The Right and the Reasonable

George P. Fletcher
Columbia Law School, gpfrecht@gmail.com

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship

Part of the Civil Law Commons, and the Common Law Commons

Recommended Citation
As the common law relies on the concept of "reasonableness," the civil law relies on the concept of "Right." Professor Fletcher argues that reliance on reasonableness enables the common law to develop rules that can be voiced in a single standard. Such rules permit what Professor Fletcher terms "flat" legal thinking. In contrast, the civil law's reliance on the concept of Right leads it to develop rules that proceed in two stages: the first rule asserts an absolute right; the second, a limitation based upon criteria other than Right. The application of such rules proceeds by what Professor Fletcher terms "structured" legal thinking. Professor Fletcher demonstrates how the common law's predilection for reasonableness and flat legal thinking has led it to ignore fundamental distinctions in the criminal law, such as that between self-defense and putative self-defense. He concludes that the preference for reasonableness is the expression of a pluralistic legal culture; the concept of Right, the expression of a monistic one.

We lawyers should listen to the way we talk. If we paused to listen to our pattern of speech, we would be surprised by some of its distinguishing features. One of the most striking particularities of our discourse is its pervasive reliance on the term "reasonable." We routinely refer to reasonable time, reasonable delay, reasonable reliance, and reasonable care. In criminal law, we talk incessantly of reasonable provocation, reasonable mistake, reasonable force, and reasonable risk. Within these idioms pulse the sensibilities of the reasonable person. For all the supposed concreteness of the common law, we can hardly function without this hypothetical figure at the center of legal debate. We cannot even begin to argue about most issues of responsibility and liability without first asking what a hypothetical reasonable person would do under the circumstances.

Our reliance on reasonableness is noteworthy because it distinguishes our legal discourse from legal discourse in other cultures. The fact is that French, German, and Soviet lawyers argue in a different idiom. Their languages deploy a concept of reason, and their terms for "reason" — raison, Vernunft and razumnost — readily yield corresponding adjectives. Yet these parallels to our term "reasonable" do not figure prominently in legal speech on the continent. The

* Professor of Law, Columbia University School of Law.

An earlier version of this paper received careful consideration both at a Columbia law faculty workshop and at a conference on criminal theory held in July 1984 in Freiburg, West Germany. I am indebted, in particular, to Meir Dan-Cohen, Harold Edgar, Albin Eser, Kent Greenawalt, and Günter Stratenwerth for thoughtful comments.

1 The Uniform Commercial Code, the Model Penal Code, and the various restatements couple the adjective "reasonable" and the adverb "reasonably" with over 100 different words. One example of this is the phrase "reasonable force," which appears in Restatement (Second) of Torts §§ 65(1), 77, 97, 101, 147(2), 150 (1965).
French civil code uses the term *raisonnable* precisely once;\(^2\) the German and Soviet civil codes do not use the term at all.\(^3\) The criminal codes — the natural habitat of the reasonable person — are barren of these derivatives of reason.\(^4\) In the civil codes, we see a variety of standards of care: in France, the conduct expected of a *bon père de famille*;\(^5\) in West Germany, the “care necessary in the particular transaction”;\(^6\) and in Soviet legislation, “foreseeing a socially dangerous consequence that one should have foreseen.”\(^7\) Reasonable mistakes are also treated in a different lexicon. The adjectives describing a faultless mistake in these languages do not translate as “reasonable” but as “invincible,”\(^8\) “unavoidable,”\(^9\) and “non-negligent.”\(^10\) All these emanations of the reasonable person find diverse translations in continental legal discourse, a distinct word for every context.

In continental Europe, neither the adjective “reasonable” nor the figure of the “reasonable person” matters much in casting a legal argument. Whatever we sense as the common denominator underlying “reasonable reliance” and “reasonable mistake” is lost in continental legal debate. Whether we think differently from our European counterparts is not so easily assayed. That we speak differently, however, is quite clear.

In my view, it is no accident that we pervasively rely upon the concept of reasonableness while Europeans do not. This pattern of our speech serves a purpose, perhaps many purposes. I will consider some of these possible purposes and then bring the analysis to bear on the specific problem of reasonable mistakes in the criminal law.

I. TWO STYLES OF LEGAL REASONING

How should we go about developing an account of the common law’s affection for reasonableness? I suggest that we listen carefully

\(^2\) CODE CIVIL [C. CIV.] art. 1112 (Fr.) (defining undue influence on a party to a contract by appealing to the impressions of *une personne raisonnable*).

\(^3\) See BÜRGERLICHES GESETZBUCH [BGB] (W. Ger.); CIVIL CODE (RSFSR) (the Russian Socialist Federal Soviet Republic code serves as a model for those of the other Soviet republics).

\(^4\) See STRAFGESETZBUCH [STGB] (W. Ger.); CRIMINAL CODE (RSFSR).

\(^5\) C. CIV. art. 1137 (an obligation to oversee a chattel in one’s charge entails a duty to exercise the care of a *bon père de famille* — literally, “good father of the family”); cf. CODICE CIVILE [C.C.] arts. 1001, 1176 (Italy) (using the analogous term in Italian — *buon padre di famiglia*).

\(^6\) BGB § 276 (defining negligence as the failure to exercise *die im Verkehr erforderliche Sorgfalt*).

\(^7\) CRIMINAL CODE (RSFSR) § 9.

\(^8\) G. STEFANI & G. LEVASSEUR, DROIT PÉNAL GÉNÉRAL 316 (9th ed. 1976). But note that this passage also refers to mistakes that any *homme raisonnable et prudent* would have made under the circumstances.

\(^9\) STGB § 17 (literally, the actor lacks “culpability” if he “could not avoid” his mistake about a legal prohibition).

THE RIGHT AND THE REASONABLE

1985] 951
to the way in which French, German, and Soviet lawyers discuss legal issues. We should heed not only the language of legislation and of judicial opinions, but also the style of argument in textbooks, treatises, and the theoretical literature. Our aim in this empirical quest should be to isolate features of European discourse that are as prominent in their context as our pervasive reliance on reasonableness. Limiting our inquiry to German legal discourse, we find a number of terms — not readily translatable — that figure almost as prominently in legal German as does reasonableness in legal English. Consider the terms Treu und Glauben (good faith and fair dealing), Recht (objective Right), Rechtsmissbrauch (abuse of personal rights), and Zumutbarkeit (fair expectability). Whether one of these terms is as significant in German discourse as reasonableness is in English does not depend on frequency alone. The question is whether one or more of these terms signals a deeper, structural feature of German legal thought.

The argument in the offting is that the concept of Right (Recht) shapes German legal thought as reasonableness directs common law reasoning. In order to develop this argument, I need first to introduce and clarify a distinction between two types of legal discourse, which, for want of better terms, I shall call "flat" and "structured." Flat legal discourse proceeds in a single stage, marked by the application of a legal norm that invokes all of the criteria relevant to the resolution of a dispute. Structured legal discourse proceeds in two stages: first, an absolute norm is asserted; and second, qualifications enter to restrict the scope of the supposedly dispositive norm.

This distinction is readily grasped in context. Consider the problem of imposing limits on the right to use force in preventing encroachment on one's rights. German law approaches this problem in

11 See BGB § 242 (establishing the general principle that obligors must fulfill their obligations according to the dictates of Treu und Glauben). This provision has become the source of a general jurisprudence of equity and reciprocal fairness in the execution of contractual relationships.

12 On the distinction between Recht and Gesetz and its significance, see 4 W. FIKENTSCHER, METHODEN DES RECHTS 328 (1977), and Fletcher, Two Modes of Legal Thought, 90 YALE L.J. 970, 980-84 (1981).

13 Although the Bürgerliches Gesetzbuch never uses the word Rechtsmissbrauch, and the Code civil never uses the phrase abus de droit, these doctrines limiting the exercise of private rights are clearly recognized in both German and French law. See, e.g., 1 L. ENNECERUS, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS 1439-43 (H. Nipperdey rev. 15th ed. 1959); Ebrü, Rechtsmissbrauch und funktionsmässige Rechtsausübung im Westen und Osten, 6 ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG 30, 39-40 (1965); Gutteridge, Abuse of Rights, 5 CAMBRIDGE L.J. 22 (1935).

14 See StGB § 35(1) (a wrongful act will not be excused on grounds of necessity or duress if abstention from that act is "fairly expectable" under the circumstances).

15 The term "flat" may strike some readers as pejorative. It is hard to find a neutral term. Professor Albin Eser of Freiburg, West Germany, has usefully suggested to me the term "holistic" to capture the self-contained quality of flat legal reasoning. Yet "holistic" seems too mystical and thus, for some, too approving.
the style of structured legal discourse. According to the criminal code of 1975\textsuperscript{16} (as well as the superseded code of 1871\textsuperscript{17}), everyone who suffers an unjustified invasion of her rights has an absolute privilege to use whatever force is necessary to thwart the invasion. If the only way to stop a fleeing thief, even a child stealing fruit, is to shoot the thief, the courts\textsuperscript{18} and the scholars\textsuperscript{19} have supported the property owner's right to use deadly force. Countering this trend, some postwar commentators\textsuperscript{20} and courts\textsuperscript{21} have invoked the principle of "abuse of rights" to limit this right at a second stage of analysis.\textsuperscript{22} At the first level, there remains an absolute right to use deadly force when necessary; at the second level, the exercise of that right comes under scrutiny. If the right is exercised at excessive cost, it is thought to be "abused" and therefore inoperative. Nothing in the criminal code supports this restriction. Nonetheless, the method of structured legal thought permits an additional level of argument, a level where extra-statutory considerations can limit the explicit provisions of the code.

