account, the practice of excusing men for their deeds is interwoven with a felt distinction between condemning the act and blaming the actor. It is always actors who are excused, not acts. The act may be harmful, wrong and even illegal, but it might not tell us what kind of person the actor is. And precisely in those cases in which there is no reliable inference from censuring the act to censuring the actor, we speak of excusing the actor for his misdeed.

7. AristotelE, ETHICA NICOMACHEA 1110a (W.D. Ross transl. 1925) [hereinafter cited as ARISTOTLE].

8. With regard to the rationale of punishment and its just distribution, the text follows H.L.A. Hart's position in Hart, supra note 1. As adapted in the text, the chain of reasoning is: (1) Punishment is just only if its distribution is just; (2) the just distribution of sanctions presupposes an allocation of burdens according to the desert of the offenders; (3) the desert of offenders is a function of their character, as manifested in committing a legally prohibited act; (4) in a case of excused conduct, one cannot determine the character of the offender; and (5) it is unjust, therefore, to punish excused offenders.

9. This distinction is explored in Fletcher, Fairness and Utility in Tort Theory, 85 HARV. L. REV. 537, 558-60 (1972) [hereinafter cited as Fairness and Utility].

10. The close connection between excusing and the personal position of the actor has caused some confusion in common law thinking. It induced Blackstone to treat excuses as questions pertaining to the specification of the "persons capable of committing crimes." 4 W. Blackstone, COMMENTARIES *20 (title to chapter treating excuses). See also CAL. PENAL CODE § 26 (West 1970).

11. In previous papers, I have argued that the issue of excusing is equivalent to the inquiry whether the accused is morally culpable for violating the law. See, e.g., Fletcher, The Theory of Criminal Negligence: A Comparative Analysis, 119 U. PA. L. REV. 401, 417-18 (1971) [hereinafter cited as Criminal Negligence]. Cf. H.
II. THESIS: THE COMMON LAW'S AVERSION TO EXCUSING CONDITIONS

If this account of excusing conditions seems plausible, it is nonetheless a view that has hardly won favor among English and American jurists. German scholars and courts have cultivated a full range of excusing conditions, but common law courts have been loath to recognize necessity, duress, insanity and mistake of law as defenses relating to the character of the doer rather than to the quality of the deed. If they have recognized these defenses at all, it is only after converting the claims of excuse into other types of defenses. Necessity and duress sometimes emerge as justificatory defenses; that is, as claims that the act is right and commendable, rather than that the actor should be disassociated from wrongful conduct. Mistake of law occasionally slips by as a defense, but only as a denial for the special mental state required for conviction; common law courts rarely, if ever, ask whether the defendant's ignorance of the law was beyond his control and therefore excusable. Even insanity, which is universally recognized as a defense, is often taken not as an excuse, but as a jurisdictional challenge to the court—something akin to the defense of infancy.

Even where common law courts and legislators recognize defenses like duress as excuses, they nonetheless shy away from equating the issue of excuse with an assessment of the actor's character. Thus, even reform-minded forces like the Model Penal Code tie the defense of duress to the expected conduct of the "person of reasonable firmness" rather than to the individual character of the accused.12 The "reasonable man" is so familiar a figure of common law rhetoric that he is hardly out of place in the Model Penal Code. Yet, as will become clear in the course of the analysis that follows, the common law reliance on "reasonable men" relates to the system's more general aversion to excusing conditions.

PACKER, THE LIMITS OF THE CRIMINAL SANCTION 103-31 (1968). This may generally be true, but the link between moral culpability and excusability breaks down in cases of civil disobedience. See, e.g., United States v. Kroncke, 459 F.2d 697 (8th Cir. 1972) (seizing and destroying draftee registration cards to protest the war in Vietnam). If the act of civil disobedience is morally sound, it is difficult to argue that the violation renders the actor morally blameworthy. Indeed he may be morally praiseworthy. Yet according to the thesis of the text, he should not be excused. Precisely because the violation is an act of moral witness, it tells us what kind of person the actor is. It thus bears little resemblance to involuntary acts, where the act is attributable to circumstances rather than the actor's character. Thus, if civil disobedience is to count as a defense, one should have to search elsewhere for a rationale.

The ensuing sections focus in detail on the common law's abuse and transformation of four excusing conditions: necessity, duress, insanity and mistake of law. I shall devote special attention to the first; for the variations of necessity are complex and the comparative history of necessity in German and Anglo-American jurisdictions illuminates the difference between justifying and excusing criminal conduct. In conclusion we shall turn to an account of the common law's aversion to excusing conditions. To anticipate that account briefly, I shall attempt to show that this feature of the common law derives from misleading assumptions about the indispensability of rules in formulating legal judgments.

A. Necessity: The Prototypical Ambiguity

The byways of necessity are so intricate that we need a roadmap of the possible types of case. At least four landmarks stand out in the variations of necessity: (1) the harm threatened; (2) the harm done by the actor in eliminating the threat; (3) whether the actor acts in his own interest or in the interest of others; and (4) whether the danger emanates from the object damaged or from another source. Let us examine these four variables in greater detail.

The harm threatened. The interest threatened might be life, health, sexual integrity, property or personal liberty. For example, a man's life might be in danger if he is starving, a pregnant woman's life or health might be endangered by the fetus, or an individual's home might be in the path of a raging fire.

The harm done. The actor can eliminate the danger only by inflicting harm on another interest. To pursue the same examples, the starving man can save his life by stealing food, a doctor can save the mother's life or health by aborting the fetus, and the homeowner can save his home only by blasting a firebreak to contain the fire.

The status of the actor. Someone must decide whether the threatened interest should prevail over the interest that would need to be sacrificed. Sometimes, as in the case of the starving man, the decision-maker is the person whose interests are at stake. At other times, as in the case of the doctor aborting the fetus, the decision-maker is a non-involved third party.

The source of the risk. The harm inflicted by the necessitated act sometimes accrues to the source of the danger, as in the case of
aborting a fetus, and sometimes to an interest independent of the danger, as in the case of stealing a loaf of bread to avoid starvation. It is obviously difficult to distinguish neatly between these two kinds of interests. If a house is blown up to check the spread of a fire, it might be viewed under either rubric. One might argue that either the fire or the continuing presence of the house is the true cause of the danger. This distinction raises familiar philosophical quandaries about the difference between causes and conditions.\footnote{13}{This distinction proves to be significant in assessing tort liability for justifiably causing harm. The German Civil Code distinguishes between causing harm to an object that is the source of the danger, BGB § 228, and intruding upon property to avoid a risk emanating from a distinct source, BGB § 904. In the former case, which German lawyers call defensive necessity, the conduct is justified and the actor is liable in tort only if he caused the risk and was at fault in doing so. In the latter case, called aggressive necessity, the actor is liable in tort regardless of his role in bringing on the risk. There is substantial evidence that the common law of tort has responded intuitively to the same distinction. \textit{Compare} Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 124 N.W. 221 (1910) (liability for aggressive necessity: damaging a wharf to avoid the risk of destruction at sea), \textit{with} Putnam v. Payne, 13 Johns. 312 (N.Y. 1816) (no liability for shooting a mad dog in the streets). The conventional rationale for these two categories of cases in the common law is that there should be no liability where the destructive act serves the public interest. W. Prosser, \textit{Law of Torts} 125 (4th ed. 1971). The distinction between public and private necessity correlates with the German distinction based on the source of the risk, \textit{i.e.}, cases of public necessity generally are directed to the source of the danger. \textit{But cf.} Surocco v. Geary, 3 Cal. 69, 58 Am. Dec. 385 (1853) (no liability for blowing up house to prevent spread of fire; a case of public necessity where the harm arguably did not accrue to the source of the risk).}

With these variations of necessity in mind, we can begin to probe the most troublesome aspect of necessity as a defense, namely, its capacity to function now as a justification and now as an excuse. When necessity figures as a justificatory rationale, the issue is whether, on balance, the act is right or wrong.\footnote{14}{For further elaboration of the concept of justification, see Hart, supra note 1, at 13-14; \textit{Fairness and Utility}, supra note 9, at 558-60.} The rightness of the act typically turns on a comparison of the utility of acting (the value of the interest saved) with the disutility of acting (the value of the interest sacrificed). Rightness is thus a matter of maximizing utility, or furthering the greater good.\footnote{15}{This merger of the standard of Right (Recht) with the calculus of utility is by no means uncontroversial. The Reichsgericht adopted this position in a ground-breaking decision of March 11, 1927, recognizing an extra-statutory justification of lesser evils, 61 RGSt. 242, 254. The difficulty with this position is that it leads to justifying the killing of innocent persons where necessary to save a greater number of lives. The alternative theory, which seeks to unify all justificatory defenses under one heading, maintains that conduct is justified if and only if it is "the appropriate means for achieving a legally recognized objective." A. Zu Dohna, \textit{Die Rechtswidrigkeit}}
of necessity—that has crystallized in the Model Penal Code\textsuperscript{16} and in the Soviet codes and literature.\textsuperscript{17}

The following cases are readily justified as cases of necessity (of furthering the greater good):

1. A starving man steals a loaf of bread.\textsuperscript{18}
2. A doctor aborts a fetus to save the life of the mother.\textsuperscript{19}
3. A homeowner blows up a house to prevent a fire from spreading and destroying many other houses.\textsuperscript{20}
4. A policeman kills a lunatic who is shooting wildly and uncontrollably into a crowd of people.\textsuperscript{21}
5. Three desperate shipwrecked sailors select a fourth to be sacrificed and eaten so that the three may survive.\textsuperscript{22}

In all of these cases, the decisive factor is determining that one interest (the starving man's life, the mother's life, etc.) should prevail over the other (the grocer's property interest, the life of the fetus, etc.), and that determination is made simply by asking which interest is worth more. The decision has nothing to do with the personality or character of the actor. In principle, the decision may be abstracted

\textsuperscript{48} (1905). The Reichsgericht rejected this formula as vague and likely to generate questionable results. \textit{Id.} at 253. But \textit{cf.} StGB 1975, § 34 (including this test as a limitation on the defense of lesser evils).

16. MODEL PENAL CODE § 3.02 (Proposed Official Draft 1962). The commentators to the code suggest that the problem of necessity as an excuse should be faced in drafting a provision on duress. See MODEL PENAL CODE § 3.02, Comment at 8 (Tent. Draft No. 8, 1958). But the provision on duress, § 2.09, is limited to "threats". See text accompanying notes 63-65 infra.


18. This is a recurrent problem in the theory of necessity. See M. HALE, PLEAS OF THE CROWN 53-54 (1680) (denying the defense in cases of starvation); \textit{cf.} Judgment of the Court of Appeals in Amiens, France, April 22, 1898, [1899] S. Jur. II. 1 (affirming an acquittal of a starving woman who stole bread to feed herself and her starving child).


21. There is some dispute whether this type of case should be considered one of necessity or self-defense. See Fletcher, \textit{Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory}, 8 ISRAEL L. REV. 367, 373-74 (1973) [hereinafter cited as \textit{Psychotic Aggressor}] (discussing common law and French tendencies to regard the danger posed by a psychotic as a problem of necessity).

