



A Primer on the Distinction between Justification and Excuse

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Abstract

This article is about the distinction between justification and excuse, a distinction which, while familiar, remains controversial. My discussion focuses on three questions. First, what is the distinction? Second, why is it important? And third, what are some areas of inquiry in which the distinction might be philosophically fruitful? I suggest that the distinction has practical and theoretical consequences, and is therefore worth taking seriously; I highlight two philosophical issues in which the distinction might play a useful role; but I express skepticism about the prospects for drawing a firm distinction between justification and excuse.

1. Introduction

Justifications and excuses are defences to criminal and civil liability. This article is about the distinction between these two defences, a distinction which, while familiar, remains controversial. In particular, the value of the distinction is contested and there is no general consensus about how best to delineate its contours. With this in mind, my discussion will focus on three questions. First, what is the distinction? Second, why is it important? And third, what are some further areas of inquiry in which the distinction might prove to be philosophically useful?

It is undeniable that there are reasons to think that the distinction is important. But those wishing to draw a firm distinction between justification and excuse face a number of obstacles. First, the breadth and variety of justifying and excusing conditions make trouble for attempts to clearly distinguish them. Second, because the justification/excuse distinction is not exhaustive – because, that is, there are defences that are neither justifications nor excuses – articulating the distinguishing features of one will not automatically yield a distinction from the other. And third, because the justification/excuse distinction is (arguably) supposed to track certain moral distinctions, and because the nuanced language of morality frequently lacks similarly complex legal analogues, some moral distinctions to which we would like the law to draw attention may be inadequately captured by the justification/excuse distinction.¹ This should

lead us be cautious about claiming that a clear and unified justification/excuse distinction can be drawn. Indeed, I will suggest that the issue may ultimately be one of ‘semantic indecision’, an issue about how we should talk. If we want to talk very broadly about justifications and excuses, then it is unlikely that a unified distinction can be drawn, while if we want to talk less broadly about justifications and excuses then, while a distinction may be articulable, its scope is likely to be correspondingly narrow.

2. Some Preliminary Distinctions

While my main topic is the distinction between justification and excuse, I propose to begin somewhere else, namely with the concept of a *bar to successful prosecution*. This concept is extremely broad.² On the one hand, it encompasses what would ordinarily be called *justifications* and *excuses*. On the other hand, it also applies to other sorts of bars to successful prosecution, including what would most naturally be called *procedural* bars, as well as to what are sometimes called *exemptions*. By procedural bars I have in mind such things as the defence of entrapment or the rule against double jeopardy; by exemptions I have in mind bars to successful prosecution that flow from the idea that, due to their special status, certain individuals are exempt from criminal liability, or, more weakly, are exempt from criminal liability for certain acts. So, for example, in many jurisdictions children are exempt, or immune, from criminal prosecution altogether.³ Similarly, the principle of consular or diplomatic immunity entails that certain individuals, due to their diplomatic status, enjoy immunity from criminal prosecution. Or take, more controversially, the principle of *conjugal unity*.⁴ Under English common law a husband and a wife were for some legal purposes treated as a single (legal) person. In consequence, it has been suggested that there are some crimes that a husband and a wife simply cannot commit. More particularly, it has been suggested that a husband and wife cannot commit the crime of conspiracy with each other. This is because conspiracy presupposes two wills, whereas for the purpose of conspiracy the law views husband and wife as forming one person and consequently sharing but one will.⁵

It might be thought that all bars to successful prosecution deserve to be called defences. But this is doubtful. For the concept of a bar to successful prosecution also includes bars that are not in any sense defences at all, such as the death of a key eyewitness, or the loss or destruction of crucial evidence. Although such happenings might make successful prosecution impossible it would be odd to call them *defences*.

Nonetheless, it is also clear that some bars to successful prosecution *are* properly called defences. But like the various different bars to successful prosecution, defences take many forms. I have already made reference to justifications and excuses, and I contrasted them with exemptions and

procedural bars to successful prosecution. But even this list of defences is not exhaustive. Consider the alibi defence, for example. It is doubtful that the alibi defence functions as an excuse – somebody who puts forward the alibi defence is not admitting to having committed the *actus reus*, or prohibited act – and it seems clear that it does not function as a justification either, since the accused is not saying that while she committed the prohibited act, she was entitled to do so. It is similarly doubtful that the alibi defence is explicable in procedural terms, and it doesn't seem right to call it an exemption either, since somebody claiming an alibi defence is not claiming that because of her special status she should be immune from prosecution. Rather, the alibi defence is simply a *denial* of the claim that the accused did what she is accused of doing.

Although examples could be multiplied, my point is a simple one: that while there are many different sorts of bars to successful prosecution only some of them are usefully categorized as justifications or as excuses. Thus, in talking about the justification/excuse distinction it must be kept in mind that justifications and excuses represent only a subset, albeit an important one, of bars to successful prosecution.⁶

3. Some Examples

The paradigmatic justification is self-defence. According to section 3.04(1) of the *Model Penal Code*, for example, a person is justified in using force upon another person if he believes that such force is immediately necessary to protect himself against the exercise of unlawful force by the other on the present occasion.⁷ Genuine self-defence – situations in which unlawful force really is being exercised by one party against another – presents few problems. The controversial cases are those involving putative or mistaken self-defence, and those cases involving so-called Innocent Threats or Innocent Aggressors. In such cases it is less clear that the use of self-defensive lethal force is justified rather than excused.⁸ I will have occasion to talk more about such cases below.

The category of excuses is a broad one. Douglas Husak, for example, in *Philosophy of Criminal Law* mentions at least eight: intoxication, automatism, physical compulsion and impossibility, mistake of fact, mistake of law, duress, provocation and necessity. Take duress and necessity. Both defences share certain similarities given that in both cases the accused claims that she 'couldn't have done otherwise' due to external circumstances beyond her control. The difference between the two resides in the difference between the external circumstances. In circumstances of duress the external circumstances are (due to) the actions of another individual as, for example, where A points a gun at B and threatens to kill him unless he assaults V. In situations of necessity, on the other hand, the external circumstances are naturally occurring events, as when a storm forces a ship illegally transporting drugs to seek refuge in a protected harbour,⁹ or when homelessness

forces individuals to trespass and squat in abandoned buildings.¹⁰ Duress and necessity present problems in part because they challenge and blur the distinction between justification and excuse. What, for example, distinguishes necessity from self-defence?

Finally, consider automatism, insanity and intoxication. Although it is tempting to label these defences as excuses it is not clear that such categorization is appropriate. Insanity, for example, is probably best thought of as an exemption or immunity to criminal liability rather than as an excuse. Similarly, a case can be made that intoxication is not a defence at all, but simply a denial of mens rea, the intoxicated accused claiming that because she was unable to foresee the consequences of her actions the necessary elements of criminal liability are absent.¹¹

This brief discussion reveals difficult issues of categorization, and I will return to some of them below. But it should also alert us to the possibility that whether a coherent justification/excuse distinction can be drawn may depend in part on what counts as an excuse: the broader the category, the less coherent it begins to look.