\textsuperscript{16} STGB § 32.
\textsuperscript{17} STGB § 53 (repealed in 1975).
\textsuperscript{18} See, e.g., Judgment of Sept. 20, 1920, Reichsgericht, Ger., 55 Reichsgericht in Strafsachen [RGSt] 82. The defendant shot and wounded fruit thieves. The Supreme Court affirmed the acquittal, reasoning that Right should prevail "in the struggle against anti-Right." \textit{Id.} at 85.
\textsuperscript{19} See, e.g., Himmelreich, \textit{Nothilfe und Notwehr: insbesondere zur sog. Interessenabwägung}, 21 \textsc{Monatsschrift f"ur Deutsches Recht} 361, 363–64 (1967); Stratenwerth, \textit{Prinzipien der Rechtferichtigkeit}, 68 \textsc{Zeitschrift f"ur die gesamte Strafrechtswissenschaft} 41, 60 (1956) (noting that the dominant scholarly opinion in Germany rejected balancing the interests of the victim against those of the aggressor).
\textsuperscript{20} See, e.g., Baumann, \textit{Rechtsmissbrauch bei Notwehr}, 16 \textsc{Monatsschrift f"ur Deutsches Recht} 349 (1963); Schaffstein, \textit{Notwehr und Güterabwägungsprinzip}, 6 \textsc{Monatsschrift f"ur Deutsches Recht} 132, 135 (1952). Some current treatises and textbooks are noncommittal about the grounds for limiting the right of self-defense. See, e.g., H. Jescheck, \textsc{Lehrbuch des Strafrechts} 279 (3d ed. 1978); K. Lackner, \textsc{Strafgezetzbuch} 175 (15th ed. 1983).

One commentator has rejected "abuse of right" as too vague a formulation, arguing that the limitation on the right of one family member to use necessary force in self-defense against another should be based on a theory analogous to the duty to aid a family member in distress. K. Marxen, \textit{Die "sozialethischen Grenzen der Notwehr} 57 (1979) (making an analogy to STGB § 13). This theory also proceeds in two stages: first, a recognition of the absolute right to use defensive force and, second, a duty to forgo rightful force in light of a relationship with the aggressor.

\textsuperscript{21} See Judgment of Jan. 22, 1963, Oberlandesgericht, Bavaria, 16 \textsc{Neue Juristische Wochenschrift} [NJW] 824. The defendant attempted to frighten a woman out of a parking spot by driving toward her. On the defendant's plea of self-defense, the court found that although the driver had a right to the parking spot, he had used a degree of force that was excessive and therefore an "abuse of right". This doctrine was invoked more recently in Judgment of Nov. 24, 1976, Oberlandesgericht, Hamm, 30 NJW 590, 592.

\textsuperscript{22} Some writers favor a limitation on self-defense without utilizing a two-stage analysis. They derive such a limitation directly from the statutory condition in STGB § 32 that self-defense be required (\textit{geboten}) under the circumstances. See Lenckner, "\textit{Gebotensein}" und "\textit{Erforderlichkeit}" der Notwehr, 1968 \textsc{Goltzamner's Archiv f"ur Strafrecht} 1; Roxin, \textit{Die "sozialethischen Einschr"ankungen" des Notwehrrechts}, 93 \textsc{Zeitschrift f"ur die gesamte Strafrechtswissenschaft} 68, 79 (1981).
In contrast, common law discourse typically avoids this bifurcation. We have no inclination to say, first, that the defending party has an absolute right to use all force necessary to vindicate his autonomy, and second, that invoking this right in particular circumstances would abuse it.\footnote{23} The advantage of the single term "reasonable" is that it packs into the initial norm criteria that are the same as or similar to those invoked in assessing "abuse of rights" at a secondary level of argument. The upshot of collapsing the two dimensions of argument is that the privilege of self-defense is no longer absolute. It is limited at the outset by the concept of reasonableness.

The structured style of legal argument is also expressed in the limitations imposed on the use of private property. At the first level of argument, private property is asserted to be absolute; at the second level, the right to use one's property is "abused" if others are affected too adversely.\footnote{24} Like the two-level analysis of self-defense, this structure collapses into one principle: everyone has the right to the reasonable use of his or her property.\footnote{25}

In view of this account of structured and flat legal thinking, we can see that our reliance on reasonableness facilitates flat legal thinking. With syntactically mobile modifiers like "reasonable" and "substantial," each rule of the common law can contain placeholders for everything that one needs to know to resolve a particular problem. Of course, the addition of open-ended modifiers sacrifices both the apparent precision and the apparent absoluteness of the stated rule. But a sophisticated American lawyer would presumably respond that these ostensible virtues of German law are illusory and that it is better to work with vague and qualified, but at least non-deceptive, legal norms. Structured and flat legal analysis each have their appeal. If they did not, they would hardly find expression in two of the world's leading legal cultures. Though my sympathies lie with the clarity gained from structured legal analysis, my primary purpose here is to probe the rhetorical and substantive differences expressed in these diverse modes of legal thinking.

Before turning to other examples drawn from American and Ger-
man law, let me qualify the present state of the argument with two points. First, the thesis as presently stated represents but the first approximation of a full account of the common law attachment to reasonableness. There is more to be said in refining the argument, particularly by way of connecting the concept of reasonableness with the basic ideas of German legal theory. Second, the concept of reasonableness is not the only factor that facilitates flat legal thinking in the common law. Other open-ended modifiers such as “substantial” permit us to formulate norms that incorporate unarticulated qualifying criteria into the statement of the rule.

A. Justification and Excuse

Let us now look at the way in which our ubiquitous invocation of the reasonable person enables us to function without the fundamental distinction between justification and excuse. This distinction is basic in German criminal law. It was also indispensable to the common law of homicide as understood by Blackstone. Today, however, only those common law theorists who read and respect the philosophical literature have high regard for the distinction.

The distinction between justification and excuse is not particularly difficult to understand. Claims of justification concern the rightness, or at least the legal permissibility, of an act that nominally violates the law. If generally impermissible conduct is justified on grounds, say, of self-defense, lesser evil, consent, or the interests of law enforcement, the act is one that ought to prevail in a situation of conflict. No one is entitled to defend against a justified act, and third parties are permitted, indeed encouraged, to assist the justified actor.

Excuses speak not to the rightness or desirability of the act but to the personal culpability of the actor. Excuses come into consideration only if it is first decided that some untoward (wrongful or unlawful) act requires excusing. If an excuse, such as insanity, involuntary

26 Blackstone defined murder as “all homicide . . . , unless where justified by the command or permission of the law; excused on a principle of accident or self-preservation; or alleviated into manslaughter.” 4 W. BLACKSTONE, COMMENTARIES *201. The reliance on these common law categories survives in criminal codes enacted in the nineteenth-century, such as CAL. PENAL CODE §§ 187–199 (West Supp. 1985).


28 In an important recent article, Kent Greenawalt challenges the notion that one may infer from society's approval of an act the rights of other parties either to resist or to assist the act. See Greenawalt, The Perplexing Borders of Justification and Excuse, 84 COLUM. L. REV. 1897, 1919–21 (1984).

29 This conceptual precondition of excusing is apparent in the American Law Institute's increasingly influential definition of insanity as an actor's lack of “substantial capacity . . . to appreciate the criminality [wrongfulness] of his conduct.” MODEL PENAL CODE § 4.01(1) (Pro-
intoxication, duress, or mistake of law, applies in the case, the untowardness of the act remains unchallenged. Yet the excuse implies that the actor is not personally to blame for the untoward act. Claims of justification direct our attention to the propriety of the act in the abstract; claims of excuse, to the blameworthiness of the actor in the concrete situation.

The distinction between justification and excuse is of fundamental theoretical and practical value. In framing a theory of liability or a rational criminal code, one would presumably inquire whether a particular defense addresses itself to the propriety of the act or to the personal culpability of the actor. Yet the distinction has gone unmentioned in most of the English language textbooks of the last hundred years. The indifference to the distinction emerges clearly in the recently published, four-volume Encyclopedia of Crime and Justice, edited by Sanford Kadish. This work captures orthodox American sentiments toward criminal law as well as any document of the last two decades. Virtually everyone active and prominent in the field has contributed an article on some issue of criminal justice. The articles are not particularly original, nor are they meant to be. They are designed to reflect the way the American professoriat thinks about criminal law, criminal procedure, and related fields in the early 1980s. The Encyclopedia provides a window to orthodox thinking on these issues.

True, the Encyclopedia does acknowledge recent philosophical work in structuring the defenses that bear on liability. But a surprising number of articles pay no attention to how particular defenses might be construed differently if treated as justifications, excuses, or jurisdictional exemptions from liability. George Dix writes about self-defense without addressing the question whether the function of the defense is to justify aggressive conduct or merely to excuse it. Yet

---

30 The finding of "not guilty by reason of insanity" implicitly affirms the "wrongfulness" or "criminality" of the act. See supra note 29. Unless the act is wrongful, it would be incoherent to say that the actor lacked capacity to appreciate the wrongfulness of his act.

31 The Model Penal Code does distinguish between claims of justification and other defenses, see MODEL PENAL CODE art. 3; but these "other" defenses are dispersed between article 2 (duress, mistake) and article 4 (insanity).

32 See, e.g., W. LaFave & A. Scott, supra note 23, at 356 - 413 (using "justification" and "excuse" interchangeably); J. Smith & B. Hogan, CRIMINAL LAW 155-211 (4th ed. 1978) (ignoring distinction in discussion of "general defenses").

33 ENCYCLOPEDIA OF CRIME AND JUSTICE (S. Kadish ed. 1983) [hereinafter cited as ENCYCLOPEDIA].

34 See Fingarette & Hasse, Excuse: Intoxication, in 2 ENCYCLOPEDIA, supra note 33, at 942; Fletcher, Justification: Theory, in 3 ENCYCLOPEDIA, supra note 33, at 941; Fletcher, Excuse: Theory, in 2 ENCYCLOPEDIA, supra note 33, at 724; Morawetz, Justification: Necessity, in 3 ENCYCLOPEDIA, supra note 33, at 957.

35 Dix, Justification: Self-Defense, in 3 ENCYCLOPEDIA, supra note 33, at 946. Although the
the case law on self-defense contains strains of both theories;\(^3\) and one would analyze particular issues, such as third-party defense\(^3\) and the duty to retreat,\(^3\) differently depending on whether the rationale of the defense is taken to be one of justification or of excuse. Martin Levine, who otherwise writes thoughtfully about duress, passes too quickly over the relevance of justification and excuse.\(^3\) In arguing for the extension of duress to homicide cases, he neglects to analyze how the resolution of that issue depends on whether duress is classified as a justification or an excuse.\(^4\) Abraham Goldstein writes about insanity,\(^4\) but fails to discuss whether the defense functions as a jurisdictional exemption from liability, by analogy to infancy, or as an excuse from liability, by analogy to involuntary intoxication.\(^4\) Steven Duke surveys the law of superior orders,\(^4\) but with indifference to the basic and rich question whether reliance on superior orders serves to justify the conduct or merely to excuse it.\(^4\)

Editors classified self-defense as a justification, there is no evidence that this judgment affected the writer's thinking about the issue. The same criticism applies to the articles cited in notes 39, 41 & 43.

