

1

The Domain of Excuses: A Theoretical Overview

1. THE NECESSARY CONDITIONS OF EXCUSE

No criminal lawyer seriously entertains the proposition that a criminal law code should avoid making any space for excuses, whilst providing for justifications. One reason for this is that any attempt to shut out excusatory claims, whilst permitting claims of justification, would involve sheer arbitrariness. By way of example, in a case where conduct falls on the boundary between the outer limits of (justifiable) reasonable defensive force and the beginning of (more or less, excusable) excessive force, it is hard to tell just when a genuinely justificatory claim ends and an essentially excusatory one begins.¹ Moreover, in some instances,² such as possession of an offensive weapon or obstruction of the highway, so long as D's³ explanation respectively for the possession or for the obstruction is sound enough to make criminal conviction morally inappropriate, it may make little or no difference whether that explanation is rightly categorized as a good excuse or as an adequate justification. Either should amount to a sufficient case for an acquittal.⁴ More broadly, in principle, it ought to be recognized that to any criminal charge there may be an answer or explanation that would make it morally repugnant to convict in the circumstances, even if the elements of the offence are made out, and even if there were understandable reasons

¹ By way of contrast with a number of other common law jurisdictions, 'excessive defence' is not, as such, an excuse or partial excuse in English law, even in murder cases: *R v Clegg* [1995] 1 AC 482. As we will see, English law overcomes this problem by somewhat artificially stretching its understanding of the limits of conduct justified in self-defence: see the discussion in chapter 2.4 below. In itself, this may be no bad thing, but the artificiality involved ought more openly to be recognized. The issues have recently been addressed by the Law Commission for England and Wales, *Partial Defences to Murder*, Law Commission Consultation Paper No 173 (HMSO, 2003), part 9.

² Principally, those where even the *prima facie* wrongfulness of D's conduct may depend on the reasons he or she gives for the conduct in question.

³ In spite of the slight awkwardness, I shall use the short forms 'D' and 'V' throughout, as is now quite common practice, rather than the full forms 'defendant' and 'victim' respectively.

⁴ So, for example, section 139(4) of the Criminal Justice Act 1988 provides that it is a defence—in relation to a charge of possessing an offensive weapon in a public place—'for a person . . . to prove that he had *good reason or lawful authority* for having the article with him in a public place' (my emphasis). No distinction is drawn, here, between the justificatory case ('lawful authority'), and the potentially excusatory one ('good reason').

why a prosecution was brought in the first place. In practice, such cases will stretch well beyond those involving circumstances of justification. For these reasons, although excuses may vary in nature and extent from one jurisdiction to the next, they have found a place even in the most unforgiving of criminal codes.⁵

So, what is an excuse? There are different ways of seeking to answer this question. It would be possible to concentrate solely on the development of excuses in the courts. Alternatively, one could seek to elaborate on the extensive discussion of how excuses are to be distinguished from justifications, and on whether excuses should be distinguished from denials of responsibility such as insanity or infancy.⁶ Although these important demarcation disputes will inevitably be confronted from time to time, by and large an attempt is made to plot a different course in this work. Putting on one side detailed consideration of the tangled web of authority that now purports to govern excuses in English law, I ask what kind of claim an excusatory claim is (chapter 1), what is the best way to understand the theoretical foundation of excuses (chapters 2 and 3) what kind of excuses there could and should be (chapters 4, 5 and 6), and what the consequences of successful excusatory pleas should be (chapter 4). In other words, I try to keep the focus on the kinds of claim that ought to excuse, in whole or in part, rather than solely on the way in which excuses take their place within the hierarchy of defences.⁷ In that regard, to return to the question posed at the beginning of the paragraph, I shall be adopting a broad definition of the kind of claims that can count as genuine candidates for excuse, in general terms; but I shall also be adopting a relatively narrow or restrictive understanding of the circumstances in which, as it were, candidature should be successful. The law should set stiff conditions to be met if an excuse (broadly defined) is to be formally recognized within a criminal code. We can think of the difference between the considerations that make a claim a candidate for excuse, and the conditions that must be satisfied if the candidature is to be successful, as a difference between the necessary and the sufficient conditions for an excusing condition to be recognizable in law.

To be recognizable as such, it is a necessary condition of any claim to excuse that it is an explanation for engagement in wrongdoing (an explanation not best understood as a justification, as a simple claim of involuntariness, or as an out-and-out denial of responsibility) that sheds such a favourable moral

⁵ Mistake, for example, finds a place, in the guise of the denial of intention in homicide cases, under shari'a law: see G. D. Baroody, *Crime and Punishment under Islamic Law*, 2nd edn. (London: Regency Press, 1979), 10–11.

⁶ For recent discussion of the former issue, see M. L. Corrado (ed.), *Justification and Excuse in the Criminal Law* (New York: Garland, 1994). For some recent discussion of the latter issue, see John Gardner, 'The Gist of Excuses' (1998) 1 *Buffalo Criminal Law Review* 575; Jeremy Horder, 'Criminal Law: Between Determinism, Liberalism and Criminal Justice' (1996) 49 *Current Legal Problems* 159.

⁷ For a defence of the view that there is, morally speaking, a theoretical 'hierarchy' of defences, see chapter 3.1 below.

light on D's conduct that it seems entirely wrong to convict, at least for the full offence.⁸ So defined, claims that are candidates for excuse overlap to some extent with claims treated as claims for mitigation of sentence; but claims that meet the necessary conditions for excuse are by no means just the most pressing of the claims for mitigation of sentence that D might plausibly make. Excuses are morally as well as legally distinctive in character. Excuses excuse the act or omission amounting to wrongdoing, by shedding favourable moral light on what D did through a focus on the reasons that D committed that wrongdoing, where those reasons played a morally 'active' role in D's conduct (meaning that what D did or what happened to D can be subject to critical moral evaluation).⁹ So long as those reasons did play a morally active role in D's conduct, it can still be appropriate to speak of the case for 'excusing' D, even when D combines a factor (duress, say, or provocation) with respect to which he or she was morally active, with a factor (mental disorder, say, or involuntariness), with respect to which he or she was morally 'passive'.¹⁰ The existence of a morally active dimension to what happened to D or to what D did, means that the event stands to be evaluated in the light of underlying 'guiding' reasons, reasons that dictate how D *ought* (not) to have behaved, in failing to control his or her nerves, or in losing his or her temper, as well as in striking someone, and so forth.¹¹ The applicability of guiding reasons gives rise to the critical, judgmental or evaluative element in a claim, making it to at least some extent excusatory, even if its potential for success must sometimes turn in part on the influence of some morally passive physical or mental weakness or deficiency, on which guiding reasons can have no bearing. I will say more about the excusatory character and potential of reasons with respect to which D is morally active in a moment. It follows, though, that excuses ought to be distinguished from out-and-out denials of responsibility, of the kind constituted by a claim to acquittal focused solely

⁸ The phraseology of 'favourable light' is taken from John Gardner, 'The Gist of Excuses', 578, where he contrasts the possibility that wrongful conduct will be shown up in a favourable light with the possibility that conduct could be shown up in a not unfavourable light, or an indifferent light. I do not want to make more of these additional distinctions, although they can clearly be made to serve a theoretical purpose, in that the amount of favourable moral light shed on one's conduct is a matter of degree.

⁹ On the morally active side to our natures, see chapter 2.7–2.9 below. In spite of the apparent focus exclusively on human individuals in this work, corporate Ds are not beyond its compass in any significant way. Their actions always stand to be evaluated in the light of guiding reasons, because their decisions, customs, practices, and so forth ought to have a rational justification and to be subject to rational scrutiny. Even so, the analysis in chapter 6 below is perhaps of the greatest relevance to corporate Ds.

¹⁰ Chapter 4 below is devoted to discussion of the case for excusing when D seeks to combine evidence of mental disorder with a factor such as duress or provocation.