22. This is the classic situation posed in Regina v. Dudley & Stevens, 14 Q.B.D. 273 (1884).
from the individual case to formulate a new rule of law: any time an actor is faced with this same conflict of values, he may legally and properly choose the value the court has preferred.

The theory of necessity becomes muddled when we note that most of these five cases also lend themselves to interpretation as cases of excused, rather than justified conduct. In cases (1), (3) and (5), one might think of the actor as surrendering to overbearing pressure rather than as furthering the greater good. Starvation causes a man to steal; the threat of destruction causes a homeowner to blow up the neighboring house; and the fear of imminent death causes sailors to cannibalize one of their number. As the inquiry moves from justification to excuse, the emphasis shifts from assessing the act in abstraction to assessing the actor's response to unusual circumstances. The relevant question is no longer whether other people should act the same way in the same situation, but whether this defendant can be justly blamed for having succumbed to overwhelming pressure.

Now one might properly note that the question whether an actor may be fairly blamed for yielding under the circumstances is very much like comparing the utility and disutility of counteracting impending harm. If a man inflicts great harm to avoid a slight injury to himself, he would be hard-pressed to show that his conduct was involuntary. Whether conduct appears to be involuntary depends, in part, on the competing interests at stake. Yet it would be a mistake to suppose that perceptions of involuntariness are tantamount to judgments that the act furthers the greater interest. For conduct to be excused as involuntary, it is neither necessary nor sufficient that the actor act to further the greater good. If the actor's life is at stake and he must kill an innocent man in order to survive (e.g., he must dislodge another shipwrecked sailor from the only plank at sea), he does not act to further the greater good, for the two competing lives are of the same value. Nonetheless, his instinctive effort to save his life would presumably be excused.

23. This point is recognized in the German literature. H. Jescheck, LEHRBUCH DES STRAFRECHTS 317 (1969); H. Welzel, DAS DEUTSCHE STRAFRECHT 180 (11th ed. 1969). The relationship between excusing and balancing interests is thoughtfully developed in an opinion of the Reichsgericht, Judgment of Nov. 11, 1932, 66 RGSt. 397: 'One can formulate the general proposition that excusing a serious crime, such as perjury, requires a more significant and persistent invasion of bodily integrity than required for excusing a lesser crime.' Id. at 400.

24. Kant refers to this case as one in which the act is not punishable though culpable (or at least not free from culpability). I. Kant, THE METAPHYSICAL ELEMENTS OF JUSTICE 41-42 (J. Ladd transl. 1965).
Conversely, acting to further the greater good does not in itself generate an image of involuntary conduct.25 Suppose a farmer shoots and kills moose attacking his crops.26 The value of the crops may well exceed the value of the several moose, but it does not follow that the shooting was involuntary. The question of involuntariness turns on the competing interests at stake, but the question is always whether the impending harm is so great relative to the cost of acting that we cannot fairly expect the actor to abstain from acting and suffer the harm. The comparison of interests is but the vehicle for determining what we may rationally and fairly expect of the actor under the circumstances.27

There may be substantial overlap in the applicability of the theories of necessity, as in cases (1), (3) and (5) above, but it is impor-

25. Indeed the fact of furthering the greater good is likely to make the actor’s choice appear to be responsive to rational and balanced reflection, rather than the pressure of circumstances. Therefore the range of involuntary, excused conduct is limited at both ends: (1) the harm cannot unduly exceed the cost (if it does, the actor is subject to blame for yielding to the pressure of the situation), and (2) the benefit should not exceed the harm (if it does, the conduct is more likely to appear voluntary, and the appropriate rationale for acquittal is justification, rather than excuse). But note cases like Ménard, Judgment of the Court of Appeals, Amiens, France, Apr. 22, 1898, [1899] S. Jur. II. 1 (starving mother stealing loaf of bread), where the benefit clearly exceeded the cost, yet the conduct also seemed to be patently reflexive and involuntary.

26. This is the problem posed in Cross v. State, 370 P.2d 371 (Wyo. 1962). The court introduced the defense of necessity under the rubric of an implied constitutional right to do everything “reasonably necessary to protect one’s property.” Id. at 377. But note that the defense recognized might be functionally closer to German Civil Code BGB § 228 (defensive necessity), see note 13 supra, than to MODEL PENAL CODE § 3.02 (Proposed Official Draft 1962) (lesser evils). The difference between the two defenses lies in the extent to which the defending party is permitted to cause harm in excess of the value of the interest protected. BGB § 228 justifies conduct if the harm is “not disproportionate” to the value of the interest protected; MODEL PENAL CODE § 3.02 would apply only if the harm is less than the interest being protected.

27. It is important to recall the difference between physical involuntariness and the evaluative dimension of involuntariness discussed in the text. English usage on this point is not clear. In discussing excuses, including duress, H.L.A. Hart notes, “most people would say of them that they were not ‘voluntary’ or ‘not wholly voluntary.’” Hart, supra note 1, at 14. In contrast, Glanville Williams insists that cases of coerced and necessitated conduct are voluntary so long as there is any choice at all to yield to the pressure of circumstances. G. Williams, The Defense of Necessity, 6 CURRENT LEGAL PROBLEMS 216, 223 (1953). Aristotle notes that cases of this class are voluntary in one sense, “but in the abstract perhaps involuntary.” Aristotle, supra note 7, at 1110a. The distinction between the two dimensions of involuntariness is captured neatly by the French differentiation between la contrainte physique and la contrainte morale. See, e.g., 1 P. BOUZAT & J. PINATEL, TRAITÉ DE DROIT PÉNAL ET DE CRIMINLOGIE 343, 348 (2d ed. 1970).
tant to note that there are three traditional areas where only one theory of the defense applies. These areas warrant our attention, for they establish the indispensability of both theories of necessity in a well-developed system of criminal theory.

The first area is typified by cases (2) and (4) above. Whenever the decision-maker is a third party, like the doctor who must decide whether to perform an abortion, the only relevant doctrine of necessity is that of justification. A finding of involuntary conduct is precluded because the actor's personal interests are not at stake. 28

There are two important types of case in which the only available defense of necessity might be a claim of excuse. The first is the case in which the actor takes human life, perhaps even to save a greater number of human lives. One might divert a river to flood a town and kill innocent people in order to save a large city from destruction. Or in the classic situation posed in Regina v. Dudley & Stevens, a group of shipwrecked sailors, facing imminent death, might cannibalize one of their number so that the rest may survive. 29 If these cases did not involve the sacrifice of innocent lives, they would be readily justified as instances of furthering the greater good. But the taking of life has traditionally posed special problems. German scholars, influenced by the Kantian tradition, have rejected the possibility of justification where the act is one of killing an innocent person. 30 And

28. The theory is obviously that a close personal tie with the victim is one factor tending to render the intervention involuntary. Limiting the scope of a defense to dependents and relatives is a sign that the theory of the defense is one of excuse, rather than justification. Compare StGB §§ 52 and 54 (necessity and duress limited to dependents), with StGB § 53; R.S.F.S.R. 1960 UGOL. KOD. [CRIM. CODE] § 13 (self-defense applicable to save the interests of all third parties). But cf. CAL. PENAL CODE § 197(3) (West 1970), where the range of permissible intervention ("wife, or husband, parent, child, master, mistress, or servant") suggests that the common law theory of the scope of defense of others might well have been the identity of interests within the manor or household, rather than the involuntariness of the defensive conduct.

30. One approach to this type of problem is to describe it as a conflict of equally imperative duties, neither of which can yield to the other. For example, in the case of diverting a river and killing a few to save many more innocent persons, one has a duty both to abstain from killing the few and to rescue the many. Whatever one does, one breaches a duty, and the breach appears to be voluntary. It is neither justified nor excused, and yet it seems clearly that a defense ought to be available to the defendant. This problem came before the German courts in a series of prosecutions against doctors who had participated in Hitler's euthanasia problem. See Judgment of
the Queen's Bench took the same stand in *Dudley & Stevens*; if, as
Lord Coleridge put it,

the broad proposition [advanced is] that a man may save his life by
killing, if necessary, an innocent and unoffending neighbor, it cer-
tainly is not law at the present day.\textsuperscript{31}

The Kantian argument for this position is that sacrificing an innocent
man for the sake of others is to treat him as a means to an end
and thus to violate the imperative of respecting persons as ends in
themselves.\textsuperscript{32} The argument has had considerable impact in Western
thought and helps to account for the common law's hostility to neces-
sity and duress as defenses in homicide cases.\textsuperscript{33}

The other type of case unamenable to analysis as justified conduct
is that in which the harm done exceeds or is equal to the gain from
acting. This is the case any time someone kills one or more persons
to save his own life. The problem is well put in a hypothetical de-
vised by Kadish and Paulsen:

\begin{quote}
X is unwillingly driving a car along a narrow and precipitous
mountain road, falling off sharply on both sides. . . . The head-
lights pick out two persons, apparently and actually drunk, lying
across the road in such a position as to make passage impossible
without running them over. X is prevented from stopping . . .
by suddenly inoperative brakes. His alternatives are either to run
down the drunks or to run off the road and down the mountain-
side.\textsuperscript{34}
\end{quote}

\textsuperscript{31} 14 Q.B.D. at 286.
\textsuperscript{32} [\textit{I. KANT, GRUNDELLEGUNG ZUR METAPOSY DES STRAFRECHTS} 243 (1785).]
\textsuperscript{33} In cases excluding homicide from the scope of the defense of duress, the
courts frequently stress the impermissibility of killing an innocent person. \textit{See}, e.g.,
Watson v. State, 212 Miss. 788, 55 So. 2d 441 (1951); State v. Nargashian, 26 R.I.
299, 58 A. 953 (1904).
\textsuperscript{34} 14 Q.B.D. at 286.
Suppose that the driver runs over and kills the two drunks in order to save his own life. Could a humane and just legal system do anything but acquit him? Yet his conduct is hardly justified as a maximization of utility: he sacrifices two lives to save one. The problem is the same any time a man is compelled to protect vital interests by inflicting greater harm than he stands to suffer. We can think of these situations as cases of necessity, but the necessity is not a form of justification. It is a form of excuse. It appeals to our sense of compassion for human weakness in the face of unexpected, overwhelming circumstances.

We have discussed three areas in which the dimensions of necessity diverge. The first is the case of the third party actor who furthers the greater good by intervening to fend off impending harm. The second is the case of killing to save a greater number of lives. And the third is the case in which he is compelled to act, but his act does more harm than good. All three of these situations have taxed the ingenuity of Western courts and theorists. The major source of difficulty has been uncertainty about the differing roles of necessity as a defense.