\(^3\) See G. Fletcher, Rethinking Criminal Law 856–58 (1978).

\(^4\) If self-defense is a justification, the right to use force is readily universalized ex ante to include anyone in a position to intervene; if it is an excuse, the defense is applied ex post exclusively on behalf of the defender. See id. at 868–69.

\(^3\) If self-defense is regarded as a justification because it vindicates autonomy, the duty to retreat is not likely to apply; if self-defense is merely an excuse, then retreat is a precondition to establishing that the defender had “his back to the wall” and “had to kill.” See id. at 864–68.

\(^4\) Levine, Excuse: Duress, in 2 Encyclopedia, supra note 33, at 729. More than other writers criticized in this Section, Levine recognizes the conflicting rationales for a defense, some justificatory and others excusatory in nature. See id. at 729–30. He blurs the distinction, however, by assuming that characterizing duress either as a justification or as an excuse would support extension of the defense to homicide cases. Id. at 731. As a result, he fails to appreciate the need to conceptualize duress as an excuse if one is to apply the defense even in cases of killing an innocent person. See infra note 40.

\(^4\) Justifying the taking of innocent life ex ante is virtually impossible for anyone except a thorough-going utilitarian; in contrast, excusing the killing ex post does not violate a moral commitment to the sanctity of human life. See Lynch v. Director of Pub. Prosecutions, [1975] 1 All E.R. 913, 930 (H.L.) (recognizing, in the case of a defendant who aided and abetted IRA assassination, that the presence or absence of duress is a question of fact for the jury).

\(^4\) Goldstein, Excuse: Insanity, in 2 Encyclopedia, supra note 33, at 735.

\(^4\) If insanity functions as an exemption from jurisdiction in the same way that infancy does, see H. Packer, The Limits of the Criminal Sanction 134–35 (1968), it should be considered prior to the proof of the wrongful act; if insanity is an excuse, its consideration presupposes proof of a wrongful act. See G. Fletcher, supra note 36, at 856–39; supra notes 29–30.

\(^4\) Duke, Excuse: Superior Orders, in 2 Encyclopedia, supra note 33, at 745.

\(^4\) Whether acting under superior orders is conceived of as a justification or as an excuse might affect the following issues: (1) whether the party victimized by the ordered act has a right to resist; (2) whether third parties not given orders have a right to assist the defendants given orders; and (3) whether, under German law StGB § 17, the ordered defendant's unavoidable belief that the order is lawful is an excusable mistake of law. German law treats the issue of lawful orders as a problem of justification. See A. Schönke, H. Schröder, & T. Lenckner,
writes of recent American developments in mistake of law, but fails to analyze the plausible analogies between mistake of law and other excuses for violating the law.

There are two perspectives from which one might assess the indifference of these five established scholars to the theory of justification and excuse. If I were to engage one of them in debate, I would argue that his analysis of the particular defense is superficial. It fails to grapple with the theoretical and practical implications of explicating the basic rationale for the particular defense. The analysis of all five issues — self-defense, duress, insanity, superior orders, and mistake of law — is enhanced by probing whether the defense sounds in the theory of justification, of excuse, or possibly of jurisdiction (as might be the case with insanity). It appears that these five writers simply fail to respond to available arguments in the field. One has the same reaction to them as one would have to an article written today about tort theory that failed to acknowledge the implications of the economic analysis of law.

It is possible, however, to assume a posture of detachment toward the implicit orthodoxy of the Encyclopedia and to view these articles as a phenomenon of intellectual history. The question that arises, then, is not whether they are right or wrong, sophisticated or unsophisticated, but a question of a different order: how do these writers analyze the criminal law without attending to a distinction that both German theorists and contemporary American analytic philosophers regard as fundamental? My answer to this query will take us back to the point of departure: the pervasive reliance in American law on the concept of reasonableness and flat legal thinking. Yet we need first to clarify the difference between cultivating distinctions and structuring legal thought.

B. Structured Argument

Distinctions do not themselves generate structured legal thinking. One could, for example, follow J.L. Austin in cultivating the conceptual line between mistakes and accidents. This would lead us to perceive two strands of negligence. One form of negligence would consist in causing harm by faultful accident; the other, in acting on the basis of a faultful misperception of the world. Yet these distinct

---

46 The analogy is important, for it explains why the mistake of law must be made without fault in order to count as a good defense. *See* G. FLETCHER, *supra* note 36, at 707-12, 736-49.
47 *See* sources cited *supra* note 34 and *infra* note 48.
48 *See* Austin, *A Plea for Excuses*, 57 *PROC. ARISTOTELIAN SOC'Y* 1, 10-11 (1956).
tracks of analysis would not yield a lexical ordering, an insistence that one dimension of the argument precede another.

How, then, does the distinction between justification and excuse generate a structured form of legal argument? This is not so easily perceived, for in fact, the importance of the distinction lies in its mirror image: in the affirmative concepts negated by each claim. A justification negates an assertion of wrongful conduct. An excuse negates a charge that the particular defendant is personally to blame for the wrongful conduct. Although the defendant might have intentionally acted in violation of the law, he is not personally to blame for an unjustified violation if he acted under duress, while insane, or under certain types of mistake about the law. The structure that is implicit in this way of stating the analysis of liability ("excuses for unjustified violations") is that the concept of wrongful conduct logically precedes the concept of personal culpability. The analysis of justification must precede the analysis of excuse.

The question that properly engages us, therefore, is whether this ordering of the issues is logically compelled. In analyzing a problem of liability, might one not first consider an allegation of excuse, say of insanity or involuntary intoxication, and later a problem of self-defense or justified use of force in making an arrest? Why should not the issue of responsibility (as American lawyers often label the issue of personal blameworthiness) be the very first issue considered in analyzing liability?

For German lawyers, it seems natural to consider the issue of wrongfulness and then of responsibility (a W/R ordering). German textbooks do not even pause to justify the ordering. Yet even if we accept a clear distinction between the issues of wrongfulness (the absence of justification) and of responsibility (the absence of excuse), two other logical relationships between these issues are possible. It might be the case either (1) that one must inquire into responsibility before wrongfulness (an R/W ordering), or (2) that no ordering of the two sets of issues is compelled. The latter possibility reflects the orientation of flat legal thinking. Consistently with my general thesis, I will attempt to show that an aversion to all ordering characterizes the orthodox American view toward analyzing criminal liability. First, however, I wish to consider the possibility of an R/W ordering and then account for the acceptance of the W/R ordering as a matter of course in German law.

1. The R/W Ordering. — There is some support in the common law tradition for the logical priority of the issue of responsibility over

---

49 Rawls appears to have coined this term in J. Rawls, A Theory of Justice (1971), in which he defines "lexical order" as "an order which requires us to satisfy the first principle before we move on to the second, the second before we consider the third, and so on." Id. at 422–23.

50 For development of this point with regard to insanity, see notes 29–30.
the issue of wrongdoing. The first issue for consideration should be whether the defendant is an addressee of the applicable legal norm. If an infant, the defendant is not a subject of the norm. If he is psychotic, or if, in the language of the common law, he behaves like a "wild beast," he should be treated like an infant — as someone who falls outside the scope of the criminal law. The analogy holds, more or less, for the criminally insane. But it is difficult to make the same claim for duress, involuntary intoxication, and mistake of law. Nonetheless this approach of the common law is still on the statute books. Section 26 of the California Penal Code lists six categories of persons who are not "capable of committing crimes." The first two categories are infants and idiots. The last four are defined as follows:

Three — Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent.

Four — Persons who committed the act charged without being conscious thereof.

Five — Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.

Six — Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe that their lives would be endangered if they refused.

The contents of categories three, five, and six obviously diverge from the subject of the provision: persons incapable of committing crimes. The issues of mistake, accident, and duress speak not to the questions of the capacity of the actor, but to the way in which an act is performed. Those who invoke these excuses are unquestionably "capable of committing crimes," but they cannot fairly be held accountable for the particular act at issue.

There are some traces of an R/W ordering in the common law, but as the California Code indicates, this ordering treats responsibility as equivalent to the general issue of personal capacity. If, in contrast,

52 Id.
53 The adjudication of strict liability claims might appear to entail an R/W ordering, but this is because strict liability dispenses with the question of wrongdoing altogether. See, e.g., Western Geophysical Co. of Am. v. Mason, 240 Ark. 767, 402 S.W.2d 657 (1966) (liability for blasting accident); RESTATEMENT (SECOND) OF TORTS § 520A (1977) (liability for ground damage due to airplane crashes). Activities subject to strict liability in tort are socially acceptable and nonenjoinable. One might also attempt to interpret strict criminal liability as an affirmation of responsibility without wrongfulness. See, e.g., United States v. Dotterweich, 320 U.S. 277 (1943). Yet, although one might construe tort liability as a nonjudgmental tax on doing business, criminal punishment is designed to condemn violations of the law. If a violation is not wrongful, it is hard to see the point of criminal condemnation.
responsibility is negated by excuses, then a finding of wrongful conduct logically precedes the consideration of possible excuses. This is the conceptual relationship that I shall now try to explicate.

2. The \( W/R \) Ordering. — The analysis of justificatory claims logically precedes the consideration of excuses only if the corresponding affirmative concepts are ordered in the same way: \( W/R \), with responsibility (R) understood as referring not to the actor's general capacity, but to his culpability or blameworthiness for engaging in a particular act. Two arguments support the logical priority of wrongdoing over responsibility. The first is conceptual and draws on the implicit meaning of "excusing."

Excuses make sense only in the context of precluding blame and thus presuppose the possibility of blame. It makes no sense to "excuse" natural events such as a rainfall or an avalanche; these events raise no question of blame because there is no person to be held responsible. Nor do excuses perform their function when applied to beneficial acts, because again there is nothing to blame and therefore nothing to excuse. It would thus seem that the inquiry about blame and excuses is limited to harmful human acts. There must be something untoward for which the actor can coherently be blamed.

Among human actions, only those that warrant a prima facie negative evaluation require our attention. In the specific case of legal violations, a prima facie negative evaluation follows from the breach of a legal prohibition. This prima facie evaluation is subject to rebuttal in cases of justification. If the violation is justified, say on grounds of self-defense, lesser evils, or consent, the act is, on balance, right and good. It no longer has the negative evaluation necessary to render excuses relevant. There would be no more point in blaming or excusing a justified act than there would be in blaming or excusing a beneficial act. The justification sanctifies the act and renders excuses irrelevant.