¹¹ See Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1990), 15–19, for an explanation of 'guiding' reasons. See John Gardner, 'Justifications and Reasons', in A. P. Simester and A. T. H. Smith (eds.), *Harm and Culpability* (Oxford: Clarendon Press, 1996), 103, for an explanation of the distinction between explanatory and guiding reasons. I shall be dividing the notion of explanatory reasons into 'adopted' and 'explanatory' reasons. For detailed consideration, see chapter 2.2 below.

on the effects of a severe mental disorder or deficiency (such as insanity). For, in such cases, guiding reasons—reasons concerned with how D ought to have behaved—have no moral significance, and we cannot judge D's conduct objectively in the light of an applicable moral standard.¹²

Excusatory reasons, with respect to which one is morally active, can be divided into two general kinds, 'explanatory' reasons and 'adopted' reasons.¹³ Adopted reasons are reasons that (even in the blink of an eye) one positively chooses to or makes one's mind up to act on, whereas explanatory reasons are not. An explanatory reason is a reason why something happened to one or why one acted in a certain way, whether accidentally (as in the case of clumsiness) or intentionally, without choice or decision, but where there was still a morally active dimension to what happened or to what was done.¹⁴ If a dancer accidentally trips, and in so doing, treads on his or her partner's toes, the accident may be treated as a straightforward denial of voluntariness, on the basis that what happened was a freak accident that could have happened to anyone. There is, though, the potential for an excusatory issue to emerge from behind this categorization of what happens to the dancer. Guiding reasons—in the form of reasons not to tread on someone's toes—clearly have a particular moral salience when one is dancing with a partner; and one can seek to guard against accidents. So, there will always potentially be an issue about whether the dancer could reasonably and should have done more to avoid tripping, bearing in mind the need, in context, to keep his or her dance movements fluid, spontaneous and well timed, etc. This is a classic capacity-focused, excusatory issue, where the dancer's plea, 'I could not, in the circumstances, reasonably have been expected to do more to avoid tripping and hence treading on my partner's toes', is an explanatory (excusatory) reason.¹⁵ We should note, further, that the dancer's claim remains in some sense excusatory in character, even if he or she puts

¹² On the importance of this, as a distinguishing mark of claims to acquittal that are truly excusatory, see chapter 3.2 below. See also Jeremy Horder, 'Criminal Law: Between Determinism, Liberalism and Criminal Justice'; John Gardner, 'The Gist of Excuses'. As we shall see in chapter 3 below, my account of excusatory claims parts company with Gardner's at the point where pleas are not 'out-and-out' denials of responsibility, but are mixed with an excusatory element that can be evaluated in the light of an applicable standard. For me, but not for him, such claims (the most well known are some pleas falling just within the outer limits of diminished responsibility) can be treated as excusatory ones.

¹³ A distinction examined in more depth in chapter 2.2 below. In Gardner's usage, what I am treating as separate kinds of reason—explanatory and adopted—are treated simply as explanatory reasons: see John Gardner, 'Justifications and Reasons'.

¹⁴ So, the distinction I am drawing, being one that can include a contrast between two forms of action that are both intentional under some description, cuts across Aristotle's much more familiar distinction between 'doing wrong' (*adikein*), and doing something that is merely in fact wrong (*per accidens*): see further, J. L. Ackrill, *Essays on Plato and Aristotle* (Oxford: Clarendon Press, 1997), 215. The case for not setting great theoretical store only by the distinction between intentional and unintentional conduct, when explanatory—as opposed to adopted—reasons are in issue, is made in chapter 2.2 below.

¹⁵ For a discussion of the capacity basis of excuses, see chapter 3 below. Of course, that a claim by someone such as the dancer can, morally speaking, be regarded as excusatory in

the whole episode down to his or her clumsiness. In such a case, the dancer gives a reason why the accident occurred that relates to an individual condition or disposition (the clumsiness), with respect to which he or she should be regarded as to a degree morally active, and hence for the manifestation of which he or she must thus accept some moral responsibility. Even though the clumsy dancer's claim resembles a claim of simple involuntariness, clumsy people can usually try with some prospect of success to be less clumsy, if they absolutely have to (this is the morally active dimension to what the dancer did). So, the issue is whether the dancer could and should have done more to keep his or her tendencies to clumsiness under control, given the need also to keep his or her dance movements fluid, well timed, and so on. As in the initial example where the dancer simply trips, this issue involves a capacity-focused question of excuse, even though there is now a more 'individualized' character to that question than there is to the question how much, in general, competent dancers should do to avoid treading on their partner's toes. In that regard, the question how much care we can reasonably expect *D* *him- or herself* to take is an excusatory question, albeit not the same excusatory question as the question how much care we can expect of competent dancers in general. The distinction between subjective and objective versions of the capacity theory of excuses that this example exploits will be examined in more detail in chapter 3.6 below.

In the case of intentional conduct, when one seeks excuse by putting a killing down to an instantaneous loss of self-control (provocation), or ascribing to the impact of sheer terror an 'instinctive' defensive response that is too heavy-handed (excessive defence), one may also be giving an explanatory reason for the action. In such cases, the phenomenological strength of the desire at the heart of the emotion (the urge to kill; the desire to ensure the attack is thwarted) spontaneously eclipses or bypasses the restraining or moderating power of reason. So the actions taken, albeit intentional, are not chosen: they are not based on 'adopted' reasons.¹⁶ Indeed, in the kind of

character does not mean that that character will be what gives it a legal significance. In law, the question is always, 'what effect does D's claim have, if any, on the specific legal wrong in issue?' It will sometimes be the case that the mere fact that someone tripped gives him or her grounds to deny the fault element (intention; foresight) in that wrong. This being so, in law, one need not probe deeper to explore the potentially excusatory factors at play behind the fact that the person in question tripped. In law, someone can perfectly well say, 'there was no excuse (morally) for tripping, but the brute fact is that, in tripping, I did at that moment not realize I would end up making painful contact with V'. Even so, the excusatory issues are liable to come to the surface when, say, it is D's own fault that he did not have the relevant mental element, as when D is voluntarily intoxicated: see Simon Gardner, 'The Importance of *Majewski*' (1994) 14 *Oxford Journal of Legal Studies* 279, and Jeremy Horder, 'Sobering Up? The Law Commission on Criminal Intoxication' (1995) 58 *Modern Law Review* 534.

¹⁶ Which is not to say that, when one gives an explanatory reason for engaging in intentional conduct, one is of necessity conceding that what was done was irrational. There is nothing necessarily inherently more rational about conduct whose motive force is an adopted reason, as opposed to an explanatory reason: see chapter 2.8 below.

cases I have in mind, the actions bear some family resemblances to conduct that is involuntary, as in the case, say, of clumsy actions. Nonetheless, there is clearly still an evaluative dimension to what D does. As we will see in chapter 2.8–2.9 below, we can still ask whether D should have let his or her temper, or terror, get the better of him or her to the extent that it did. As Derek Parfit puts it, conduct that is, ‘not deserving the extreme charge “irrational” [may, nonetheless, be] open to rational criticism’.¹⁷ One must, however, take care with examples of this kind, in general (angry or fearful actions). People who are provoked to anger, or fearful of threats, can sometimes still remain in evaluative control of their consequent conduct throughout, and can hence make genuine—reasoned—choices, even if they are not the choices they would have made in a calm frame of mind.¹⁸ How do all such actions, actions based on an *adopted* reason (a reason D chose to act on) come to be excused, whether or not they are grounded in an emotional reaction?

There are different routes to excuse for such actions, actions based on adopted reasons, which is why it is important to have a broad understanding of the necessary conditions of excuse. Finding an understandable ‘rational defect’ in a morally salient motivating force or factor behind an action is perhaps the most commonly encountered route to excuse, particularly but not solely where the action is grounded in a strong emotional reaction.¹⁹ In a case of angry or fearful action, D might claim that the phenomenological strength of an understandable emotion (D’s ‘operating’ reason)²⁰ so diminished in significance any countervailing evaluative considerations that the wrongful course seemed overwhelmingly attractive or proper, in a way it could and should never rationally have done. By way of contrast with the examples discussed in the preceding paragraph, however, in such cases it is still correct to say that D chooses his or her action from the balance of applicable reasons.²¹

¹⁷ Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984), 119, cited in this form by John Gardner and Timothy Macklem, ‘Reasons’, in J. Coleman and S. Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002), 444 n. 4.