B. NECESSITY: CONFLICTING GERMAN AND ANGLO-AMERICAN APPROACHES

It is useful to contrast the German experience of devising a defense for all three types of case with the continuing common law confusion about necessity and its nature. The German Criminal Code of 1871 contained only one sentence on the issue of necessity; in section 54, the Code provided:

A criminal act is not present whenever, apart from cases of self-defense, the act is done out of necessity to overcome an imminent risk to the life or bodily security of the actor or one of his dependents, provided that the actor is not responsible for the necessity and there is no other way of overcoming it.

Like other sections of the 1871 Code bearing on defensive issues, this provision does not specify whether the defense functions as a justification or an excuse. Yet there are several indications that the underlying rationale of section 54 is that of excusing involuntary conduct.

35. The standard clause introducing defenses in the 1871 Code is Eine strafbare Handlung ist nicht vorhanden . . . [a punishable act is not present . . .]. See StGB §§ 52, 53, 54 (1871). Compare the drafting style of the new Code which distinguishes clearly in each provision whether the defense is an excuse or a justification. See, e.g., StGB 1975, § 34 (necessity as a justification); id. § 35 (necessity as an excuse).
First, the provision does not impose a limit on the harm that may be committed in the name of saving one's own life (or that of a dependent). Thus section 54 would apply to the case, posed above, of the driver who had to choose between running over two drunks and driving off the road to his own death. Secondly, the provision does not apply unless the actor's interests are at stake (or those of someone close to him); this requirement would not attach unless the underlying rationale were excusing those who succumb to self-interested action.

It was not until the early 1900's that German scholars perceived the two dimensions of necessity. In a landmark article published in 1913, Professor Goldschmidt identified section 54 as a rule pertaining not to the rightness of the accused's conduct, but to the excusability of his engaging in wrongful conduct. Provisions of the Civil Code, on the other hand, provided for a justification of necessity where the actor violated the property interests of another in order to further the greater good. Goldschmidt's analysis brought a semblance of structure to the theory of necessity, and it also demonstrated a serious gap in the statutory scheme. The excuse of necessity was limited to cases in which the actor's or a dependent's serious interest were at stake, and the justification of necessity was limited to cases of inflicting property damage. Neither theory of the defense covered the case in which a third party furthered the greater good by violating an interest other than property rights. Thus there was no basis in the statutory scheme for acquitting a doctor who aborted a fetus to save the life of the mother. It was up to the Reichsgericht to round out the statutory scheme. In a dramatic 1927 decision, the German Supreme Court held that implicit in the criminal law was an extra-statutory justification based on necessity, and that this justification applied to render a life-saving abortion legal and proper. Since 1927 the German courts have proceeded on the assumption that the Criminal Code regulates necessity as an excuse and that the Civil Code, supplemented by the extra-statutory defense of necessity, governs the justificatory dimension of the issue. The newly enacted Criminal Code, effective January 1, 1975, provides separate and comprehensive sections on the two dimensions of necessity.

37. Id. at 134-35.
38. See the discussion of BGB §§ 228 & 904 in note 13 supra.
Common law attitudes toward necessity have been much the opposite of those in the German tradition. Whenever the issue of necessity has arisen, the courts have assumed that the only applicable theory of necessity was that of justification. In the leading case of Dudley & Stevens, the Queen's Bench assumed that if necessity were to apply as a defense it would render the homicide lawful and justified. The court had little difficulty concluding that killing an innocent man was morally wrong and therefore unjustifiable. Thus the judges excluded necessity as a possible defense. What eluded the Queen's Bench in 1884 was that a killing might be unlawful, unjustified and murderous, but nonetheless be excused under the unique circumstances of the case. This was a manner of legal thinking that perturbed the judges. It symbolized "a divorce of law from morality which would be of fatal consequence.""}

The court assumed that if the defendants were to be acquitted, it would have to be under a rule clarifying the elements of murder—a rule that would be applicable in future cases as well. The only such rule the court could imagine was the repugnant proposition "that a man may save his life by killing, if necessary, an innocent and unoffending neighbor.""}

The Queen's Bench had no difficulty making another type of decision without relying on rules. It intimated that although it favored conviction, it would welcome the Queen's clemency.

41. The Queen's Bench did not even discuss the possibility of excusing, as opposed to justifying the homicide. It identified the issue of yielding to pressure with "temptation to murder" (14 Q.B.D. at 287) and held that "temptation" could not be "an excuse for crime." Id. at 288.

42. Id. at 286.

43. A more charitable reading of the opinion is that the court regarded any chosen form of conduct, however limited the options of choice, as fully voluntary and therefore unexcused. See the discussion of the perspectives on voluntariness in note 27 supra. This view of the concept of involuntariness correlates with the earlier rejection of the "irresistible impulse" test as a criterion of legal insanity. Regina v. Burton, 176 Eng. Rep. 354, 357 (1863) (irresistible impulse called a "most dangerous doctrine"). The M'Naghten test of insanity, like the holding in Dudley & Stevens, implicitly endorses the view that any choice at all is morally equivalent to a responsible choice.

44. 14 Q.B.D. at 287. It is not clear what the "fatal consequence" would be; presumably the public would confuse the acquittal with approbation, and thus others would be encouraged to kill and cannibalize innocent persons.

45. The court defines the "real question in the case" to be whether the killing "be or be not murder." Id. at 281.

46. Id. at 286.

47. Id. at 288.
Crown subsequently did commute the death sentences to six months’ imprisonment. The decision to solicit executive clemency was much like a decision to excuse a case of unjustified killing. It was based on an individualized assessment of the facts and of the character and propensities of the defendants. But it was not the kind of decision the Queen’s Bench could call part of the “law”; therefore, the court regarded the decision to excuse the killing as beyond its province.

Common law jurists now regard Dudley & Stevens with uneasiness. There is something inescapably odd about a court’s simultaneously affirming a conviction and recommending clemency. The Model Penal Code sought to correct the mistake in the Dudley & Stevens syllogism, but it did so by tampering with the wrong premise. Necessity should be a justification, the draftsmen concluded in section 3.02, any time an actor favors the greater good; this principle, the

48. As noted by the reporter “A.P.S.” Id.
49. Yet it is important to note, as the court concedes, id. at 288, that clemency is an expression of mercy; excusing, in contrast, is an expression of compassion. There are significant differences between the two sentiments. First, mercy is always expressed by a superior to an inferior, and only when the superior person has the power and the right to subject the inferior to significant loss. Compassion, in contrast, is always expressed among persons on an equal plane; it is not the forfeiture of a right or power, but the recognition that there is no basis in the facts for claiming a right or power over the object of compassion. Secondly, mercy is expressed freely, on the basis of an assessment of the recipient’s entire moral worth. Compassion is expressed in a particular factual setting, and need not encompass an analysis of the recipient’s general moral worth. To grasp the difference between mercy and compassion in the context of Dudley & Stevens, consider whether the Queen would have commuted the sentence if the two defendants were known to be rogues or dedicated revolutionaries. Could one, either morally or predictively, expect the Queen to commute their sentence? Presumably not. On the other hand, if the issue were compassion for their conduct under the extreme circumstances of the case, questions about their record for loyalty and honesty would presumably be irrelevant. For a critique of the English tendency to rely upon the executive prerogative of mercy to correct abuses of the courts, particularly in cases of capital punishment, see Devlin, Criminal Responsibility and Punishment: Functions of Judge and Jury, 54 CRIM. L. REV. 661, 664-66 (1954).
51. One curious feature of Model Penal Code § 3.02 is that the defense is not limited by the requirement that the risk represent a “direct and immediate peril.” See United States v. Kroncke, 459 F.2d 697, 700-01 (8th Cir. 1972); accord, Judgment of July 12, 1951, 1951 NEUE JURISTISCHE WOCHENSCHRIFT 769 (Bundesgerichtshof, Germany). The only limitations on the defense are that there be (1) no more specifically defined defense covering the case, and (2) no legislative purpose to exclude the defense. It is not surprising that the provision has not been adopted in this form in the states that have reformed their penal codes in line with the Model Penal Code. See N.Y. PENAL LAWS § 35.05 (McKinney 1967); WIS. STAT. ANN. § 939.47 (1958).
draftsmen point out in commentary, would permit a court to conclude "on utilitarian grounds" that killing one man to save three was justifiable. By extending the principle of necessity as a justification to homicidal conduct, the draftsmen thought they had corrected the error of Dudley & Stevens and had fashioned a comprehensive rule of necessity.53

It will be remembered, however, that there are two areas in which necessity might have to function as an excuse in order to generate just and humane results. The first is the area of homicidal behavior, and the second is the area in which the actor saves his own life at a cost greater than or equal to one human life. The Model Penal Code disposes of the first by assimilating it, without qualm, to cases of conduct justified under a utilitarian calculus. The Code cannot so easily distend theories of justification to accommodate the second type of case: killing two men to avoid driving alone off the road is not supportable under any theory of justification.54 The remarkable fact about the Model Penal Code is that it provides no solution at all to the second type of case. It is hard to believe, but the draftsmen ignored the problem. This was the tariff for maintaining that necessity was exclusively a justificatory rationale.

52. Comment, supra note 50, at 10.

53. Embracing a utilitarian rationale for justifying homicide induces concern for procedural fairness in selecting the victim. Id. Yet it has never been clear to me why, on utilitarian grounds, the procedure should matter. If it is right for three of the starving sailors in Dudley & Stevens to kill the fourth in order to survive, why should it matter which three of the four take the initiative? The emphasis on procedures, such as drawing lots, see United States v. Holmes, 26 F. Cas. 360 (No. 15,383) (C.C.E.D. Pa. 1842), would seem to speak to values other than the optimization of utility. As in the book of Jonah, the throwing of lots suggests that a higher power (God, fate) is responsible for selecting the victim. The procedure thus serves to deflect responsibility from the men who are the true agents of the killing. See Jonah 1:7 (lots thrown to determine whose presence was the occasion for God's causing the storm); the instruction of Judge Baldwin to the jury in Holmes, 26 F. Cas. at 366-68 ("When the selection has been made by lots, the victim yields of course to his fate . . .").

54. Charles Fried once argued, interestingly, that the killing of the two drunks could be justified on a theory akin to self-defense. One would have to picture the driving on the highway as the normal state of affairs; the two drunks, lying in the roadway, might then appear as aggressors against the driver. Some views of self-defense permit the causing of unlimited harm in the interest of protecting the defender's autonomy. See Psychotic Aggressor, supra note 21, at 378-80 (discussing Self-Defense III). The argument is interesting, for it illustrates how much turns on picturing the running over the two drunks as defensive or passive conduct as opposed to assertive killing. For a similar effort to generate an image of abortion as defensive conduct, see Thompson, A Defense of Abortion, 1 PHIL. & PUB. AFFAIRS 47 (1971).
The common law theory of necessity has hardly matured since the decision in *Dudley & Stevens*. Witness a routine case decided three years ago by the Supreme Court of Missouri. A convict named Green suffered a series of homosexual rapes and attacks by fellow convicts. He sought help from the prison guards; they ignored his pleas. On the day of his alleged offense, four other convicts told him they would rape him that evening. "Snitching" in the prison meant that he was likely to be killed. There was no available protective confinement other than the disciplinary "hole." As you or I would have done under the circumstances, Green went over the wall. Upon being caught, he was charged with escaping from a state institution, convicted, and sentenced to an additional three-year term. The Supreme Court ruled that the trial judge properly kept all the data on the prior and threatened homosexual rapes from the jury. Green's peers were not even allowed to consider whether compassion for his situation required an acquittal.