All of this is plausible, one might concede, but it does not prove that the analysis of justificatory claims logically precedes the analysis of excuses. Why not consider the issues in this order: (1) violation of a statutory prohibition; (2) blame and excuse; and then (3) possible justification? This is a sensible challenge that poses the problem whether the violation of a statutory prohibition and the negative evaluation that it implies are sufficient, without a finding of wrongdoing, to make excusing a relevant issue. If so, it would be plausible to consider the excusability of a violation prior to its justifiability.

This argument has particular force so far as our criminal statutes conform closely to our moral norms. Because violations of these statutes carry strong negative implications, excuses can then come into play. Implicitly, this is to argue that the violation of a morally sound prohibition raises a strong presumption of wrongful conduct. Yet, this presumption is subject to refutation by a claim of justification.
If the violation of the prohibition and the question of justification both bear on the wrongfulness of the act, it makes little sense to split the issues and consider them, respectively, at the first and third stages of the inquiry. As a matter of legal bookkeeping, one might consider claims of excuse prior to those of justification. But a method conforming to the logical structure of the matter would first consider all issues bearing on the negative assessment that renders both blaming and excusing relevant.

So far, the argument for the logical priority of wrongdoing has proceeded as a conceptual inquiry. The claim has been that the W/R ordering inheres in the nature of excusing. A second argument derives from retributive theories of punishment. These theories — as opposed to those that stress social protection — hold, simply, that punishment should be imposed for wrongdoing. Retribution requires that offenders be punished for their wrongs in order to rectify the imbalance represented by the unpunished wrong. The manner in which the punishment counterbalances the wrong might be mystical in the Hegelian sense. It might follow from the Kantian approach of universalizing the wrong. Or it might take on the modern slant one finds in the work of Herbert Morris: the punishment rectifies the maldistribution of benefits and burdens brought about by the commission of the crime. In each type of retributive theory, the primary issue is wrongdoing. The gravity of the wrong determines the maximum severity of the punishment. The punishment might be reduced in case of partial blameworthiness, or eliminated in cases of blameless or excused conduct. The need to consider wrongfulness before responsibility follows from the structure of retributive thinking. The first inquiry is whether there is a wrong to be punished and, if so, how grievous it is. The second inquiry, whether the punishment should be mitigated, arises in considering whether the actor should be excused or should be punished to the full extent of her wrong.

The argument for mitigation might well be that the actor had incomplete control over the unfolding of the crime. The less control the actor has, the less his blame for the act. The diminution of control might result either from external pressures or from the actor's psycho-

---

54 See G. Hegel, Philosophy of Right § 97, at 69 (T. Knox trans. 1952).
55 See I. Kant, The Metaphysical Elements of Justice 99–107 (J. Ladd trans. 1965). Kant had several distinct arguments justifying punishment, all of which focus on the wrong done. Among them is his claim that thieves should be punished as though they had made thievery a universal law, rendering the thieves themselves destitute. Id. at 102.
57 This point is well expressed in the formula devised by Robert Nozick, in which the amount of punishment is determined by \( r \times H \). \( H \) represents the wrong and \( r \) the degree of responsibility or blameworthiness. \( H \) is, in principle, unlimited, but \( r \) varies only between 0 and 1. In a case of excused conduct, \( r \) equals 0. See R. Nozick, Philosophical Explanations 363–66 (1981).
logical condition. In cases of duress and personal necessity, such as breaking out of prison to avoid a homosexual rape, the actor's control over his actions is so far reduced that blaming him for wrongful conduct offends our sense of justice. Similarly, involuntary intoxication and insanity, at least in the conventional understanding of these states, reflect internal loss of control to an extent that makes blaming unjust. The analysis of mistake of law follows the same mode of reasoning: so far as someone does not know that his conduct might be wrongful, he can hardly be said to have control over a wrongful act he might commit. These remarks represent but the first cut at a difficult set of issues. Nonetheless, they point to a general account of excuses.

My analysis of excuses will remain at the superficial level of argument, for the point of these remarks is simply to demonstrate the secondary nature of blame and excuse in analyzing liability. The theory of retributive punishment invites us to consider the relative desert of the offender, but only after establishing that he is an offender who has committed a wrongful act. The issues of blaming and excusing make sense only if we inquire: blameworthy or excusable for what? The "what" in this question requires us to specify the untoward act that makes the notions of blame and excuse meaningful.

3. The Non-ordering: W or R — In a culture stressing flat legal reasoning, one would not expect to find either an R/W or a W/R ordering. And indeed we do not. The Model Penal Code — a vestige of the 1950's but still an orthodox document — makes no mention of either ordering. The provision defining a "material element of an offense" treats the absence of justification and excuse on a par with criteria defining the prima facie case of liability. The Code adopts the model of flat legal reasoning. All elements are of equal significance. If any element, be it affirmative or negative, is absent, the defendant is not guilty. It is of little importance whether we analyze the elements in any particular order, so long as we check them all before imposing liability.

C. Flat Legal Reasoning

Reasonableness — the ubiquitous modifier — provides the lever for this flattening of liability. The reasonable person enables us to blur the line between justification and excuse, between wrongfulness and blameworthiness, and thus renders impossible any ordering of the dimensions of liability. The standard "what would a reasonable person do under the circumstances?" sweeps within one inquiry questions that would otherwise be distinguished as bearing on wrongfulness or
on blameworthiness. Criteria both of justification and of excuse are amenable to the same question. Concerning the justification of self-defense, we ask what amount of force a reasonable person would use. The inquiry is similar in analyzing the excuse of duress. We ask whether it is reasonable to rob a bank to avoid being killed, or to escape from jail in order to avoid a homosexual rape. Herbert Fingarette ingeniously argues that the key element in duress is that the defendant's act is "wrongfully made the reasonable thing to do." The same formula works for self-defense. The aggressor wrongfully makes it reasonable for the victim of aggression to use force in self-defense. In this verbal matrix, we can slide back and forth between the criteria of justification and of excuse with the greatest of ease.

I have argued, however, that Germans accept the W/R ordering not as a matter of policy, but because it is logically compelled both by the nature of excusing and the structure of retributive punishment. If this is true, we need to account for the failure of these considerations to entrench the W/R ordering in common law thinking. The two reasons for the German W/R ordering are not as distinct as they might seem. Excuses have a secondary status only if we assume the priority of wrongdoing in the analysis of punishment. But if punishment has some purpose other than censuring wrongdoing, then this relationship of logical priority might collapse.

Since the writings of Bentham and the translation of Beccaria, English legal theorists have been skeptical about censuring wrongdoing as an end in itself. The duty to punish the guilty does not comport with the Anglo-American quest for a productive purpose in every social practice. Inflicting injustice offends us. But doing justice for its own sake does not compel us. Although English and American lawyers might well believe that punishing the innocent is wrong, there are fewer votes for the Kantian principle that we have a categorical duty to punish the guilty. According to the dominant view today, the requirement of blameworthiness functions at most as a limit on punishment carried out for the sake of deterrence and other social

---

60 According to § 2.09(1) of the Model Penal Code, the defense of duress applies only if a person of "reasonable firmness" is unable to resist the threat. MODEL PENAL CODE § 2.09(1) (Proposed Official Draft 1962).
61 See People v. Lovercamp, 43 Cal. App. 3d 823, 827, 118 Cal. Rptr. 110, 112 (1974) (holding that escape was "the only viable and reasonable choice available").
66 See I. KANT, supra note 55, at 102.
goals. Yet, in a spirit of democratic tolerance, we loathe leaving out either the Kantians or the utilitarians. We pick and choose among the purposes of punishment as we see fit. In this tolerant muddle, we naturally fail to generate the logical two-stage structure of analysis that follows from a commitment to punishing the guilty as an imperative of justice.

It is not surprising, then, that orthodox common law theorists make so little of the distinctions between wrongdoing and responsibility, justification and excuse. These issues bear with equal force on the objective of social control. We should have little trouble picking up distinctions so easily stated, but we think and argue on a bedrock of instrumental concerns that renders these distinctions little more than philosophical curiosities.

II. THE CONCEPT OF RIGHT

We would hardly arrive at the concept of Right simply by seeking translations in particular contexts of the ubiquitous term "reasonable." Yet if we pay attention to those points of legal debate where flat legal thinking in the idiom of reasonableness corresponds to structured legal thinking in German law, we might be surprised at how often we encounter the notion of Right in German discourse. The concept of Right, then, becomes a candidate for the systemic equivalent of reasonableness. By "systemic equivalent," I mean to refer to a concept in German law that is as basic as reasonableness is in the common law and is pivotal in a system of structured legal thought that functions without the leveling effect generated by the reasonable person.

In the two issues from the criminal law that we have been discussing — the scope of self-defense and the distinction between justification and excuse — the concept of Right provides the wedge for breaking the German analysis into distinct, lexically-ordered levels of discourse. I wish to explain how this is so and to draw some inferences about structured legal argument in a system of Right.

We need at least a tentative account of what the Germans mean by Recht; the French, by droit; and the Russians, by pravo. These

---

67 The most popular version of this view is the thesis that criteria of desert and retribution function as a desirable limitation on the pursuit of utilitarian goals. See F. Allen, The Decline of the Rehabilitative Ideal 71-72 (1981); H. Packer, supra note 42, at 58-62.

68 See B. Ackerman, Private Property and the Constitution 41-87 (1977) (discussing both Kantian and utilitarian theories as examples of comprehensive views). Unfortunately, the view that a sound proposal must satisfy opposed standards (for instance, those of Kant and Bentham) has gained increasing currency. See, e.g., Dressler, supra note 27, at 81-83.

69 See, e.g., Model Penal Code § 1.02(1)(c) (Proposed Official Draft 1962) (one purpose of the Code, among others, is "to safeguard conduct that is without fault from condemnation as criminal"); Hart, The Aims of the Criminal Law, 23 Law & Contemp. Pros. 401 (1958).
terms express a normative concept of just or sound law. Each legal
system also has a term expressing a descriptive concept of enacted
law: Gesetz, loi, and zakon. The normative principles of Right acquire
their binding force from their intrinsic moral appeal. That no person
should be a judge in his own case, that no one should profit from his
own wrong, that no innocent person should be punished — these are
all readily accepted principles of Right recognized in the common law
as well as in other Western legal systems. By contrast, the rules of
Gesetz, loi, and zakon are enacted. These are laws that get their
binding force not from their content but from their form. The critical
feature of their form is their pedigree: they must be enacted or declared
by a law-giver recognized as authoritative within the legal system.
The debate between positivists and their opponents turns on the ex-
clusivity of enacted law within the system. As Thomas Hobbes, a
semitic positivist, put it: “It is not Wisdom, but Authority that makes
a Law.”

