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Rethinking Justifications

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I. INTRODUCTION

George Fletcher deserves much of the credit for persuading Anglo-American criminal law theorists to think seriously about justifications and excuses as two quite different ways in which a defendant can ward off conviction for a criminal offense, and as two quite different kinds of element in the structure of criminal liability.[1] Or does he rather deserve much—or at least some—of the blame for luring theorists into a morass of unfruitful controversy about the precise contours of the distinction between justification and excuse? He surely deserves more credit than he does blame, and nothing in this paper is intended to cast doubt on the theoretical importance of the differences between justificatory and excusatory modes of defensive pleading.[2] However, when one looks at the apparently interminable and irresoluble controversies that surround the topic, in particular those about so-called "unknown justifications" and "putative justifications,"[3] one must begin to wonder just what of substance is at stake and how far the substantive issues may be concealed or distorted, rather than being illuminated, by such a determined focus on the question of what counts as a "justification" or as an "excuse."

Two features of the contemporary controversies seem especially suspicious as possible sources of distortion. First, the debate is often conducted as if we are left with just two classificatory possibilities once we have determined that a particular ground for acquittal does not negate an element of the offense: that it is

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1. *See* George P. Fletcher, *Rethinking Criminal Law* 515-79, 683-875 (Little, Brown & Co. 1978) [hereinafter Fletcher, *Rethinking*]; George P. Fletcher, *The Right and the Reasonable*, 98 Harv. L. Rev. 949 (1985) [hereinafter Fletcher, *The Reasonable*]; George P. Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. Rev. 293 (1975) [hereinafter Fletcher, *Right Deed*].

2. My concern in this paper is with the importance of justification and excuse for legal theory, as revealing significant features of the structures of criminal liability, rather than with the separate, further question of how far statutes or courts should explicitly distinguish justificatory from excusatory defenses. Any attempt to answer that further question would need to address the kinds of worry articulated by Kent Greenawalt. *See* Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 Colum. L. Rev. 1897 (1984). I will not even try to address them here.

3. For a useful summary of the continuing controversies, see Robert F. Schopp, *Justification Defenses and Just Convictions* 2-11 (Cambridge U. Press 1998).

a justification, or that it is an excuse.[4] We should at least wonder whether such an austere classificatory apparatus might not force theorists into damagingly procrustean efforts to force defenses into one or another category. Second, theorists still often seem to take for granted certain supposed logical relationships, which then make the classificatory task even harder. For instance, if a defense constitutes an excuse, it supposedly cannot figure in the "rules of conduct" that give citizens guidance on what they may or may not do—excuses cannot be action-guiding;[5] or, even more notoriously, if an actor is justified in Φ-ing, it supposedly follows that others can legitimately assist him and cannot legitimately resist him, whereas if he has (only) an excuse for Φ-ing, no such implications are supposed to follow.[6]

I will not discuss the second of these features here—largely because others have already thoroughly exposed the errors it involves.[7] There are of course important questions to be asked about the conditions under which others may resist, or may assist, an actor's enterprise, but they are not to be answered simply by classifying the actor's defense as a justification or as an excuse, nor should that classificatory issue be determined by answers to those questions. I will, however, discuss the first feature—the widespread assumption that "justifications" and "excuses" provide us with an adequate classificatory schema for defenses that do not negate an element of the offense. I will argue that such an austere schema is quite inadequate.[8]

Before I embark on that argument, I should note two assumptions that I am making, and one modest methodological suggestion. The first assumption is that

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4. I will ignore here the other two categories of "defense" that Robinson distinguishes since "offense modification" defenses modify the definition of the offense itself, while "non-exculpatory defenses" should not count as "defenses" or as grounds for acquittal at all. *See* Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 Colum. L. Rev. 199, 203, 208-13, 229-32 (1982). "Non-exculpatory defenses" are better conceptualized as bars to trial. *See* R.A. Duff, *"I Might Be Guilty, But You Can't Try Me": Estoppel and Other Bars to Trial*, 1 Ohio St. J. Crim. L. 245 (2003).

5. *See e.g.* Fletcher, *Rethinking*, *supra* n. 1, at 810-13; Arthur Ripstein, *Equality, Responsibility, and the Law* 164-65 (Cambridge U. Press 1999); Paul H. Robinson, *Structure and Function in Criminal Law* 226-29 (Clarendon Press 1997) (locating excuses firmly in the "Code of Adjudication"); Peter Alldridge, *Rules for Courts and Rules for Citizens*, 10 Oxford J. Leg. Stud. 487, 487-90 (1990); John Gardner, *The Gist of Excuses*, 1 Buff. Crim. L. Rev. 575, 597 (1998); *but see* R.A. Duff, *Rule-Violations and Wrongdoings*, in *Criminal Law Theory: Doctrines of the General Part* 47, 65-68 (Stephen Shute & A.P. Simester eds., Oxford U. Press 2002).

6. *See e.g.* Fletcher, *Rethinking*, *supra* n. 1, at 759-69; Robinson, *supra* n. 5, at 96, 105-06; Albin Eser, *Justification and Excuse*, 24 Am. J. Comp. L. 621, 622-23 (1976); Claire O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. Pitt. L. Rev. 621, 644 (1996).

7. *See e.g.* Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 Duke L.J. 1, 62-64 (2003); Joshua Dressler, *New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and* Rethinking, 32 UCLA L. Rev. 61, 87-98 (1984); Greenawalt, *supra* n. 2, at 1918-27; Douglas N. Husak, *Conflicts of Justifications*, 18 L. & Phil. 41 (1999) [hereinafter Husak, *Conflicts*]; Douglas N. Husak, *Justifications and the Criminal Liability of Accessories*, 80 J. Crim. L. & Criminology 491 (1989) [hereinafter Husak, *Accessories*].

8. Two important discussions from which I draw are Suzanne Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* 9-56 (Cambridge U. Press 1994); and Marcia Baron, *Justifications and Excuses*, 2 Ohio St. J. Crim. L. ___ (forthcoming 2005). My focus will be on justifications, or defenses that have been portrayed as justifications, rather than on excuses. In particular, I will not discuss whether we should distinguish "excuses," properly speaking, from "exemptions." *See* Gardner, *supra* n. 5.

we can and should draw a tolerably clear distinction between "offenses" and "defenses"—although just how that distinction should be characterized is, of course, a difficult matter.[9] Roughly, the offense definition should specify the particular kind of mischief, the type of normally wrongful conduct, against which the law is aimed; defenses then specify conditions under which one who does such a mischief—engages in such conduct—should nonetheless be acquitted. In counting self-defense as a defense, rather than as negating an offense element, Anglo-American criminal law thus treats the mischief against which the law of homicide is aimed as the killing of a human being—a killing that is defensible if it is the necessary, defensive killing of an assailant. One could easily imagine a different system, reflecting a profoundly different moral perspective, that portrayed the relevant mischief as the killing of an "innocent" human being, i.e., one not engaged in an unlawful attack; within such a system, the killing of an unlawful aggressor would not need a "defense," since the aggressor would fall outside the law's protection.[10] This illustrates the general point that what counts as an offense element, and what counts as a defense, depend upon the moral perspective that structures the particular legal system; but nothing in what follows depends on accepting any particular, controversial conception of what belongs to an offense and what belongs to a defense.

The second assumption is that the justified includes the permissible. Outside the law, this is certainly true: the category of justified conduct includes conduct that is merely permissible, as well as conduct that is expected or required of us. If I miss a class that I was due to teach, I might seek to avoid criticism for neglect of my duties by pleading illness. Now if my illness was so severe that I literally could not make it to the class (if I was unconscious or paralyzed, for instance), I would not, of course, be offering a justification; my explanation would show that neither justification nor criticism was appropriate. But if, as is more likely, I decided that although I could make the class, I would be better off staying in bed, we are in the realm of justification. In some cases, others might agree that I ought to stay in bed—because, for instance, it would be seriously imprudent to endanger my health further by dragging myself to a class that is not important enough to warrant such sacrifice, or because I owe it to others not to risk infecting them. In other cases, however, if the illness was less serious, they might think that while to have turned up to teach my class would have displayed admirable devotion to my

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9. *See* Fletcher, *Rethinking*, *supra* n. 1, at 552-69, 691-707; John Gardner, *Justifications and Reasons*, in *Harm and Culpability* 103, 107-14 (A.P. Simester & A.T.H. Smith eds., Clarendon Press 1996). For an English debate that usefully clarifies some of the issues, see Glanville Williams, *Offences and Defences*, 2 Leg. Stud. 233 (1982); and Kenneth Campbell, *Offence and Defence*, in *Criminal Law and Justice: Essays from the W.G. Hart Workshop, 1986*, at 73 (I.H. Dennis ed., Sweet & Maxwell 1987).