¹⁸ See e.g. the discussion in Jeremy Horder, *Provocation and Responsibility* (Oxford: Oxford University Press, 1992) chapter 5. As we will see, it can be controversial whether a plea should excuse if the action was founded on an adopted reason, whatever the influence of the additional element of human weakness or deficiency. Provocation cases are like this. The case for excusing serious violence in such cases is much weaker where D *decides* to make his or her anger grounds for retaliation (where retaliation is his or her adopted reason for action), as compared with the case where a loss of self-control is merely the explanatory reason for the retaliatory conduct: see chapter 2.12 below.

¹⁹ See Michael S. Moore, *Placing Blame* (Oxford: Clarendon Press, 1998), 538, ‘[M]oral excuses, like legal excuses, are not based on causation, but on interference with practical reasoning’. This builds on his analysis, in similar terms, in Michael S. Moore, *Law and Psychiatry: Rethinking the Relationship* (Cambridge: Cambridge University Press, 1984).

²⁰ For the distinction between operating and auxiliary reasons, see chapter 2.7 below.

²¹ I do not mean that D spends time weighing up competing considerations before coming to a decision, although that is possible. D simply chooses to act for the reason that seems best, something that can happen quickly and spontaneously but does not involve a ‘loss of

D's choice hence has some of the hallmarks of a rational choice, but is a defective example of such a choice, for the reasons just given. So, for example, in an excessive defence case, the fulfilment of the necessary conditions for excuse could hinge on a finding that the sheer strength of D's fear made the choice of a heavy-handed course of action as a means of thwarting an attack *seem* entirely rational and proper, but only because of the mental domination achieved by the desire to ensure that the attack is thwarted. To give a different kind of example, a morally salient rational defect in a motivating factor behind the action also underpins the excusatory element in many factual mistake cases where, as things turn out, the mistake leads D into wrongdoing.²² In such cases, D commonly acts for an adopted reason, deciding on or choosing a course of action in a normal way. So, D's choice appears to have some of the hallmarks of a rational choice. D chooses that course of action, though, in the more-or-less understandably mistaken belief that a state of affairs exists (D's 'auxiliary' reason)²³ that makes a crucial—morally salient—difference to the rational justification for that course of action, when no such state of affairs really exists. So, there is a rational defect lying behind D's choice. These different kinds of rational defects in morally salient motivating forces or factors behind actions can, of course, combine. So, one might be mistaken about the existence or nature of provocation (one kind of rational defect) that then led one into precipitate action following a loss of self-control (another sort of rational defect).²⁴

These kinds of mistake cases, in which the existence of a rational defect in a morally salient motivating force or factor behind D's choice does important excusatory work,²⁵ are very different from cases where the adopted reason for which D commits the wrongdoing reflects a salient *moral* mistake. This happens where, for example, D decides (adopted reason) to abide by the demands of his or her religion as a matter of conscience, even though to do

self-control', or being overwhelmed by some other emotion: see J. L. Austin, 'A Plea for Excuses', reprinted in M. L. Corrado (ed.), *Justification and Excuse in the Criminal Law*. A choice can be rational when it has this character. As administrative lawyers are all-too-well aware, however, a choice can be rational but unjustified. That D, in an excessive defence case, took the defensive steps that seemed to him or her best at the time, does not—very obviously—guarantee that that course of action will be justified. A choice is normally only justified when it reflects a reason that is one of those that—either by itself or with the support of other reasons—is on the 'winning' side in the balance, objectively judged: see John Gardner, 'Justifications and Reasons'.

²² On mistakes as denials of the mental element, in law, as opposed to the foundation of an excusatory claim, see n. 15 above.

²³ For the distinction between operating and auxiliary reasons, see chapter 2.7 below.

²⁴ This possibility is anticipated in *R v Graham* [1982] 74 Cr App Rep 235, 241, on which see chapter 2.9 below.

²⁵ Naturally, the question whether or not D's mistake was reasonable may also be made to do excusatory work: see further, chapter 2.9 and 2.10 below. When D had reasonable grounds for thinking he or she was entitled to proceed as he or she did, when what D did was in fact wrong, Heidi Hurd says that D was epistemically justified, but not morally justified, in so acting: Heidi Hurd, 'Justification and Excuse, Wrongdoing and Culpability' (1999) 54 *Notre Dame Law Review* 1551, 1564. This distinction is briefly criticized in chapter 2 below.

so means D will perform acts regarded as wrong in law, a case discussed in chapter 5 below. The defect in the motivation for D's choice here is not rational, but moral: he or she simply gets the balance of reasons wrong by sticking to what conscience demands. D (*ex hypothesi*) understands the demands of his or her religion well enough to know how believers mean them to influence the balance of reasons. So, the excusatory work is now being done by a sense that it is understandable, albeit morally mistaken, to get the balance of reasons wrong by putting conscience-based compliance with religious demands ahead of avoiding legal wrongdoing.²⁶ Even so, as in all the examples discussed to date, what matters in this category of cases is a capacity-focused question examined in chapter 3.6 below: could and should more have been expected of D, rationally or morally (as the case may be)? This category of case shares something else with those discussed earlier. It is as true of this category of cases as of all the 'adopted reason' cases briefly discussed so far, that the importance to the excuse of the rational or moral defect in a motivating force or factor behind the choice is that the adopted reason is given for doing the very thing that is, in fact, prohibited by law. In other cases, discussed in chapter 6 below, the excusatory focus is on reasons for action D adopted to *avoid* committing wrongdoing, in spite of which the wrongdoing occurred. This is so, for example, when D says he or she should be excused on a 'due diligence' basis (normally, in regulatory cases), because no more could reasonably have been expected than that he or she put in the effort he or she did put in, taking the steps he or she chose to take, to try to ensure that wrongdoing would be avoided. Given that the adopted reasons—the compliance strategy, in effect—bear on steps taken to avoid wrongdoing, rather than being reasons to commit the act involving wrongdoing itself, there is no need for them to manifest some rational or moral defect. Indeed, as we will see in chapter 6 below, it may be that we would not excuse, on a 'due diligence' basis, unless we could find no rational (and still less, moral) fault whatsoever with the compliance strategy D adopted.

Whilst mitigating circumstances can clearly bear on the explanatory or adopted reasons for the act or omission amounting to criminal wrongdoing, there is no necessary conceptual connection between them. It could be right to mitigate a sentence in response to developments after the commission of the act, such as V's forgiveness, or D's co-operation with the authorities. It could also be right to mitigate the sentence in response to, morally, purely passive factors underlying the crime's commission not amounting, as such, to a denial of responsibility, like D's deprived upbringing.²⁷ Some factors can be mitigating in a non-excusatory way, or can be dealt with as excusatory claims, depending on what it is that 'counts' about them in context. For

²⁶ If it is *not* morally mistaken to take this course of action, of course, D ought to be regarded as fully justified, and should not need to rely on an excuse: see chapter 5.3 below.

²⁷ For a general discussion, see Andrew Ashworth, *Sentencing and Criminal Justice* (London: Butterworths, 1995), 2nd edn., 133–149.

example, following the definition of the necessary conditions of excuse just given, youth can only be pleaded in an excusatory way if it is tendered as an argument (say) about the understandable nature of the impulsiveness or lack of adequate foresight (i.e. the rational defect in a morally salient motivating force or factor) that lay behind the act itself. Youth can also, though, be relevant to mitigation in a non-excusatory way, i.e. even if it did nothing to shed light on the reasons why D did as he or she did. This would be the case if the court believes that it would be wrong to sentence D for as long a period in prison as someone older, for the same offence, because the impact of the same period of experiencing imprisonment would be disproportionately harsh on a younger person. The example of youth shows, though, that even if a factor can be pleaded in a genuinely excusatory way (in that it meets the necessary conditions for excuse), this obviously does not mean that it ought to gain recognition as a formal excusing condition, rather than being left as a matter for mitigation of sentence. Whether a plea ought to gain recognition as a formal excuse must turn on how significant the sufficiency conditions for an excuse are, in a given kind of case.