4. *Why the Distinction Matters*

To return to the main plot. I said that I would be talking about what the distinction between justifications and excuses is, and about why it matters. But let me turn to the second question first.

I am of the view that the distinction between justifications and excuses is an illuminating one because it forces us to confront deep and difficult questions related to responsibility, culpability and liability. But not everybody agrees. Consider in this respect the following remarks from Smith and Hogan's *Criminal Law*, at 248:

systems of classification into justifications and excuses suffer from a number of drawbacks. First, there is no agreement on the precise model that the classifications should take . . . Secondly, there is no consensus as to which classification applies to which defense – for example, many see duress as excusatory but some as justificatory. Thirdly, there seems to be little agreement as to what difference, if any, would result in practical terms from classification of a particular defence into one category or another.¹²

Of course, in some sense the proof will be in the pudding: *is* a principled distinction between justification and excuse available? If so, *will* it succeed in capturing (most of) what we want the distinction to capture? But we can also point to considerations in support of the idea that regardless of whether a generally agreed-upon distinction between justifications and excuses can be drawn, investigation of the distinction remains worthwhile. Let me mention two considerations in particular. First, there are *practical* considerations: it turns out that it can make a practical difference whether a justification is offered by an accused, or whether what is claimed is better thought of

as an excuse. And second, there are *moral* considerations, reasons to think that the distinction between justification and excuse matters because it matters what sort of individuals we want to be. Let me discuss each in turn.

I begin with the idea that it can sometimes make a practical difference whether somebody is afforded a justification or an excuse. For example, it is unlawful to resist justified conduct, but lawful to resist conduct that is merely excusable. Thus, whether an action is justified or merely excused can have practical consequences for how one reacts to that action. Similarly, it is generally accepted that a third party will be entitled to come to the aid of somebody engaged in justified conduct, but will not be entitled to help somebody whose conduct is merely excused.¹³ Justifications, in other words, seem to affect legal relationships with third persons, while excuses do not. In this sense, a justification is analogous to an *in rem* right, good against the whole world, whereas an excuse is closer to a right *in personam*, good only against certain individuals. Moreover, whether an action is justified or merely excused can have remedial implications as well. If I act in a justified manner, then it is less likely that I will have to pay damages for any harm thereby caused, whereas if I am merely excused, it is more likely that compensation will be owed. This suggests that whether an action is justified or excused can have important practical consequences. It can make a difference to what I am entitled to do in the face of the action of another, to whether third parties can come to my aid, and to whether I might incur remedial obligations as a result of my actions.

Second, consider the idea that the distinction between justification and excuse matters *morally* because it matters what sort of individuals we want to be. As John Gardner argues, criminal lawyers

tend to take it for granted that any doctrine that serves to acquit the accused . . . is as good as any other so far as the accused is concerned. I have always found this an astonishing assumption, which implies that nobody who is tried in the criminal court has, or even deserves to have, any self-respect. Self-respect is an attitude which everyone ought to have if they deserve it, and which, moreover, everybody ought to deserve . . . It follows that it is part of the nature of self-respect that a self-respecting person wants to be able to give a rational intelligible account of herself, to be able to show that her actions were the actions of someone who aspired to live up to the proper standards for success in her life and fitness to lead it. She wants it to be the case that her actions were not truly wrongful, or if they were wrongful, that they were at any rate justified, or if they were not justified, that they were at any rate excused. ('Gist of Excuses' 133)

Gardner's point is that the manner in which somebody is acquitted makes a difference to how that person views herself, and to how she is viewed by others. Thus, it can make a difference whether somebody is spared punishment because she did nothing wrong, or because she was entitled

to act as she did – that is, was justified in acting as she did – or because, while she acted badly, she had an excuse available to her.

H. L. A. Hart says something similar when he remarks that, in a case of excuse,

what has been done is something which is deplored, but the psychological state of the agent when he did it exemplified one or more of a variety of conditions which are held to rule out the public condemnation and punishment of individuals. ('Prolegomenon to the Principles of Punishment' 13–14)

This is to be contrasted with a justification, in which 'what is done is regarded as something which the law does not condemn, or even welcomes' (13–14). In short, whether something is a justification or an excuse, or one sort of excuse rather than another, can make a moral difference, particularly where self-respect is at issue.

The language of self-respect might seem needlessly fluffy and abstract, but the basic idea strikes me as sound and is nicely illustrated by reflection on the so-called battered woman syndrome. For many years in the United States and Canada, women who killed their abusive partners could seek acquittal on grounds of temporary insanity or diminished responsibility only. However, since *State v. Kelly*¹⁴ in the United States and *R. v. Lavallee*¹⁵ in Canada women have been able to plead self-defence instead. This is a significant change. Self-defence is a justification, battered woman syndrome an excuse. Thus, in recognizing the availability of self-defence courts have sent the message that in killing their abusive partners abused women sometimes act as they are entitled to act. This is a very different message than that communicated by the idea that abused women who kill their abusive partners should be excused on the grounds that their behaviour was the result of a syndrome that compromised their capacity for rational thought and voluntary action. The first message coheres much better with a robust conception of self-respect and moral worth.

5. *What the Distinction Is*

So far I have suggested that there are both practical and moral reasons for supposing that the distinction between justification and excuse matters. So let me turn, finally, to discussion of that distinction.

I indicated above that we should approach with caution the claim that a clear and unified justification/excuse distinction can be drawn. And indeed, there are a number of different attitudes one might take towards the distinction. One is that of the genuine skeptic, who does not believe that the distinction exists at all. If an argument is wanted, it might be pointed out that, given the multiplicity of justifications and excuses – self-defence, defence of others, defence of property, the use of force in effecting arrests in the case of justification, intoxication, automatism, necessity, duress and provocation in the case of excuse – it is an open question whether there

can be such a thing as *the* justification/excuse distinction. Perhaps it will turn out that trying to draw a distinction between justification and excuse is like trying to draw a distinction between games and non-games, a difficult task given what appears to be a cluster of more or less similar things that differ from one another in various different ways.

Another attitude is that of what might be called the partial skeptic. The partial skeptic does not deny that there is a distinction between justification and excuse, but remains skeptical about whether it can or should be drawn precisely. Kent Greenawalt is arguably an example of such a person.¹⁶ According to Greenawalt, while the distinction is an important one, ‘Anglo-American criminal law should not attempt to distinguish between justification and excuse in a fully systematic way’ (‘Perplexing Borders of Justification and Excuse’ 1898). For while

[a] fully comprehensive [criminal] system *could* divide up all the instances of justification and excuse, [it] could do so only by distorting of [sic] ordinary concepts or by employing some complicated subcategories reflecting significant policy judgments. A program to achieve that objective is not an appropriate one for Anglo-American penal law. (1927, italics in original, internal footnotes omitted)

Greenawalt does not deny that a firm distinction between justification and excuse could be drawn. Rather, his point is that because in drawing such a distinction would do violence to various legal concepts and categories ‘the law should not aim for comprehensive, precise distinctions between justification and excuse’ (‘Distinguishing Justifications from Excuses’ 90). Although I will suggest that an attitude of partial skepticism is not inappropriate in this difficult area of the law, it seems to me to be a mistake to conclude from the fact that the distinction may be hard to draw that the justification/excuse distinction cannot or should not be drawn.¹⁷ A more principled argument is needed.