In the *Green* case, as in *Dudley & Stevens*, the court assumed that there was only one dimension to necessity: the dimension of balancing interests. The Missouri Supreme Court could have held the evidence of prior and threatened homosexual rapes admissible on the ground that it might have been right, on balance, for Green to break out of prison. The defense of lesser evils could well have pointed toward acquittal, yet there are several reasons why a contemporary Anglo-American court would be reluctant to label Green's conduct as right and proper. For one, it would be fashioning a rule that would seem to give other similarly maltreated inmates the right to walk out the front door. Further, judges today are likely to interweave two distinct questions of balancing: first, whether on balance the defendant did the right thing, and secondly, whether it would be right, on balance, to acquit the defendant. Looking at Green's conduct as a matter of interest-balancing readily blends with the court's balancing the benefits and burdens of deciding to acquit. Once the court starts

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56. The majority defined the defendant's claim to be that "the conditions of his confinement justified his escape." *Id.* at 568. Further, it defined the relevant defense of justification to require a determination that the conduct optimized utility. *Id.* In contrast, Judge Seiler, dissenting, stressed the analogy between coercion or duress as a defense and the necessity of Green's escape. The issue for the dissent is not whether Green chose the greater good, but whether his conduct was blameless. *Id.* at 570.

57. In discussing the defense of lesser evils as applied to prison escapes in *People v. Richards*, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597 (1969), the court said that part
focusing on the interests weighing against acquittal, Green's chances plummet. He would have been far better off if he could have anchored the debate to the limited inquiry whether his escape was excused by the impending rapes. He might then have kept the court's focus on the question of whether he could fairly be blamed for yield-

of the harm the defendant would have to weigh in the balance would be "the destruction of the general discipline of the prison." \textit{Id.} at 778, 75 Cal. Rptr. at 604. If an escape should cause a breakdown in prison discipline, there would obviously be at least two contributing factors: (1) the escape itself, and (2) the subsequent acquittal on the ground of lesser evils. The paradox of interweaving the justification of escape with the justification of the acquittal is that if the defendant is convicted of escape, his escape appears to be relatively more justifiable. That is, the conviction reduces the likelihood that his escape would cause a breakdown of discipline and thus diminishes the costs of the escape. This paradox derives from the fallacy of assessing the costs of the escape as though the defendant were acquitted in his subsequent trial; because those costs appear to be high (even though they are purely hypothetical) they are relied upon to justify the conviction. The paradox can be avoided only by distinguishing rigorously between justifying the escape and justifying the acquittal; the acquittal should be justified if the escape furthered the greater good under the circumstances. The costs of the acquittal cannot be considered part of the "circumstances" without sliding back into the paradox we are trying to avoid.

58. The record of appellate decisions hardly gives one cause to believe that balancing interests might lead to an acquittal or a reversal. Dempsey v. United States, 283 F.2d 934 (5th Cir. 1960) (defense rejected on behalf of escapee who was a diabetic and claimed that he escaped to get a needed shot of insulin); People v. Richards, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597 (1969) (defendant contended that he escaped to avoid rape; defense rejected); People v. Whipple, 100 Cal. App. 261, 279 P. 1008 (1929) (defendant sought to defend his escape on the ground that prison conditions were intolerable; defense rejected); State v. Palmer, 45 Del. 308, 72 A.2d 442 (Ct. Gen. Sess. 1950) (defense of necessity rejected in escape case, the court stressing "[s]ound reasons of public policy," \textit{id.} at 310, 72 A.2d at 444); State v. Cahill, 196 Iowa 486, 194 N.W. 191 (1923) (defense of necessity rejected in case of escape from allegedly intolerable solitary confinement); Hinkle v. Commonwealth, 23 Ky. L. Rptr. 1988, 66 S.W. 816 (1902) (possibility of defense rejected even though defendant argued that he escaped for fear of being shot); People v. Noble, 18 Mich. App. 300, 170 N.W.2d 916 (1969) (defense rejected on facts comparable to \textit{Green}; the court feared a "rash of escapes, all rationalized by unverifiable tales of sexual assault," \textit{id.} at 303, 170 N.W. 2d at 918); State v. Davis, 14 Nev. 439 (1880) (possibility of justifying escape from allegedly intolerable conditions rejected); People v. Brown, 70 Misc. 2d 224, 333 N.Y.S. 2d 342 (1972) (defense of lesser evils held inapplicable to case in which convicts held guards as hostages in order to protest prison conditions).

59. There is some evidence that focusing on the issue of compulsion rather than lesser evils aids the defendant. Note the acquittal of defendants Terry and Cooper in the case of People v. Cooper, No. 38602 (Sacramento County Super. Ct., Aug. 11, 1971), \textit{discussed in Note, Duress and the Prison Escape: A New Use for an Old Defense, 45 S. Cal. L. Rev. 1062 (1972)}. According to the latter report, defense counsel argued at trial that because the inmates feared for their lives, the case should be treated as one of duress under \textit{Cal. Penal Code} § 26(8) (West 1970). 45 S. Cal. L. Rev. at 1062-63. \textit{See also State v. Green, 470 S.W.2d 565, 568 (Mo. 1971) (Seiler, J., dissenting) (arguing that the theory of duress should encompass prison escapes where the defendant's conduct is blameless).
ing to the pressure of the situation. By so directing the inquiry, he might have been able to divert judicial attention away from the prospective benefits and burdens of their decision and toward the requirements implicit in treating the individual defendant fairly. Yet at least for the last century, judges in England and the United States have been unreceptive to that mode of decision. The unequivocal preference is for a future-oriented assessment of the virtues of deciding for and against the defendant; there is little commitment to the imperative of treating the defendant justly—as a value independent of the resulting social benefits. As a result, a lawyer in a case like Green is hard-pressed to induce the court to focus on the question whether the defendant can be fairly blamed for yielding to overwhelming pressure, for that question is not tied directly to any social goal that would outweigh the benefits arrayed in favor of conviction.

Like the draftsmen of the Model Penal Code, American judges are prone to insist that the only relevant dimension of necessity is the defense of lesser evils; thus the theoretical rationale for acquittal is whether, on balance, the defendant acted in the social interest. Yet that dimension rarely yields acquittals.60 And whenever a strong interest—like maintaining discipline in the prisons—emerges on the opposing scale, the judges are likely to frustrate the defendant’s appeal to the greater good.61

60. The textwriters maintain that necessity is a defense recognized in the Anglo-American legal tradition. MODEL PENAL CODE § 3.02, Comment at 6 (Tent. Draft No. 8, 1958); W. LAFAVE & A. SCOTT, CRIMINAL LAW 382 (1972); G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 724 (2d ed. 1961). But one is hard pressed to find criminal cases where a court actually reverses for mistake by the trial judge in instructing or excluding evidence on the issue of necessity. There are some cases in which a court appeals to a constitutional or a natural right in order to justify the kind of result that would be obtained under a defense of necessity or lesser evils. E.g., State v. Jackson, 71 N.H. 552, 53 A. 1021 (1902) (natural right to protect one's children and thus to keep them out of school when ill); Cross v. State, 370 P.2d 371 (Wyo. 1962) (constitutional right to protect property from marauding moose). In another situation, the court relied upon a theory of contract interpretation to justify a seamen's strike at sea, United States v. Ashton, 24 F. Cas. 873 (No. 14,470) (C.C.D. Mass. 1834) (the seamen “contract only to do their duty and meet ordinary perils and to obey reasonable orders.” Id. at 874; followed in United States v. Nye, 27 F. Cas. 210 (No. 15,906) (C.C.D. Mass. 1855). These cases may represent the particularized, functional equivalent of the justification of necessity; but it would be a mistake to say they recognize the defense as such. When common law courts discuss the defense of necessity, it is typically by way of holding the defense inapplicable. E.g., United States v. Kroncke, 459 F.2d 697 (8th Cir. 1972); cf. People v. Brown, 70 Misc. 2d 224, 333 N.Y.S.2d 342 (1972) (N.Y. PENAL LAWS § 35.05 (McKinney 1967) held to be applicable only to “technically criminal behavior that no one would consider improper.”)

61. See cases cited note 58 supra.
Thus one sees the extent to which the common law approach to necessity diverges radically from the German historical development. Anglo-American jurists are now inclined to hold that the defense of lesser evils ought, in principle, to justify violations of the law, yet the system remains averse both to applying this defense in practice and to recognizing a general excuse based on human frailty in situations of extraordinary pressure. The German pattern, in contrast, is rooted in the theory of necessity as an excuse; the defense of lesser evils emerges later as a way of covering those cases in which the actor's own interests are not at stake. This divergence manifests a deeper jurisprudential rift, which runs to the core of each system's conception of the law and appropriate judicial roles. The common law pattern reflects the influence of 19th century positivism blended with a commitment to decide each case instrumentally—a commitment to justify each decision as a means of optimizing the community's welfare. We shall return in conclusion to this account of the common law's posture toward necessity; but first we should broaden the analysis by turning to a comparative survey of duress, insanity and mistake of law.

C. DURESS: NECESSITY REVISITED

If common law judges have failed to acknowledge the excusing dimension of necessity, they have not fared so poorly in the field of duress. Jury instructions on duress frequently build on words like "coercion," "compulsion," and "involuntariness." There is at least some recognition that the issue posed by a claim of duress is not whether the act was justified, but whether the actor's will was overborne by circumstances. Stressing the issue of involuntariness makes it clear that the law's dominant concern is not the act in the abstract, but the extent to which the act reveals the kind of person the actor is.

Yet there are also contrary indications in the common law of duress. There are some signs that courts and legislators are inclined to recognize duress as a defense only when they feel that the act is right and justified. First, duress is frequently recognized as a defense only


when the actor's life is in danger;64 and secondly, it is rarely and only recently admitted as a defense in cases of homicide.65 These two requirements, taken together, mean that the defense of duress is available only to those who protect an interest (namely life) that is greater than the harm caused (which must be less than the taking of life).

These restrictions on the common law defense of duress belie efforts to label the issue as an excusing condition. If the issue were exclusively the involuntariness of the deed—and not its rectitude—there would be no reason to reject claims of duress in homicide cases. German law recognizes the applicability of duress in homicide as well as other cases,66 and so it must if it distinguishes rigorously between the issues of justifying a deed and excusing it. Yet the common law is obviously ambivalent about the distinction. It uses the idiom of excuses in characterizing duress, but it insists that the party relying on duress act to further the greater good.