10. On this meaning of "innocent" in the context of defensive force, see Richard Norman, *Ethics, Killing and War* 166-69 (Cambridge U. Press 1995). See also Campbell, *supra* n. 9, at 83 (discussing the difference between killing in self-defense and killing an outlaw); and J.C. Smith, *Justification and Excuse in the Criminal Law* 30-31 (Stevens & Sons 1989) (arguing that in English law the offense is the killing of a human being "under the Queen's peace," so that the killing of an enemy soldier in war does not need a legal defense, since it does not count as a homicide).

teaching, "far beyond the call of duty," I was not required or expected to turn up; staying in bed was a legitimate option. If staying in bed was a legitimate option, it was justified: we might call this a "weak," rather than a "strong," justification,[11] but it is still a justification; this is not a case in which I need an excuse for doing wrong. Given this feature of justification as it operates outside the law, and given the plausible presumption that the concept of justification should function in legal thought in at least roughly the same way as it functions in extra-legal moral thought,[12] theorists who argue that conduct counts as legally justified only if it is expected or required or at least approved, rather than merely permitted, face a difficult task.[13] Why should the criminal law, which is normally taken to permit what it does not define as criminal, adopt a narrower concept of justification than that which figures in our extra-legal thought? I do not think that they provide any plausible answers to this question—though one might suspect that part of what motivates them is the belief that justified actions may be assisted and may not be resisted, together with a recognition that this cannot plausibly apply to conduct that is merely permissible; but that is another issue that I cannot pursue in detail here.[14]

The methodological suggestion, however, is that we should begin by suspending our use of "justification," "excuse," and their cognates. Rather than asking of each kind of defensive plea whether it offers a justification or an excuse (which would beg the question that I want to raise, by presupposing that those are the only two possibilities to consider), we should try to get clear about its character, content, grounds, and implications, and about its similarities to and its differences from other kinds of defensive plea, without yet worrying about just how or where it should fit in some general classificatory structure. We might in the end find that we can mark the differences and the resemblances that we need to mark simply by distinguishing "justifications" from "excuses"; or find that, while that distinction provides a useful classificatory foundation, we need to draw further distinctions within each category—distinctions relating not just to the content of the defenses, but to their structure and logic; or find that we need more than two categories to do justice to the differences that we need to mark; or even find that, since "justification" and "excuse" now carry so much theoretical baggage and confusion with them, we should replace those terms with others.[15] But it will

11. *See* Uniacke, *supra* n. 8, at 14-15.

12. For a useful discussion of this point, see Berman, *supra* n. 7, at 18-38.

13. *See e.g.* Claire Finkelstein, *Excuses and Dispositions in Criminal Law*, 6 Buff. Crim. L. Rev. 317 (2002); Finkelstein, *supra* n. 6; Fletcher, *The Reasonable*, *supra* n. 1, at 977-80; George P. Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?*, 26 UCLA L. Rev. 1355, 1358-60 (1979). On the less determinate position expressed in Fletcher, *Rethinking*, see Dressler, *supra* n. 7, at 69-73.

14. *See* Dressler, *supra* n. 7, at 70-87; Husak, *Accessories*, *supra* n. 7, at 491-504.

15. *See e.g.* Eric Colvin, *Exculpatory Defences in Criminal Law*, 10 Oxford J. Leg. Stud. 381 (1990) (proposing to replace "justification" and "excuse" with "contextual permission" and "mental impairment"). But we will see in Part IV that "permission" is also liable to be misleading since we must distinguish what is merely permitted from what is expected or demanded, and it is far from clear that all "excuses" must involve what we should count as "mental impairment"—quite apart from the

be salutary, and will guard against the dangers of procrustean distortion, if we suspend judgment on whether "justifications" and "excuses" are the two categories that we need for an adequate theoretical analysis of those defensive pleas that do not deny an element of the offense.

However, before we temporarily foreswear the language of "justification" and "excuse," it will be useful to look at the role the concept of justification plays in the context of belief, rather than that of action: this will suggest a tentative diagnosis of the source of at least some of the problems in the debates among legal theorists.

II. TRUTH, JUSTIFICATION, AND BELIEF

Beliefs aim at truth: any rational believer who is trying to form or test her beliefs seeks to acquire and maintain beliefs that are true and to avoid or reject those that are false. However, apart from judging beliefs to be true or false, we also judge them to be justified or unjustified, and (if they are unjustified) to be excused or unexcused. Where legal theory, in its analysis of criminal defenses, thus tries to operate with a simple two-part structure of "justification" and "excuse," epistemology operates with a richer structure of truth, justification, and excuse. It is worth asking whether legal theory can learn from epistemology here.

A belief is true if, roughly, the world is as the belief portrays it as being, false if the world is not as the belief portrays it.[16] A belief is justified if there are good reasons for accepting it—reasons at least as good as those for rejecting it; it is unjustified if there are no, or insufficient, reasons for accepting it. More precisely, we can distinguish the question of whether there are good reasons for a belief from that of whether a particular believer holds that belief for those good reasons. *A* is justified in believing that *p* (*A*'s belief that *p* is justified) if there are good reasons to believe that *p* and *A* believes that *p* for those reasons, but we should hesitate to say that *A* is justified in believing that *p* if, although there are good reasons to believe that *p*, *A*'s own belief that *p* is not based on those reasons. We might more plausibly say that a belief that *p* would be justified, or is justifiable (i.e., that a believer would be justified in believing that *p* for those good reasons), while also saying that *A*'s own belief that *p* was not justified, since it was not based on the reasons that would have justified it. A belief that is unjustified, one that is held for inadequate reasons or in the face of sufficient reasons for disbelief, might

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suggestion that we should also distinguish between "excuses" and "exemptions." *See* Gardner, *supra* n. 5; Victor Tadros, *The Characters of Excuse*, 21 Oxford J. Leg. Stud. 495 (2001).

16. This should not be read as assuming a "correspondence" theory of truth, as against, for example, a "coherence" theory that takes truth to be a matter of coherence with other beliefs rather than of correspondence to any mind-independent world. *See* Marian David, *The Correspondence Theory of Truth*, in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., Summer 2002) (available at <http://plato.stanford.edu/archives/sum2002/entries/truth-correspondence/>); James O. Young, *The Coherence Theory of Truth*, in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., Summer 2001) (available at <http://plato.stanford.edu/archives/sum2001/entries/truth-coherence/>). Any philosophical theory of truth must posit an account of "the world" as that against which beliefs are to be measured for their truth or falsity; the question of just what that account should be need not concern us here.

still be excusable: I might have jumped too quickly to the conclusion that *p*, or failed to attend to the available evidence that not-*p*, or put too much weight on the rather slender evidence that *p*, but such failures might be excusable if I was, for instance, tired, or distracted, or distressed (for good reason). If an unjustified belief is inexcusable, however, the believer is liable to be criticized for his culpable failure of rationality.

I will not say anything more about what can make beliefs excusable or inexcusable here; my interest is rather in the relationship between truth and justification. It is clear that truth and justification can come apart, which generates four possible assessments of beliefs:

(a) *A*'s belief that *p* could be *true* and *justified*: she holds the belief for good or adequate reasons, and *p* is indeed the case.

(b) *A*'s belief that *p* could be *true* but *unjustified*: *p* is indeed the case, but *A* has no good reason to believe it.

(c) *A*'s belief that *p* could be *false* but *justified*: *A* has good reasons to believe that *p* (and believes it for those reasons), but *p* is not actually the case.

(d) *A*'s belief that *p* could be *false* and *unjustified*: *p* is not the case, and *A* has no good reason to believe that *p*.

