

## 1

## Justification Defenses

## The Issues

The fully competent, culpable, and malevolent Spike attacks Mother Beneficence with a tire iron in order to steal the alms she has collected for the poor. Mother Beneficence defends herself by kicking Spike in the shins, and Dudley Doright rushes to her rescue, smiting Spike sharply, knocking him to the ground, and holding him until the police arrive. Dudley acts solely for the purposes of preventing harm to Mother Beneficence and bringing Spike to Justice.

Both Mother Beneficence and Dudley fulfill the offense elements for assault in that they purposely cause bodily injury to another human being.<sup>1</sup> Most readers, jurors, and theorists would probably agree, however, that their actions are justified. The Model Penal Code (MPC) provides justification defenses of self-defense for Mother Beneficence and defense-of-others for Dudley.<sup>2</sup> These defenses would not only exempt Mother Beneficence and Dudley from punishment, but also ratify their defensive force as acceptable under the circumstances.<sup>3</sup>

Most theorists accept the general characterization of justification defenses as affirmative criminal defenses that ratify the defendant's conduct as acceptable under the circumstances, despite fulfilling all offense elements for some criminal offense. This formulation distinguishes justification defenses from excuses that exempt the defendant from punishment due to some disability, but do not mark the defendant's conduct as acceptable under the circumstances.<sup>4</sup>

Despite the broad acceptance of this basic distinction, important questions remain regarding both the general class of justification defenses and specific defenses that fall within this category. Difficult issues regarding the general category of justification defenses involve the conceptual and moral foundations of this class of defense, the significance of the defendant's knowledge regarding justificatory circumstances, the effects of these defenses on the rights and duties of third parties, and the boundaries that differentiate justification defenses from related defenses and mitigation.

1 MPC at § 211.1.

2 *Id.* at §§ 3.04, 3.05.

3 Defenses at § 24(a); Rethinking at 759.

4 Defenses at §§ 24, 25; Rethinking at 759.

These theoretical concerns contribute to at least two types of practical problems. First, the manner in which legislatures and courts formulate, interpret, and apply legal provisions representing these defenses can depend on their understanding of the answers to some of these theoretical questions. Should a statute privileging the exercise of force in self-defense, for example, require that the defensive force is necessary, believed necessary, or reasonably believed necessary to prevent the use of unlawful force against the defendant? Does the presence of a psychological syndrome, such as the battered woman syndrome, contribute to or undermine a claim of self-defense? Second, many jurisdictions recognize a residual justification defense, known as the necessity, lesser-evils, or choice-of-evils defense. This defense serves as a residual corrective device intended to address conduct that violates an offense definition in circumstances that render it more acceptable than the available alternatives but do not qualify for any specific justification defense. The manner in which courts define the parameters of this defense can depend partially on their understanding of some of the theoretical issues.

This book advances an integrated theory of justification defenses. It interprets the role and parameters of justification defenses by appealing to the expressive function of the criminal law as an official representation of a conventional public morality. Roughly, justification defenses apply to conduct that violates some criminal offense definition in circumstances that preclude the expression of condemnation inherent in criminal conviction and punishment. The parameters of such defenses in a liberal democracy must reflect underlying principles of liberal political morality.

## 1.1 The Theoretical Debate about the General Category of Justification Defenses

### 1.1.1 *The Context*

In order to establish the guilt of a defendant for a criminal offense in contemporary American criminal law, the state must prove that the defendant fulfilled the material elements of the offense as defined in the relevant criminal code.<sup>5</sup> The MPC defines offenses in a manner that includes both objective offense elements stated in the form of conduct, circumstances, or results and culpability elements. One commits assault, for example, by purposely, knowingly, or recklessly causing bodily injury to another human being.<sup>6</sup> “Causing bodily injury to another human being” represents the objective offense elements for assault,<sup>7</sup>

<sup>5</sup> MPC at § 1.12(1).

<sup>6</sup> *Id.* at § 211.1(1).