There are a number of different ways of drawing the justification/excuse distinction. I will focus on three of them. For simplicity I will dub them the Responsibility Thesis; the Role Played by Reasons Thesis; and the Reasonable Belief Thesis. I have chosen to focus on these ways of drawing the distinction for two reasons. First, they figure prominently, either explicitly or implicitly, in both historical and contemporary debates about justification and excuse. And second, they have some intuitive theoretical plausibility.

Some other ways of drawing the distinction do not, in my view, merit extended comment. Take, for example, the idea that excuses are subjective, having to do with features of individuals, whereas justifications are objective, having to do with features of the circumstances in which individuals act.¹⁸ The problem with this idea is that some justifications depend on subjective features or properties of the actor. Thus, parents and police officers may be justified in doing certain things – disciplining children or

effecting arrests – that ordinary citizens are not. Conversely, some excuses also include an objective component. For example, in Canada the defence of provocation, which serves to reduce murder to manslaughter, requires that a wrongful act or insult that causes sudden provocation be ‘sufficient to deprive an ordinary person of the power of self-control’ (*Criminal Code*, R.S.C. 1985, c. C-46, s. 232). The reference to the ordinary person imports an external and objective element into the excuse and makes trouble for the claim that excuses depend solely on subjective qualities of the agent at the time of the action. It is therefore doubtful that the distinction between justification and excuse can be founded on a distinction between subjective and objective.

Or consider the idea that ‘[t]he distinguishing feature of excusing conditions is that they preclude an inference from the act to the actor’s character’ (Fletcher, *Rethinking Criminal Law* 799). However, while this might be a necessary condition for something’s being an excuse it cannot be what *distinguishes* justifications from excuses. The reason is simple. Ordinarily, if person A kills person B we can infer that A is not morally virtuous. But if A kills B in self-defence, that inference is blocked. And yet self-defence is a justification. Consequently, since at least some justifications preclude an inference from act to character, the blocking of such an inference cannot be what distinguishes justifications from excuses.

Or take, finally, the idea that the distinguishing feature of justifications is that they function to prevent greater evil – the so-called *Lesser Evils Defence* picture of justification.¹⁹ On this view an actor will be afforded a justification for conduct that would otherwise be a crime if she believes that the conduct is necessary to avoid a harm or evil to herself or to another person that is greater than the harm or evil sought to be prevented by the law defining the crime.²⁰ But again, it is doubtful that this can be what *distinguishes* justifications from excuses. To see why, assume for the sake of argument that conduct is justified only if it prevents a greater evil. From this it follows that if conduct fails to prevent a greater evil it is not justified. But much conduct that fails to prevent a greater evil will not be excusable conduct either. Consequently, it is not clear that appeal to the Lesser Evils Defence will serve to *distinguish* justifications from excuses.

This highlights a general problem with attempts to distinguish justification from excuse. Because the justification/excuse distinction is not exhaustive – because there are other sorts of defences in addition to justifications and excuses – identifying what is distinctive about justifications, say, will not automatically yield a distinction from excuses. Suppose all and only justifications have feature F; then any action that lacks F cannot be a justification. Does it follow that somebody who performs an action that lacks F cannot be excused? It does not. Thus, learning what is characteristic of justifications may not reveal what is characteristic about excuses.

5.1. SOME PRELIMINARIES

But what *is* characteristic of justifications? At a minimum a justification is an *entitlement*. To say that X was justified in ϕ -ing is to say that X was entitled to ϕ , or that X had a right to ϕ , or that in ϕ -ing X did nothing that she ought not to have done. On the other hand, to say that X has an excuse for ϕ -ing is to say, among other things, that X was not entitled to ϕ , that X had no right to ϕ , or that in ϕ -ing X did something she ought not to have done. The distinguishing feature of a justification therefore has to do with an entitlement to act.

Now in some sense this is uncontroversial. For even those who worry about whether necessity, say, is a justification or an excuse agree that the answer to this question depends, at least in part, on whether necessity entitles a person to act in a certain way. As Jerome Bickenbach remarks, to defend one's actions on the grounds of necessity

is not to point to one's mental state at the time of the action and say that there was, literally, no choice. The defence, rather, is of the action, *that under the circumstances it was not the wrong thing to do*, when under different circumstances it would be the wrong thing to do. (87; emphasis added)

For to say of A's ϕ -ing that it was not the wrong thing to do is to say that A was entitled to ϕ , and to say that is to say that A was justified in ϕ -ing.

But in another sense these remarks about entitlements to act do not add much to the debate about justification and excuse, since it remains unclear why an action that is not justified might nonetheless be excused. So what I'd like to do now is consider some influential views about the conditions under which somebody can be said to be justified or excused in acting in a particular way.

5.2. THE RESPONSIBILITY THESIS

Perhaps the most philosophically familiar attempt to draw the justification/excuse distinction is due to J. L. Austin who, in his classic paper 'A Plea For Excuses', distinguished justifications from excuses as follows: '[i]n the one defence [justification], briefly, we accept responsibility but deny that it was bad: in the other [excuse], we admit that it was bad but don't accept full, or even any, responsibility' (124). Peter Westen echoes Austin: 'the difference between justification and excuse, properly understood, is as simple as the distinction between "I didn't do anything wrong" and "Even if I did, it wasn't my fault"' (291) And Kent Greenawalt says something similar:

When something is fully justified, it is warranted. A justified belief is a belief based on good grounds; a justified action is a morally appropriate action. When something is fully excused, it is not warranted, but the person involved is not blameworthy. An excusable belief is one that a person cannot be blamed

for holding; an excusable action is one for which a person is not fully responsible. This is the central distinction between justification and excuse. ('Distinguishing Justifications from Excuses' 91)²¹

These remarks suggest that the difference between justification and excuse has to do with whether or not the accused was appropriately *responsible for* or *in control of* her actions. On this view somebody claiming an excuse claims that she was not appropriately responsible for what she did, whereas somebody claiming a justification claims that while she was responsible for what she is accused of doing, she nonetheless acted properly in acting as she did. Call the idea that excuses operate by denying responsibility or agency the *Responsibility Thesis*.²²

Although it isn't always spelled out, we can give a more formal argument for the Responsibility Thesis. For simplicity I'll call it the *Responsibility Argument*.²³

Responsibility Argument

- (1) All and only justifications are reasons for action. (Assumption)
- (2) No excuse is a justification. (Assumption)
- (3) So excuses are not based on reasons. (From (1) and (2))
- (4) If excuses are not based on reasons, excuses are irrational. (Assumption)
- (5) Excuses are irrational. (From (3) and (4))
- (6) If excuses are irrational, excuses must work by denying responsibility. (Assumption)
- (7) Excuses must work by denying responsibility. (From (5) and (6))

The argument seems valid, and (7) is just a restatement of the Responsibility Thesis. So we have an argument from the idea that excuses are not based on reasons to the conclusion that excuses must be based on a denial of responsibility, that in cases of wrongdoing one's responsibility is 'something to be regretted and (if possible) avoided' (Gardner, 'In Defence of Defences' 85). Other things being equal, in other words, it is preferable not to have been responsible for one's wrongdoing, since wrongdoing yields adverse consequences when conjoined with responsibility. And an excuse is precisely what prevents such a conjunction.