Of these four possibilities, (a) is the condition to which rational believers aspire, and it is (a) alone that should count, according to a venerable philosophical analysis, as knowledge—an epistemic state that brings credit to its possessor.[17] In relation to (b) and (c) we might talk of luck, of the bad luck that *A* suffers in (c), or of her good luck in (b). As for (d), we might say that *A* gets what she deserves; she should not be surprised that her ill-grounded belief is false.

Although truth and justification can come apart, they cannot be separated as direct guides to belief formation. It would be senseless to ask whether in forming my beliefs I should aim for truth or for justification—for beliefs that are true or for beliefs that are justified. I cannot aim for truth as distinct from justification, or for justification as distinct from truth, since the only way of aiming to acquire true beliefs is to aim to acquire beliefs that there is good reason to think are true—i.e., beliefs that are justified. In aiming for justification, I am also aiming for truth and cannot rationally aim for truth in any other way. Others might be able to distinguish those of my beliefs that are true from those that are justified but false (and I might be able to do the same later, as an observer of my own past beliefs), but I cannot myself, as a believer, separate the true from the justified but false

17. That analysis, of knowledge as justified true belief, appeared vulnerable to counter-examples proposed in Edmund L. Gettier, *Is Justified True Belief Knowledge?*, 23 Analysis 121 (1963). For clear accounts of the post-Gettier debates, see Robert Audi, *Epistemology: A Contemporary Introduction to the Theory of Knowledge* ch. 8 (Routledge 1998); and Matthias Steup, *The Analysis of Knowledge*, in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., Spring 2001) (available at <http://plato.stanford.edu/archives/spr2001/entries/knowledge-analysis/>).

among my current actual or potential beliefs. The distinction between truth and justification nonetheless still matters to the believer: a rational believer aspires to belief that is true, and she seeks to acquire beliefs that are justified because this gives her the best chance of acquiring beliefs that are true.[18] If her justified belief turns out to be false, she might take some solace or credit from the fact that it was justified—from the fact that she was unlucky, rather than stupid or careless; but she must still recognize that she failed to achieve her aim.

The fact that our aim or aspiration is truth, but that our guide must be justification, gives a certain ambiguity to the question, "Should I have believed that *p*?," when it turns out that *p* was false, even though there was good reason to believe it. We might say that I should not have believed it, as it turns out, since one should believe only what is true; or we might say that I should have believed it, since I had good reason to believe it and it would have been irrational not to believe it. Similarly, I can in one way regret having believed it, especially if relying on it caused me significant harm; but in another way, I cannot rationally regret having believed it, since I cannot rationally regret having formed my belief in the only rational way available to me. To say that I should not have believed it, or to regret having believed it, reflects the fact that false beliefs are failed beliefs. To say that I should have believed it, and that regret is not rationally appropriate, reflects the fact that we can pursue success in beliefs only by pursuing justification—only by believing what we have good reason to believe. Similarly, if someone whose unreasonable, ill-founded belief that *p* luckily turns out to have been true asks, "Should I not have believed that *p*?," we might reply either that, as it turns out, he should indeed have believed that *p*, since that was after all the truth, or that he should not have believed it, since he had no good reason to do so and displayed irrationality in doing so. Or, if there were good reasons for believing that *p*, reasons that were available to him, and he believed that *p* but not for those reasons, we might say not that he should have believed that *p simpliciter*, but that he should have believed that *p* for those reasons; that is, he should have attended to the available reasons or evidence, rather than leaping unreasonably to a fortuitously correct conclusion.[19]

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18. Sometimes what matters to a believer ultimately is simply to acquire true beliefs; she will be as happy with an unjustified but luckily true belief as with a justified true belief. Sometimes what matters is that her belief be justified as well as true—that she reaches the truth by a process of rational inquiry. But in both cases truth is, or is the central aspect of, her aim.

19. These comments presuppose that the reasons for which a belief is held make a difference to its pedigree but not to its content or intrinsic character: someone who forms the belief that *p* on inadequate grounds, though adequate grounds were available, could have formed just the same belief that *p* on adequate grounds. When we turn to the context of action, we will see that we cannot always thus separate actions from the reasons for which they are done, and it might be argued that the same is true of beliefs: that an unjustified belief that *p* differs in its intrinsic character, not just its pedigree, from a justified belief that *p*. *See* Michael Brady, *Virtuous Motives and the Value Problem* (unpublished manuscript) (copy on file with *Tulsa Law Review*). If Brady is right, talk of forming the right (i.e., true) belief for wrong or inadequate reasons might be as problematic as talk of doing the right deed for the wrong reason will turn out in Part IV to be; but this would not affect the general thrust of my comments here.

There is much more that could be said about justification and truth in relation to beliefs—and much more that would need to be said in an adequate discussion of the topic. However, I hope that I have said enough to bring out the salient features for our present purposes, and to ground the suggestion about justification in relation to action that I want to pursue in the next two sections. The core of that suggestion should already be obvious enough, but I will sketch it here before going on to develop it in rather more detail in relation to the notorious problems of "putative justification" and "unknown justification."

In judging beliefs, we have two distinct measures of appraisal (leaving aside excuse): truth and justification. This enables us to distinguish clearly the case in which a believer's belief is both true and justified, that in which it is justified but false, and that in which it is true but unjustified. By contrast, legal theorists appear to allow the criminal law only one such measure of appraisal of actions and their agents—justification. Perhaps this is the source of some of the problems that then confront them: they have to try to shoehorn quite different distinctions into a single distinction between "justified" and "unjustified," when what they really need is a structure analogous to that which applies to beliefs. For instance, we might talk of "right" and "wrong" as the dimension of appraisal analogous to truth and falsity, and of "warranted" and "unwarranted" as the dimension analogous to justification or its lack, thus enabling ourselves to say that an agent's action was right and warranted; or right, but unwarranted; or warranted, but wrong; or unwarranted and wrong.[20] (An examination of our modes and measures of extra-legal moral judgment would reveal an even more complex structure than this; but that need not concern us here.)

We cannot, of course, just assume that our appraisals of actions and agents are structurally analogous in this way to our appraisals of beliefs and believers; the aim of the following two sections is precisely to see how far the suggested analogy does hold. Nor can we assume that, even if the analogy is sound, this richer classificatory scheme would dissolve all the problems that bedevil current debates about justification and excuse, since it certainly will not. We can, however, hope that it will dissolve some of those problems, and that it will clarify those that it cannot dissolve by showing more clearly just what is at stake.

III. THE PROBLEM OF "PUTATIVE JUSTIFICATION"

Diane goes by arrangement to call on Bill, an elderly relative who is visiting a friend nearby. There is no answer when she rings the doorbell, so she goes to

20. Kent Greenawalt uses "warranted" as a synonym for "justified." Kent Greenawalt, *Distinguishing Justifications from Excuses*, 49 L. & Contemp. Probs. 89, 91-93 (1986). In response to this, Donald Horowitz suggests that "[a] good way to begin the discussion of exculpation . . . is to ban words like *warranted*, since their usual function is to pronounce, and always to pronounce ambiguously, on the ultimate question of justification or excuse." Donald L. Horowitz, *Justification and Excuse in the Program of the Criminal Law*, 49 L. & Contemp. Probs. 109, 110 (1986). We will of course need to provide a clear (and unambiguous) specification of the meaning of any such term that we want to introduce, but my suggestion so far is only that the discussion might benefit from the introduction of an alternative terminology—in part because this might help us to see that there is no *single* "ultimate question of justification or excuse."

look through the window; she sees Bill lying face down on the floor, and bangs on the window to attract his attention, without success. Knowing Bill's history of heart problems, she thinks that he must have had a heart attack—but how can she help? The house is isolated, she has no mobile telephone, and it would take too long to run to the nearest house for help (she came on foot). So she decides that she must break into the house in order to telephone for help and to give Bill emergency aid straight away (she is trained in resuscitation techniques). Reluctantly, but decisively, she therefore breaks in, knowing that she is causing expensive damage to the carefully restored window of the old house. The story then develops in one of two ways:

(1) Bill has had a heart attack, and he would have died had Diane not administered such timely first aid; she saves his life.