<sup>7</sup> *Id.* at § 1.13(9) (material elements); see Defenses at § 11(a).

and “purposely, knowingly, or recklessly” represents the culpability element.<sup>8</sup> In addition, the conduct constituting the offense must include a voluntary act as defined in the MPC.<sup>9</sup>

Defendants may offer several types of defenses in response to the state’s case-in-chief. Defendants advance failure-of-proof defenses when they attempt to show that the state has failed to carry its burden of proving one or more offense elements.<sup>10</sup> Defendants can escape liability despite fulfilling all offense elements by establishing general defenses. For the purposes of this book, justifications and excuses are the two categories of general defenses of primary interest. Those who raise justification defenses contend that although they have engaged in conduct that fulfills the material elements of a criminal offense, circumstances render that conduct socially acceptable and perhaps even desirable and, thus, immune from punishment. Excuses, in contrast, address the accountability of the defendant rather than the acceptability of the conduct. Those who raise excuses admit that they engaged in criminal conduct that was wrongful in the circumstances, but they contend that they are not appropriately held accountable for that behavior due to some disability-based excusing condition.<sup>11</sup>

In short, justifications exonerate defendants who perform ordinarily criminal conduct in special circumstances that render their behavior socially acceptable. These defenses would apply to any other actor who performed the same conduct in the same circumstances. Excuses, in contrast, are specific to defendants because they exculpate these individuals for their criminal conduct due to disabilities, such as infancy or psychological disorder, that undermine the attribution of culpability for this conduct to these defendants.

Although this general distinction between justification and excuse is relatively well settled, a series of difficult cases and theoretical issues regarding the parameters of the justification defenses remains. The central theoretical questions include the following: (1) Do justification defenses render conduct right or merely tolerable or permissible? (2) Must defendants act with awareness of justificatory circumstances in order to qualify for justification defenses? (3) Should defendants who commit criminal conduct with the reasonable but mistaken belief that justificatory circumstances prevail qualify for excuse, justification, or neither? (4) Do justification defenses create a matrix of social responsibility such that other persons may assist and may not resist or interfere with justified conduct? (5) Does this social matrix generate a corollary incompatibility thesis such that no more than one party in violent confrontation can be justified? The following subsections examine each of these contentious issues in order to clarify the parameters of the contemporary debate.

8 MPC at § 2.02 (culpability elements).

9 *Id.* at § 2.01.

10 Defenses at §§ 21, 22.

11 *Id.* at §§ 24, 25; Rethinking at 759.

*1.1.2 Justified Conduct as Right or as Permissible*

According to George Fletcher's theory, offense definitions proscribe conduct forbidden by prohibitory norms that constitute morally coherent imperatives for the society to which the law applies. Justification defenses provide a license or permission to violate a general prohibitory norm when certain relatively well-defined conditions indicate that doing so will promote a superior right or social interest.<sup>12</sup> Justification defenses enhance the criminal justice system's ability to fulfill some of its important functions.

The criminal law provides both a guide for voluntary self-regulation by individual citizens and criteria for evaluation of each person's conduct by other citizens and by courts. In order to fulfill these functions, justifications should identify right, rather than merely permissible, behavior, because doing so guides individual decision making toward correct conduct under the circumstances.<sup>13</sup> The criminal law seeks to prevent violent confrontation and, in order to promote this purpose, it avoids rules giving rise to inconsistent claims. Justifications that render conduct objectively right, establishing the justified actor's right to perform that conduct, prevent conflicts among legally sanctioned acts. If the actor has a right to engage in that conduct, then others have no right to interfere. Thus, justifications that establish objectively right conduct, as opposed to merely permissible behavior, avoid situations in which two parties in conflict might both be justified.<sup>14</sup>

Joshua Dressler and Kent Greenawalt reject the claim that justifications always identify right conduct that the actor has a right to perform, contending that some justified behavior is merely permissible or tolerable. Law sometimes allows conduct that is morally less preferable than available alternatives.<sup>15</sup> The offense definitions for most serious crimes forbid conduct that harms others. Justifications sometimes exempt certain behavior from punishment because it does not cause the proscribed type of harm. Such conduct might qualify for exception because it is not harmful, although it is not beneficial, morally ideal, or conduct that the actor has a positive right to perform.<sup>16</sup>

The criminal law does not attempt to promote morally ideal behavior; rather, it establishes minimal standards of social morality, leaving considerable lati-

12 Fletcher presents his theory in several sources: *Rethinking* at 553–77; *The Right and the Reasonable*, 98 Harv. L. Rev. 949 (1985); *The Right to Life*, 13 Geo. L. Rev. 1371 (1979); *Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?* 26 U.C.L.A. L. Rev. 1355 (1979).