The Model Penal Code has fashioned a defense of duress free of some of the inconsistencies of the common law tradition. It is classified as an "excuse," it requires merely a threat of unlawful force against the person, and it is available as a defense to every crime, including homicide.67 Yet the Model Penal Code also betrays the common law's reluctance to inquire straightforwardly into the connection between an improper act and the actor's character. Section 2.09 of the Code provides:

It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by

64. E.g., CAL. PENAL CODE § 26(8) (West 1970); MINN. STAT. ANN. § 609.08 (1964).

65. A long line of cases rejects the applicability of duress in homicide cases: Arp v. State, 97 Ala. 5, 12 So. 301 (1893); Taylor v. State, 158 Miss. 505, 130 So. 502 (1930); State v. Nargashian, 26 R.I. 299, 58 A. 953 (1904). See also 1 E. EAST, PLEAS OF THE CROWN 225 (1806); 4 W. BLACKSTONE, COMMENTARIES *30. But cf. Jones v. State, 207 Ga. 379, 62 S.E.2d 187 (1950) (homicide conviction reversed, duress recognized as a defense). In 1968, the Georgia legislature intervened to bring Georgia law back in line with the dominant common law position. See GA. CODE ANN. § 26-906 (1972) (expressly exempting murder from the scope of coercion as a defense).

66. Judgment of Jan. 14, 1964, 1964 NUEN JURISTISCHE WOCHENSCHRIFT 730 (Bundesgerichtshof, Germany) (recognizing the applicability of necessity and duress as defenses in prosecutions arising out of the mass murder of Jews in White Russia in 1941). It is noteworthy that both the Soviet Union and the Federal Republic of Germany have abolished or are in the process of abolishing duress as a separate defense. The Soviet Union has assimilated it to necessity as a justification R.S.F.S.R. 1960 UGOL. KOD. [CRIM. CODE] § 14; see discussion note 3 supra; the West Germans have assimilated it to necessity as an excuse, STGB 1975, § 35; see note 2 supra.

the use of, or threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.

"Reasonable men" and "persons of reasonable firmness" are ubiquitous in the language of the common law, and yet the same rhetorical figures are strangers to German legal idiom. This is not a fortuitous difference between the two systems. There is a close connection between each system's orientation toward excusing conditions and its reliance on fictitious standards like that of the reasonable man. The common law's aversion to excusing conditions is coupled with the felt indispensability of the reasonable man standard; the German law's cultivating excusing conditions is tied to indifference toward fictitious standards of exemplary men. This correlation is not at all mysterious, for the standard of the reasonable person provides a substitute for inquiries about the actor's character and culpability. This means that a system willing to assess character and culpability has no need of reasonable men; and a system afraid to look squarely at the character and culpability of the defendant must do so indirectly, by relying on standards like "the person of reasonable firmness." Let us see exactly why this is so.

What is the operative significance of the phrase "person of reasonable firmness" in section 2.09? The point of the requirement is that not every case of alleged duress is sufficient to excuse the defendant. Suppose someone kills another in order to avoid a slap in the face. Or suppose a government employee discloses official secrets to avoid having his car stolen. These are cases in which we would not be inclined to recognize the defense. It may well be true that these two actors felt "compelled" or "coerced" to act, but their sense of being compelled is hardly enough to warrant excusing their conduct.

There are two equivalent ways of explaining this result. The first approach would be to ask: Are these actors culpable for not resisting the threats? The first step in resolving that issue is to account for the actors' feeling compelled to act as they did. Unless we have

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68. It is not that German scholars would never refer to standards like the "average man." See, e.g., H. Jescheck, Lehrbuch des Strafrechts 333 (1969) (discussing the standard of the Durchschnittsmenschen in connection with the theory of extrastatutory excusing conditions). But these standards do not appear in German legislation and they play an insignificant part in German criminal theory. As a general matter, there is no term in German theory whose function replicates the ubiquitous use of "reasonableness" in the common law. There are very deep reasons for this difference in terminology, but that is a subject for a separate paper.
additional facts about the psychological make-up of these defendants, we may suppose that the first actor was simply afraid of being slapped in the face. The second was presumably selfish; he was simply unwilling to make a personal sacrifice for the sake of governmental secrets. Do the traits of cowardice and selfishness excuse criminal behavior? Hardly. In the typical case, we can fairly expect of a man that he conquer his cowardice in the interest of saving human lives, or of a government official that he overcome his selfishness when governmental secrets are at stake. Of course, if the conduct of either was indeed beyond his control, it would be appropriate to excuse the conduct. But it would take some discernible pathology to cause us to believe that either of these men could not have done otherwise. Thus, according to this first approach, we relate the act to the actor's character traits and then assess whether the actor should be expected to control his propensities to act in the particular way.

The second path to the same result is the conventional common law formula: Would a reasonable person under the circumstances have acted in the same way? This test seems deceptively simple, yet its application requires the same logical steps and the same moral judgments as the first approach discussed above. Is the reasonable person cowardly? Is he selfish? If he were, our two allegedly coerced actors would have good defenses. Common law courts would obviously hold that the reasonable man is neither cowardly nor selfish. Why? Because these are traits that men can be fairly expected to surmount to save the life of another or to protect other vital interests. Thus, the definition of the reasonable person requires the same analysis and moral sensitivity as the frontal assessment of the actor's character and culpability.

69. There is little sensitivity today to this kind of reasoning in Anglo-American cases. But cf. Maher v. People, 10 Mich. 212 (1862), in which the court reasoned that the standard for the defense of provocation should include the defendant's "peculiar weakness of mind or infirmity of temper, not arising from wickedness of heart or cruelty of disposition." Id. at 221. That is, the test for whether the defendant was to blame for yielding to a particular disposition was whether that disposition or trait manifested a "wickedness of heart."

70. The term "control" is ambiguous in precisely the same way as the terms "voluntary," "choice," and "compulsion." "Control" might refer to that degree of self-automation necessary to say that the accused has acted as an independent agent; or it might refer to that degree of self-control necessary to say that the accused is fairly accountable for his conduct. Cf. the parallel analysis of the concept of "voluntariness" in note 27 supra.

71. This analysis is hardly shared by the courts and commentators. In Bedder v. Director of Pub. Prosecutions, [1954] 1 W.L.R. 1119 (H.L.), the House of Lords
To demonstrate this point more satisfactorily, let us suppose that our first hypothetical defendant kills to avoid being struck in the groin, and that it can be shown by reliable medical evidence that he has a pathological fear of castration and genital injury. The case for excusing him now seems more convincing; for we can now attribute his conduct to a personality disposition beyond his control. Would it also seem more convincing under the standard of the "person of reasonable firmness"? It all depends, does it not, on the characteristics attributed to this fictitious character? If the applicable standard is the reasonable man with a pathological fear of castration, the jury might well acquit the defendant; if the applicable standard is the reasonable man without such fears, the jury would probably convict. How, then, does one decide how to instruct the jury?

There is only one sound way to determine the traits attributed to the reasonable man, and that is with an eye to the justice of blaming the accused for having displayed weakness of character. If we keep from the jury an important fact bearing on the homicide, namely the accused's pathological fears, we distort the jury's attempt to assess the causes of the killing. We skew the jury's inquiry toward finding that it was a culpable weakness of will, rather than uncontrollable pathological factors that induced the killing. For the defendant to be treated justly, the jury instructions should refer to a standard of a reasonable man with the specific pathological fears of the defendant. There is no doubt that the reasonable man standard can be adjusted and manipulated that the defendant's impotency was irrelevant in defining the standard of the "reasonable person" to be applied in assessing the alleged provocation by a prostitute. The court could see no difference between "an unusually excitable or pugnacious temperament" and the defendant's impotence. Id. at 1123. If it particularized the standard by including the latter, presumably it would also have to include the former. Commentators criticized the decision, but hardly advanced our understanding of the connection between (1) the analysis of culpability and (2) the traits to be attributed to the reasonable man. Edwards, Provocation and the Reasonable Man, Another View, 1954 Crim. L. Rev. 898, 905 (1954); Note, Manslaughter and the Adequacy of Provocation: The Reasonableness of the Reasonable Man, 106 U. Pa. L. Rev. 1021 (1958); 70 L.Q. Rev. 442, 443 (1954). Nonetheless, there is a widespread sense that Bedder is wrong. In the context of provocation as a partial defense, the Model Penal Code responds to this sense by shifting the seemingly indispensable concept of reasonableness from its place in defining an exemplary actor to asking whether there is a "reasonable explanation or excuse" for the "extreme mental or emotional disturbance" inducing the homicide. Model Penal Code § 210.3(1)(b) (Proposed Official Draft 1962). Also note the perspicacity of the comments to this provision. Model Penal Code § 201.3, Comment (Tent. Draft No. 9, 1959). For another effort at individualizing the defense of provocation, see New Zealand Crimes Act § 169 (1969). The intriguing implication is that where the issue is mitigation, rather than excuse, the common law courts are prepared to move to a relatively more individualized standard.
ulated to encourage the right kind of jury deliberations. But the only way to make these adjustments in the standards is to decide by the first method discussed above whether the personality disposition accounting for the act is one that the accused should be able to control. If the accused should be able to overcome his dispositions, as in the case of cowardice and selfishness, these dispositions should not be attributed to the reasonable man; if the accused could not control the relevant disposition, as in the case of documentable, pathological fears, the disposition must be included in the standard used to assess the defendant’s conduct.72

There is no suggestion in this analysis that the reasonable man test need yield results different from those obtained by assessing the actor’s character and culpability.73 Indeed, the appeal of the reasonable man is precisely that he permits one, covertly, to make the same judgment that one would make in openly discussing the defendant’s moral responsibility for his conduct. Yet if that is the case, one wonders why common law judges bother with the circumvention; why not simply ask whether the accused ought to have been able to resist the pressure exerted on him? This is a problem to which I shall return in conclusion. As we shall see, it is part of the broader puzzle posed by the common law’s distinctive anxiety about decisions not based on rules.

D. INSANITY

Insanity is probably the clearest case of an excusing condition in the common law tradition. The courts have never confused insanity with the criteria of justification. It would be absurd to suggest that a man’s psychological incapacity renders his conduct right and proper. Thus, at least in the case of insanity, common law jurists admit the possibil-

72. In fact, however, common law courts are disinclined to consider the defendant’s psychiatric condition in assessing the defenses of duress and necessity. People v. Goldman, 245 Cal. App. 2d 376, 53 Cal. Rptr. 810 (1966) (defendant’s “psychiatric assertions” irrelevant in considering whether prison escape was excused); Ross v. State, 169 Ind. 388, 82 N.E. 781 (1907) (court rejected defendant’s mental disability in analyzing defense of duress). But cf. State v. St. Clair, 262 S.W.2d 25 (Mo. 1953) (conviction reversed for failure to instruct adequately on the issue of duress; the court suggests that it would be relevant in assessing the defense that the defendant suffered food poisoning as a child and was “mentally impaired.”).

73. And yet the use of the “reasonable man” test does in fact affect the outcome of litigation when the issue is duress or provocation. See notes 71-72 supra. Compare the problem whether an “objective” standard of negligence produces results different from a “subjective” standard of negligence. See Criminal Negligence, supra note 11, at 406 & n.21.
ity that an act might be wrongful and unjustified,\textsuperscript{74} even though the actor is not to blame for committing it.