The German legal tradition has positivist strains, as Kelsen’s in-
fuential book, Die Reine Rechtslehre, reminds us. Kelsen’s positiv-
ism is simply stated: all Recht is enacted by an authoritative law-
giver. This strain has never been dominant in German thought, at
least not to the same extent that the positivist message of Hobbes,
Bentham, Austin, and Hart has commanded loyalty in the Anglo-
American tradition. German legal thought, particularly in the post-
war period, seeks to foster a living sense of Right, a conception of
law that transcends the enacted legal materials.

Defining the Right by contrast to the positivist concept of law is
unhappily negative. It tells us only that the Right is not reducible to
the set of enacted laws. It is more difficult to say positively what the
Right is. For Kant, whose influence is still felt in German legal
thought, the Right is the set of conditions under which the choices of
each person can be reconciled with the choices of others, under uni-

versal laws of freedom. Kant’s account distinguishes clearly between
Right and morality. The former states the framework of freedom that
enables people with diverse purposes to live together in civil society.

---

70 T. Hobbes, A Dialogue Between a Philosopher and a Student of the Common
71 See R. Dworkin, Taking Rights Seriously 107–10 (1977) (arguing that principles
supplement but do not displace statutory law); Fuller, Positivism and Fidelity to Law — A
Reply to Professor Hart, 71 Harv. L. Rev. 630, 647–51 (1958) (expressing the view that
legislative commands must be just in order to constitute law).
72 The oft-criticized translation into English is H. Kelsen, Pure Theory of Law (M.
Knight trans. 1967).
73 See I. Kant, supra note 55, at 34. Unfortunately, Professor Ladd’s translation of Kant
mistakenly renders Recht as “justice.” See id.
Morality addresses itself, more demandingly, to our duty to respect the humanity in ourselves and in others.\textsuperscript{74}

Kant conceived of the Right as guaranteeing the security and external freedom of everyone in civil society.\textsuperscript{75} Provided that one respects these spheres of autonomy in others, one is legally free to be moral or not as one chooses. This legal freedom is expressed in the view we plausibly attribute to Kant on the duty to rescue. The categorical imperative commands that one rescue a person in distress.\textsuperscript{76} Yet the failure to do so does not violate the security or external freedom of the person in danger. Therefore, the Right, construed strictly, does not require one to rescue.

This narrow conception of the Right strongly resembles Rawls's first principle of justice.\textsuperscript{77} It seeks to guarantee the basic structure of society without resolving the inevitable conflicts that occur in social and economic life.\textsuperscript{78} A twentieth-century conception of the Right addresses itself to these conflicts and in the course of resolving them strikes a compromise between the moral duty to protect the interests of others and the autonomy secured by the basic structure. This conception of the Right is expressed in the growing trend toward legally imposed duties to aid others.\textsuperscript{79} Another significant example is the defense of lesser evils in torts and criminal law, a principle that requires courts to decide when it is right for one individual to encroach upon the less valuable interests of another.\textsuperscript{80} The person suffering the invasion must forgo his otherwise rightful interests. This modern conception of the Right thus compromises the values of security and external freedom, trading off these aspects of personal autonomy against other interests in an effort to resolve social conflict.

It is significant, however, that the traditional conception of the Right still informs the law of self-defense. Section 32 of the German criminal code provides:

\textsuperscript{74} See I. Kant, Foundations of the Metaphysics of Morals 53-54 (L. Beck trans. 1959).

\textsuperscript{75} By virtue of this guarantee, individuals are obligated to enter into civil society and may be compelled to do so. See I. Kant, supra note 55, at 65-66.

\textsuperscript{76} Cf. I. Kant, supra note 74, at 48-49 (discussing the duty to aid others).

\textsuperscript{77} See J. Rawls, supra note 49, at 60 ("[E]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.").

\textsuperscript{78} Rawls regards these issues as beyond the scope of his book. Id. at 315.

\textsuperscript{79} See, e.g., StGB § 13 (treating the duty to rescue as a matter of Right); Weinrib, The Case for a Duty To Rescue, 90 Yale L.J. 247, 266-67 (1980) (relying on Kant's moral theory to advocate a legal duty to rescue).

\textsuperscript{80} See, e.g., StGB § 34; Model Penal Code § 3.02 (Proposed Official Draft 1962). The history of this defense — particularly as it bears on the theory of Right — has yet to receive adequate exposition. The defense as applied to the sacrifice of interests other than property entered German criminal law in the landmark decision of the Imperial Supreme Court, Judgment of Mar. 11, 1927, Reichsgericht, Ger., 61 RGSt 242, 247-55 (under the circumstances abortion held not wrongful).
(1) Whoever commits an act required by self-defense acts not-wrongfully.
(2) "Self-defense" refers to a defense necessary to ward off an imminent wrongful attack from oneself or another.\textsuperscript{81}

The term "wrongful," appearing in both provisions, means "contrary to Right." Only attacks contrary to Right trigger the privilege or right of self-defense (including defense of self, of property, and of others);\textsuperscript{82} the minimal force necessary to ward off a wrongful attack is not contrary to Right. In the same context, American legislation would use the term "unlawful,"\textsuperscript{83} a term that risks confusion between law as the Right and law as reduced to enacted laws. In order to capture the point of the German term, my translation relies on "wrongful" as equivalent to "contrary to Right."

Limiting self-defense to warding off wrongful attacks means that if an attack is not wrongful, one has no privilege to respond. The attack itself might be justified on grounds of self-defense, in which case section 32(1) tells us that it is not wrongful. Similarly, section 34 provides that attacks justified on grounds of lesser evils are not wrongful.\textsuperscript{84} It follows from the structure of these provisions that justified attacks, which are not wrongful, do not generate a right of self-defense. Recalling the distinction between wrongfulness and blameworthiness,\textsuperscript{85} however, we may infer that attacks excused on grounds of insanity, duress, and personal necessity do generate a full right of self-defense.\textsuperscript{86} If the attack is merely excused, it is nonetheless "contrary to Right" and warrants the full measure of resistance. On this point there will be more to say later.

For present purposes, the important point is the failure of section 32, enacted in 1975, to incorporate the principle of proportionate force as a limitation on the right of self-defense. Even though important voices in the literature and the case law favored this limitation,\textsuperscript{87} the code adopted the traditional German rule that all necessary force is privileged. If deadly force is necessary to prevent the escape of a

\textsuperscript{81} STGB § 32 (author's translation).
\textsuperscript{82} The literal translation of the German term Notwehr would be "necessary defense."
\textsuperscript{83} See MODEL PENAL CODE § 3.04(1) (Proposed Official Draft 1962). The Code makes an inept effort to define "unlawful" in § 3.11(1). The definition is prolix primarily because the drafters could not formulate a concept (like excuse) to describe defenses that even if successfully asserted by an aggressor, would leave the unlawfulness of the attack unaffected.
\textsuperscript{84} See STGB § 34 (if the provision applies, the act is "not wrongful").
\textsuperscript{85} See supra pp. 50-59.
\textsuperscript{86} The dominant view in German law is that self-defense is allowed against excused aggression. See H. JESCHECK, supra note 20, at 273. The Model Penal Code concurs, but without a concept of excuse. See MODEL PENAL CODE § 3.11(1) (Proposed Official Draft 1962); supra note 83. Some German scholars, however, have concluded that the right of self-defense does not apply against excused aggression. See, e.g., E. SCHMIDHÄUSER, STRAFRECHT: ALLGE MEINER TEIL 151-52 (2d ed. 1975).
\textsuperscript{87} See sources cited supra notes 20-21.
petty thief, the code permits it. The common argument for this extreme position invokes a German maxim: Right need never yield to Wrong.\textsuperscript{88} The very idea of being in the Right against an aggressor, of having a personal right encroached upon, means that one is entitled to resist. This is what it means to be an autonomous person in civil society. As Kant would put it, resisting an aggressor in the name of the Right reinforces the basic structure of civil society.\textsuperscript{89} Forcibly repulsing the aggressor ensures that every individual may exercise his freedom consistently with the exercise of a like freedom by others.\textsuperscript{90} It follows, then, that the legal system should not require that individuals surrender their rights to aggressors rather than use the force necessary to vindicate both their autonomy and the legal order.

Despite the wording of section 32, contemporary German theorists would require the surrender of rights in some cases — particularly if the aggressor is obviously drunk, an infant, or a member of the defender’s family.\textsuperscript{91} As noted earlier, the doctrinal rationale for this restriction is that although the defender has a right to use all necessary force, he “abuses” this right if he exercises it in certain cases.\textsuperscript{92} What should lead to this restriction on the vindication of personal autonomy? At the outset we might say that some balancing is necessary between the interests of the defender and the interests of the aggressor. Deadly force would be all right to prevent a rape, but not to avoid a kiss; wounding the aggressor would be acceptable to prevent grand larceny, but not to frustrate an illegal attempt to tie up a parking spot.\textsuperscript{93} The preliminary question, however, is why the defender, whose rights are under attack, should be concerned at all about the interests of the aggressor.

The answer, simply, is that the aggressor is a human being. Even though he is engaged in wrongful aggression, one cannot treat him simply as an intrusive force to be nullified at all costs. With its exclusive emphasis on vindicating personal autonomy, the German philosophy that Right need never yield to Wrong does indeed treat the Wrong as a force always rightfully negated. The humanitarian response is that sometimes the cost of defending the Right is simply

\textsuperscript{88} In German: Das Recht braucht dem Unrecht nicht zu weichen. The maxim dates back at least to Berner, Die Notwehrtheorie, 1848 ARCHIV DES CRIMINALRECHTS 547, 557, 562.
\textsuperscript{89} Cf. I. KANT, supra note 55, at 36 (the Right entails the authorization to use coercion against anyone who violates the Right).
\textsuperscript{90} Id. at 36–37.
\textsuperscript{91} This is the standard line of the textbooks and treatises. See, e.g., H. JESCHECK, supra note 20, at 277; A. SCHÖNKE, H. SCHRODER & T. LENCKNER, supra note 44, § 32, at 457. As to attacks occurring within the family, see the supportive language in the Judgment of Sept. 25, 1974, Bundesgerichtshof, W. Ger., 28 NJW 62.
\textsuperscript{92} See cases cited supra note 21.
\textsuperscript{93} See Judgment of Jan. 22, 1963, Oberlandesgericht, Bavaria, 16 NJW 824.
too high; sometimes the Right must yield in order to preserve values found even in the person of a wrongful aggressor.