13 *The Right and the Reasonable*, *id.* at 976–7.

14 *Prison Conditions*, *supra* note 12, at 1358–65.

15 Joshua Dressler, *New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 U.C.L.A. L. Rev. 61 (1984); Kent Greenawalt, *Distinguishing Justifications from Excuses*, 49 Law & Contemp. Probs. 89 (1986); Kent Greenawalt, *On the Perplexing Borders of Justification and Excuse*, 84 Colum. L. Rev. 1897 (1984).

16 Dressler. *id.* at 83.

tude within which individuals can prefer their own interests over those of others. People can defend themselves with deadly force in their own homes without retreat, for example, and in many jurisdictions, they can also do so in public places. Arguably, this rule provides legal permission for conduct that is only morally tolerable in that retreat to avoid killing would be the morally superior option.<sup>17</sup> Perhaps the rule allowing the use of deadly force in self-defense against innocent aggressors provides more compelling support for the contention that some justified conduct is merely tolerable rather than superior conduct. At the least, the critics contend, the law ought to be able to provide the justification while leaving open the question regarding whether such conduct is superior or merely tolerable.<sup>18</sup>

### 1.1.3 *Unknowingly Justified Defendants*

Fletcher contends that justifications apply only to those who act with awareness of the justificatory circumstances because justifications exonerate defendants for violations of general prohibitory norms, and only those who act with such knowledge merit exoneration. In some passages he seems to demand also that they act for the right reasons in that they must be motivated by the justifying conditions.<sup>19</sup> Paul Robinson contends that current American law reveals no consensus on the knowledge requirement. According to Robinson, case law is rare and approximately equally divided regarding this issue, and some jurisdictions justify on the basis of defendants' beliefs regarding justifying conditions while others do not. Finally, he interprets the MPC provisions that justify defendants on the basis of their beliefs in the justifying conditions as intended to include putatively justified defendants rather than to exclude unknowingly justified ones.<sup>20</sup>

In addition to disputing Fletcher's position as a descriptive account of current law, the critics argue that justifications ought to apply to unknowingly justified actors. Justification defenses provide exceptions to prohibitory norms for classes of behavior that do not cause the harm the norms are intended to prevent, yet the knowledge requirement would deny the defense to those who do not perform socially harmful conduct as well as to some who actively prevent the relevant harm.<sup>21</sup>

Furthermore, the knowledge requirement fails to satisfy Fletcher's purpose of limiting justifications to those who deserve them because it would extend the defense to defendants who are aware of the justifying circumstances but act

17 *Perplexing Borders*, *supra* note 15, at 1904–7.

18 Dressler, *supra* note 15, at 84–6.

19 *Compare* Rethinking at 562–5; *The Right to Life*, *supra* note 12, at 82–3 with Rethinking at 557, 559; *The Right to Life*, *supra* note 12, at 1384–5.

20 Defenses at § 122(e).

21 *Id.* at § 122(c); Dressler, *supra* note 15, at 79.

from vicious motive. Suppose, for example, that *X* learns of justifying conditions that would provide a defense for force exerted against *Y*. Although *X* cares not at all about these justifying circumstances, he takes advantage of them in order to exercise his long-standing hatred for *Y* by shooting *Y*. The critics deny that *X* deserves the defense merely because *X* knows of the justificatory circumstances if that knowledge does not motivate the conduct that violates the offense definition.<sup>22</sup>