(2) Bill has fallen asleep, with his hearing aid turned off, while practicing a new relaxation technique, and he needed no medical attention.[21]

Our description of and judgment on Diane's action are unproblematic in case (1). There was good, indeed clearly sufficient, reason for her to break the window; she realized and acted for that reason—to try to save Bill's life. We and she might, and should, regret the damage to the owner's property, but should not regret her action. What is regrettable is that she had to break the window to save Bill, but not that she broke it. She has a good defense against a charge of criminal mischief, since, although she "damage[d] tangible property of another purposely,"[22] she did so in order to prevent a clearly greater harm.[23] On the story, as told so far, she deserves thanks and even admiration for her quick thinking and effective action—it would be wrong to condemn her action, or to suggest that she should have done anything other than she did.[24]

Case (2) leads us into a familiar controversy about the borders of justification and excuse; but even theorists who take different sides in that

21. Or perhaps he has had a heart attack, and she cannot save him or is too late to try to save him. I assume that our judgments on these cases would not differ significantly from our judgments on case (2).

22. Model Penal Code §220.3(1)(a) (ALI 1985).

23. *See id.* at §3.02(1). The Code counts conduct as "justifiable" just so long as the actor believed it to be necessary to prevent greater harm, and would thus provide Diane with the same defense in case (2). In case (1), Diane would also have a straightforward defense to a charge of criminal damage in English law, since she had "lawful excuse" for her intentional damage of another's property. *See* Criminal Damage Act 1971, § 1(1) (Eng.). "Lawful excuse" in this context clearly covers what theorists classify as justifications as well as excuses as conventionally understood; and although it figures formally within the statutory definition of the offense, it is equally clear that in substance it constitutes a defense, not a negation of an offense element. *See* John C. Smith, *Smith & Hogan Criminal Law* 706-14 (10th ed., Butterworths 2002).

24. A final moral appraisal of Diane's action would depend on what we can discover of her motives: if she saved Bill only because, for instance, she anticipated a reward, we would not take her action to reflect morally well on her. I assume, however, that even if the criminal law is properly interested in the reasons for which she damaged another's property (an issue to be discussed in Part IV), its demands will be satisfied if she damaged the property in order to save Bill (if that was her immediate reason for action), whatever her further motives for that enterprise.

controversy ought to be able to agree upon a number of substantive propositions about case (2).

- Assuming that her belief about the necessity of breaking into the house was reasonable,[25] Diane should be acquitted of criminal mischief and should not be subject to moral blame or criticism for acting as she did.
- She should be acquitted because she acted in and on a reasonable belief that she had good reason to act thus.
- She might properly (perhaps even should) regret having damaged the house—whereas in case (1) the most that anyone could properly regret is that she had to do that damage.
- But she would presumably (and rightly) say that, faced by the same situation, she would do the same again—as would any reasonable person, given the available evidence.
- A third party who helped her break in should be free from both moral blame and criminal liability if he shared her beliefs, but not if he knew that she was mistaken.
- A third party who shared her beliefs would merit moral blame, if not criminal liability, if he resisted her attempt to break in. If he knew that she was mistaken, he should tell her—and if she refused to listen, her action would cease to be based on a reasonable belief.[26]

But if they can agree on this much, why is there such persistent disagreement between those who argue that her defense constitutes a justification and those who argue that it constitutes an excuse?[27] The reason, we should suspect, is that the restrictive schema of "justification" and "excuse" forces theorists to choose between just two alternative classifications, neither of which is satisfactory. The solution would then lie in adopting a richer classificatory schema.

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25. I hope that I have described the case in such a way as to render her belief reasonable. We cannot discuss cases in which the actor's beliefs are unreasonable here.

26. We can imagine a version of the case in which Diane could continue to act on the basis of a reasonable belief that her action was necessary to save Bill's life, despite the existence of a third party who both knew her beliefs to be mistaken and was in a position to prevent her action, if Diane reasonably but mistakenly believed that third party to be unreliable (Mitch Berman made me think of this case). This version of the case that would instantiate theorists' worries about whether both the actor and one who resists her could be "justified" in acting as they do. This is another issue that I cannot explore here (though I am inclined to think that in many such cases each actor could be "warranted" and "right," at least in the sense of "permissible.") For useful discussions, see Russell L. Christopher, *Mistake of Fact in the Objective Theory of Justification: Do Two Rights Make Two Wrongs Make Two Rights . . . ?*, 85 J. Crim. L. & Criminology 295 (1994); Dressler, *supra* n. 7, at 87-91; Fletcher, *supra* n. 13; and Husak, *Conflicts*, *supra* n. 7.

27. I won't attempt a thorough bibliography of the by now extensive literature on this topic, but noteworthy contributions include: Fletcher, *Rethinking*, *supra* n. 1, at 691-98 (excuse); Gardner, *supra* n. 9, at 118-22 (excuse); Smith, *supra* n. 10, at 8-12; B. Sharon Byrd, *Wrongdoing and Attribution: Implications beyond the Justification-Excuse Distinction*, 33 Wayne L. Rev. 1289 (1987) (excuse); Dressler, *supra* n. 7, at 92-95 (justification); Finkelstein, *supra* n. 6 (excuse); Greenawalt, *supra* n. 2, at 1907-09 (justification); Heidi M. Hurd, *Justification and Excuse, Wrongdoing and Culpability*, 74 Notre Dame L. Rev. 1551, 1563-65 (1999) (excuse); Husak, *Accessories*, *supra* n. 7, at 506-09; and Robinson, *supra* n. 4, at 239-40 (excuse). For more nuanced discussions, see Uniacke, *supra* n. 8, at 15-25; Baron, *supra* n. 8; and Christopher, *supra* n. 26.

If we simply classify Diane's defense as a justification, we ignore a significant difference between this case and case (1), in which her beliefs were true. In case (2) she has reason to regret acting as she did, which she would not have had if her beliefs had been true. There is a sense in which she did the wrong thing; she damaged another's property when there was in fact no good reason to do so. A good reason to damage that property (the reason that Diane thought she possessed) would have been that this was necessary in order to bring Bill the medical help he urgently needed; but that reason did not obtain, since Bill was not ill. Diane therefore acted against the reasons, the "guiding" reasons as some put it,[28] that applied to her: the fact that what she damaged was property belonging to another person who did not consent to the damage constituted a good reason not to damage it, and there was in fact no good reason to damage it to set against that reason against damaging it.[29]

It is important to be clear on this point, and to resist the temptation to say that Diane had, and acted upon, good reasons to break the window because she believed that by acting thus she would bring about a desirable result—saving Bill's life. Whatever we say about "motivating" or "explanatory" reasons, the reasons that actually motivate action and by reference to which actions are explained,[30] the "guiding" reasons in virtue of which we have or lack good reason to act as we do are constituted not (simply) by our own desires and beliefs, but by features of the world.[31] Had Bill been ill, Diane would have had good reason to break the window; since he was not ill, she had no such reason to break it. Two aspects of such situations should bring this point out. First, when Diane considers what she should do, she is wondering what reasons for action apply to her. In asking that question, she is asking not about her own internal states of desire or belief, but about the world—is Bill ill? How can she help him? Second, suppose that just as Diane is about to break the window, she sees Bill wake up and stand up. Her new belief that Bill is not ill does not give her a new reason for action—a reason not to break the window; rather, it shows her that the reason she thought she had to break the window (Bill's need for help) did not exist. Diane did have good reason to believe that she had good reason to break the window, but that belief was false, and to say simply that her defense constitutes a justification conceals this crucial difference from the case in which her belief is true.

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28. *See* Gardner, *supra* n. 9, at 103 (drawing on Joseph Raz, *Practical Reason and Norms* 16-20 (2d ed., Princeton U. Press 1990)).

29. I am talking here of the reasons that existed, or that she believed to exist, independently of the criminal law. We need not embark here on the question of what difference to the reasons that apply to her is made by the existence of the law that defines criminal mischief as an offense and also provides for various defenses.

30. Many philosophers take motivating reasons to consist of the actor's beliefs and desires. For a persuasive argument against this orthodox view, see Jonathan Dancy, *Practical Reality* (Oxford U. Press 2000).