Among some common law writers and legislators, however, the defense of insanity has suffered another kind of distortion. There is a tendency in some quarters to think of the criminal law as applicable only to normal adults.\textsuperscript{75} On this view of criminal responsibility, insanity and infancy become preliminary questions that one must resolve before deciding whether the criminal law is applicable. The California Penal Code provides, for example, that:

All persons are capable of committing crimes except those belonging to the following classes:

One—Children under the age of fourteen . . .

Two—Idiots.

Three—Lunatics and insane persons . . . \textsuperscript{76}

As this provision is drafted, insanity is a status, not a condition explaining and excusing a particular act. This provision dates to 1872, but the view is even more fashionable today. Commentators now realize that a verdict of not guilty by reason of insanity leads, operationally, to one form of commitment rather than another. This fact of life has led to considerable skepticism whether insanity functions as an excuse. As Herbert Packer argues in his thoughtful book, \textit{The Limits of the Criminal Sanction}:

The insanity defense cannot be viewed as an excuse in the ordinary sense. It would be more useful to say that its successful invocation is a direction to punish but not to punish criminally . . .

The insanity defense has no more to do with \textit{mens rea} than does the defense of infancy . . . \textsuperscript{77}

\textsuperscript{74} This concession is implicit in the test of insanity under \textsc{Model Penal Code} § 4.01(1) (Proposed Official Draft 1962), which provides in part that the actor is not responsible if "he lacks substantial capacity to appreciate the criminality [wrongfulness] of his conduct." The draftsmen left open the choice between the terms "criminality" and "wrongfulness." In United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972), the District of Columbia adopted this test and opted for the word "wrongfulness." \textit{Id.} at 971. If the insane actor does not appreciate the wrongfulness of his act, it follows that his act is regarded, objectively, as wrongful.

\textsuperscript{75} See, e.g., J. Hall, \textsc{General Principles of Criminal Law} 436 n.85 (2d ed. 1960) ("[A]n insane person is not bound by duties of the penal law.")

\textsuperscript{76} \textsc{Cal. Penal Code} § 26 (West 1970).

\textsuperscript{77} H. Packer, \textsc{The Limits of the Criminal Sanction} 134 (1968).
The defect in this argument seems rather elementary. It confuses an empirical concomitant of civil commitment with the grounds and justification for that commitment. Let us suppose that men acquitted by reason of insanity are regularly and routinely committed. It certainly does not follow that the verdict of not guilty is a "direction to punish" by civil commitment. The rationale for the commitment is a prediction of future dangerousness, not the finding that the actor was insane at the time of the act charged.\(^7\) Now most courts may suppose that men acquitted by reason of insanity are sufficiently dangerous to be committed. But that practice may be wrong; it may indeed be unconstitutional.\(^7\) That courts rely on one index of dangerousness at one point in history hardly warrants the claim that the insanity defense does not perform an excusing function. Yet one is invariably struck by the widespread willingness of common law writers to reject the excusing function of the insanity defense. This willingness may well be further testimony to the deeply rooted hostility of the common law to the excusing conditions of the criminal law.\(^8\)

E. MISTAKE OF LAW

Mistakes about the legality of conduct impose the hardest strain on a legal system's sensitivity to individual justice. It is so easy for courts and commentators to slip into the mindless rhetoric about everyone's being presumed to know the law. Common law courts regularly intone that liturgy,\(^8\) as German courts did about a hundred years ago.\(^8\) In this century, German theorists have been engaged in intense debate about the appropriate doctrinal analysis of mistakes of law and about the kind of defense the courts should administer. This theoretical work has led the courts through several stages of development—stages

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79. Specht v. Patterson, 386 U.S. 605 (1967) (holding that a supplementary hearing is required for commitment under Colorado Sex Offenders Act); Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968) (holding that there is no constitutionally acceptable distinction between ordinary civil commitment and commitment after acquittal by reason of insanity).
80. This tendency in common law thinking runs parallel to Soviet legal theory, according to which the issue of insanity is classified as an issue bearing on the status of the offender, rather than the way the criminal act was committed. Kurs, supra note 17, at 205-56 (treating insanity and infancy as the issues bearing on the "Subject of the Crime").
82. Judgment of Sept. 25, 1880, 2 RGSt. 268.
that are regrettably too complicated to document here. After a landmark decision in 1952, the German courts and theorists have converged on a fairly simple formula; translated into English legal idiom, the German rule is that reasonable mistakes of law excuse; unreasonable mistakes do not. Whether a mistake is reasonable depends on whether the actor could be fairly and justly expected to perceive the wrongfulness of his conduct.

For good or ill, the common law is at about the stage of sophistication commanded by German theorists at the turn of the century.

83. A tentative analysis of the development would include the following stages and styles of analysis:

1) Treating the issue of illegality (Rechtswidrigkeit) as an element of the offense and therefore classifying mistakes of law as mistakes denying elements of the offense. See Judgment of Mar. 26, 1889, 19 RGSt. 209. This style corresponds to the technique in People v. Weiss, 276 N.Y. 384, 12 N.E.2d 514 (1938), discussed in the text at notes 88-91 infra. Its application depended on the code's referring explicitly to Rechtswidrigkeit as an element of the offense.

2) Distinguishing between mistakes about the criminal law and mistakes extrinsic to the criminal law. See Judgment of Nov. 8, 1901, 34 RGSt. 418 (issue was whether in an incest prosecution, it was a mistake of criminal law or private law to assume, incorrectly, that a divorce from a former wife terminated the legal relationship with one's former stepdaughter).

3) Treating all mistakes of law, whether reasonable or not, as denying the intent required for conviction. This was endorsed in Judgment of Apr. 13, 1946, DEUTSCHE REchts-ZEITSCHRIFT 126 (Oberlandesgericht Kiel).

The first stage proved to be unsatisfactory, for it was too closely tied to legislated language; the second stage, because the distinction between the two types of mistake eventually appeared to be arbitrary; and the third stage, because it awarded a defense even in cases where the mistake of law was negligent (if the crime was not punishable when committed negligently). See generally H. JESCHECK, LEHRBUCH DES STRAFRECHTS 294-306 (1969); Ryu & Silving, Error Juris: A Comparative Study, 24 U. CH. L. REV. 421 (1957); Criminal Negligence, supra note 11, at 420-23. For the position that finally emerged in German law, see text accompanying notes 84-86 infra.


85. The test as formulated by the German Supreme Court is whether the mistake is unavoidable (unüberwindlich). Id. at 209. If it is, it provides a complete defense. If it is avoidable (überwindlich), it functions merely to mitigate guilt. This is the position called the Schuldttheorie in the German literature and endorsed by many leading scholars. See, e.g., H. WELZEL, DAS DEUTSCHE STRAFRECHT 164-74 (11th ed. 1969) (as formulated herein, however, the distinction is between mistakes that are vermeidbar and those that are unvermeidbar); R. MAURACH, DEUTSCHEs STRAFREcht 471-84 (4th ed. 1971) (concurring in terminology). Cf. StGB 1975, § 17 (unavoidable mistake of law (Verbotsirrtum) precludes culpability and liability).

86. More specifically, in its Judgment of Jan. 27, 1966, 20 BGHSt. 18, the German Supreme Court defined a mistake to be unavoidable (unüberwindlich) when the actor, in light of the circumstances of the case, his personality, his station in life and professional role, could not, even with the degree of conscientious thought that could be expected of him, perceive the wrongfulness of his act. Id. at 20.

87. This judgment may be overly harsh, for there are some path-breaking cases
We do not speak of mistake of law as a defense, though there are indeed isolated cases in which mistakes of law do bear on the state of mind required for conviction. In *People v. Weiss*, for example, the defendant thought he had the authority to arrest one Wendel and take him out of the state. The defendant was prosecuted and convicted under a statute defining kidnapping as "wilfully seiz[ing] . . . another, with intent to cause him, without authority of law, to be . . . sent out of the state . . . ." The New York Court of Appeals reversed the conviction. If the defendant assumed he had arresting authority, the court reasoned, he didn’t have the "intent to cause [the victim], without authority of law, to be . . . sent out of the state"; therefore he was not guilty of the offense as defined by the statute.

There are several remarkable features of this decision. First, there would have been no defense if the statute had read "wilfully seizing another, without authority of law, with the intent to cause him to be sent out of the state." Under this version, the defendant would have had the intent required for conviction; the only difference is that the phrase "without authority of law" is moved up six words in the formulation. It is inconceivable that the legislature would have located that phrase with an eye to whether mistakes about arresting authority should or should not constitute a defense. It is hardly exemplary of the judicial craft to place so much reliance on the fortuities of legislative drafting. Secondly, under the rationale of the decision, it is wholly immaterial whether the defendant’s mistake is reasonable or unreasonable. Any mistake, even an irrational mistake, would negate the "intent to cause him, without authority of law . . . to be sent out of the state." It is scarcely sensible to resolve the case on the basis of a theory that leads to unacceptable results. And in a sys-

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88. 276 N.Y. 384, 12 N.E.2d 514 (1938).
89. Id. at 386, 12 N.E.2d at 514 (emphasis omitted).
90. Id. at 389-90, 12 N.E.2d at 515-16.
91. The common law seems destined to fluctuate between rejecting all mistakes, see, e.g., Regina v. Prince, 2 Cr. Cas. Res. 154 (1875), and acknowledging even unreasonable mistakes as a defense on the ground that they negate the requisite intent.
tem hostile to mistakes of law, it is an odd, unacceptable result to admit an irrational mistake of arresting authority as a full defense to the crime of kidnapping. These anomalies in the Weiss opinion should be enough to despair of this path for resolving the problem of mistake of law.

Yet there is no competitive approach in the Anglo-American literature. The Model Penal Code recognizes that relying on certain kinds of mistaken legal advice should constitute a defense, but the Code fails to integrate mistake of law into its theoretical structure, and indeed it discourages any association between mistake of law and other excusing conditions.92

It may well be that a legal system must develop some sophistication about the role of excusing conditions before it can engage the problem of mistake of law. It is only when courts appreciate the difference between excusing conduct and interpreting the law that they can avoid the snares surrounding mistakes of law. There is a common law tendency to say that recognizing mistake of law as a defense would be to allow the defendant to make his own law,93 or to recognize a new exception to the pre-existing rule. But the law does not change when a jury finds that a man could not have been expected to know

92. MODEL PENAL CODE § 2.04(3) (Proposed Official Draft 1962). That the draftsmen perceive mistake of law to be different is reflected (1) in the specification of the kinds of situations in which the mistake would constitute a defense without advert ining to a principle for including these situations and excluding others, and (2) shifting the burden of persuasion to defendant. Id. § 2.04(4). Cf. id. § 2.09 (defense of duress based on a broad general principle, with the burden of persuasion on the prosecution to disprove a properly raised claim).