2. THE SUFFICIENT CONDITIONS FOR AN EXCUSE

Even armed with an excusatory explanation for wrongdoing of a morally forceful kind, Ds will not meet the sufficiency conditions for the provision of a formal excuse in law for their wrongdoing, unless the case for excuse still seems compelling when the law's 'strategic' or 'common good' concerns have been addressed. In very general terms, a strategic concern is a concern about the need to maintain the integrity and flourishing of a common good that is supported (and perhaps, in part, defined) by law.²⁸ The moral demands of a legally supported common good should take precedence over lesser moral or non-moral concerns, such as (where citizens are concerned) matters of individual convenience, and purely partisan pleading of special interests, or (where officials are concerned) the temptation to shield from justice those whose understandable but culpable moral failings have led them to act against the common good.²⁹ In that regard, as John Finnis puts it:

[T]he reasons that justify the vast legal effort to render the law . . . relatively impervious to discretionary assessments of competing values and conveniences are reasons

²⁸ In *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), 52, Joseph Raz defines a common good as a good that 'refers not to the sum of the good of individuals but to those goods which, in a certain community, serve the interests of people generally in a conflict-free, non-exclusive, and non-excludable way'. He relies on the seminal discussion in J. M. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), chapter 6.

²⁹ Naturally, the demands of the common good shape offences as much as they do defences. It is often claimed, for example, that the law's insistence that people wear seatbelts whilst driving, or helmets whilst motorcycling, is a 'paternalistic' concern; but that would only be true in such cases if an intelligent conception of the good, rather than a matter of simple convenience, was being overridden in the interests of reducing the incidence of costly and harmful accidents.

that . . . relate particularly to the extent, complexity and depth of the social interdependencies which the law . . . attempts to regulate. Such an ambitious attempt as the law's can only succeed in creating and maintaining order, and a fair order, inasmuch as individuals drastically reduce the occasions on which they trade off their legal obligations against their individual convenience or conceptions of social good.³⁰

So far as justifications are concerned (although the argument applies with as much force to excuses), this argument has found legal support in, for example, the judgment of Dickson J in the decision of the Supreme Court of Canada in *Perka et al. v R*,³¹ in which he said, 'no system of positive law can recognize any principle which would entitle a person to violate the law because *on his view* the law conflicted with some higher social value'.³² So, what are the strategic legal concerns, or common goods, to which individual convenience, idiosyncratic conceptions of the good, instances of special pleading, and so forth, are to be subordinated, in the shaping of excusing conditions?³³ In no particular order of importance, at least some could be described as follows:

- (i) *Maintaining a close match between how a defence—and the prohibitions to which it applies—ought morally to be regarded by those whom it governs, and by those who must interpret and develop it, and how it is regarded.*³⁴
- (ii) *Preventing the development of defences perverting or distorting, amongst citizens and officials alike, a proper understanding of the importance (absolute and relative) of personal and proprietary interests, along with public or common goods.*

As it happens, when the common good of accident reduction does come into conflict with a refusal (say) to wear a helmet that is genuinely based on a conception of the good, such as the religious demand that turbans be worn instead of helmets, the law yields to the moral force of this conception for the individuals or groups in question: see the Motor-Cycle Crash Helmets (Religious Exemption) Act 1976. More generally, though, by enforcing these prohibitions the law is rightly emphasizing the moral significance of the common good in question over what is (for the vast majority) a matter of simple non-moral convenience, rather than a matter bearing on their conception of the good.

³⁰ J. M. Finnis, *Natural Law and Natural Rights*, 319.

³¹ (1985) 13 DLR (4th) 1.

³² *Ibid.*, 14 (my emphasis). Note, however, that Dickson J speaks of individuals purporting to act for the sake of 'higher value' rather than, as Finnis does, speaking of acting for the sake of 'individual convenience'. This distinction can matter, in some instances, as we will see in chapter 5 below in the discussion of the demands of conscience.

³³ Sufficiency conditions for excuse overlap to a substantial degree with those that help to shape justifications in criminal law, such as consent and necessity, and in the discussion of such conditions in ensuing sections, both instances of excuse and justification will be a source of examples. For general discussion, see Jeremy Horder, 'On the Irrelevance of Motive in Criminal Law', in Jeremy Horder (ed.), *Oxford Essays in Jurisprudence*, 4th Series (Oxford: Oxford University Press, 2000), 177–184; A. P. Simester and G. R. Sullivan, *Criminal Law: Theory and Doctrine*, 1st edn. (Oxford: Hart Publishing, 2000), 640–642.

³⁴ (i) looks in some sense like an overarching concern, only in relation to which do the other concerns gain moral significance; but I do not want to argue this point here.

- (iii) *Ensuring that the availability of defences does not undermine the promotion of a culture of compliance and law-abidingness, in relation to the State's good faith attempts to promote the common good through regulation.*
- (iv) *Maintaining, through the provision of appropriate defences, a sense of reciprocity in criminal proceedings, whereby there are, in point of fault, always one or more morally significant answers to the charge that Ds could make, however restricted the circumstances in which such answers can be made.*
- (v) *Discouraging the emergence of a 'defence industry' fostered by experts and professional advisers, in relation to particular kinds of claim, of a kind likely to result in the success of too many unmeritorious claims.*
- (vi) *The need to encourage citizens to seek redress through political or bureaucratic processes rather than resorting to 'self-help', especially where the latter entails the use of force.*
- (vii) *Ensuring that the circumstances in which a defence may be pleaded do not entail intractable problems of proof for either or both of the prosecution and the defence, meaning that they are likely to be unable to discharge their legal, evidential or tactical burdens in relation to crucial issues.*
- (viii) *Maintaining a relationship between the legislature and the courts in which it is understood on both sides that the former must take responsibility for the resolution of morally complex issues raised by an excusatory (or justificatory) claim that it is beyond the competence of an adversarial process to resolve in a definitive and satisfactory way.*

These strategic concerns overlap and are usually inter-related. For example, in relation to (i), the close match in question could be lost if an excuse is, in pursuit of an understandable wish to be as generous as possible to the accused, defined in such a way that it in effect permits exploitation of its terms by those seeking to, but not meant to, benefit from it. Such exploitation—at the heart of the concern in (v), and (vii)—may undermine respect for the law's claim to value the interests protected by the offences to which the excuse applies, in so far as its breadth entails that unmeritorious claims might foreseeably succeed, thus bringing into play the concerns in (ii) and in (iii).³⁵ Moreover, such exploitation may also undermine moral respect for the excuse itself, in so far as its ethical currency will rightly be perceived to stand persistently to be devalued by the success of unmeritorious claims.³⁶

³⁵ It should not be supposed, however, that strategic concerns are focused solely on occasions for limiting the scope of excuses. It could be that respect for the law would be undermined by the failure to develop or extend some kinds of excuse or justification: see chapter 6 below.

³⁶ This seems to be part of John Gardner and Timothy Macklem's argument against the dramatic extension of the provocation excuse in *R v (Morgan) Smith* [2001] 1 AC 146: see John Gardner and Timothy Macklem, 'Compassion Without Respect: Nine Fallacies in *R v Smith*' (2001) *Criminal Law Review* 623.