5.3. THE ROLE PLAYED BY REASONS THESIS

The Responsibility Thesis has obvious appeal. For one thing, it is historically influential. For another, it is surely true that in some sense somebody who avails herself of an excuse is less responsible for what she has done insofar as she is not subject to the same degree of punishment as she would have been had she lacked an excuse. And finally, it is not implausible to suppose that actions are sometimes excused because the actor was unable to do what she wanted to do, and that 'it is inappropriate to punish actions which are normatively "involuntary"'.²⁴

But the Responsibility Thesis is also open to challenge. First, it might be noted that as an account of what it means to be entitled to do something the Responsibility Thesis is lacking. Am I entitled to ϕ if I am *responsible* for ϕ -ing? Hardly, since I can be responsible for doing many things that I am not entitled to do – hitting you on the nose, for example. Is my entitlement to ϕ compromised by my *not* being responsible for ϕ -ing? Hardly, since I may be entitled to do many things that I am not, in a given circumstance, responsible for doing – smashing my own vase as a result of an epileptic seizure, for example. In short, one problem with the Responsibility Thesis is that the link between entitlement and responsibility remains unclear.

Second, and perhaps more importantly, some theorists have argued that the Responsibility Thesis's focus on lack of responsibility and agency is itself misplaced. John Gardner, for example, considers a version of the Responsibility Argument set out above and suggests that once we see why this argument ought to be rejected, we will also see why the Responsibility Thesis is problematic. Gardner in effect denies (1). On his view, while it may be true that all justifications are reasons for action, it does not follow that all *and only* justifications are reasons for action. This is because excuses can be based on reasons as well. As Gardner puts it,

having an excuse, like having a justification, is by its nature an affirmation of one's rational competence. Both justifications and excuses are rational explanations for wrongdoing. They explain why the agent acted as she did by pointing to reasons that she had at the time of her action. ('In Defence of Defences' 86)

This is not to say, however, that reasons operate in the same way in cases of justification and excuse. Rather, when one is justified, says Gardner, one has reasons for acting as one did, and so has an entitlement to act as one did. In cases of excuse, on the other hand, one merely has reasons for *believing* that one has an entitlement to act as one did. Excusing reasons therefore operate at one remove from justifying reasons. I take your coat at a party, mistakenly thinking it is mine (our coats being indistinguishable to the untrained eye). I am not entitled to take your coat – it is, after all, yours – but I have good reasons to *believe* that I am entitled to take your coat: I think it belongs to me. So my action is excused rather than justified, for even if my *belief* that the taking of your coat was justified, the taking itself was not.

Paul Robinson defends a similar position. He suggests that whether an action is justified depends on 'whether the justification defence is given (1) because the conduct in fact is justified or (2) because the person acts for a justified reason' ('Competing Theories of Justification: Deeds v. Reasons' 46).²⁵ Only if the conduct in fact is justified – only if the agent is entitled to act as she did act – does Robinson believe a justification is in order. This is why Robinson says that 'a person who mistakenly believes that the conduct is justified is not justified'. Rather, the test for justification, according to Robinson,

ought to be whether on balance the conduct in fact avoided a net societal harm (in the broadest sense of harm). An actor's reasons might be relevant to liability but, if so, they [are] properly taken into account by other criminal law doctrines: a mistaken reasonable belief that the conduct was justified might exculpate under an excuse defence. ('Competing Theories of Justification: Deeds v. Reasons' 47)

There are obviously differences between the views of Gardner and Robinson. Robinson, for example, would be uncomfortable with the idea that reasons can sometimes be the source of justification – as he says, an actor's reasons, if relevant to liability, are at best relevant to issues having to do with excuse. But on the not implausible assumption that what is important to both Gardner and Robinson is whether the world is as one takes it to be when one acts the two views are not dissimilar.

Other excuses can be refashioned to fit this general picture. Thus, provocation can be seen as an unjustified reaction to justified anger (directed toward another human being), duress as an unjustified reaction to justifiable fear (created by another human being), and necessity as an unjustified reaction to a justifiable belief that legally available alternatives are precluded (by certain natural phenomena).²⁶

Note, however, that this picture depends on a particular conception of excuse. Gardner says that 'having an excuse, like having a justification, is by its nature an affirmation of one's rational competence. Both justifications and excuses are rational explanations for wrongdoing' ('In Defence of Defences' 86). But surely this is an open question. If insanity and automatism operate as excuses, for example, then it is less clear that this picture makes sense, since both are by hypothesis defences that deny that the agent acted rationally at all. Then again, if insanity and automatism are thought of as exemptions rather than as excuses, perhaps this picture of the nature and scope of excusing conditions is not implausible. Still, it is worth keeping in mind that to the extent that this sort of picture presupposes a particular way of distinguishing excuses from other sorts of defences, the picture is only as plausible as the distinction on which it rests.

To recapitulate: on the present view the distinction between justification and excuse is to be understood in terms of the role played by reasons. The distinction does not depend on the presence or absence of responsibility or agency, since on this view excuses do not operate by denying responsibility at all. Rather, on this view excuses emphasize the fact that one *is* responsible for what one has done, in the sense that one acted on the basis of a reason, even though it may turn out that the reason in question did not in fact apply. Thus, according to what I will call the *Role Played by Reasons Thesis* the distinction between justification and excuse does not depend on whether or not there *is* a reason on which a given action is based. Rather, what matters is *how* the reason in question operates.

This is a very attractive picture about the relationship between reasons, actions, justifications and excuses. It also has important consequences. Take, for example, a paradigmatic puzzle about self-defence: Aggressor

approaches Victim menacingly, gun in hand, and makes gestures that suggest that he intends to kill Victim. Unbeknownst to Victim, however, Aggressor is under the influence of a powerful hallucinogenic drug that prevents him from forming the *mens rea* for murder, and is brandishing an unloaded weapon. Victim certainly has good reasons for believing that she is entitled to defend herself: Aggressor is coming towards her, gun in hand, and is manifesting what appears to be an intention to kill. But Victim's beliefs, while reasonable and justified, are false: Aggressor does not intend to kill her, and could not act on those intentions even if he had them, since his gun is unloaded. Says Gardner,

[i]t is one thing to have a reason to defend oneself and quite another to have every reason to believe that one has a reason to defend oneself that in reality one does not have (e.g. because one has strayed accidentally and without any warning onto the set of an action movie). The first opens the way to justifying one's act of self-defence. The second opens the way to excusing it. Thus, sometimes, even though we are epistemically faultless, we cannot be aware of what we would need to be aware of in order to perform a justified action. In that case the most we can hope for is an excuse. That takes us down a peg, morally speaking, because although it testifies to our rational competence, it also points to a rational error. We acted for a non-existent reason, albeit one that we were justified in holding to exist. ('In Defence of Defences' 87)