31. I add the "(simply)" in order to avoid becoming embroiled in the philosophical debate about "internal" and "external" reasons—about whether it can be true that I have good reason to Φ if no rational connection can be shown between Φ-ing and my present desires. *See id.* at 1-48; Bernard Williams, *Internal and External Reasons*, in *Moral Luck: Philosophical Papers 1973-1980*, at 101 (Cambridge U. Press 1981); John McDowell, *Virtue and Reason*, 62 The Monist 331 (1979).

If, on the other hand, we say that Diane's defense constitutes an excuse, we do take due notice of the fact that her belief was mistaken, and that she did not actually have good reason to break the window, but we also ignore what is surely a crucial difference between her case and others in which we would naturally talk of excuses: that while excusing an actor reflects a judgment that it would be unjust or unfair to condemn him for not having acted differently and better on this occasion, it also implies the judgment or hope that he would act differently or better if faced again by a similar situation—a judgment and hope that are not appropriate to Diane's case. We might, for instance, excuse an actor who acted under a kind of duress that was not sufficient to make his action right or unqualifiedly permissible, in response to a threat that, given what was at stake, he should ideally have resisted, if to resist would have required a kind of heroism that we cannot reasonably demand of citizens on pain of being punished if they do not display it. We recognize a weakness that is "reasonable," or "human," rather than deserving of condemnation.[32] We might also excuse an actor who acted on an unreasonable, mistaken belief if there is some suitable exculpating explanation for his irrationality. In both cases, however, in excusing the actor we express a belief that he should, and a hope that he would, act differently if faced in the future by a relevantly similar situation; but that is not a hope or belief that we should have in relation to Diane in case (2). As we saw, there is a sense in which Diane did the wrong thing, and now has reason to regret doing it—a sense in which, as it turns out, she should not have broken the window. But it is also true that she acted just as she should have: her practical reasoning was impeccable; she acted appropriately in response to what reasonably appeared to be very good reasons. Had she asked for advice about what to do from others in the same epistemic position as her, they should have advised her to act just as she did. If someone asked us what he should do if he found himself in a situation like hers, we should advise him to act just as she did. What she sought, and what anyone ought to seek, was the right thing to do. However, just as the only way to pursue truth in our beliefs is, as we saw, to pursue justification—i.e., to strive to ensure that we acquire and maintain only those beliefs that there is good reason to think are true—so the only way to pursue right action is to strive to act in accordance with what reasonably appear to be good reasons.[33]

We should, therefore, be reluctant to classify Diane's (clearly legitimate) defense either as straightforwardly and unqualifiedly a "justification" or as straightforwardly and unqualifiedly an "excuse," because either classification

32. I assume that, even if we reserve the term "duress" for cases in which the actor should (ideally) have resisted, there are cases in which giving in to a threat is the right, or at least a right or permissible, thing to do. When a bank clerk hands over his employer's money at gunpoint, he needs no excuse, since it would have been stupid or even wrong to resist; or, even if resistance would have been admirably heroic, it is not expected of the employee, who is allowed to give in. For more on the conception of duress as an excuse on which I rely here, see Duff, *supra* n. 5, at 62-68; and Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. Cal. L. Rev. 1331 (1989).

33. *See* Ripstein, *supra* n. 5, at 138-39; Baron, *supra* n. 8, at (m.s. 16) (discussing "formal rightness"); Husak, *Accessories*, *supra* n. 7, at 506-09.

ignores crucial differences between her defense and other defenses that clearly fall into that category.

We could nonetheless still seek to preserve the structure of "justification" and "excuse" by distinguishing different kinds or notions of justification. We could say, for instance, that Diane had an "agent-perspectival" justification, but not an "objective" justification (from the "objective" perspective she rather had an excuse);[34] or that her action was "formally" right, although it was not "materially" right;[35] or that she was "epistemically," but not "morally," justified.[36] One danger with such an approach is that we might then be tempted to ask which is *the* appropriate notion in the context of the criminal law—a question which, I have been suggesting, is unhelpful. Another danger is that we will then feel impelled to say that in terms of the notion of justification that does not apply to Diane, she has an excuse—which I have argued would also be misleading. The alternative strategy is to abandon the language of justification altogether (in part because it has become too mired in controversy and confusion), in favor of two other terms that would perform in relation to actions the functions performed by "true" and "justified" in relation to beliefs.

I suggested above that "right" and "warranted" would be possible terms—so long as they are defined with sufficient clarity and lack of ambiguity. Roughly, we would count an action as "right" (only) if there actually were sufficient, undefeated reasons for the actor to do it;[37] and we would count an action as "warranted" if the actor acts on the reasonable belief that there are sufficient, undefeated reasons for her to do it. Diane's action was therefore wrong (assuming that, since "right" includes "permissible," what is not right is wrong) but warranted. As we have noted, theorists who disagree about whether Diane's defense counts as a justification or as an excuse agree that she should be acquitted—which is to say that they agree that it is sufficient that her action was warranted; and I have suggested that disagreement about what a third party may or may not do by way of assisting or resisting Diane must be settled by asking about that third party's own position, not about whether Diane had a justification or an excuse.

Of course, to have shown—as I claim to have shown in this section—why theorists have disagreed so persistently about whether to count Diane's defense as

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34. *See* Uniacke, *supra* n. 8, at 15-23. More precisely, since she acted on the basis of reasonable beliefs that anyone would have formed in that situation, her action was in one sense "objectively" justified, which is to say that it was reasonable; but in another sense it was "objectively" unjustified, when judged against the actual facts. *Id.* at 17-18 n. 17. As indicated in the text, I think it is misleading to say that Diane has an excuse, even if we add that that applies only from an "objective" perspective.

35. *See* Baron, *supra* n. 8. Baron notes the possibility of two distinct uses for "justification" and its cognates: in one usage it would be tied to the "material" rightness of the action, without reference to the actor's beliefs and motives; in the other, it would be tied to the "formal" rightness of the action as done by that particular actor, given her beliefs and motives. She argues that we should tie justification to formal rightness, but my argument in this section is intended to show that we should not thus tie "justification" only to "formal rightness."

36. *See* Hurd, *supra* n. 27, at 1564.

37. I include, but bracket, the "only" to avoid prejudging the question to be discussed in Part IV. On the idea of "undefeated" reasons in this context, see Gardner, *supra* n. 9, at 107-14.

a "justification" or as an "excuse" (because we have reason both to assert and to deny that it is a justification, and both to assert and to deny that it is an excuse), and to have shown as well that we can dissolve that disagreement by adopting two new classificatory terms in place of "justification," is not yet to show that all cases of so-called "putative justification" can be dealt with in this way. We would need to go on to look, for instance, at cases in which the offense is much more serious (most obviously, cases in which the actor kills), cases in which he acts to benefit or to protect himself rather than, as Diane does, to benefit or to protect another,[38] and relatedly, cases in which were the facts as he believed them to be, his action would not be expected or demanded (as I assume it would be in Diane's case), but rather permitted. We would also, of course, need to look at cases in which there might be more of a real question about whether others may legitimately resist (i.e., whether they would be at least warranted, and might even act rightly, in resisting) an action that is warranted but not right.[39] I cannot pursue these issues here. All that I claim to have done in this section is to show, in relation to one straightforward (and fairly typical) example of "putative justification," how we can make progress by looking beyond the "justification"/"excuse" dichotomy to a more nuanced grasp of the ways in which the case resembles or differs from others that we would unhesitatingly count as justifications or as excuses, and by adopting a modestly richer classificatory schema that distinguishes the "right" from the "warranted." We must now see whether a similar approach can help us with the problem of so-called "unknown justifications."