Even a mere chance that such an undermining of respect may be the result of developing or extending an excuse (or justification) could be enough to justify refusing to take such a step, perhaps particularly where it is crimes involving *mala in se* to which the defence is to apply. It is, moreover, important to stress that the sufficiency conditions for excuse, strategic legal concerns of the kind just mentioned, are genuinely moral concerns. They are not simply trumped-up so-called ‘policy’ arguments used to override the moral claims to excuse of Ds who have satisfied the necessary conditions for an excuse. Even some theorists willing to grant an important role to such concerns within the criminal law sometimes mistakenly deny this. For example, in his discussion of voluntary euthanasia, Joel Feinberg claims that if a blanket ban on the practice is to continue to be justified, it can only be, ‘in terms of “pragmatic” policy considerations, such as the need to provide safeguards against mistake and abuse’.³⁷ In what way, though, could a concern for mistake or abuse in the committing of euthanasia, a concern for what Feinberg himself describes as ‘the inadvertent or contrived deaths of nonconsenting patients’,³⁸ come to be seen as a purely *pragmatic* rather than as a genuinely moral concern? The only way in which this could begin to make sense is if moral concerns are strictly confined—as, indeed, Feinberg confines them—to the realm (highly restrictively understood) of individual interests; but modern liberal theory rejects this idea outright, recognizing that common goods have weighty intrinsic moral value.³⁹

So, to take strategic legal concerns seriously, as a lawyer or theorist, is to show that one has grasped how individual claims to excuse must be capable of being accommodated within the much broader and highly complex political task of establishing and maintaining a (morally) sound legal order, one that sustains relevant common goods.⁴⁰ Now, to be sure, whilst judges often rely on strategic considerations when refusing to develop a defence, they also often exaggerate the likelihood that granting a defence will have the kind of adverse consequences that raise a strategic concern, or (even worse) they misunderstand the kinds of adverse consequences that raise a genuine strategic concern. Further, judges sometimes make decisions hinge on strategic concerns when they are not in as good a position as Parliament to gauge whether the concern should exercise a decisive influence in the (kind of) case being considered.⁴¹

³⁷ Joel Feinberg, *Harm to Self* (New York: Oxford University Press, 1986), 374 (his quotation marks around ‘pragmatic’). ³⁸ *Ibid.*

³⁹ See n. 28 above, and Joseph Raz, ‘Right-Based Moralities’, in Jeremy Waldron (ed.), *Theories of Rights* (Oxford: Oxford University Press, 1984), chapter 11.

⁴⁰ See J. M. Finnis, *Natural Law and Natural Rights*, chapter 6, and passage cited just after the start of this section.

⁴¹ All of these claims about the misuse of ‘strategic concern’ arguments could be sustained, for example, about the decision of the majority, and of the speech of Lord Jauncey in particular, in *R v Brown* [1994] 1 AC 212. In that case, the House of Lords refused to permit consent to be a defence to a charge of assault occasioning actual bodily harm, when the ‘assault’ occurred during the course of consensual sado-masochistic activity. For a more measured understanding of the limits of the adversarial process to account properly for strategic concerns, see Lord

It should not be supposed, however, that the tension this kind of mismanagement of cases can create in a system of criminal law, between the pressure to develop excuses and strategic legal concerns, stems from a natural opposition between individual rights and common goods. When a formal excuse is created in law, upon the satisfaction of certain factual and evaluative criteria (of different kinds, depending on the nature of the excuse), Ds may have a right to be excused under that heading. As with all rights, the right depends in part for its justification on the strong interest that Ds themselves have in avoiding, in whole or in part, official censure through conviction when the necessary conditions for excusing have been met. As with all rights, though, Ds' own interests, however pressing, are not in themselves sufficient reason to create a right unless to create such a right would *itself* serve or further a common good.⁴² Providing an excuse will serve a common good, if (other things being equal), for example, to have no excuse will bring the law into disrepute amongst officials and citizens alike by, say, confounding reasonable expectations, by encouraging widespread unauthorized bending of the rules elsewhere in the system to accommodate defendants with the relevant claim, and so forth.⁴³ Appearances to the contrary notwithstanding, in that regard, the role of strategic considerations in shaping defences need never be purely a restrictive one. The almost inevitable unpredictability of the circumstances in which the necessary conditions for excuse (or justification) may be fulfilled, means that it also serves a common good to keep the list of possible excuses or justifications open. Moral respect for the law's demands, and a culture of compliance and law-abidingness (common good (iii) above), may actually be undermined by a restrictive or rigid approach to the development of defences to some crimes, if such an approach means Ds stand to be convicted when they are entirely blameless. Moreover, the fact that defences do not by and large exist to guide citizens but to provide for their exculpation,⁴⁴ means that the continuing exercise by judges of an active discretion to expand existing or to develop new excuses can be tolerated (and perhaps encouraged), even when the legislation has itself already provided for some of the circumstances in which D may be excused.⁴⁵

As we will see in the next two sections, some theorists who discuss the scope of excuses have erred by concentrating too narrowly on the necessary conditions for excusing, overlooking the sufficiency conditions. They end up with

Wilberforce's comments on the development of defences, cited in the text in section 7 below.

⁴² Joseph Raz, *Ethics in the Public Domain*, 52–55.

⁴³ Both these ways in which the law could be brought into disrepute, if there is no excuse, reflect 'rule of law' concerns of a very broad kind.

⁴⁴ This generalization should not be taken too literally: see Jeremy Horder, 'On the Irrelevance of Motive in the Criminal Law', 183. See also the discussion in section 4 below.

⁴⁵ A. T. H. Smith, 'Judicial Law-Making in the Criminal Law' (1984) 100 *Law Quarterly Review* 46, 63–67, discussed in A. P. Simester and G. R. Sullivan, *Criminal Law: Theory and Doctrine*, 1st edn., 649–650. See further section 7 below.

an over-broad understanding of excuse. Other theorists, by way of contrast, focus exclusively on excuses that already pass the tests for the necessary conditions for excusing because they have certain effects (such as obstructing the rationality of choice). This leads them to overlook the possibility that there may be other excuses satisfying the necessary conditions (and also the sufficiency conditions), but in different ways, i.e. other than through interfering with the rationality of choice. They end up, thus, with an over-narrow understanding of excuse. In sections 3, 4, and 6, I will give an example of each.

3. OVER-BROAD CONCEPTIONS OF EXCUSE: H. L. A. HART'S ACCOUNT⁴⁶

In his attempt to rebut arguments for the relentless application of unrestrained utilitarian thinking to criminal law and punishment, Hart highlighted the importance of justification and excuse within the criminal law, as an example of the need for a focus on the deserts of the offender, as well as on the efficient achievement of what he took to be the (happiness-maximizing, crime-reducing) general aims of criminal law and punishment.⁴⁷ In doing this, Hart perhaps initiated what has now become the regrettable standard practice (a practice, ironically, avoided by Bentham, Hart's main target) of regarding the rationale for excuses as detached from a theory of the general aims—or common goods—the criminal law is meant to achieve or sustain. Hart claimed that we should look at the existence of excusing conditions as 'something that *protects* the individual against the claims of the rest of society', as 'a requirement of fairness or of justice to individuals independent of whatever the General Aim of punishment is . . .'.⁴⁸ Such a view prioritizes the necessary conditions for excusing over the sufficient conditions. Indeed, it is hard to see, on this view, how the sufficient conditions could have any relevance to an excuse at all. Such an individualistic view of the place of excuses within the criminal law can be challenged, simply by pointing out that what Hart calls the 'claims of the rest society' can actually include common goods—such as common good (i), a broad match between the shape of the law and people's reasonable moral expectations—capable of incorporating a right to be regarded as excused (or justified) in certain circumstances.

Significantly, at the cost of some apparent inconsistency with his very broad understanding of excuses, Hart did in at least one instance suppose that the character of excuses was to be shaped by the 'claims of the rest of society', rather than being limited to the protection of the individual from such claims.

⁴⁶ A sympathetic reading of Hart's theory is to be found in Michael S. Moore, *Placing Blame*, 549–562.

⁴⁷ H. L. A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968), 14–17.

⁴⁸ *Ibid.*, 44, and 14, respectively (Hart's emphasis on 'protects').

That was when questions of proof might prove intractable for the prosecution, as in cases when subjective mental states (like loss of self-control) were in issue, where he thought one might become dangerously reliant on D's own version of events.⁴⁹ In spite of this acknowledgement of the force that strategic concerns, such as (vii) above, can have in circumscribing excuses, Hart's basic instinct was to suppose that excuses should be explained in an individualistic way, that is, detached from a concern with common goods. This view has proved to be highly influential, even in the most unlikely of places.