93. J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 383 (2d ed. 1960); Hopkins v. State, 193 Md. 489, 498, 69 A.2d 456, 460, appeal dismissed, 339 U.S. 940 (1950) ("If an accused could be exempted from punishment for crime by reason of the advice of counsel, such advice would become paramount to the law."). For thoughtful replies to this argument, see W. LAFAVE & A. SCOTT, CRIMINAL LAW 368 (1972) (but the authors also respectfully repeat Jerome Hall's statement of the argument. Id. at 364); Houlgate, Ignorantia Juris: A Plea for Justice, 78 ETHICS 32, 39 (1967).
that his conduct was illegal. Suppose that there is a rule prohibiting the carrying of pocket knives. The accused violates the rule in blissful ignorance of the illegality of his conduct. The trier-of-fact finds, for whatever reason, that the accused could not have been expected to know of the rule, thus that his mistake was reasonable. The accused is acquitted, but does not the rule remain the same? It would be odd to say that the court has engrafted an exception onto the rule, namely that you may carry a pocket knife whenever you reasonably think that it is legal to do so. By its nature, a rule of law communicates a standard of conduct. It is not part of the rule that you may carry a pocket knife if you are reasonably mistaken about the law, for no rule can coherently direct people what to do in the event they are ignorant of that same rule. Thus there is an important and subtle difference between modifying a rule and finding that someone who violated the rule is excused and blameless for having done so. Yet this distinction has had little impact on common law thinking. And as a general matter, common law analysts have yet to see that mistake of law is an excusing condition parallel to necessity, duress and insanity.

III. INDIVIDUALIZATION AND RULES

A recurrent theme in this discussion of the common law posture toward excusing conditions is that the common law, in the mind of its practitioners, consists of rules and nothing but rules. Judicial decisions must either follow rules or make new rules. Courts can handle the issue of justification, for recognizing a new justification is but to acknowledge an additional exception to the rule. Judges can think about what reasonable men would do, for abstracting the issue from the accused permits one to think of the case as a recurrent problem—the type of problem that is amenable to solution by rules. What com-

94. Quaere: What is the imperative not to engage in statutory rape after People v. Hernandez, 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964) (recognizing reasonable mistake of fact as a defense)? Is it: thou shalt not engage in intercourse with a girl under the age of 18. Or is it: thou shalt not engage in intercourse with a girl whom you do not reasonably take to be over the age of 18. According to the former version, the defense of reasonable mistake functions as an excuse analogous to mistake of law. Yet the latter version seems to be a plausible interpretation (if one can decide oneself that one's regarding a girl to be over 18 is reasonable). According to this view, the reasonable mistake functions not as an excuse for violating a rule, but as a denial that the rule was violated. This suggests that there may indeed be a plausible distinction between being mistaken about whether conduct is prohibited and being mistaken about the circumstances in which one is acting. Mistakes of law function as excuses; it is not so clear that mistakes of fact do.
mon law judges find to be extra-legal are questions about the particular accused: What could we fairly expect him to do under the circumstances? Is he personally to blame for having succumbed to pressure? These questions are not about what the rule ought to be, but about whether a violation of the rule is fairly attributable to a particular individual. As questions about individuals in unique circumstances, they fall outside the dominant Anglo-American conception of law. The issue whether an individual is accountable for violating a rule fails to fit a model of analysis that limits the legal process to defining rules and determining whether they have been violated.

What the common law lacks is a concept comparable to the German notion of Zumutbarkeit—a term that is roughly translated as attributability or imputability. The German term captures the question whether an individual can be justly held accountable for violating a rule. It bears witness to the role of compassion as well as to the application of rules in the total process of judging an individual accused of crime. Anglo-American lawyers use words like "accountability" and "responsibility" but they come to life only when we speak of the insanity defense. And the special feature of insanity, as we have seen, is the tendency to think of the insane as a class apart—as people, like infants, who fall outside the ordinary jurisdiction of the criminal law. There is simply no single term in the idiom of the common law that helps us focus on the question whether a normal person is responsible for having violated a legal obligation.

The common law tradition suffers a fundamental paradox. The tradition purports to be based on case-by-case evolution. In fact, the courts are systematically averse to considering the peculiarities of particular defendants. They are committed to deciding the ultimate issue of guilt or innocence according to rules that suppress the differences among persons and situations. In contrast, the contemporary German

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95. But note the German scholars and courts have resisted the recognition of any general, extra-statutory excuse based on the principle of Zumutbarkeit. Judgment of Nov. 11, 1932, 66 RGSt. 397, 399 (holding that the courts should not recognize excuses not specified in the criminal code); J. BAUMANN, STRAFRECHT: ALLGEMEINER TEIL 463-65 (5th ed. 1968); H. JESCHECK, LEHRBUCH DES STRAFRECHTS 333 (1969). Accord, C. PEN $ 65 (specifying that conduct may be excused only under conditions specified in the code). But cf. H. WELZEL, DAS DEUTSCHE STRAFRECHT 184-86 (11th ed. 1969) (recognizing a defense of extra-statutory necessity as an excuse, which would cover the cases of conflict-of-duties discussed in note 30 supra). Cf. also Judgment of Mar. 18, 1952, 2 BGHSt. 194 (developing a new defense of mistake of law, with the court stressing that it was up to the judiciary to explicate the implications of requiring culpability as a condition for conviction).

96. See text accompanying notes 74-80 supra.
style of thought stresses the centrality of codification and legislative supremacy in defining prohibited conduct. Yet at the level of assessing individual culpability, the German courts cultivate a system of individualized excusing conditions. The indispensable inquiry in every case is whether the defendant, as a concrete individual, can be fairly blamed for having violated the law.

This radical difference between the contemporary common law and the German styles of legal thought manifests a deeper cleavage between the two traditions. It is a cleavage that is not likely to be explained by the conditions of social life, for it is hard to find two societies more alike than contemporary West Germany and the contemporary United States. The cleavage springs from radically different perspectives on the nature of law and the ideal of doing justice under the law. In an effort to approach these divergent perspectives, I shall try to state the arguments that a common law jurist might offer on behalf of the practices of his system. Each argument will invite a reply, and these replies will bring us close to the alternative view expressed in the German orientation toward the theory of excuses.

A. THE ARGUMENT THAT INDIVIDUALIZATION IS IMPOSSIBLE

It is a mistake, this argument would hold, to think that individualization is ever possible. Each decision is made with reference to a perceived set of facts about an individual, his conduct and the surrounding circumstances. This set of facts is always finite. If the decision is based on a finite set of perceived facts, that set of facts \( \{F_1, F_2, F_3, \ldots, F_n\} \) generates a rule. The rule is that whenever \( F_1, F_2, F_3, \ldots, F_n \) recurs, the defendant will be acquitted. Individualization, it follows, is an illusion. Legal acquittals invariably express rules that may be followed in future cases.

The first response that this argument invites is straightforward rejection. It is simply not true, one should maintain, that every factual situation is reducible to a finite set of variables. There is an irreducible uniqueness about every case of succumbing to pressure. There could never be another case just like Green. No other convict would be just like him. No other threat would affect an actor the way the threat of rape affected him.

Yet if one generates a description of the Green situation, one can imagine the same scenario occurring at another time and place. The time, place and defendant would be different, but presumably
these facts would not matter in assessing the involuntariness of the escape. If the case can be definitively described, and the description transcends time and place, then one has no difficulty imagining the described set of facts obtaining in another context.

The individualization of excuses presupposes that each case of involuntary conduct is unique. Yet to maintain that claim, we are driven to claiming that the uniqueness consists in some feature of the case that goes beyond the factual description. The whole, one must argue, is greater than the sum of its parts: the situation of excused conduct is more than the sum of its component factors.

Yet this additional feature does not lend itself to articulation. And one of the first principles of legal decision-making is the commitment to articulating and explaining all that bears on the process of decision. One then confronts the antinomy of individualization, which resists verbal explanation, and the processes of the law, which are premised on the values of publicity and full articulation of the facts that inform decisions.

Given this conflict between legal values and the virtues of individualization, one would expect that courts would be consistently averse to deciding cases in their full peculiarity. We have already noted this aversion in the attitude of common law courts toward excusing conditions. But this attitude, surprisingly, does not pervade the thinking of American judges. One notable exception is the long line of Supreme Court cases on the admissibility of allegedly involuntary confessions. Since the late 1950's the Supreme Court has stressed that each decision should be rendered on a unique set of facts. The Court committed itself to deciding each case under the "totality of the circumstances." Though the judges specified the facts that seemed significant in each case, the decisions did not render rules that police could rely on in conducting subsequent interrogations. The personality of each individual suspect was too much a part of each case for the holding to provide a guide to interrogating other persons under other conditions. If a confession was involuntary, when offered by a foreign-born suspect after eight hours of interrogation, it might not be involuntary, if offered by a native-born first year law student. The problem of generating rules in this field was not simply a function of the multiplicity of factors. The commitment to deciding under the

"totality of the circumstances" was itself hostile to the emergence of rules about permissible police interrogation.

The way to understand the individualization of excusing conditions is to think of the process of individualization as akin to the assessment of allegedly coerced confessions in the "totality of the circumstances." In both instances, the ultimate issue is whether the conduct in question—violating the law or confessing—was undertaken voluntarily. What is so hard to fathom is that American courts can be so sensitive to individualization where the problem is the procedural fairness of relying on a confession, but so clearly averse to the same inquiry when the issue posed is the fairness of punishing a particular individual.

It is worth recalling that this line of analysis represents an effort to reply to the argument that individualization is conceptually impossible. The most that we have done is show courts can and do operate on the assumption that inquiries about voluntariness—of violating the law or of confessing—may be fitted to the "totality of the circumstances." We have not dispelled the claim that this commitment to individualization might be an illusion, and that decisions invariably reflect the perception of a finite set of factual variables. To counter that charge, we should have to argue that the whole is indeed greater than the sum of its parts, that each situation is indeed greater than the sum of its components. That would call for a much deeper critique of prevailing conceptions of rational thought. It is a critique that would require a work of much greater depth and sophistication than this limited paper on the theory of excuses.

We can, however, make a weaker claim that individualization, at least in one sense, is conceptually tenable. The argument would be that an acquittal on grounds of involuntary conduct is tied to the particular defendant. The acquittal is individualized in the sense that it fails to set a precedent that can be relied upon by other actors in the future. To appreciate this point, we should try to imagine the implications of an acquittal in a case like *Green*. Would other convicts, caught in comparable conditions of impending rape, be able to escape in the expectation that they would not be punished upon being caught? One would think not, for the fact that they expected to be immune from prosecution would partially undercut their claim that their conduct was a reactive response to impending danger. Their escape would come to appear to be attributable less to the present threat of rape and more to the promise of future immunity in the courts. On the other hand, after a conviction in a case like *Green*,
subsequent escapes would appear to be even more the product of desperation and fear. If the convict fears punishment and he nonetheless escapes to avoid an impending rape, one senses even more that his conduct is the involuntary response to the terror of the situation.