IV. THE PROBLEM OF "UNKNOWN JUSTIFICATION"

Once again, Diane goes to her friend's house and breaks a window. This time, however, her intentions are malicious rather than benevolent: she has fallen out badly with her (ex-)friend and wants to hurt him by damaging the house that means so much to him. So far, it looks like a straightforward case of criminal mischief. However, unknown to Diane, there has been a gas leak in the house, and Bill is having a sleep: he would have died from inhaling the gas, but the breaking of the window both wakes him up and lets in sufficient fresh air to save him. Diane's action has thus saved his life, at the modest cost of a broken window. Had she done it in order to save his life, we would have said without hesitation that she did "the right thing," and would have praised her for her quick thinking and effective action.[40] What should we say about her, however, and what should

38. Finkelstein rightly emphasizes the importance of this feature. *See* Finkelstein, *supra* n. 6; Finkelstein, *supra* n. 13. If we are to use the language of "justification," however, I think she is wrong to suggest that justified actions must actually promote social welfare, and that actions undertaken for a purely self-regarding reason therefore cannot be "justified." Such actions can certainly be right, i.e., permissible, and I think that we would sometimes rightly criticize an actor on moral, not merely prudential, grounds for failing to protect herself when she could—i.e., that self-regarding actions are sometimes in Finkelstein's sense justified, not merely permitted.

39. *See supra* n. 26 and text following *supra* n. 7. As indicated there, I share the view that the question cannot be answered simply by deciding on the proper classification of the actor's defense.

40. Assuming again that her motives in saving his life were of a morally appropriate kind. *See supra* n. 24.

the criminal law say, when she had no idea that Bill was in danger, or that she was saving his life? Should she be acquitted of criminal mischief on the grounds that her action was in fact justified, although she had no idea that it was?[41] Or should she be convicted, on the grounds that justification requires at least awareness of, if not actual motivation by, the facts that ground the justification?[42] Or are these supposed grounds not the most helpful way to explicate the problem?

Here again, as in the case of "putative justification," there seem to be some propositions on which both sides to the dispute could and should agree.

- There was good reason for anyone who was in a position to do so (and thus for Diane) to break the window; although it would damage another's property (which constitutes a normally conclusive reason against an action), it was necessary to save Bill's life.
- Since Diane acted not for that reason, but from malice, she deserved moral condemnation for her malicious action, and can claim no moral credit for saving Bill's life. There might be room for a kind of "agent pleasure" here—she might be able to take pleasure not just in the thought that Bill was saved, but in the thought that she saved Bill;[43] but "saving Bill" is not something that redounds to her moral credit.
- A third party who knew the true facts could legitimately (indeed should) encourage her to break the window, at least if he could not do it himself, and should not prevent her from breaking it: for he would be acting in accordance with the reasons he knew to exist.[44]

Theorists also typically agree that Diane merits criminal liability, since those who argue that she should not be convicted of criminal mischief often argue that she should be convicted for attempted criminal mischief. I will suggest shortly that they are wrong to do so.[45]

Why then should theorists disagree about how the law should judge Diane, and especially about whether she or her action is justified? Is part of the reason once again that they operate with too limited a classificatory schema? Could we

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41. As proposed most famously, or notoriously, by Robinson, *supra* n. 5, at 95-124. Also see Glanville Williams, *Criminal Law: The General Part* 23-27 (2d ed., Stevens & Sons 1961); Michael Moore, *Placing Blame: A General Theory of the Criminal Law* 65-66 (Clarendon Press 1997); Schopp, *supra* n. 3, at 29-38; and Hurd, *supra* n. 27, at 1565-67.

42. *See* Fletcher, *Rethinking*, *supra* n. 1, at 555-66; Baron, *supra* n. 8; Russell L. Christopher, *Unknowing Justification and the Logical Necessity of the* Dadson *Principle in Self-Defence*, 15 Oxford J. Leg. Stud. 229 (1995); Anthony M. Dillof, *Unraveling Unknowing Justification*, 77 Notre Dame L. Rev. 1547 (2002); Fletcher, *Right Deed*, *supra* n. 1; Gardner, *supra* n. 9. For more nuanced accounts, see Ripstein, *supra* n. 5, at 138-39, 191, 214-17; and Berman, *supra* n. 7, at 48-62.

43. *Cf.* Bernard Williams, *Moral Luck*, in *Moral Luck: Philosophical Papers 1973-1980*, at 20, 27-31 (Cambridge U. Press 1981) (discussing "agent regret"—the particular kind of regret that I can appropriately feel if I was the agent (albeit unwittingly and non-culpably) of harm).

44. The position of a third party who shared Diane's ignorance would be the same as her position (if he was to help her), or the same as that of the mistaken Diane in Part III if he was to try to prevent her.

45. *See supra* n. 41 and accompanying text. American and English law both allow an attempt conviction. Criminal Attempts Act 1981, § 1(3) (Eng.); Model Penal Code § 5.01; *but see infra* nn. 49-56 and accompanying text.

resolve at least some of their disagreement by saying, in line with my suggestion in Part III, that Diane acted rightly but was not warranted in doing so—that her position is analogous to that of someone whose ill-founded, unjustified belief turns out fortuitously to be true? Even if we could usefully say this, it would obviously not decide the question of whether Diane should be criminally liable, or for what, but it might clear away some irrelevant disputes and clarify those substantive issues that remain. It will in particular, I suggest, help us to realize that there is no one answer to the question whether the "unknowingly justified" actor should be acquitted: sometimes the law should be content that the actor did "the right thing," even unknowingly; in other kinds of case, however, only the actor whose action was warranted should be acquitted.

To distinguish thus between the "right" and the "warranted" might suggest that the issue here concerns actors who do "the right deed for the wrong reason," and the title of Fletcher's response to Robinson on the problem of "unknown justification" suggests that he shares this view.[46] But if we can properly say that Diane, or any other "unknowingly justified" actor, did "the right deed for the wrong reason," this seems to speak in favor of the "deeds" view—that she should not be convicted of criminal mischief. For while what is expected of us morally is that we act not just in accordance with the right, but for the right reasons, surely the most that the criminal law can properly demand of us is that we do the right thing. If I refrain from theft or insure my car merely to avoid the possibility of criminal punishment, my action might not be morally commendable, but it is legally innocent.

Of course, in typical cases of doing "the right deed for the wrong reason," although the actor does not act for the reasons that make the action right, she does intend her action under the description under which it is "the right deed." Whatever my further reasons or motives for not stealing or for insuring my car, what I intend to do is precisely "not to steal" or "to insure my car," which is also precisely what the law requires me to do. This is not, however, true of Diane. "Saving Bill's life" does indeed describe an action of hers—albeit an unintentional, unknowing action; whether "breaking the window" and "saving Bill's life" describe one act or two,[47] she saved Bill's life by breaking that window. She did not, however, intend her action under the description ("saving Bill" or "breaking the window to save Bill") which showed it to be "the right thing to do." But should this matter to the law? Suppose that I owe $10,000 in taxes, and post a money order for $10,000. I intend to post it to my sister, but by mistake put it in

46. *See* Fletcher, *Right Deed*, *supra* n. 1. Fletcher distinguishes "justified acts" from "just events." *Id.* at 320. If a judge takes a bribe to decide against the plaintiff in a lawsuit, without knowing that the plaintiff had in fact perjured himself, we can say that the decision was "just, without being justified." *Id.*

47. According to so-called "coarse-grained" theories of action, if Diane saved Bill's life by breaking the window, "breaking the window" and "saving Bill's life" are two descriptions of the same act. *See* Donald Davidson, *Agency*, in *Essays on Actions and Events* 43 (Clarendon Press 1980). According to so-called "fine-grained" views, those descriptions describe two acts, one of which was done by doing the other. *See* Alvin I. Goldman, *The Individuation of Action*, 68 J. Phil. 761 (1971). This (somewhat fruitless) controversy need not concern us here.

the envelope addressed to the IRS office (and put into my sister's envelope the letter that was designed to keep the IRS off my back for a bit longer). If the IRS officer realizes that the money comes from me and keeps it as constituting full payment of the taxes I owed, surely I have, as far as the law is concerned, paid my taxes. I cannot be prosecuted or penalized for failing to pay them (though I can claim no moral credit for paying them).