Despite the elegance of this picture, however, it gives rise to some difficult questions. Gardner suggests that Victim makes a *rational* error in acting on the basis of her reasonable and justified belief that Aggressor means to do her harm. And yet is hard to see what the source of such an error is. Victim is not making an epistemic mistake since, as Gardner allows, her belief is both reasonable and justified: she is epistemically faultless. Nor is she making a mistake of practical rationality, since she is surely not at fault for *acting* on the basis of her reasonable beliefs. As Justice Holmes famously said, detached reflection cannot be demanded in the presence of an uplifted knife.²⁷ It is hard to avoid the conclusion, in other words, that Victim makes no mistake in acting as she does. And if Victim makes no mistake it is unclear that an excuse is appropriate.²⁸

Of course, perhaps this just shows that we should not take Gardner's remarks about rationality too seriously. Perhaps we should simply accept the fact that Victim, while rationally and epistemically faultless, is nonetheless to be blamed for causing Aggressor's death because – to use the language of the Lesser Evils Defence – she failed to prevent a greater evil. Or perhaps we ought to say that Victim does make an epistemic mistake, albeit a blameless one. And yet the question remains: *should* Victim be blamed for engaging in self-defence on the basis of a faultless belief? While there is no question that the relationship between mistake, error, blame and fault is complicated – can I be faulted, and so blamed, for making a blameless, and so faultless, mistake? – I can't help but wonder whether the *Role Played by Reasons Thesis* has got the relationship right.

5.4. THE REASONABLE BELIEF THESIS

Gardner's claim is that it is one thing to have a reason to defend oneself and quite another to have every reason to believe that one has a reason to defend oneself. But what if having every reason to believe that one has a reason to defend oneself *is* a reason to defend oneself? Perhaps the following is true instead: '[i]f the circumstances warrant a reasonable belief, the actor is entitled to rely on the appearances, whatever the facts may actually be' (Fletcher, *Rethinking Criminal Law* 707). Call this the *Reasonable Belief Thesis-?*²⁹

Care is required. The claim is not that a person is justified if she *believes* that she is justified. With respect to a true belief, for example,

[t]he fact that [the belief] is believed does not justify the action. Rather, the fact that it is true justifies the action, but the agent can only appeal to that justification if he or she was aware of it at the time of the act. In the same way, the fact that [a belief] is reasonable justifies the action, but the accused can only appeal to it if he or she was aware of its reasonableness at the time of the act. (Ripstein, 'Self-Defense and Equal Protection' 688)

In other words, what does the justifying is not the belief, but its reasonableness. But what is meant by 'reasonableness' here? Like many, it seems to me that reasonableness is best understood in terms of something like the paradigm of *reasonableness as reciprocity*.³⁰ John Rawls famously distinguished the rational from the reasonable. On his view, while rational persons act to promote their own system of ends, reasonable persons act so as to create a world 'in which they, as free and equal, can co-operate with others on terms all can accept' (Rawls 50). According to this idea I act reasonably when, in deciding what to do, I act in a way that appropriately balances various liberty interests (my own, or those of others) with various security interests (my own, or those of others). Related to the concept of reasonableness as reciprocity are issues having to do with the allocation of risk. Tort law, for example, seeks to answer the question, Whose misfortune is it when things go wrong? But this is just another way of asking whether a risk imposed by defendant on victim was *reasonably* imposed. According to the paradigm of reasonableness as reciprocity I act reasonably when I appropriately balance my interest in liberty with your interest in security, thereby reasonably allocating the risk of misfortune between us. If I reasonably impose a risk on you and it ripens into injury, the loss lies where it falls, and the misfortune is yours. But if I *unreasonably* impose a risk on you any resulting misfortune is mine, and I bear the burden of making you whole.³¹

Importantly, what determines whether the balancing of my interests in liberty with your interests in security is reasonable is not a function of my subjective intentions but depends instead on where the various risks lie and on how those risks are allocated. And those are objective matters. So

as Ripstein remarks, ‘reasonable beliefs are not psychological states at all. Reasonableness is a description of the world from a particular perspective – the perspective of equality [or reciprocity]’ (‘Self-Defense and Equal Protection’ 695). In short, the Reasonable Belief Thesis-? is the claim that an actor is entitled to act on the basis of a reasonable belief provided that the belief is reasonable from the external perspective of reciprocity.

I find this account of what it means to be entitled to act attractive, in no small part because it seems to me to get the phenomenology of Victim and Aggressor right in a way in which the Role Played by Reasons Thesis does not. Nonetheless, as an account of the justification/excuse distinction the Reasonable Belief Thesis-? also faces problems, since it seems to collapse the justification/excuse distinction altogether. For appeals to reasonable beliefs are ubiquitous, appearing in justifications such as self-defence as well as in excuses such as provocation, necessity and duress. So how are we to distinguish justifications from excuses on the Reasonable Belief Thesis?³²

The best way to address this problem is to return to first principles and focus on the nature of the underlying rights involved. Consider again the case where I mistakenly take your coat, reasonably believing it to be mine. Here the wrong to you consists in the unauthorized use of your property. That is a trespass (or a conversion). And because I ordinarily do not have a right to use what is yours without your consent liability for trespass is typically strict (although there may be a restricted right to use another’s property without consent if done in self-defence, or in situations of necessity).³³ On the other hand, in cases of harm-based wrongs to persons generally – and in cases of self-defence in particular – the appropriateness of defendant’s behaviour is always at issue. Consequently, whether a wrong has been committed depends in part on the degree to which appropriate care has been taken. In short, because the underlying rights are different in the two sorts of cases it stands to reason that the reasonableness of the relevant belief will operate somewhat differently in each case as well. And it does. In the coat case the reasonable belief operates to excuse, since liability is strict; in the case of self-defence, it operates to justify, since liability depends in part on the how risk has been allocated, that is, on the reasonableness of my actions.³⁴

Nonetheless, it might be objected that even if it is allowed that reasonable beliefs sometimes justify, and sometimes excuse, the Reasonable Belief Thesis-? *itself* is not what distinguishes justifications from excuses since, as noted above, that distinction depends on a separate analysis of the underlying rights involved. Is this a problem? It is not clear that it is. For the real question is whether there is an independently plausible account of the nature of the underlying rights available. And it is arguable that there is. Since the law – or at least private law – already recognizes a distinction between trespass- and harm-based torts, there is no reason why the Reasonable Belief Thesis cannot appeal to such a distinction as well. This suggests that whether an act is justified depends on whether the boundaries

of the underlying rights have been transgressed, but that whether an individual is excused depends on how much we are willing to allow others to do by way of transgressing such boundaries.³⁵

The following picture – which I'll call the *Reasonable Belief Thesis* – is therefore suggested: where X is an individual, ϕ an action, and C a set of circumstances in which ϕ is performed, X is justified in ϕ -ing in C provided that

Reasonable Belief Thesis

- (i) X reasonably believes that ϕ -ing in C is necessary (to preserve or defend life, limb, property, etc.);
- (ii) X's ϕ -ing in C is proportionate to the threat encountered in C; and
- (iii) the boundaries of the rights interfered with by X's ϕ -ing in C are not fixed, i.e., liability for ϕ -ing is not strict.