Greenawalt interprets this problem regarding the unknowingly justified actor as demonstrating that no clear parameters can be drawn for justification defenses because moral evaluation involves behavior, consequences, and knowledge, blurring the distinction between justification and excuse. He offers the hypothetical Ann who attacks Ben out of hate while she is unknowingly justified because Ben was in the process of setting a bomb in a crowded place. Ann provides no grounds for excuse, so her act is either justified or wrongful. Greenawalt contends that Ann's act seems justified if we concentrate on the consequences but unjustified if we focus on her behavior and reason for acting. He concludes that Ann's action was warranted, although she was wrong to attack Ben.<sup>23</sup> Finally, Robinson argues that extending justifications to unknowingly justified actors who act for evil purposes will not result in gross injustice or social approval of evil actions because these actors remain liable for criminal attempts.<sup>24</sup>

#### 1.1.4 Putative Justification

Putative justification arises when the actor reasonably but mistakenly believes that the act is justified. Fletcher argues that putatively justified actors should be excused but not justified because including these defendants within the scope of justification would frustrate the violence-preventing function of the criminal law by justifying both parties in violent confrontation under certain conditions.<sup>25</sup> Suppose, for example, that *X* reasonably but mistakenly believes that *Y* is attacking her. If putative justification justifies, then *X* is justified in responding with force against *Y*, and *Y*, who is unaware of *X*'s mistaken belief, reasonably but mistakenly believes that *X* is unjustifiably attacking her. Thus, *Y* is justified by putative justification in responding in kind. As a result, both parties are justified in engaging in armed combat. Should the police intervene in this altercation, they would interfere in mutually justified behavior.

The justificatory approach to putative justification also results in cases in which the actor is not justified in acting in a manner that seems intuitively to be clearly justified. Suppose, for example, that *B* attacks *C* because *B* reasonably

22 Defenses at § 122(e); Dressler, *supra* note 15, at 80.

23 *Distinguishing*, *supra* note 15, at 95.

24 Defenses at § 122(d).

25 Rethinking at 762–9.

but mistakenly believes that *C* is attacking her. If putative justification justifies, then *B* is justified, and if *C* is aware of *B*'s mistake, then *C* is aware that *B*'s violence against her is justified and, hence, not unlawful. *C*, therefore, may not justifiably exert any force in protecting herself from this unprovoked attack.

For these reasons, Fletcher argues that putative justification should be interpreted as a mistake-based excuse that exculpates the defendant for the putatively justified conduct but does not render it lawful. With this approach, *C* can legally defend herself from *B*'s excused but unlawful conduct. *B*'s conduct does not actually serve any superior social interest or right that would ground an exception to the general prohibitory norm and support the matrix of interlocking social relationships created by a true justification.<sup>26</sup>

Greenawalt resists the attempt to consistently categorize putatively justified defendants, arguing that some are most appropriately justified rather than excused. He cites the example of a forest ranger who reasonably but erroneously concludes that he must burn a section of forest in order to create a fire break and protect a town and its inhabitants from a forest fire. Greenawalt contends that the ranger should be justified rather than excused because his choice and action were justified under the circumstances although the consequences fortuitously were not.<sup>27</sup> Any choice that is the best that could be expected under the circumstances should be justified.<sup>28</sup>

Greenawalt advances cases intended to demonstrate the significance of defendants' mental states for justification. Recall Ann who strikes Ben out of hatred while she is unknowingly justified, and compare her to Anna who strikes Bill because she reasonably but mistakenly believes that he is about to attack her. If justification is purely a matter of the external circumstances without regard to perception, then Ann is justified while Anna is not, yet it seems clear that Ann is blameworthy while Anna is not. Greenawalt contends that Anna's blameless perception should be sufficient for justification and that the fact that Ann would be subject to attempt liability demonstrates that her act was not fully justified. He concludes that actors who act on a faultless appraisal of the facts should be justified.<sup>29</sup>

### *1.1.5 The Social Matrix and the Incompatibility Thesis*

Fletcher's classification of putative justification as excuse rather than as justification reflects his claim that justifications identify conduct that is right despite violating the prohibitory norm. Any actor would be right to perform such conduct in order to promote the superior right or social interest that justifies it. Excuses, in contrast, are specific to the individual because they arise from the

<sup>26</sup> *Id.*; *Prison Conditions*, *supra* note 12, at 1361–5.