4. OVER-BROAD CONCEPTIONS OF EXCUSE: ALAN NORRIE'S ACCOUNT

Amongst influential contemporary commentators, Alan Norrie is one whose concern in discussing excuses is largely with the necessary conditions, to the exclusion of the sufficient conditions. He argues that the law adopts a narrow view of the meaning of intention in order to confine 'broader issues of normative judgment'⁵⁰ to excuses (alongside justifications):

[I]n relation to intentionality we see the way in which matters of normative justification and judgment are suppressed within the law's base categories. Once that is done, and these categories have been 'secured' against moral infection, issues of justification and excuse are permitted as 'subsidiary' categories within the law's architectonic. These are subsidiary issues because the law has made them so, driving a wedge between legal and *genuinely moral* judgment.⁵¹

When seeking to highlight a contrast with the law's allegedly restrictive understanding of intention, Norrie presents justifying and excusing conditions (matters of 'genuinely moral judgment') in terms solely of the fulfilment of what I have called the necessary conditions for excusing. Small wonder, then, that when he turns his attention specifically to the way in which the law in fact shapes justifications and excuses, he feels bound to accuse it of moral betrayal when it refuses to regard conduct as justified or excused in some cases in which the necessary conditions for excusing appear to have been fulfilled.⁵²

Consider the 'justification' case of *London Borough of Southwark v Williams*.⁵³ A homeless family with young children, disappointed by the

⁴⁹ Ibid., 32–33. Hart does not allude to the possibility that these supposed problems of proof can be met, at least in some cases, not only by using the 'reasonable man' concept as a heuristic guide, but also by evidentiary devices such as corroboration warnings or shifting the burden of proof. Even so, he is surely right to identify problems of proof as a strategic concern, with a common good—(vii) above—at stake.

⁵⁰ A. Norrie, "Simulacra of Morality"? Beyond the Ideal/Actual Antinomies of Criminal Justice', in R. A. Duff (ed.), *Philosophy and the Criminal Law: Principle and Critique* (Cambridge: Cambridge University Press, 1998), 126.

⁵¹ Ibid., 128 (my emphasis).

⁵² His argument, in that regard, is further considered in chapter 5.6 below.

⁵³ [1971] 2 All ER 175. Although the case is really one about justification, rather than excuse, the issues raised have an important bearing on the discussion that follows.

failure of their local authority to find housing for them, breaks into vacant local authority property and makes their home there. Should the family be regarded as justified in committing a trespass?⁵⁴ The court held that there was no justification for the trespass. In justifying the decision, Lord Denning said this:

If homelessness were once admitted as a defence to trespass, no-one's house could be safe. Necessity would open a door which no man could shut . . . The plea would be an excuse for all sorts of wrongdoing. So the courts must for the sake of law and order take a stand. They must refuse to admit the plea of necessity to the hungry and the homeless; and trust that their distress will be relieved by the charitable and the good.⁵⁵

In the bulk of this passage (with characteristic hyperbole), Lord Denning relies on a combination of two arguments relating to the sufficiency conditions for the creation or extension of a defence to cover particular circumstances, arguments that may perfectly defensibly be employed under certain conditions.⁵⁶ The first is a 'slippery slope' argument, the argument that if the necessity plea were permitted in this (*ex hypothesi*, deserving) case, the courts might have to permit it to be successfully employed in less-deserving cases.⁵⁷ The second argument relies for its force on a combination of the strategic concern or common good (vi), set out in section 2 above (discouraging the use of force as a form of 'self-help');⁵⁸ and concern (i) (maintaining a close match between how defences ought to be regarded, and how they are regarded). The argument is that to permit the defence of necessity in this case would send out the wrong kind of moral (and hence, legal) message. Citizens who become aware of the decision might gain the impression that they are more or less free to decide for themselves what steps it is appropriate to take to resolve housing difficulties—and perhaps a broad range of other social problems—impinging on their individual lives, in the full expectation that if the courts sympathize with their plight, there will be no adverse legal consequences when 'they invade others' rights through their actions. Criminal justice (and other public) officials, labouring under a similar impression, might feel that they must adjust their policies towards law-breaking likewise.

⁵⁴ See Simon Gardner, 'Necessity's Newest Inventions' (1991) 11 *Oxford Journal of Legal Studies* 125. ⁵⁵ *London Borough of Southwark v Williams* [1971] 2 All E R 175, 179.

⁵⁶ At the time *London Borough of Southwark v Williams* was decided, there was some doubt whether the defence of necessity existed, as a formally recognized defence in English law: see Simon Gardner, 'Necessity's Newest Inventions'.

⁵⁷ The House of Lords has relied—somewhat implausibly—on such an argument, in justifying a refusal to allow the excuse of duress to apply in murder cases, for fear that the defence could become 'a charter for terrorists, gang-leaders and kidnapers' (the words of Lord Simon, for the minority in *DPP v Lynch* [1975] AC 653, 688. His argument found favour with the House of Lords in the later case of *R v Howe* [1987] 1 All ER 771). This argument really relates to strategic concerns or common goods (vi) and (viii), from section 2 above, although there are hints that (ii) and (v) also concerned the House of Lords.

⁵⁸ *London Borough of Southwark v Williams* [1971] 2 All ER 175, 181, 'The law regards with the deepest suspicion any remedies of self-help, and permits these remedies to be resorted to only in very special circumstances' (per Edmund Davies LJ).

Whilst it is obviously fanciful to suppose that a single decision by the Court of Appeal could lead to the kind of widespread anarchy Lord Denning fears, his use of such arguments has a sound legal–philosophical basis, in the sufficiency conditions that must be met for an excuse to be created (or for it to have an application in particular circumstances).

For Norrie, however, as a matter of individual justice (what he calls, in the passage cited earlier, ‘genuinely moral judgment’), there was ‘a clear matter of necessity in play’ in this case,⁵⁹ and the family should have been regarded as justified. Norrie regards the court’s decision as founded on a judicially perceived need to ‘partition . . . off broader questions of social justice’ like the problem of homelessness, when developing defences, even if that means overlooking the demands of individual justice—and hence the necessary conditions for justifying or excusing—in a particular case.⁶⁰ For Norrie, when D is denied an excuse or justification, even though the individual circumstances suggest that it would be morally repugnant to convict (the necessary conditions for excusing), D is being sacrificed in order to maintain a façade of detachment within criminal law doctrines from questions of social justice, these questions being conveniently hived off by the court for resolution by the nearest bureaucratic agency or charity. The fact that, behind the façade, mitigation of sentence is then permitted to make some amends for the enforced sacrifice simply compounds this alleged anomaly.⁶¹ For Norrie, if the individual circumstances in which D committed the wrongdoing exercise a strong moral ‘pull’ in favour of lenient treatment, then what reason could there be to confine their relevance solely to mitigation of sentence?

It is, though, only in the final few words of the last sentence of the passage cited from *Williams* that Lord Denning employs a ‘partitioning-off’ argument of the kind that Norrie regards as central to the decision. For the most part, Lord Denning’s arguments are taken up with the kind of sufficiency conditions that could perfectly legitimately count against extending the defence of necessity to the circumstances under consideration. Moreover, far from being a matter for criticism, for anyone who believes in the supremacy of the legislature over the courts when it comes to determining how social and economic policies are to be implemented, the court’s use of a ‘partitioning-off’ argument in *Williams* is entirely appropriate. As Lord Hoffmann has more recently put it, ‘in a field such as housing law, which is very much a matter for the allocation of resources in accordance with democratically determined procedures, the development of the common law should not get out of step with legislative policy’.⁶² Indeed, even Norrie himself eventually has

⁵⁹ See his discussion of the case in Alan Norrie, ‘From Criminal Law to Legal Theory: The Mysterious Case of the Reasonable Glue-Sniffer’ (2002) 62 *Modern Law Review* 538, 543–544.

⁶⁰ *Ibid.*, 544.

⁶¹ See his discussion of the defence of necessity in Alan Norrie, *Crime, Reason and History*, 2nd edn. (London: Butterworths, 2001), 156–161.