While talk about boundaries being fluid is admittedly vague, it is intended to be neutral as between rights whose boundaries are determined by principles of negligence and rights whose boundaries are determined instead by broader principles of fault. Thus, on the present scheme crimes that require subjective intent and/or recklessness will involve rights whose boundaries are fluid in this sense, since whether a right has been interfered with will depend not just on whether harm has been caused, but on the level of fault involved.

The basic idea behind Reasonable Belief Thesis is this. Where X interferes with a *fixed* right of Y's, or with a right the boundaries of which do not depend on the reasonableness of X's action, X's liability is *strict*: X has done something that she ought not to have done. Consequently, X is at best excused. But where X interferes with a right whose boundaries are fluid, depending on considerations having to do with fault, intention, or with the reasonable imposition of risk, then X's actions may be justified so long as she reasonably believed that interference with the right was necessary to prevent harm (to himself or to others or to property).

To put this account to work, consider self-defence. Genuine self-defence counts as a justification according to this definition, as it should. But what about putative or mistaken self-defence? Take Victim again. Since by hypothesis Victim reasonably believes that defending herself with lethal force is necessary to preserve her life, (i), and, I shall assume, (ii), are met; and since the scope of the right interfered with by Aggressor – Victim's right to be free from interference with her person – is determined by considerations of reasonableness (since it is a matter in part of whether Aggressor is unfairly imposing a risk on Victim) (iii) is also met. So Victim is justified in deploying lethal force in defence of her life even though her reasonable belief that Aggressor means, and is able, to do her harm is false. Thus, according to the Reasonable Belief Thesis even putative or mistaken self-defence can be justified so long as Victim's belief is reasonable in the circumstances.

Necessity is more challenging. In many cases of necessity (iii) will not be met, although (i) and (ii) arguably will be. This will be the case where the conditions of necessity require me to use of the property of another person in order to preserve my life, for example. In using another person's property I commit the wrong of trespass. But because I reasonably believe that the trespass is necessary to preserve my life, an excuse is not inappropriate. And what of cases in which the conditions of necessity require the use of another *person* without that person's consent? Perhaps, for example, a fat man has fallen off a cliff and will crush those of us picnicking below if we do not zap him with our laser gun; or perhaps a fellow spelunker is trapped in the cave opening and is blocking our only means of escape. May we act to preserve our lives at the expense of theirs? Again, the thing to keep in mind in such cases is that we never have a right to *use* another person without his consent in order to prevent harm to ourselves. Thus, even in such cases it seems to me that (iii) would not be met and that at best an excuse would be appropriate.

The main problem with the Reasonable Belief Thesis is one of scope: while it seems to capture the distinction between a justification like self-defence and excuses like necessity or duress, it is hard to see how to extend it to other excuses. How is the Reasonable Belief Thesis to be extended to the excuse of automatism, for example, given that somebody who is suffering from automatism presumably is not acting on the basis of a reasonable belief, if indeed he is acting at all? How does the excuse of intoxication fit in? It is tempting to say that the reason why an excuse is appropriate in such cases is because somebody who is intoxicated lacks of responsibility. But this is just the Responsibility Thesis again, with all its attendant problems.

We have seen this issue before, in connection with Gardner's criticism of the Responsibility Thesis. In rejecting the idea that excuses are denials of responsibility, Gardner claimed that both justifications and excuses are rational explanations for wrongdoing. But this gave rise to problems. For the account doesn't seem to fit all excuses since some – intoxication, automatism and physical compulsion – don't seem to be amenable to rational explanation at all. A natural way around this problem was canvassed: refuse to count intoxication, for example, as an excuse, and characterize it as an immunity or exemption instead, thereby limiting the scope of excusing conditions.

This leads to one final observation. We seem to be presented with two options. On the one hand, we could interpret the category of excuses broadly to include defences like intoxication and automatism in addition to defences like duress and necessity, in which case the best that can be said is that the Responsibility Thesis makes sense for some excuses – intoxication and automatism, for example, and possibly physical compulsion – whereas the Reasonable Belief Thesis makes better sense for others, such as mistake of fact, mistake of law, duress and necessity. In the

first set of cases we have involuntary and/or non-rational action, in the second set of cases interferences with fixed rights backed by reasons. Both sorts of considerations excuse, but in different ways. And yet to say this is to say that there is no unified justification/excuse distinction. At best there is a disjunctive or hybrid distinction.

On the other hand, we could interpret the category of excuses narrowly to include only those excuses that have a rational component to them, such as mistake of fact, mistake of law, duress, provocation and necessity, in which case something like the Role Played by Reasons Thesis or the Reasonable Belief Thesis would seem to be more appropriate. In so doing we would be able to frame a justification/excuse distinction, but only by limiting its scope.

Which option is the right one? This is a difficult question to answer but it may be that it is best thought of as a case of what David Lewis called 'semantic indecision'.³⁶ That is, in asking which option is the right one, it may be that we are not asking a question about the true nature of justifications or excuses. Rather, it may be that we are asking a question about how we want to talk. If we want to talk *ever so inclusively* about excuses and count intoxication, say, as an excuse, then no non-disjunctive justification/excuse distinction will be forthcoming, for the reasons given above. If we wish to talk *more or less inclusively* about excuses and refuse to count intoxication, say, as an excuse, then a justification/excuse distinction can arguably be framed, but its scope will be limited.³⁷ In neither case is a deep question about the nature of justifications and excuses answered. There is only a question about how we want to talk, in which case the correct answer to the question, Is there a firm distinction between justification and excuse?, can only be: it depends.

6. Further Issues

Before concluding, let me highlight two further areas of inquiry, one familiar, the other perhaps less so, in which attention to the distinction between justifications and excuses might turn out to be philosophically illuminating.

6.1. FREEWILL AND DETERMINISM

In 'A Plea for Excuses' Austin suggests that the investigation of excuses might allow us to get a better handle on the nature of freedom and responsibility. As he remarked,

there is little doubt that to say we acted 'freely' (in the philosopher's use, which is only faintly related to the everyday use) is to say only that we acted *not* un-freely, in one or another of the many heterogeneous ways of so acting (under duress, or what not). (128)

Peter Strawson can be read as making a similar, although perhaps more limited, proposal. In 'Freedom and Resentment' Strawson suggests that we sometimes suspend the reactive attitudes in favour of the objective attitudes when we have reason to view the injury caused as being one for which the agent is not fully responsible. A natural gloss on this idea is to say that where an agent is excused – because 'He couldn't help it' (duress?) or because 'He was left with no alternative' (necessity?) – we do not suppose that the agent deserves the same sort of moral condemnation as do agents who are genuinely responsible for the injuries they bring about.