<sup>27</sup> *Perplexing Borders*, *supra* note 15, at 1907–11.

<sup>28</sup> *Id.*; Dressler, *supra* note 15, at 93.

<sup>29</sup> *Distinguishing*, *supra* note 15, at 101–3.



individual's disability rather than from the superior right or interest that gives rise to the justification.<sup>30</sup> This foundation in superior rights or social interest supports a matrix of complimentary legal rights and duties for third parties. If person *X* is justified in doing act *A* because doing *A* serves the superior right or social interest, then any other person *Y* has a right to assist and a duty not to resist or interfere with *X* in doing *A* because assisting *X* will promote the justificatory right or social interest and resisting or interfering will frustrate that right or interest.<sup>31</sup> That is, the related legal rights and duties in the social matrix cohere with one another because they share a common foundation in the superior social interests, abstract rights, and norms that provide the normative foundation for all specific legal rights and duties in the set.

Fletcher's interpretations of justified conduct as right behavior, of putative justification as excuse, and of the social matrix arguably promote the violence-preventing function of law by supporting the incompatibility thesis, which holds that no more than one party to a violent confrontation can be justified.<sup>32</sup> That is, if a common foundation of justificatory rights or abstract social interests provides the underlying normative foundation for a set of related legal rights and duties, that set should generally cohere in such a way as to preclude situations in which two or more participants in violent confrontation with each other have access to legal justification. If justification defenses apply only to cases in which justificatory circumstances actually occur, and if third parties have a duty not to resist justified acts, then situations should not ordinarily arise in which two justified parties engage in violent behavior. If *X* and *Y* engage in violent conflict, then each resists or interferes with the other. If both were justified, then both would be justified in resisting or interfering with justified actors, in direct contradiction of the claim that one may not resist or interfere with justified actions.

The claim that the social matrix provides a coherent set of interlocking duties and responsibilities encounters tension with Fletcher's knowledge requirement. Suppose that *X* is unknowingly justified in killing *Y* and that *Z* assists *X* in performing that act with knowledge of the justifying circumstances. Due to the knowledge requirement, *X* has no justification defense, but *Z* is justified in assisting *X*.<sup>33</sup> It seems that it is true both that *Z* is justified and that he

30 Rethinking at 759–62.

31 *Id.* at 761–3; *The Right to Life*, *supra* note 12, at 77; *Prison Conditions*, *supra* note 12, at 1357–65. Fletcher refers to a matrix of social relationships. One could use this phrase to refer to an interlocking set of specific legal rights and duties or to the complex set of conventional moral principles that support the legal rights and duties related to justification defenses. In the former sense, the matrix would be the set of related legal rights and duties. In the latter sense, the matrix would be the relevant part of the conventional public morality that provides the normative foundation for that set of legal rights and duties. For the sake of clarity, I refer to the set of interlocking rights, privileges, and duties as the social matrix, and I refer to the underlying normative foundation as the conventional public morality.

32 *Prison Conditions*, *supra* note 12, at 1357–65.

33 Dressler, *supra* note 15, at 95–6.



is not; Z is justified in that he acts in furtherance of the superior social interest with knowledge of the justifying circumstances, but Z is not justified in that he promotes X's unjustified action.