⁶² *London Borough of Southwark v Mills* [2001] AC 1, 10.

to concede (although the concession is tucked away in a footnote), that it is hard to see on what grounds the Court of Appeal might genuinely be justified in using the law of trespass, in individual cases, to dictate what might have to be a change in general policies adopted by housing and welfare agencies which are employed to use a knowledge and expertise in allocating scarce resources that the Court of Appeal cannot hope to match.⁶³

Surely, it might be said, sensitivity to the law's legitimate strategic concerns cannot undermine the view that, in a case like *Williams*, judges should not themselves seek to determine as a matter of law what counts, or does not count, as action justified under conditions of necessity? The entire matter should perhaps be left to the fact-finder (magistrate or jury) to determine, evaluation of claims being on a simple case-by-case basis. Such an open-ended approach, whether it is justifications or excuses that are in issue, holds out the tantalizing prospect of acquittal to almost anyone with a plausible claim that their wrongdoing can be viewed in a favourable light; but we should have confidence, so the argument runs, that fact-finding judges and juries can distinguish from amongst such claims those that truly merit excuse or justification. We can call this kind of argument an argument for wholly facilitative ('fact-finder empowering') rules governing defences. Wholly facilitative rules hand to the fact-finder the task of deciding, for example, not only when (in fact) a D acted under conditions of justification or excuse, but also what are (in an evaluative sense) to count as the conditions of justification and excuse themselves. The adoption of wholly facilitative rules may in some circumstances be appropriate, as when it would be best to leave entirely to the fact-finder the task of deciding what counts as a 'reasonable excuse' for committing some preparatory or regulatory crime. A proposal to adopt more or less wholly facilitative rules can nonetheless

⁶³ Alan Norrie, 'From Criminal Law to Legal Theory: The Mysterious Case of the Reasonable Glue-Sniffer', 544 n. 29. Norrie thinks that the argument for the Court of Appeal leaving the matter to housing and welfare agencies would only work if it could be shown (to the Court of Appeal's satisfaction?) that 'the social problem was or could be effectively dealt with by the other agency' (ibid.). The key word here, of course, is 'effectively'. Would Norrie's test only be satisfied if every applicant for housing support was successful? Would his test be satisfied if every 'deserving' case was successful (and is the Court of Appeal to determine what counts as a relevant desert-based consideration?)? More broadly, how plausibly can it simply be assumed that the Court of Appeal is justified in using defences to civil and criminal liability to shame government agencies for problems that may not be of their own making, when it seems equally plausible to argue that it is to Parliament that such agencies should be accountable, and that it is Parliament's responsibility to ensure that such agencies can function 'effectively'? Ironically, then, like thorough-going liberal theorist Ronald Dworkin, Norrie seems to hold an over-optimistic view of the value of encouraging people to resolve legal uncertainty through litigation, hence risking the legal equivalent of martyrdom if the courts resolve the uncertainty against them. Dworkin's way of putting it, in *Taking Rights Seriously*, 217, was, 'Our legal system pursues these goals ["the development and testing of the law through experimentation by citizens and through the adversary process", ibid., 216–217] by inviting citizens to decide the strengths and weaknesses of legal arguments for themselves, or through their own counsel, and to act on these judgments, although that permission is qualified by the limited threat that they may suffer if the courts do not agree.'

also bring us up against a number of the law's strategic concerns, as described in section 2 above.

Underpinning Lord Denning's reasoning in *Williams* is the thought that there can sometimes be overriding strategic value in structuring or shaping facilitative ('fact-finder empowering') rules by reference to 'determinative' rules. Determinative rules may shape the operation of facilitative rules in different ways. They may simply specify limits to what may count as, say, a 'reasonable' excuse, in a particular context (not drunkenness, perhaps), or they may impose a more general theoretical constraint on the scope of mitigation (such as the need to show that there was a loss of self-control, in provocation cases). In that regard, it is significant that when judges have drawn up rules for defences, they have eschewed a *wholly* facilitative structure for such rules, in favour of a partially facilitative structure. The law determines the criteria according to which conduct is to be evaluated (such as some version of the reasonable person test), and the fact-finder's facilitative role is confined to deciding whether those criteria have been met in any given case.⁶⁴ The aim of determinative rules is in part to support strategic concerns or common goods (i) and (v) (see section 2, above), reducing the likelihood that courts and juries will constantly have to confront speculative or unmeritorious individual cases, even if judges and juries could in all probability be trusted successfully to distinguish between these when they confront them. The value in this does not lie, or lie solely, in the inconvenience the criminal courts may experience in having to deal with unmeritorious cases. A legal system whose defences were comprised of wholly facilitative rules would have too much potential not only for V's rights wrongly but mistakenly to be invaded, but also for Ds needlessly to be subjected to the harsh treatment constituted by the prosecution process, when it may have been the Ds' misunderstanding of the likely outcome that led to the need for the process to be undertaken. Justice can be served, thus, if such misunderstandings—and hence the needless risk of a prosecution for a rights

⁶⁴ Almost needless to say, there is more a difference of degree than of kind between defences that could be described as wholly facilitative, and those that are best described as partially facilitative, a difference understandably sometimes overlooked by judges. In the provocation case of *R v (Morgan) Smith* [2001] 1 AC 146, the development of the doctrine of provocation in that case ought best to be described as the reduction of the determinative element in what nonetheless remains a partly—rather than wholly—facilitative set of rules for mitigation (the law, after all, continues to set the standard for evaluation, and to rule out consideration of factors like self-induced intoxication); but the development of the doctrine was (mis)understood as the adoption of a wholly facilitative set of rules for mitigation: see the argument of Lord Hoffman in *R v (Morgan) Smith* [2001] 1 AC 146, 163, where, speaking of the effect of section 3 of the Homicide Act 1957, he says, 'the jury was given a normative as well as a fact-finding function. They were to determine not merely whether the behaviour of the accused complied with some legal standard, but could determine for themselves what the standard in the particular case is'. That this understanding of the objective condition in provocation cases is not really thought by Lord Hoffmann to be as wholly facilitative as it is presented as being, is evidenced by the fact that he himself would have the jury told that they must rule out from consideration the effects, for example, of possessiveness or jealousy: see *R v (Morgan) Smith* [2001] 1 AC 146, 169, and the discussion in chapter 4.5 and 4.8 below; but see now *A-G for Jersey v Holley* [2005] UKPC 23.

invasion—are avoided by the use of determinative rules, which are designed to do as much as possible to discourage more or less understandably speculative or misconceived claims, rather than by leaving the law so open-ended that the resolution of uncertainty must come through a criminal trial.⁶⁵

The way in which this claim for the importance of strategic considerations in the construction of defences has been made, may give the impression that such considerations only really have ‘bite’ when the ability of the law to guide conduct *ex ante* is in issue, and that will only be so when justifications, rather than excuses, are in play.⁶⁶ Not so. Far from all justifications involve the *ex ante* guidance of conduct.⁶⁷ Certainly, some justifications, such as the justification given by a police officer for a search of property authorized by a search warrant, are indeed wholly *ex ante* in character.⁶⁸ Other justifications, however, such as pleas of self-defence or necessity by private citizens, are more in the nature of a plea for *ex post facto* vindication of the action taken in the circumstances, on the basis of moral considerations (such as the necessity and proportionality of self-defensive force) it is now claimed that the law should regard as having provided for that action an adequate (justificatory) basis. This feature gives such justificatory pleas something in common (as well as a claim of *ex post facto vindication*) with excusatory claims such as reasonable mistake or due diligence. For, contrariwise, such excusatory claims can have a conduct-guiding dimension to them. If it were a defence to a regulatory offence that one could have done no more than one did to avoid committing it (a ‘best endeavours’ defence), that would certainly be an excusatory rather than a justificatory defence; but it would also be a defence with some conduct-guiding implications, if one wished to put oneself in a position to plead it successfully. In any event, strategic considerations are not confined in their focus to the likely direct effects on how citizens will think and behave. As strategic consideration (v) above implies, it can be important to seek to influence for the good the way in which legal advisers and other experts analyse, categorize, and advise on the plausibility of running particular pleas, as the following examples illustrate.