The humanitarian response leads directly to the modern conception of the Right, which incorporates the interests of the aggressor in asserting the limits of rightful self-defense. One finds this modern conception in Blackstone, who argued that if we do not execute petty thieves for their crimes, neither should we permit the use of deadly force in resisting petty theft. The property owner should not be able to react more severely on the street than does the sentencing authority in the courtroom. Whatever the logical limits of this analogy, it does support an integrated standard for self-defense: on a single plane of argument, judgments about the merit of the defender's position interweave with concern for the aggressor's interests.

In the dominant German approach to the problem, these two levels are still kept distinct. The first level of the argument addresses itself to the criteria of security and personal freedom, the values embodied in the traditional conception of Right. The second level softens the harshness of this absolutist view by introducing criteria of human solidarity. In going from the first to the second level, we shift from rights to interests. According to the Kantian view, the aggressor has no right that a person exercising self-defense defer to his interests as a human being. So far as Right requires the vindication of autonomy, it is entirely on the side of the defender.

Those who would reject the recognition of humanitarian criteria at a second level might argue as follows. Of course, the aggressor has interests, but if Right is entirely on the side of the defender, then it is up to the defender to decide whether to defer to the interests of the aggressor. No victim is under a legal duty to exercise her privilege of necessary defense; she may choose to be compassionate, but the state has no rightful authority to force her to surrender her rights in the name of altruism. This is an important point, for it illuminates the extent to which the coerced surrender of personal autonomy in civil society does in fact reflect coerced altruism. The only disagreement would be whether it is the business of the state to ensure that people act altruistically and compassionately, even toward wrongful aggressors.

The same distinction between Right and compassion emerges in analyzing the criteria that bear on claims of justification and excuse. Looking at the converse side of these categories, we find that the
analysis of wrongfulness raises questions of Right; the analysis of blameworthiness, questions of compassion. If the defendant's conduct is justified, it is not wrongful and the state's right to punish no longer obtains. There is nothing that warrants punishment. If, in contrast, the conduct is wrongful, the state does have a right to punish. The only question is whether, in view of the the exigent circumstances of the act, compassion precludes exercising the right to punish.

Grounding excuses in compassion for the accused raises some difficult points. There is no doubt that under circumstances of duress, personal necessity, unavoidable ignorance of the law, and mental disturbance, wrongful actors deserve our compassion. Nonetheless, it is difficult to speak of a judge who administers an institution like the criminal law as having a duty to be compassionate. What if on the day of trial, the sentencing judge happens to feel nothing — neither outrage nor compassion for the allegedly excused offender? If taken too seriously, this point would undermine the entire institution of blame in the criminal law. Whether conduct is blameworthy can hardly depend on whether the judge feels like blaming the defendant. The judge's proper response is not to ask whether she feels like blaming the defendant, but whether the defendant deserves blame. The same mode of thinking comes to bear in assessing whether the allegedly excused offender deserves compassion.

Further, the grounding of excuses in compassion raises the question whether the person relying on the statutory excuse has a right to be excused. It is hard to comprehend how the legal system could regularly engage in a particular practice without the beneficiaries of the practice having a right to its benefits. This is particularly the case where the practice is domesticated in legislated rules setting forth the defenses. Defendants have a right that the courts follow the legislated law, and in this sense they do have a right to be excused where a legislated excuse properly applies.

The right to be excused, however, applies only against the courts. It would be difficult to say that a defendant had a right at the time of his act to engage in the wrongful act. Suppose we were to recognize an excuse of personal necessity in a case like *Dudley & Stephens*. Killing the ship boy and consuming his body would be wrongful, but it would be unfair to expect ordinary people to starve to death for fear of wrongdoing. The excuse would come into play ex post, at the time of the trial. But ex ante, at the time of the act, it would be implausible to speak of a right to kill the boy and of the boy's duty to submit to the killing.

---

97 Kant argues that the state has both a right and a duty to punish offenders. The right is grounded on the subject's "having committed a crime." I. Kant, supra note 55, at 100. The duty is grounded on the categorial imperative to respect the humanity of the offender. Id.

Further, if the excused actor had a right to do what he did, he should have been able, consciously and deliberately, to rely on that right at the time of acting. Relying on the expectation of a subsequent acquittal, however, would undercut the element of compulsion necessary to constitute an excuse of personal necessity. Excuses apply only where the wrongful conduct is attributable substantially more to exigent circumstances than to the voluntary choice of the offender. So far as the actor expects to be excused and acquitted, his conduct takes on the contours of voluntary choice and planning.  

To summarize the argument thus far, I have attempted to show that the analysis of Right differs significantly from a secondary line of analysis that invokes considerations of compassion and altruistic concern for the interests of wrongdoers. In the field of necessary defense, the notion of Right generates an absolute right to use the force necessary to prevent wrongful aggression. In the analysis of criminal liability, the concept of Right provides the threshold for determining when conduct is wrongful and warrants punishment. In both fields of inquiry, humanitarian considerations come to bear at a secondary stage of analysis. In self-defense, these altruistic concerns restrict the scope of defensive force permissible against petty intrusions. In the analysis of liability, compassion comes center stage in the recognition of mitigating and excusing circumstances that reduce or eliminate the punishment deserved by the wrongdoer.

III. PUTATIVE SELF-DEFENSE: A CASE STUDY OF FLAT AND STRUCTURED REASONING

The first two sections of this essay permit us to generalize tentatively about two styles of legal thought. One style is rooted in the notion of reasonableness; the other, in the conception of Right. The former generates flat legal rules that, with the inclusion of vague modifiers, refer explicitly or implicitly to all the relevant criteria that bear on a particular legal problem. The latter style of thought yields structured tiers of legal argument, with the argument of Right occupying one tier and humanitarian considerations, a secondary level.

There is probably no area of the criminal law that better illustrates the conflict between these two styles of thought than the problem of putative justification, particularly the problem of putative self-defense. Although most professors of criminal law in the United States and England would easily understand the difference between justification and excuse, few are likely to comprehend the label “putative self-defense.” This fact is itself significant. The phrase “putative self-
defense" is well known among criminal lawyers in Western\textsuperscript{100} and Eastern Europe,\textsuperscript{101} the Soviet Union,\textsuperscript{102} Latin America,\textsuperscript{103} and Japan.\textsuperscript{104} That the English-speaking world departs from this pattern should trigger our interest.

The phrase "putative self-defense" refers to the problems that arise when someone reasonably believes that he is being attacked, but in fact is not, and uses force against a person who is not in fact an aggressor. The problem is whether in view of the actor's reasonable belief, the use of force will support a charge of battery or, if the victim dies, of homicide. The self-defense is called putative for it is not a case of real self-defense, but of force used against a putative aggressor.

Suppose that Dan reasonably, but mistakenly, believes that Allan is attacking him. The jurisdictions mentioned above concur that in this situation of "putative self-defense," Dan's use of force cannot be justified. Justification — harmony with the Right — is an objective phenomenon. Mere belief cannot generate a justification, however reasonable the belief might be. This is not to say that Dan has no defense. He may rely on his mistake to defeat liability for his use of force against the innocent Allan.\textsuperscript{105} Now, suppose that Dan, still believing that Allan is attacking him, endangers Allan's life. Does the

\textsuperscript{100} See, e.g., G. Bettiol, Diritto Penale 347 (11th ed. 1982); R. Merle & A. Vitu, Traité de Droit Criminel 517–18 (3d ed. 1978) (distinguishing between legitime defense vraisemblable and legitime defense putative: the former is based on objective appearance and is justified; the latter is based only on personal culpability); A. Schönke, H. Schröder & T. Lenckner, \textit{supra} note 44, § 32, at 461 (20th ed. 1980).


\textsuperscript{102} See, e.g., 2 Kurs sovetskogo ugozhnogo prava, \textit{supra} note 10, at 363–65.

\textsuperscript{103} See, e.g., L. Jimenez de Asua, Tratado de Derecho Penal 85 (2d ed. 1961) (la defensa putativa discussed in passing).


\textsuperscript{105} The treatment of this mistake is controversial under German law. The code recognizes only two types of mistake: those that concern the factual elements of the offense and those that concern the prohibited nature of the act. A faultless or negligent mistake about the elements of the offense negates the intent required for intentional liability; such a negligent mistake will support liability for negligence if a specific provision so stipulates. See StGB § 16. An unavoidable mistake about the legal status of an act negates the culpability required for conviction; if the mistake is avoidable, it can only mitigate punishment. See StGB § 17. A mistake about the factual presuppositions of self-defense falls between these statutory stools. It is neither a mistake about the definition of the offense nor a mistake about the legal characterization of the act. The tendency today is to extend § 16 by analogy to cover mistakes about the factual presuppositions of self-defense. See Judgment of June 6, 1952, Bundesgerichtshof in Strafsachen, 3 BGHSt 105; H. Jescheck, \textit{supra} note 20, at 375; G. Stratenwerth, \textit{Strafrecht: Allgemeiner Teil I}, at 152–53 (2d ed. 1981). \textit{But see} H. Welzel, Das Deutsche Strafrecht 168 (11th ed. 1969) (classifying putative self-defense as a mistake about the wrongfulness of the aggression). For a totally different approach to the problem, see E. Schmidhäuser, \textit{supra} note 86, at 151 (arguing that the mistaken defender does not act wrongfully unless he sticks to his action after being advised of the mistake).
innocent Allan have a defense in response? Virtually everyone agrees that Allan has a right to defend himself against the person mistakenly trying to kill him. Dan's use of force is wrongful against Allan, and therefore, under section 32(2) of the German criminal code, Allan may use the minimal force necessary to ward off Dan's attack. In the final analysis, both Dan and Allan could be acquitted; Dan on the ground of faultless mistake and Allan, on the ground of self-defense.