Critics advance difficult cases calling both the social matrix and the incompatibility thesis into question. Dressler advances the example in which X is an undercover police officer who believes mistakenly but with probable cause that Y is a mass murderer. X draws her gun and approaches Y in order to arrest her. Before X has an opportunity to identify herself as a police officer, Y sees X draw her gun and reasonably but mistakenly concludes that X is about to attack her. Dressler contends that it is at least arguable that under these circumstances Y is justified in defending herself from the apparent deadly attack, and X is justified in defending herself from Y's exercise of force. This example suggests that, contrary to the incompatibility thesis, both parties in a violent conflict might be justified when both act on mistaken perceptions.<sup>34</sup>

Dressler advances other cases that raise doubts about the incompatibility thesis, and he contends that the resolution of these cases may vary with the underlying moral theory. Suppose, for example, that X and Y are both swimming from their sinking ship toward the only available plank that is floating in the water. It is sufficient to keep either of them afloat, but not both. Dressler contends that it is at least arguable that each party is justified in fighting for her life by preventing the other from gaining the plank.<sup>35</sup> He advances another example, which he interprets as a conflict between irreducible values. Suppose X can save a thousand innocent children only by killing the innocent Y. Dressler contends that one could plausibly conclude that X would be justified in killing Y and that Y would be justified in exerting deadly force against X in self-defense. Thus, both sides in the violent conflict would be acting rightly.<sup>36</sup>

Greenawalt advances actual (as opposed to hypothetical) cases in which he claims both sides in violent conflict might be justified. In *People v. Young*, the defendant Young intervened in an apparent mugging that was actually a legal arrest in progress.<sup>37</sup> Young was arguably justified in that he should be praised rather than blamed for his decision and in that society should encourage people to make similar decisions when confronted with similar information. Yet, the police who violently resisted Young's intervention were also justified in doing so, and society should generally encourage police to resist those who interfere in legal arrests by police officers. Greenawalt presents a similar analysis of prison escape cases in which prisoners might be justified in escaping in order to avoid some imminent violence and prison guards might also be justi-

34 *Perplexing Borders*, *supra* note 15, at 94.

35 Dressler, *supra* note 15, at 88–9.

36 *Id.* at 89–91.

37 *People v. Young*, 11 N.Y.2d 274, 183 N.E.2d 319, 229 N.Y.S.2d 1 (1962), *rev'g* 12 A.D.2d 262, 210 N.Y.S.2d 358 (1961).

fied in fulfilling their responsibilities by preventing those prisoners from escaping.<sup>38</sup> While Dressler interprets his incompatible justification cases as reflecting tensions among underlying moral theories, principles, and values, Greenawalt explains them as manifestations of the complex process of justifying decisions and acts in light of the information available.<sup>39</sup>

### 1.1.6 *Duress as a Problematic Classification*

The defense of duress constitutes a problematic category for any attempt to systematically classify justifications and excuses because it contains elements that are ordinarily attributed to each. Duress is frequently classified as an excuse, but it often includes an objective component such as the MPC's "person of reasonable firmness."<sup>40</sup> Cases, codes, and commentators vary, addressing duress as an excuse, a justification, or some hybrid combination.<sup>41</sup> Under the MPC some cases could fall under both the choice-of-evils justification and the duress excuse.<sup>42</sup>

### 1.1.7 *Summary*

The debate among Dressler, Fletcher, Greenawalt, and Robinson emphasizes the following theoretical issues with accompanying difficult cases.<sup>43</sup>

- (1) Right or Permissible: Do justifications render conduct right, or do they include merely permissible or tolerable behavior?
  - 1.1 *X* exercises deadly force in self-defense against *Y* in *X*'s house without retreating.
  - 1.2 *X* exercises deadly force in self-defense against *Y* who is an innocent aggressor.
- (2) The Knowledge Requirement: Must defendants be aware of the justifying circumstances in order to be eligible for the defense, or are justifications purely objective in the sense that they are determined by the presence of the justifying circumstances independent of the actor's awareness?
  - 2.1 The unknowingly justified *X* attacks *Y* out of hate. (Greenawalt's Ann)

38 *Perplexing Borders*, *supra* note 15, at 1919–21.

39 Compare Dressler, *supra* note 15, at 87–91 with *id.*

40 MPC at § 2.09.

41 Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. Calif. L. Rev. 1331, 1349–67 (1989).

42 MPC at §§ 3.02 (choice of evils), 2.09 (duress).

43 In later sections of this book, I refer to cases identified in this summary by number. "Case 2.1," for example, refers to the case of the unknowingly justified Ann who attacks out of hate.