Thus, so far as the problem in *Green* is treated as a matter of excusing conduct that is not fairly subject to blame,98 the outcome of the case bears an inverse relationship to the legal situation of actors who thereafter rely on the decision. If *Green* is acquitted on grounds of involuntariness, it becomes more difficult to acquit the next convict caught in a comparable situation. If *Green* is convicted, the mere fact of the conviction lends greater credence to the claims of those who subsequently claim that they are not to blame for yielding to the pressure of circumstances. In this weaker sense, excuses are individualized; for the mere fact of publicly excusing conduct under overwhelming pressure injects a new factor into the analysis of subsequent cases.

In this respect, excusing conditions differ fundamentally from justificatory claims. For the nature of a justification, say self-defense or necessity, is that it posits a right to cause harm under a defined set of circumstances. If a court should justify, say, the shooting of a stray dog to protect children in the neighborhood, it would in effect generate a new rule of law. Should the same circumstances recur, actors in the future could rely upon the decision, and guide their conduct accordingly. Excuses, in contrast, do not modify the applicable legal rule; they relate to the subsidiary question whether a particular individual can be held accountable for violating a rule that remains intact. Yet the fact of excusing changes the array of circumstances under which similar cases are to be judged in the future.99 The difference between justifying and excusing conduct, then, proves to be the difference between a legal process that is distinct from the world to be judged (the process of justifying conduct), and a legal process

98. Recall that the problem can be assayed within the framework of necessity as a justification. See text accompanying notes 56-61 *supra*.

99. It might help in grasping this point to turn again to the coerced confession cases. Suppose that after the decision in *Spano* v. New York, 360 U.S. 315 (1959), another suspect, also 25 years old, foreign-born and as much like *Spano* as we can imagine, were interrogated in exactly the same way. The only articulable difference is that this second suspect knows of the decision in *Spano*. He confesses expecting that the confession will be held inadmissible. Under the circumstances his confession would appear to be relatively more deliberative and voluntary. The expectation of inadmissibility would counteract the factors suggesting involuntary self-incrimination.
that is symbiotically tied to the world and irreversibly alters the factual background of succeeding cases (the process of excusing).

B. THE POSITIVISTIC ARGUMENT AGAINST INDIVIDUALIZATION

As a hedge against confusing conceptual problems with policy issues, we have addressed ourselves first to the problem whether individualization is conceptually plausible. As noted, there remains the task of demonstrating the possibility of individualization in the strong sense; the proof of this stronger claim awaits the broader inquiry whether each situation may be viewed as "greater" than the sum of its factorial components. What we have shown is that individualization in a weaker sense is conceptually tenable; according to this weaker sense, decisions about involuntariness of conduct become factors in the analysis of subsequent cases based on comparable facts. Thus decisions about excuses are individualized in the sense that they are limited to a unique set of facts; the rendering and publicizing of the decision means that the same decisional context cannot arise again.

In this section of the discussion, I wish to assume the plausibility of individualization, both in the weaker and in the stronger sense. The point of making the assumption is to broaden the inquiry by reaching a range of other objections that might be made against the process of individualizing excusing conditions. The point of all these objections is to challenge the desirability of individualizing excuses, even if there is no conceptual barrier to doing so.

The first objection is that there is something characteristically "unlegal" about individualized decision-making. It might be appropriate to individualize administrative processes, like sentencing and even the exercise of prosecutorial discretion. But the rule of law presupposes decision-making under rules, and relying on rules runs against the rigours of individualization.

This is a powerful objection—one that is likely to appeal to many who would instinctively support the pattern of the contemporary common law. The argument reveals the extent to which the common law tradition identifies the phenomenon of law with the governance of rules. It bespeaks the essence of legal positivism and thus in the reply that follows, I shall refer to this strain of fidelity to rules as the positivist objection.

By way of constructing a reply to the positivist objection, we should note first that the process of individualization is not conducted
without reference to a standard of decision. The standard in the cases of excuses, as in the case of allegedly coerced confessions, is whether the individual acted voluntarily under the circumstances. Voluntariness in the context of excuses means: Is the actor culpable for having succumbed to the pressure of the situation? Or to rephrase the question: Could one fairly and reasonably expect the actor to have resisted the pressure and to have abstained from violating the law? The standard is patently evaluative. There is no way to resolve the issue of voluntariness except by appealing to our sense of what we may fairly demand of each other under specified circumstances.

There is, no doubt, something odd about the claim that an individualized decision can be made under an abstract standard, even an irreducibly evaluative standard like that of voluntariness. One is invariably puzzled by the process of reasoning from abstract standards to results in concrete cases. The process is different from applying the rules of a game or the algorithms of a computer program. It seems to be part of the legal process as we know it; yet it has yet to receive an adequate jurisprudential account.100

To meet the positivist objection at a deeper level, we should recall that the issue of excusing arises only after a determination that conduct violates the applicable legal norm. As it is formulated in German theory, the issue is whether illegal (rechtswidrige) conduct is fairly to be attributed to a particular individual. Thus one confronts an ambiguity about the legal status of excuses. In one sense, excuses are not decisions under the law (Recht), for they come to play only after one posits the illegality (Rechtswidrigkeit) of the conduct. The questions of excusing, therefore, cannot be resolved by appealing to criteria of the law; for those criteria have already applied in finding the conduct to be contrary to law.

Yet there is a broad sense of law and the legal process that seemingly encompasses the process of excusing. Excuses bear on guilt or innocence; the decision whether to excuse or not is a necessary stage in determining liability under the law. Thus one comes to see that the process of excusing and assessing blame occupies a hiatus between

two concepts of law. Law in the narrow sense consists solely of the norms prohibiting conduct and laying down the conditions of justified, legal conduct. Law in the broad sense consists of the full range of criteria bearing on liability. It is in this hiatus that one seeks to individualize the judgment of liability by focusing on the individual and his personal culpability for violating a legal norm.

The thrust of the positivist objection is to banish this hiatus from the province of the law. For when it is banished, the sovereign of norms comes to rule over the entire kingdom. Once expelled, individualized determinations of culpability inhabit extra-legal domains. They are to be found in the discretionary processes of sentencing, pardoning, arresting and choosing to prosecute. The reply to the positivist objection turns on seeing that these borderland and admittedly individualized processes are part of the law itself. The task of the theory of excuses is to bring them within the law, and thus to provide a public and visible forum for the process of individualized assessment in the criminal law. There is no doubt that one can achieve individualization in the surrogate settings of prosecutorial charging, sentencing and pardoning. But every legal system, one would think, should be committed to maximizing that aspect of the criminal process that is public and subject to reasoned argumentation.

The positivist objection expresses a preference for a minimalist concept of law, a commitment to the dominance of rules, which leaves a maximum array of problems to be resolved in semi-secret, administrative processes. Though the prosecutorial bureaucracy may be the beneficiary of the positivist objection, it is hardly its author. There are many other biases of the age that militate against an expanded concept of law, a concept of the legal process that would encompass individualized excusing conditions as well as norms of conduct.

One of these biases is an empiricist preference for identifying the law with the collection of discrete official decisions of the system. As generations of Holmes' followers have learned to think. There is no law out there

101. For a good example of this empiricist frame of mind, see Glazebrook, *The Necessity Plea in English Criminal Law*, 30 CAMB. L. J. 87, 108 (1972), in which the author defines a criminal offense to be "the total effect of the judicial decisions determining the extent of criminal liability in respect of a particular type of conduct."

102. As Holmes originally put it: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." *Holmes, The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897). Cf. K. LLEWELLYN, BRAMBLE BUSH 12 (1930) (defining the law as what "officials do about disputes.")
hovering over us as a "brooding omnipresence in the sky." Yet the German dualist sense for the legal process presupposes that one can perceive the violation of a norm, even though that violation has no practical consequences. The violation is sensed, but it has no pragmatic manifestation. It is like a right without a remedy. As Anglo-American lawyers have difficulty conceiving of unenforceable violations of the criminal law.

An even deeper bias that buttresses the positivist objection is the commitment to policy analysis, particularly as it is expressed in American legal circles. The relentless emphasis on policy objectives has created a condition of mind that sees the rationale of judicial decisions only in their consequences. A decision is right if and only if its prospective benefits outweigh its prospective burdens. What is lost in this unqualified embrace of the utilitarian calculus is a sense for the imperatives implicit in the situation of the parties before the court. The imperatives of a situation command our attention, not because our response will maximize utility, but because we have no choice but to respond to the perceived demands of justice. Why do we recognize the constitutional right to a hearing in a criminal case? It is not because we believe that providing hearings will redound to the long-range benefit of society. We affirm a right to a hearing in a criminal case because, as human beings, we know what it means to suffer condemnation and punishment, and we can imagine the torture of being tried and convicted without the opportunity to answer the accusations against us. Once we identify with the criminal defendant and grasp that he is one of us, we cannot but affirm his right to a hearing. We respond to the imperative, not because it will inure to society's benefit, but because we know that not responding will betray what is human within us.

Excuses do not express policy goals. They respond to an imperative generated by the defendant's situation. Excuses are not levers for channeling behavior in the future, but an expression of compassion for one of our kind caught in a maelstrom of circumstance. If we

104. At least in Powell v. Alabama, 287 U.S. 45, 68 (1932), the Court based its analysis of a right to a hearing on what it perceived to be an "immutable principle of justice," rather than on the contingent predicted benefits of allowing defendants to be heard. From its perception of the right to a hearing the court inferred the now well developed right to counsel in state criminal trials.
sense that we would escape from prison to avoid a homosexual rape, do we have any choice but to acquit an escapee like Green? Should it matter whether the net impact of acquitting Green might be to undermine discipline in the prisons and produce a net social loss? Yet so long as we think of law as the pursuit of policies, we are inclined to think the probable consequences of our decision ought to mediate our sense of justice to the individual accused. The instrumentalist bias of the times thus converts the doing of justice into one among many policies, to be weighed and assessed along with the value of maintaining discipline in the prisons. This way of thinking about justice is so well entrenched in contemporary American legal thought that most students of the law find it hard to conceive of justice or compassion as an imperative, a demand to which we must respond without a view to the overall costs of our response.

There may be no compelling way to dispel the biases of empiricism and instrumentalist legal reasoning. There may be no definitive reply to the positivist preference for a legal system based on rules. The process of objection and reply must end with a sigh of resignation rather than the exhilaration of victory. The positivist can parry our every thrust. Yet his agile swordplay betrays a master we may not wish to accept. He serves a sovereign who rules from above and dominates his subjects with rules. If there is tolerance for individual weakness it is expressed in the processes of charging, sentencing, and pardoning. Yet the quest for a government of equals may lead us to reject a system of justice that depends so heavily on prosecutorial discretion and executive mercy. We may yet come to see the virtue of incorporating criteria of compassion into the criminal law. We shall then choose a public system of excuses instead of a semi-secret system of administrative grace. And then we shall understand that individualizing excuses complements rather than detracts from the rule of law.