The main propositions of this analysis are straightforward. First, mistakes cannot justify homicide. Second, the mistaken actor may rely only on his mistake; if the putative aggressor must defend himself, he, as the innocent party, may justify his act on grounds of self-defense. Yet these propositions do not present themselves as serious possibilities to American legislative reformers. Following the recommendation of the Model Penal Code, American legislatures routinely equate reasonable belief in the existence of a justification with the actual existence of the justification. They collapse the problem of putative self-defense into the analysis of actual self-defense. Therefore, in the case of Allan and Dan, the standard American response is that Dan has a full right of self-defense against Allan and Allan has a full right of self-defense against Dan. The reasonable is equated with the justifiable. There could be no better proof that American lawyers do not take seriously the distinction between justification and excuse.

I am not sure whether this state of affairs in the United States simply reflects a confusion that will, in the course of debate, work its way clean, or whether it reflects a way of thinking that is so deeply rooted in the American legal consciousness that efforts to clarify the issue will always be branded as the importation of "German ideas." In most of my work, I have argued for the former proposition. It is worth considering, however, whether a legal system founded on reasonableness is likely to generate the sharp distinction between objective justification and subjective belief required to distinguish between actual and putative self-defense.

In order to approach these issues, I wish to reflect upon numerous discussions with American academic lawyers, both in print and in private exchanges, about two central propositions. Either of these propositions, if accepted, would lead to the distinction between actual and putative self-defense. The first proposition is that subjective belief cannot by itself render conduct justified. Believing that defensive force is rightful cannot, by itself, make it rightful.

One philosophical argument that subjective belief can justify conduct builds on a misreading of Kant's view that a good will is the

---

highest conceivable good. The good will is taken to be synonymous with good intentions, and because the putative defender acts with good intentions, his defensive conduct must be moral and is therefore presumably justified. An argument of this sort is found in the work of Charles Fried.

This argument is flawed first in its reading of Kant's moral theory and second in its attempt to link the moral theory with the criteria of justification. According to Kant, the will is good only if one acts out of a sense of duty, which means that the act is rendered necessary by reverence for the moral law. Let us suppose that the categorical imperative (the moral law) requires us to defend the Right against wrongful aggression. This is our duty. It is conceivable that a putative defender might act out of this sense of duty and that his will would therefore be good. His conduct would be moral — in the Kantian sense. There is no warrant, however, for equating a good will in this special sense with good-faith intentions. Nor is there any basis for the logical leap from good will to the concept of justification. The notions of Right and of justification arise in legal theory, which Kant properly keeps distinct from moral theory. Morality is a characteristic of our inner attitude, but the Right is an objective framework for regulating practical affairs in civil society. It seems to misrepresent Kant to appeal to his moral theory in arguing about the justification for killing an aggressor in the name of the Right.

108 See I. Kant, supra note 74, at 9.
109 See C. Fried, RIGHT AND WRONG 48 (1978); see also Dressler, supra note 27, at 80 (relying on Kant).
110 See I. Kant, supra note 74, at 19–20.
111 See I. Kant, supra note 55, at 36.
112 Acting out of duty alone (that is, the will's being good) requires that no other motives inform the action. The will cannot be good if self-interest or other sentiments motivate the action, even in part. See I. Kant, supra note 74, at 17. Good intentions, by contrast, are perfectly compatible with conscious self-interest or a feeling of fear in resisting the supposed attack.
113 The mere agreement or disagreement of an action with the Right, without regard to the incentive of the action, is called [legality]; but, when the Idea of duty arising from the law is at the same time the incentive of the action, then the agreement is called the [morality] of the action.
114 A great deal of confusion about Kant derives from the natural assumption that his use of "morality" coincides with our use of the term today. One can never be moral in the Kantian sense simply by conforming to a rule, even if that rule expresses deontological values. For Kant, morality requires that the will be pure, which means that the act be free and that the exclusive motive for acting be duty (reverence for the moral law). Kant concedes that a moral act in this highly restricted sense may never have occurred. See I. Kant, supra note 74, at 23–24.
115 Perhaps one could argue that a killing in self-defense would be moral if the actor executed the killing solely because it was his legal duty to do so. See supra note 114. But self-defense
Furthermore, the argument that good intentions can justify our actions clearly proves too much. It would establish that the good-faith use of defensive force is always justified. Even an unreasonable, good-faith belief in the necessity of defensive force would establish that the will is good. It should take more than a misreading of Kant to convince us that good faith is equivalent to the Right. Yet the contrary view, that a principled distinction separates justified conduct from the mistaken perception of justifying circumstances, has yet to take hold even in sophisticated quarters of American legal thinking.

The second proposition that could lead us to the distinction between actual and putative self-defense derives from a claim about the nature of justified conduct. The claim is that in any situation of physical conflict, where only one party can prevail, logic prohibits us from recognizing that more than one of the parties could be justified in using force. I shall refer to this proposition as the “incompatibility thesis.”

In the conflict posed above between Dan and Allan, the only plausible way under the Model Penal Code of protecting Allan against Dan’s mistaken self-defense would be to recognize a privilege in Allan also to use defensive force. The problem is whether this defensive response should be regarded as justifiable. Most commentators and colleagues seem to think that there is nothing implausible about recognizing that both sides to the conflict are privileged or justified. These theorists do not even balk at saying that both sides could have a right to use defensive force. Indeed, when I argue this point, I rarely find colleagues who agree with me that only one side can be justified, only one side can be in accordance with the Right and have a personal right to use force. There is an obvious difficulty in any argument based upon conceptual analysis. My argument must rest on our common understanding of the concepts of justification and rights. It is embedded in our language, I would say, that incompatible actions cannot both be justified. In any situation of conflict, one or the other must be in the Right and have the right to act. But if I cannot convince my audience about the ordinary meaning of our

is not regarded as a legal duty today (there are no legal consequences of choosing to suffer the invasion), and I am reluctant to attribute this view to Kant. One might argue, however, that there is a duty to defend the Right against aggression, precisely as there is a duty to punish. See I. KANT, supra note 55, at 36.

116 MODEL PENAL CODE § 3.04(1) (Proposed Official Draft 1962). Generating a defense from this provision is, in fact, not so easy. In order to invoke the privilege of self-defense, the actor must (1) believe that defensive force is immediately necessary (2) to protect himself (3) from unlawful force. If Allan knows that Dan is mistaken, it is hard to see how he could believe that Dan’s attack is unlawful, for Dan’s force would not be unlawful under § 3.04, coupled with § 3.11(1).

117 See C. FRIED, supra note 109, at 48 (in the case supposed, in which Allan defends against Dan’s mistaken attack, Fried concludes “we will have a fight between two persons, both acting justifiably. This is unfortunate but in no sense a contradiction . . . .”).
language, there is little that I can say to prove my point. I must take refuge in the larger issues that surround the debate.

Several factors might explain the willingness of thoughtful American commentators to speak of both parties to a dispute as having rights or being justified. Any of the following beliefs might be operative, and indeed operative in different degrees and in different combinations, among American theorists.

A. Justification as Synonymous with "Defense"

Quite possibly, American lawyers incline toward thinking of a justification as synonymous with any operative substantive defense recognized by law. They might think of a justification as a claim to be interposed ex post in appealing to a court not to convict. Of course, every justification and excuse could be conceptualized exclusively as a reason for not convicting the defendant. But the criteria of justification are supposed to function not only ex post as decision rules, but ex ante as conduct rules. In an ideal state of affairs, everyone who contemplates harmful action could know whether her conduct is rightful. She need not guess how courts will subsequently evaluate the circumstances.

The prospect of knowing the law without judicial instructions reflects an ideal of a self-regulating criminal law. It is an ideal with anarchistic overtones. It suggests a body of norms rooted not in legislation, but in the tacit understandings of the community. From this perspective, claims of justification appear not as claims against courts, but primarily as claims of individuals against one another.

In order to think of justifying claims in this way, we must suppose that in a situation of conflict—say, Dan versus Allan—the struggling parties might argue about their claims instead of acting them out. They could make arguments and counter-arguments about who was in the wrong and who ought to desist from the struggle. This is conceptually untenable in the case of Allan's resisting Dan's mistaken self-defense, for by hypothesis Dan cannot tell Allan about the mistake. But if the ideal is the hegemony of the Right even prior to legislation, then all conflicts should, in principle, lend themselves to resolution. Every struggle comes to be seen as conflict between the Right and those who, by their acts, set themselves opposed to it.

The concept of justification is best understood as an expression of this ideal of self-regulation. Struggling parties should, in principle, be able to determine for themselves whose conduct conforms to the Right and whose does not. There is little evidence, however, that this ideal informs contemporary American legal theory. We are in-

clined to think of the entire criminal law as coercion imposed from above, as the product of intervention by police, prosecutors, and judges. If we think of the criminal law as dominated and defined by these official decisions, then of course we would be inclined to think of all defenses as appeals to officials. And there is no reason why officials, charged with finding reasonable solutions to practical problems, cannot find that two people in conflict — Dan and Allan — both have acted reasonably and therefore "justifiably."

B. Justification as Permissible Conduct

Another argument against the "incompatibility thesis" emerges from the sensible classification of actions into the rightful, the permissible, and the excusable. Self-defense and, particularly, lesser evils are better thought of not as rightful, but as permissible actions. There is indeed support for this view in German legislation, which labels these justificatory claims as not-wrongful rather than rightful.119 German theory repeatedly stresses the distinction between conduct that falls outside the scope of the criminal law, such as killing a fly, and justifiable conduct that nominally violates the law, such as killing in self-defense.120 The philosopher Judith Thomson highlights this distinction by treating justifiable conduct as the infringement of a protected interest but not a violation of that interest.121 That cases of justifiable conduct are nonetheless infringements suggests that it is perhaps not correct to think of these acts as rightful.

The concept of the permissible enters to fill the apparent gap between the rightful and the wrongful. The common law notion of privilege also seems to capture this ambivalent middle ground. All reasonable options become privileged and permissible. Thus, the conduct of both Dan and Allan could be regarded as permissible, and, in this sense, justifiable. If that is all the claim of justification means, the incompatibility thesis must give way to a multiplicity of permissible actions.