It is also true, of course, that in Diane's case we are dealing not with the absence of some necessary element of the offense, but with the existence of a fact that provides, in the eyes of the criminal law as well as of morality, good reason to commit the offense. As those theorists who would convict Diane of criminal mischief insist, while even the unknown absence of an element of the offense does of course require the actor's acquittal, we cannot just assume that the same will be true of the unknown presence of a factor that grounds a defense. However, if Diane did do the right thing, how can she be justly convicted?[48]

What made breaking the window the right thing to do was simply that it was necessary to the saving of Bill's life. The good that was to be achieved was saving Bill's life—not saving it intentionally or for the right reason. Someone who knew the facts would surely urge Diane to break the window, whatever her reasons for doing so. To urge her not to break the window, if she was not breaking it for the right reasons, would be absurd. It might not be a legal duty to break a window in such a situation (though one could imagine a Good Samaritan statute that imposed just such a duty), but it is surely what one ought to do—and what makes it what one ought to do has nothing to do with the actor's reasons for doing it. How then can we say both that this is what anyone (including Diane) ought to do in such a situation, and that she should be convicted of criminal mischief for doing it?

It might seem no less absurd to convict Diane of attempted criminal mischief, as those who argue that her act is justified typically want to do.[49] For that would imply that there was some criminal act that she tried but failed to perform, which is obviously not the case. If we can see her case as strictly analogous to those kinds of "impossible attempt" in which what prevents the actor's conduct from constituting the commission of a complete offense is the absence of some circumstantial element of the offense—an element whose absence does not *frustrate* the actor's intention—she should not be convicted of an attempt, just as we should not (as I have argued elsewhere) convict a person who handles what she believes to be stolen goods of an attempt to handle stolen goods,

48. I will not pursue a further question for those who would convict Diane: whether acquittal should require only awareness of the relevant reason-generating facts, or that the actor act for those reasons (or "take them into account" in deliberating; see Dillof, *supra* n. 42, at 1596-99). On the one hand, mere knowledge cannot be what matters; the actor must act *for* the right reason. *See* Dressler, *supra* n. 7, at 78-81. But, on the other hand, one might say that all the law should demand is knowledge, since it should give the benefit of the doubt to any actor who had that knowledge, rather than also requiring evidence that the knowledge was her reason for action.

49. *See supra* n. 45 and accompanying text.

if the goods had not actually been stolen.[50] The formal basis for this argument is that criminal attempts should require an "intent to commit an offense,"[51] which is best interpreted as an intention such that the actor would necessarily commit an offense in carrying it out.[52] For one who handles non-stolen goods in the mistaken belief that they are stolen does not act with any such intent. The more substantive reason for not counting this as a criminal attempt is that a criminal attempt should involve an attack on a legally protected interest.[53] The actor who handles what she mistakenly believes to be stolen goods does not attack, or intend to attack, a legally protected interest, even if she believes that she is attacking one.

Even if such an argument is sound for cases in which what is missing is an element of the offense, one could argue that it should not be extended to Diane's case. For, first, she does act with an intention (to break this window) such that she will necessarily commit the offense of criminal mischief in carrying it out, so long as we distinguish "committing the offense" from "being guilty of the offense," taking the latter but not the former to involve having no defense for one's commission of the offense. Second, she is attacking a legally protected interest—the owner's interest in the secure possession of his property, which the law of criminal mischief is meant to protect.

The fact remains, however, that any reasonable onlooker would, and so the criminal law should, urge Diane to break the window. And while we should hope (if not realistically expect) that both successful and failed criminals will come to look back on their past crimes or attempted crimes with the repentant wish that they had not committed them (modified, in the case of failed attempts, by relief that they had failed),[54] we surely should not hope this of Diane. She should certainly look back with a repentant regret at her reasons and motives for breaking the window; but far from regretting breaking it, she should (if she had or acquired the kind of modest concern for other's well-being that we expect of citizens) be relieved and delighted that her malicious act had, albeit no thanks to her, turned out to have been just the right thing to do. I think we must conclude, therefore, that Diane should not be convicted of attempted criminal mischief. While her intentions and motives deserve moral condemnation, the criminal law focuses on *action* as what constitutes crime,[55] and conveys the message that what

50. For such a case, see *Anderton v. Ryan*, 1 App. Cas. 560 (1985), where the prosecution could not prove that the goods in question had been stolen. Matters are less clear if the defendant was a professional fence. *See e.g. People v. Jaffe*, 78 N.E. 169 (N.Y. 1906).

51. *See e.g.* Criminal Attempts Act 1981, § 1(1). Section 1(3), however, stipulates that for the purposes of the law of attempts, such an actor's intention does count as an intent to commit an offense.

52. *See* R.A. Duff, *Criminal Attempts* 22-29, 206-19 (Clarendon Press 1996).

53. *Id.* at 221-22, 363-66, 378-80.

54. On the importance of such retrospective thoughts and feelings, see Peter Winch, *Ethical Reward and Punishment*, in *Ethics and Action* 210 (Routledge & Kegan Paul 1972); and Duff, *supra* n. 52, at 335-46.

55. This claim is, I fully realize, neither clear nor uncontroversial, and many would reject it. For a powerful critique, see Douglas N. Husak, *Philosophy of Criminal Law* ch. 4 (Rowman & Littlefield 1987). I have tried to clarify it and to render it plausible in R.A. Duff, *Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law?*, 6 Buff. Crim. L. Rev. 147 (2002); and R.A. Duff,

the defendant did or tried to do should not have been done. This then implies that if the offender accepts the message that his conviction communicates, he should regret having done what he did—the action that constituted his crime. But that is not what we think Diane should do. Just as Ms. Ryan should benefit from the lucky fact that the video-recorder that she bought was not stolen goods,[56] so Diane should benefit from the lucky fact that she saved Bill's life by avoiding conviction not only for the complete offense that she thought she had committed, but also for attempting to commit it. She deserves no moral credit (although Bill might thank her), but does not merit a criminal conviction for doing or attempting a criminal wrong.

This is not yet to say, however, that in every case of "unknown justification" we ought to acquit the actor both of the complete offense and of attempting to commit it. In Diane's case, what was crucial was that we could say she had "done the right deed," albeit not merely "for the wrong reason," but not even knowingly. We should not assume either that we can make such a claim in every case of "unknown justification," or that the defendant should escape conviction if we cannot say that he did "the right deed."

In our extra-legal moral discourse we can sometimes talk of doing "the right deed for the wrong reason," but it does not always make sense to do so. Such a locution sits most happily in contexts in which there is a clear, determinate requirement to bring about, or to prevent, some result (to do what is necessary to save Bill's life, for instance), or to discharge a behaviorally specifiable duty (to pay a debt, for instance, or to do what I promised). One whose behavior conforms to what morality thus requires might gain no moral credit for it if he acted thus for the wrong reason or unknowingly;[57] but he has still done what morality requires, and we would not advise or require him not to behave thus. It would be absurd to advise him not to do what would save another's life, or not to give the money he in fact owes to the person to whom he owes it. Diane's case is of this kind, and my suggestion is that when what an actor does is, albeit unintentionally and unknowingly, in this sense "the right deed," she should not be criminally liable for the offense of which she would have been guilty had her beliefs been true—nor for an attempt to commit that offense. However, there are two other kinds of moral context in which we cannot talk of the right deed for the wrong reason: in one this is because we cannot separate the rightness of the deed from the reason for which it is done, in the other it is because we cannot talk of "*the* right deed."

Action, the Act Requirement and Criminal Liability, in *Action and Agency* __ (Helen Steward & John Hyman eds., Cambridge U. Press forthcoming 2004).

56. *See Anderton v. Ryan*, 1 App. Cas. 560 (1985). To be more precise, her luck lay in the fact that the prosecution failed to prove that the video-recorder that she bought had been stolen.

57. One of the points on which such disparate moral theorists as Aristotelians and Kantians can agree. See Aristotle, *Nicomachean Ethics* ch. II.4 (Christopher Rowe trans., Oxford U. Press 2002), on the need to do just actions "for themselves." See Immanuel Kant, *Groundwork of the Metaphysics of Morals* 3-4 (Mary Gregor trans. & ed., Cambridge U. Press 1998), on the need not merely to "conform" to the moral law, but to act "for the sake of" the moral law.