An even more explicit statement of this idea is found in Richard Bronaugh's paper 'Freewill as the Absence of an Excuse'. There Bronaugh claims that 'whether the agent is said to have a choice is dependent on the existence of an excuse' and that as a result 'freedom is not a factual issue per se, but is rather an issue of the facts which are morally judged to excuse'. Thus, for the purposes of the freewill debate, 'the relevant sense of "freedom" is to be found through the role or use the term has in relation to the practice of holding men responsible' (163). Note that each of Austin, Strawson and Bronaugh cash out excuse talk in terms of responsibility. Note also that Austin, Strawson and Bronaugh are primarily concerned with excuses, rather than with the *distinction* between justification and excuse. But the motivating idea seems to be that progress might be made on the question of what it means to act freely by paying particular attention to the various different ways in which, as Austin remarks, individuals might be said to act *unfreely*. And chief among those ways are cases in which an individual acts on the basis of an excuse. Thus, one potential philosophical pay-off of studying the justification/excuse distinction is a more nuanced understanding of what we mean when we say things like 'He couldn't help himself' or 'She wasn't responsible for what she did'.

6.2. THE INFRINGING/VIOLATING DISTINCTION IN THE THEORY OF RIGHTS

Another place where the justification/excuse distinction might prove to be philosophically useful is in the context of what Francis Bohlen called, somewhat inelegantly, the incomplete privilege to inflict intentional invasions of interest of property and personality.³⁸ The classic case is *Vincent v. Lake Erie Transportation Co.* There the defendant moored its ship *The Reynolds* to the plaintiff's dock for the purpose of unloading cargo. During the unloading process a storm developed. Consequently, instead of casting off *The Reynolds* kept her lines fast, and as they became frayed the crew replaced them with new lines. While this allowed *The Reynolds* to stay moored to Vincent's dock it also resulted in damages to the dock of \$500.

Or take Joel Feinberg's Hiker example: Alice is on a back-packing trip in the high mountain country when an unanticipated blizzard strikes. Fortunately, she stumbles onto an unoccupied cabin, locked and boarded

up for the winter, smashes in a window, enters, and huddles in a corner for three days until the storm abates. During this period she helps herself to her unknown benefactor's food supply and burns his wooden furniture to keep warm.³⁹ Both *Vincent* and Hiker raise a question about rights and duties of compensation and both answer that question in the same way: although Lake Erie, for example, had a privilege to use Vincent's dock, it was nonetheless liable for any damages it thereby caused. The privilege, in other words, was incomplete. But this gives rise to a puzzle. For if Lake Erie was entitled to use Vincent's dock then why should Lake Erie compensate Vincent for any damage done?⁴⁰

The distinction between justification and excuse is potentially illuminating here. This is because whether a duty of compensation is owed might depend on whether Lake Erie, for example, acted justifiably or was merely excused in using Vincent's dock. If Lake Erie was excused then it can be argued that compensation is owed because Lake Erie improperly interfered with Vincent's property rights. But if Lake Erie was justified in using Vincent's dock then it becomes less clear that compensation is due. The point, of course, is that this way of approaching the problems raised by *Vincent* and by Hiker requires getting clearer on the justification/excuse distinction, as well as on the distinction, if there is one, between legal excuses and what might more properly be called moral excuses. Consequently, the idea that the justification/excuse distinction might shed some light on the nature and scope of Bohlen's incomplete privilege seems to me to be an idea worth considering.

7. Conclusion

I have suggested that the justification/excuse distinction is worth taking seriously for both practical and moral reasons, and that the distinction might play a role in understanding the relationship between freedom and responsibility, as well as the so-called incomplete privilege to inflict intentional invasions of interest of property and personality. I have also argued, however, that we should approach with caution the claim that a clear and unified distinction between justification and excuse can be drawn.

Still, despite these misgivings the justification/excuse distinction remains important. So let me end with one further reason to suppose that time spent thinking about the justification/excuse distinction might be time well spent. Here I turn again to Austin, who said, in connection with the study of excuses, that 'it has long afforded me what philosophy is so often thought, and made barren of – the fun of discovery, the pleasures of co-operation, and the satisfaction of reaching agreement' (Austin 123). These are also good reasons for taking the justification/excuse distinction seriously. The distinction is doctrinally and theoretically important, to be sure, but it is also a source of great intellectual fun and stimulation. In the end, what more could a philosopher ask for?

Acknowledgements

Thanks to Dennis Klimchuk and an anonymous reviewer for *Philosophy Compass* for helpful comments and suggestions.

Short Biography

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¹ As J. L. Austin pointed out when he referred to ‘terms, such as “extenuation”, “palliation”, “mitigation”, [that hover] uneasily between partial justification and partial excuse’ (125).

² Paul Robinson, for example, identifies 54 different kinds of bars to successful prosecution: alcoholism, alibi, amnesia, authority to maintain order and safety, brainwashing, chromosomal abnormality, consent, convulsion, custodial authority, defense of habitation, defense of others, defense of property, *de minimis* infraction, diplomatic immunity, domestic (or special) responsibility, double jeopardy, duress, entrapment, executive immunity, extreme emotional disturbance, hypnotism, impaired consciousness, impossibility, incompetency, insanity, intoxication (voluntary and involuntary), involuntary act defenses, judicial authority, judicial immunity, justification, law enforcement authority, legislative immunity, lesser evils, medical authority, mental illness (apart from insanity), military orders (lawful and unlawful), mistake (of law and fact), necessity, official misstatement of law, parental authority, plea bargained immunity, provocation, public duty or authority, reflex action, renunciation, self-defense, somnambulism, the spousal defense to sexual assaults and theft, statute of limitations, subnormality, testimonial immunity, the unavailable law defense, unconsciousness and withdrawal. See Robinson, ‘Criminal Law Defenses’.

³ In Canada, for instance, children under the age of 12 are exempt from criminal prosecution: *Criminal Code*, R.S.C. 1985, c. C-46, s. 13. By contrast, in the UK children under the age of ten are exempt from criminal prosecution: *Children and Young Persons Act* 1933, s. 50.

⁴ For critical commentary of the principle of conjugal unity see Williams, ‘Legal Unity of Husband and Wife’.

⁵ This remains the law in Canada: see *R. v. Kowbel*, [1954] S.C.R. 498.

⁶ Let me emphasize that this way of categorizing defences – along the lines of justification, excuse, procedural defences and exemptions – represents only one way of understanding the relationships between various different defences. Paul Robinson, for example, in ‘Criminal Law Defenses: A Systematic Analysis’ 203, proposes five categories of defences: failure of proof defences, modification of offence defences, justifications, excuses and non-exculpatory public policy defences. Robinson would, however, agree with the general point made above.

⁷ Compare s. 34(1) of the Canadian *Criminal Code*, R.S.C. 1985, C. C-46, according to which every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself. Where an individual does cause death or grievous bodily harm or death, he will be justified if death or grievous

bodily harm is caused under the reasonable apprehension of death or grievous bodily harm (34(2)(a)) or if he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm (34(2)(b)).

⁸ For further discussion see Fletcher, 'Proportionality and the Psychotic Aggressor'; Thomson, 'Self-Defense'; Otsuka, 'Killing the Innocent in Self-Defence'.