The best argument against the view that justifiable conduct is merely permissible derives from the same thought experiment we used in assessing the view that claims of justification are merely appeals to courts. According to the ideal of the criminal law as a self-regulating set of conduct rules, the rules must generate a solution ex ante for every case. The "permissible" flows from a skepticism about the possibility of a single solution. It favors a limited range of reasonable outcomes. The notion of the permissible thus has no place in this idealized system of self-regulation. It follows that the incompatibility

119 See StGB §§ 32, 34.
120 See, e.g., H. Welzel, supra note 105, at 81.
thesis can find no support in the reduction of justifiable conduct to the merely permissible.

C. Rights as Prima Facie Rights

German lawyers think of rights as absolute, although subject to defeasance on grounds of "abuse." An absolute right occupies the available moral space. It is logically impossible for someone resisting the assertion of a right also to have a right. If a mother has a right to abort a fetus, the fetus cannot also have a right to be born. If a convict has a right to leave a burning jail, a guard cannot also have a right to keep him confined. If Dan has the right to use force against Allan, Allan cannot also have the right to use force against Dan. This strikes me as the natural way to speak about rights. The impossibility of inconsistent rights seems implicit in the grammar of rights discourse. So far as justifications generate rights, therefore, the impossibility of inconsistent justifications follows.

It is not clear, however, that Americans think about rights in this way. There is a good deal of talk about rights "trumping" utilitarian incursions against the interests of right-bearers. But the advocates of rights in contemporary jurisprudence typically concede that the rights themselves are "trumpable," or susceptible to being overridden in extreme cases. The innocent have a right not to be punished, but this right might be "trumped" by the necessity of saving the nation from a maniac who threatens to bomb us unless we punish a designated person. We have a constitutional right to free speech, but this right might be "trumped" by a "clear and present danger" to the body politic. That rights can be "trumped" in this way is expressed by saying that the rights are merely "prima facie.”

There are at least two distinct interpretations of what it means to say that a right is prima facie, one interpretation for each of the modes of legal thought I have attempted to articulate. The advocates of a structured approach to rights insist that even if the right is trumped or overridden, we should retain a sense of loss in witnessing the overriding of the right. The right remains intact, even though

122 This point holds only for the traditional conception of Right. The modern conception, discussed on p. 906, treats rights as relative rather than absolute.
123 This conclusion receives some support in J. Feinberg, Social Philosophy 72 (1973).
124 See, e.g., R. Dworkin, supra note 71, at xi.
127 See H. Morris, supra note 56, at 55–56 (stressing that when a person is not accorded a right, the right is nonetheless infringed); cf. H.L.A. Hart, Punishment and Responsibility
our common sense tells us that we must make sacrifices under exigent circumstances, such as sacrificing an innocent person in order to save the nation. The other interpretation appeals to the advocates of flat legal analysis. That a right is prima facie means that it occupies only a portion of the single plane of moral argument. When one right fails to govern the resolution of a particular dispute, another right on the same plane of moral space prevails. Once the right is trumped, it has no force at all. This, I take it, is the way many people think about overriding the right to free speech on the basis of clear and present danger to the common good.

If justifications generate prima facie rights in the first, structured sense, it would seem that the incompatibility thesis would still hold at the first level of analysis. But if “prima facie” is understood in the second sense of flat legal argument, there would seem to be no logical impediment to recognizing that both the mother and the fetus, both the escaping prisoner and guard, have prima facie rights. These rights would conflict but would still co-exist. In order to resolve the conflict, we would have to override one person’s right and allow the other person’s to prevail. Yet the basis for overriding the right is not that the other person’s right is superior, for that would be to recognize that the latter party indeed had an absolute right. The trumping of a prima facie right is likely to turn on criteria of prudence and social interest — indeed whatever criteria rendered the right prima facie rather than absolute.

It is worth eliciting an additional ambiguity in talk about prima facie rights. The modifier “prima facie” could refer either to the degree of evidence about the existence of an absolute right, or to the nature of the right itself. When I say that a mother has a prima facie right to abort, I could mean: “I am not convinced that the mother has a right to abort on these facts, but there is a prima facie case made on her behalf.” Or I could mean: “The right she has is qualified in its very nature.” The former view, based as it is on the partial state of the evidence, would be compatible with the belief in absolute rights. The latter view is the one we need for the claim that after all the evidence is in, both the mother and the fetus have prima facie, but nonetheless conflicting, rights.

The divergence of common law thinking from continental thinking on putative self-defense derives from a matrix of interrelated assumptions. American lawyers tend to think of all available legal defenses as analogous, tend to assume that what is permissible is justified, and tend to view rights as trumpable claims. At the foundation of these assumptions lies the cement of reasonableness, a concept that enables

---

19 (1968) (in cases of strict liability, where fault is not an issue, we have “the sense that an important principle has been sacrificed”).
Americans to blur distinctions between objective and subjective, self-defense and putative self-defense, wrongdoing and responsibility.

IV. MONISM AND PLURALISM IN LEGAL THEORY

Although the Right and the reasonable lead us in different directions in criminal theory, the two concepts have much in common. They both represent efforts to transcend the sources of positive law and to reach for a higher, enduring, normative plane. Kelsen to one side,128 German thought clearly recognizes the Right as the inexhaustible repository of ultimate truth about justice in civil society. A vivid sense of Right is expressed in the post-war West German constitution, which holds that judges are bound not only by enacted and customary law, but also by the Right.129 We express the same point by reasoning that judges abide not only by enacted rules, but by principles of morality and justice.130

As the Right is not reducible to enacted laws, reasonableness is not reducible to a finite set of rules. As we know from the “stop-look-and-listen” cases in tort law,131 no set of rules can determine what is reasonable in all situations. Nor does reasonableness lend itself to definitive specification on the basis of custom or of market practices.132 We do not always know what the reasonable requires, but working with this open-ended concept at the core of our legal system saves us from the constricting effects of positivism. Whatever philosophers may argue, we know that the rule of law means more than the law of rules.

Although both the Right and the reasonable permit the ongoing infusion of moral values into the law, these two architectonic concepts impose different structures on the legal order. The Right stands for a monistic legal order, for the existence of one right answer in every legal dispute. The Right requires us to believe that only one party can be justified in any situation of conflict. The reasonable, in contrast, urges us in the direction of a pluralistic legal order. Perhaps only one side can be in accordance with the Right, but both disputants might be reasonable. Both sides might indeed be justified.

Understanding this divergence between the Right and the reasonable helps us to fathom the deeper structure of the debate between H.L.A. Hart and Ronald Dworkin over discretion in the legal process. It is no accident, in my view, that in explaining why judges invariably have discretion in applying the law, Hart relies on the paradigmatic

128 See H. Kelsen, supra note 72.
129 See GRUNDGESETZ § 20(3) (W. Ger.).
132 See The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).
example of negligence and reasonable care. The standard of reasonableness invites consideration of diverse normative criteria in resolving the dispute. It does not, however, necessarily point to a single right answer. If there are several reasonable solutions to a particular dispute, then there is no way to decide between them but by judicial exercise of choice or discretion. A pluralistic legal order mandates discretion. As Hart states his conclusion: "[T]here is no possibility of treating the question raised by the various cases as if there were one uniquely correct answer to be found, as distinct from an answer which is a reasonable compromise between many conflicting interests." To counter Hart's thesis, Dworkin seeks recourse in modes of legal thought found, as well, in continental thinking. First, he develops a model of structured legal argument. His favorite case is Riggs v. Palmer, which raises the question whether a designated heir of a murdered testator may nonetheless take under a will. The rule holds that everyone properly designated in a will has a right to inherit. This rule appears to be absolute; but in fact, the rule is subject to defeasance on another plane of analysis: the plane of principle or of Right. If the defendant murders the testator, the relevant principle on this second plane is that no one should profit from his own wrong. By stressing that principles of Right are accepted or rejected on grounds of their intrinsic appeal rather than the pedigree of their enactment, Dworkin effectively undermines the positivist assumption that all law is reducible to enacted law.

Invoking this mode of structured argument, however, is not enough to rebut the thesis that judges exercise discretion in interpreting and applying the law. Needed in addition is a commitment to a monistic legal order. If there is a single truth of the matter and judges are obligated to discover that truth, then they cannot exercise a choice between reasonable alternatives. The thesis eventually emerges in Dworkin's work that there is a right answer in every dispute, however difficult the answer may be to discover. In another version of the

134 Id. at 128.
135 See R. Dworkin, supra note 71, at 14.
136 115 N.Y. 506, 22 N.E. 188 (1889).
137 See R. Dworkin, supra note 71, at 22–31 ("principles" function, like the Right, as the law beyond the enacted law). Dworkin's two-stage analysis, applying rules, then principles, should not be confused with the structured division between the Right and humanitarian considerations.
138 See id. at 36.
139 See Dworkin, No Right Answer?, in Law, Morality and Society 58, 84 (P. Hacker & J. Raz eds. 1977) ("[T]here will always be a right answer in the seamless web of our law."). While conceding that Dworkin is almost universally understood to claim that one of the parties in every hard case has a right to a decision in his favor, Leon Gallis reads Dworkin's claim to be merely that one of the parties might have a right. See Gallis, The Real and Unrefuted Rights Thesis, 92 Phil. Rev. 197, 200–01 (1983).
same monistic strain, Dworkin argues that there is one best fit of the authoritative legal materials to a particular case and one best interpretation of these materials.\textsuperscript{140} Whatever turn this monistic argument takes, the thrust of Dworkin's work is to elaborate a theory of Right in American law.

The conflict between pluralism and monism, between reasonableness and Right, replicates itself on the level of methodology in legal theory. Should we assume that there are many different, equally plausible theories of criminal law? Is the common law solution to the problem of putative self-defense just as sound as the German solution? Or should we be committed to monism in searching for the single best theory of criminal law that transcends particular legal cultures? Comparative legal theory might illuminate our understanding of diverse legal styles. But, to my mind, it would be an intellectual tragedy to take the concepts of style or of culture as a limitation on possible modes of argument. Should we say to Dworkin: "You cannot argue for a single right answer in the context of the common law. We think differently here"? A reference to culture is not an argument. That a particular mode of thought has been ascendant for a century or two tells us nothing about how we might think a century from now. My own view is that as a descriptive matter, our legal culture might incline us in a particular direction. The task of philosophical argument is to arrest this inclination and to establish a common basis for discourse that enables us to transcend our particular conventional practices. It is not the task of culture to legitimate argument. It is the task of argument to legitimate — or to delegitimate — culture.

\textsuperscript{140} See R. DWORKIN, supra note 71, at 116–17.