The first kind of obstacle to talking of the right deed for the wrong reason appears clearly in cases in which what makes "the right deed" right is its expressive character. I should visit my sick aunt because she would value this expression of my love for her; or I should give a gift to the person who did me a great favor, at real cost to herself, to express my gratitude. I might, of course, think of visiting my aunt simply to curry favor with her (with an eye on her will), or think of giving the gift simply to encourage future benefits. Such reasons, however, are not just morally bad or disreputable; they corrupt the moral character of the action itself. If I act for such a reason, my action is no longer a genuine expression of love or gratitude, but is merely a pretense; and although, if I am a competent actor, it might deceive its recipient and make her happy, it is neither the action that I should do, nor the action that the recipient wants and values. What I should do, what counts as "the right deed," is to express my love by visiting my aunt, or my gratitude by giving my benefactor a gift. What I in fact (and intentionally) do is to deceive my aunt into thinking that I love her, or my benefactor into thinking that I am grateful. We might say in such cases (as we would not say when we can identify "the right deed" separately from "the right reason") that the actor should not do it at all if he cannot do it for the right reason: better not to visit my aunt at all, or not to give the gift, than to do so with a false heart and a deceitful pretense.[58]

We thus cannot talk of "the right deed for the wrong reason" when what makes an action "the right deed" is in part the right reasons for which it is done. So long as we can still talk of "the right deed," however—i.e., of the action that is required or expected—this constraint is not likely to be relevant to questions of criminal liability, since the criminal law does not usually require actions that have this character. It does not, for instance, require expressive actions of us, *qua* expressive, and when it does require an action whose importance might lie partly in its expressive quality, it does not inquire into the sincerity of the action. Witnesses might be required to swear an oath or to make a solemn affirmation at the start of their testimony, and the importance of such oaths and affirmations no doubt lies partly in the respect for the legal process that they supposedly express. However, all the law requires is that witnesses take the oath or make the affirmation, not that they do so sincerely, to express their own respect.[59]

The second possible obstacle to talking of "the right deed for the wrong reason" is more relevant to our present purposes. We noted that conduct that is "justified" might be "strongly" justified, in that it is what is required or expected

58. On the moral significance of such expressive actions, see Peter Winch, *Moral Integrity*, in *Ethics and Action* 171 (Routledge & Kegan Paul 1972); N.J.H. Dent, *Duty and Inclination*, 83 Mind 552 (1974); Bernard Williams, *Morality and the Emotions*, in *Problems of the Self: Philosophical Papers 1956-1972*, at 207 (Cambridge U. Press 1973); Mary Midgley, *The Objection to Systematic Humbug*, in *Heart and Mind: The Varieties of Moral Experience* 88 (Routledge 2003); and Lawrence A. Blum, *Friendship, Altruism, and Morality* (Routledge & Kegan Paul 1980).

59. Perjury consists not of insincere oath-taking or affirmation, but of lying after taking the oath or making the affirmation. *See* Model Penal Code §241.1; Perjury Act, 1911, §1 (Eng.) (the perjurer's sincerity or insincerity when taking the oath or making the affirmation is irrelevant).

of us; or it may be only "weakly" justified, in that it is permissible.[60] Now, if an action is merely permissible, rather than being required or expected, we cannot talk of "the right deed for the wrong reason," for we cannot talk of "*the* right deed" at all, but only of that range of deeds that are all permissible. Furthermore, if an action is only permitted, rather than required or expected, the criminal law might more plausibly sanction it (i.e., acquit the actor) only on condition that it is done for an appropriate reason.

Suppose that I divert a group of runaway cows into my neighbor's yard, where they will damage his rather decrepit bicycle. My motives are malicious—to harm my neighbor. But as it turns out (though I did not know this at the time), had I not diverted them they would have gone on to damage my expensive car (which my son had parked round the corner). Or, to use the example most often discussed in this context, suppose that I kill *V*, for malicious reasons, when (unknown to me) he was in fact attacking me. I take it that, in both these cases, my action is at best permissible, rather than being either morally or legally required or expected; that is, it is legitimate to damage another's property in order to prevent clearly greater damage to my property,[61] or to kill someone if this is the only way to prevent him from unlawfully killing me, but I would do nothing wrong if I let my property suffer the damage, or let the assailant kill me—which is to say that it is also permissible or legitimate not to damage another's property even if this results in greater damage to my property, and not to kill an assailant even if this results in my own death at his hands.[62] In such cases we can still talk of "right deeds," since acts that are not wrong—i.e., that are permissible—count as right.[63] But we cannot now talk of "the right deed," since there is no unique right act.

In such cases, although the law permits me to Φ, I would do no wrong in not Φ-ing. This then means that the law could consistently condemn me if I Φ for the wrong kind of reason or in ignorance of the facts that make Φ-ing permissible. We can now say (as neither we nor the law could say of Diane's life-saving window-breaking) that I ought not to have Φ-ed, if I did not Φ for an appropriate reason. And we can say (as we could not say of Diane) that I should now repent not just my motives or reasons for Φ-ing, but my Φ-ing itself. In other words, the reasons that I offered above for concluding that Diane should be convicted neither of criminal mischief, nor of attempted criminal mischief,[64] do not apply to these cases in which what the law offers is nothing stronger than a permission to commit a normally wrongful act. We could therefore argue that, while the law should acquit someone who does what is in fact "the right deed," even if she does it for the

60. *Supra* text accompanying n. 11; *see supra* nn. 13-14 and accompanying text (discussing whether the idea of "justification" in the criminal law should encompass the merely permissible).

61. *See* Model Penal Code § 3.10; Criminal Damage Act, 1971, ch. 48, § 5(2)(b) (Eng.).

62. This deliberately leaves open the possibility that if I could save my life by some less drastically harmful defensive action, doing so would be expected or required, not merely permitted. *See supra* n. 38.

63. A point rightly emphasized by Baron, *supra* n. 8. For further discussion, see *supra* note 14 and accompanying text.

64. *See supra* text accompanying nn. 46-56.

wrong reason or not even intentionally, it should convict one who does a merely "permissible deed" unknowingly or for the wrong kind of reason.[65]

It is therefore striking that those who insist that justificatory defenses should be available only to actors who are at least aware of the relevant justificatory factors talk of such defenses as conferring "licenses," or "privileges," or "permissions."[66] The argument of this section suggests that they might be right about those defenses that constitute permissions, but wrong to extend their claim to cover all defenses that acquit the actor because his action was "right." This also suggests another way in which the orthodox classificatory schema of "justification" and "excuse" is too limited for the analytical and normative purposes of criminal law theory: as well as distinguishing the "right" from the "warranted," we must distinguish more sharply within the category of the "right" the permissible from the required or expected.

Even if this suggestion is right, it still leaves much substantive work to be done. For one thing, I have not argued that the law *should* convict actors who act in ignorance of facts that would ground legal permissions to act as they do; I have argued only that the reasons which make it implausible to convict the actor who does—albeit unknowingly—what is expected or required of her do not apply to the case of permissions. For another thing, there is still much work to be done in deciding which cases are of which kind. When can we, and when can we not, distinguish "the right deed" from "the right reason"? When should we see an act that the criminal law sanctions as merely permissible, or as required, or expected (given that such acts are not usually formally required by the criminal law itself, on pain of conviction for failing to do them)? But my aim has not been to settle all, or even most, of the substantive problems that surround "justifications" in the criminal law; it has only been to suggest that some of the problems that have come to obsess theorists can be dissolved, while others can be clarified, by adopting a richer classificatory schema than that of "justification" and "excuse." Once we abandon a supposedly unitary notion of "justification" in favor of a schema that distinguishes the "right" from the "warranted" and the "permissible" from the "expected," we can see more clearly both what the substantive issues are (and plenty are still left), and which controversies—for instance about "putative justifications"—have been kept going for so long at least partly by a failure to recognize or to remedy the inadequacies of the orthodox classificatory schema.

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65. On whether what is legally required should be merely awareness of, or motivation by, the relevant facts, see *supra* note 48.

66. *See e.g.* Fletcher, *Rethinking*, *supra* n. 1, at 563-66 (using all three terms); *cf.* Gardner, *supra* n. 9, at 117 (discussing "cancelling permissions"); Colvin, *supra* n. 15, at 392 (discussing "defences of contextual permission"). Fletcher's use of such terms, however, sits uneasily with his view that justification involves something more than mere permissibility. *See supra* n. 13 and accompanying text. The fact that the example that dominates much of the discussion is that of a killing that actually saves one's own life is also significant, since this is surely a case of permitted, not expected, action.