⁹ *Perka v. The Queen*, [1984] 2 S.C.R. 232.

¹⁰ *Southwark London Borough Council v. Williams*, [1971] 2 All E.R. 175.

¹¹ Criminal responsibility is typically based on two elements: the *mens rea*, or guilty mind; and the *actus reus*, or prohibited act. As it is sometimes said, *actus non facit reum nisi mens rea sit* (the act does not make a person guilty unless the mind is also guilty). In addition, in order for an individual to be found guilty, the *mens rea* and *actus reus* must coincide. By way of illustration, according to the Canadian *Criminal Code*, R.S.C. 1985, c. C-46, the *actus reus* of murder is causing the death, directly or indirectly, of another human being. Murder is *second degree* where the accused intended to cause the death or intended to cause bodily harm that he knew was likely to cause death, and was reckless whether or not death ensued. Murder is *first degree* when the causing of death was planned and deliberate.

¹² See also A. P. Simester and G. R. Sullivan, *Criminal Law: Theory and Doctrine*, in which the authors choose not to classify defenses under the heads of justification and excuse at all.

¹³ See Fletcher, *Rethinking Criminal Law* 760–2.

¹⁴ (1984) 97 NJ 178.

¹⁵ [1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97.

¹⁶ See Greenawalt, 'Perplexing Borders of Justification and Excuse'; 'Distinguishing Justifications from Excuses'.

¹⁷ For further discussion of this issue see Botterell, 'Why We Ought to be (Reasonable) Subjectivists about Justification' 38.

¹⁸ See, for example, Klimchuk, 'Outrage, Self-Control, and Culpability' 446: "She killed him but it was in self-defence" *justifies* the action by calling attention to features of the circumstances in which it was performed. "She killed him but she was sleepwalking" *excuses* the agent by calling attention to qualities of the agent at the time of the action'.

¹⁹ For discussion of the Lesser Evils Defence interpretation see, among others, Alexander, 'Unified Excuse of Preemptive Self-Protection'; 'Lesser Evils'; Berman, 'Lesser Evils and Justification'; Simons, 'Exploring the Intricacies of the Lesser Evils Defense'.

²⁰ See in particular §3.02 of the Model Penal Code.

²¹ See also Kadish, 'Excusing Crime' 258, according to which, in asserting an excuse, it is claimed that 'some disability in my freedom to choose makes it inappropriate to punish me'; Bickenbach, 'Defence of Necessity' 87, according to which '[t]o excuse somebody is, at least morally speaking, to exonerate him – not because, as things turned out, he brought about more good in the world than evil but because it was not, strictly speaking, his action. To excuse is to allow that because of an incapacity – temporary or permanent – or because of an external constraint in effect at the inception of the action, the action was outside of the accused's control'.

²² Similar remarks apply to the idea that excuses operate by denying voluntariness. This is because somebody who acts involuntarily cannot be said to be responsible for what she has done since it is unclear that she has *done* anything at all.

²³ I don't mean to suggest that this is the only argument in favour of the Responsibility Thesis, but it is one that seems to me to be worth considering.

²⁴ *Perka v. The Queen*, [1984] 2 S.C.R. 232, p. 250, per Dickson C. J. C., discussing the defence of necessity.

²⁵ See also Robinson, 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability'.

²⁶ See, for example, Fletcher, 'Individualization of Excusing Conditions'. The claim that necessity functions as an excuse rather than as a justification is controversial. For defence of this idea see Ripstein, 'In Extremis'.

²⁷ *Brown v. United States*, 256 U.S. 335 (1921), p. 343.

²⁸ The issue is obviously much more complex than I have made it out to be. For further discussion of this issue see again Fletcher, 'Proportionality and the Psychotic Aggressor'; Thomson, 'Self-Defense'; Otsuka, 'Killing the Innocent in Self-Defence'.

²⁹ The '?' is intended to indicate that the thesis is open to revision.

³⁰ For discussion see, for example, Fletcher, 'Fairness and Utility in Tort Law'; Ripstein, 'Self-Defense and Equal Protection'; Keating, 'Reasonableness and Reciprocity in Negligence Law'. Although Ripstein talks about reasonableness as *equality*, for ease of exposition I will stick with reciprocity in what follows.

³¹ For a much more sophisticated analysis of tort law along these lines, see Ripstein, 'Philosophy of Tort Law'.

³² Gardner himself is no fan of the reasonable belief interpretation of justification. See his 'The Mysterious Case of the Reasonable Person'.

³³ See, famously, *Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221 (Minn. Sup. Ct. 1910).

³⁴ I am indebted to discussion with Arthur Ripstein here. For a much more thorough discussion of this point see also Ripstein, 'Tort Law in a Liberal State'.

³⁵ See Ripstein, 'Self-Defense and Equal Protection' 693. One way to make sense of the nature and scope of the underlying rights might be to focus on *functions* rather than on *reasons*. In 'Decision Rules and Conduct Rules: On Acoustic Separation in Law' Meir Dan-Cohen distinguishes conduct rules (legal rules addressed to the public) from decision rules (legal rules addressed to officials). The basic idea is that conduct rules tell people what to do, and so say when something is a crime, whereas decision rules tell state officials (prosecutors, judges) what to do once a crime has been committed. On this view the justification/excuse distinction amounts to this: justifications should be viewed as *conduct rules*, and so considered part of the theory of crime, whereas excuses should be viewed as *decision rules*, and so considered part of the theory of punishment. George Fletcher also endorses this view. In 'Rights and Excuses' 19, he says the following:

It seems, therefore, that excuses inhabit a realm outside the concept of 'law' as the set of norms defining unlawful conduct. They are undoubtedly part of the law that bind the courts, but they are not part of the law that informs us what is lawful and unlawful.

The idea is that the conduct rule/decision rule distinction articulates the nature and boundaries of the underlying nature of the rights involved.

³⁶ See Lewis.

³⁷ The 'ever so inclusively' and 'more or less inclusively' language comes from Johnston, 'How to Speak of the Colors' although he might not agree with the use to which I am putting it.

³⁸ Francis Bohlen, 'Incomplete Privilege to Inflict Intentional Invasions of Interest of Property and Personality'.

³⁹ See Feinberg, 'Voluntary Euthanasia and the Inalienable Right to Life' 102.

⁴⁰ And there is reason to think that Lake Erie *was* entitled to act as it did: see *Ploof v. Putnam* (1908), 71 Atl. 188 (Vt. Sup. Ct.). There Sylvester Ploof and his family were sailing on Vermont's Lake Champlain when a storm arose. Seeking shelter Ploof moored his sloop to Putnam's dock, but an employee of Putnam's untied Ploof's sloop (seeking, as W. V. O. Quine might put it, relief from sloopfulness). As a result, the sloop was thrown upon the rocky shore and destroyed, and members of Ploof's family were injured. Ploof sued in trespass, charging that Putnam wilfully unmoored the sloop, and also in case, or negligence, alleging that Putnam had breached a duty owed to Ploof to allow Ploof to moor his boat to Putnam's dock. The court upheld both claims, and *Ploof* was cited favourably by the court in *Vincent*.

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