Strategic concerns of the kind just raised can also be important when considering the nature and scope of excusatory claims based on ‘explanatory’,

⁶⁵ See the remarks at n. 63 above.

⁶⁶ Because only when a justificatory rule is in play could D misunderstand its function and unwittingly but wrongly use it as a basis for invading another’s rights. For such an argument, see Paul H. Robinson, *Structure and Function in Criminal Law* (Oxford: Clarendon Press, 1997), chapter 5C. These issues are also discussed in some detail in Peter Alldridge, ‘Rules for Courts and Rules for Citizens’ (1990) 10 *Oxford Journal of Legal Studies* 487, and in Meir Dan-Cohen, ‘Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law’ (1994) 97 *Harvard Law Review* 625.

⁶⁷ See Jeremy Horder, ‘On the Irrelevance of Motive in Criminal Law’, 189.

⁶⁸ *Ex ante* guidance plays a crucial role for those acting in a public or semi-public capacity, such as law enforcement officials or doctors: see Jonathan Rogers, ‘Justifying the Use of Firearms by Policemen and Soldiers: a Response to the Home Office’s Review of the Law on the Use of Lethal Force’ (1998) 18 *Legal Studies* 486.

rather than ‘adopted’, reasons for action, or when dealing with partially excusatory claims in which mental disorder or deficiency is an important aspect of D’s claim. The important message that it is essential to restrain violent urges even in the face of grave provocation, is lost or distorted if the test for excusing provoked violence becomes so diluted as to invite, as Gardner and Macklem put it, ‘an evaluative free-for-all in which anything that induces sympathy by the same token helps to excuse’.⁶⁹ Similarly, the message that self-restraint must be exercised becomes corrupted if the law’s definition of mental disorder is too easily satisfied by, for example, claims of prior ‘victimization’. As Jill Peay suggests, offenders can be only too willing to be persuaded to see their behaviour as the uncontrollable product of disorder if there is an anticipated benefit in so doing; and hence, ‘The scene is set: . . . victimisation in one form or another is a common, if not universal, experience; psychiatrists are peculiarly reliant on what their clients tell them; offending is widespread. All of the ingredients are present to permit a re-structuring of experiences as explanations or excuses’.⁷⁰ There is an irony here. In both provocation and diminished responsibility cases, professional advisers are under an obligation not unduly to influence the self-perception of a D in order to make it ‘fit’ the legal doctrines; but sweeping away determinative rules would effectively side-line this obligation, because there would no longer be any restrictive legal doctrines D’s self-perception would be required to fit. The price paid for this, however, is that, in the shadow of facilitative rules, the integrity of the defences can be undermined by the very fact that purely solipsistic narrative has acquired as much potential excusatory significance as the best grounded moral claim. Strategic concerns of the kind at issue in (v) above then re-emerge, with the prospect that legal advisers will have even greater incentives to encourage D to rely on untestable and uncorroborated assertions about him- or herself, as well as about his or her treatment at the hands of V, (backed, wherever possible, by medical evidence providing such assertions with a veneer of scientific objectivity).⁷¹ Such a development would, of course, simply highlight further existing anomalies about the way in which expert evidence tendered by the defence can find its way into court. As John Spencer most memorably put it:

[E]ither or both of the parties [can be] palming off upon the court someone who, though not bogus . . . is cranky, senile, or generally ill-thought of within the profession. Matters are made worse by . . . the fact that the defence (although not the prosecution) is free to

⁶⁹ John Gardner and Timothy Macklem, ‘Compassion without Respect? Nine Fallacies in *R v Smith*’, 635.

⁷⁰ J. Peay, ‘Mentally Disordered Offenders, Mental Health and Crime’, in Mike Maguire, Rod Morgan, and Robert Reiner, *The Oxford Handbook of Criminology*, 3rd edn. (Oxford: Oxford University Press, 2002), 775. See further, chapter 4.6 below.

⁷¹ By making evidence of mental disorder relevant to provocation cases, *R v (Morgan) Smith* [2001] 1 AC 146 simply encouraged this kind of practice, disregarding (amongst other strategic concerns) the concerns in (v) above. See now, *A-G for Jersey v Holley* [2005] UKPC 23.

shop around, tearing up one ‘unhelpful’ expert report after another, until at last it finds the man or woman who is ready to say what it wants the court to hear.⁷²

5. STRATEGIC CONSIDERATIONS AND ‘OBJECTIVISM’ IN EXCUSES

Does it necessarily follow that adequate sensitivity to strategic considerations or common goods entails that one must be an unashamed ‘objectivist’ about standards for judgment in excuse cases, insisting that in all cases it is agent-neutral standards that provide the benchmark against which the adequacy of D’s excusatory claim is tested, and never simply the standards D him- or herself was capable of reaching? I doubt it. A modified form of objective assessment is defended later in chapter 3.6 below, but that defence does not have to (even if it might) follow from the need to reflect in the conditions for excuse the kinds of strategic considerations currently at issue. It could be that a rigorous application of the test of ‘each according to his or her abilities’, the kind of test briefly endorsed by the House of Lords as the appropriate test for judging whether control of the urge to kill could reasonably have been retained in the face of provocation,⁷³ would do enough to avoid the spectre of Gardner and MacLennan’s ‘evaluative free-for-all’. Certainly, in Lord Hoffmann’s view, the need for the adoption of a more (but still not wholly) facilitative approach in provocation cases comes from his understanding that in the historical development of determinative rules to govern such cases, ‘what has been rendered unworkable is not the principle of objectivity, but the particular way of explaining it’.⁷⁴ Whether or not one agrees with the decision in which this view was expressed, *R v (Morgan) Smith*,⁷⁵ his point reveals a more fundamental truth. Objective standards, in one form or another, are best understood as part of the necessary conditions, rather than as part of the sufficient conditions, for excuse. To show that someone well-equipped with powers of self-control might have done as one did, or—the weaker standard—that one did as much as could reasonably have been expected of one, is arguably to do no more than show one’s action in the kind of favourable light that can make an explanation for it in principle excusatory (the necessary condition). So, such objective standards—be they strong or weak—should not be given explanations or rationalizations that falsely suggest that they are restrictions on what would otherwise be plausibly excusatory explanations for one’s conduct

⁷² J. R. Spencer, ‘The Neutral Expert: an Implausible Bogey’ (1991) *Criminal Law Review* 106. Spencer adds that fear of cross-examination amongst less-articulate experts may simply leave the field open to ‘the usual cabal of log-rollers, time-servers, self-publicists and people with friends’, citing M. N. Howard, ‘The Neutral Expert: a Plausible Threat to Justice’ (1991) *Criminal Law Review* 98.

⁷³ See *R v (Morgan) Smith* [2001] 1 AC 146 now effectively overruled by *A-G for Jersey v Holley* [2005] UKPC 23.

⁷⁴ See *ibid.*, 173.

⁷⁵ *R v (Morgan) Smith* [2001] 1 AC 146.

(the sufficiency conditions), like the rule requiring the fact-finder to ignore evidence of self-induced intoxication,⁷⁶ even if there are strategic considerations or common goods that stand to be compromised if weaker objective standards are preferred to stronger ones in the setting of the necessary conditions for excuse.

When it comes to choosing between stronger (less individualized) or weaker (more individualized) standards, though, in his ruthless exposure of judicial vacillation over the correct tests to apply for the satisfaction of justifications and excuses, Norrie suggests that judges are caught up in a dilemma characteristic of philosophical and legal argument in conditions of modernity, at least since the time of Kant and Hegel. He says:

They [judges] . . . see justice as a matter of universal principle based upon individual freedom and reason . . . [but] there is a crisis of justice resulting from social conditions. The universalised abstract individual has to be counterposed to individual particularity under contemporary moral and social conditions.⁷⁷

Whether or not English law has ever worked with a conception of universal anything like that made famous by Kant may be doubted.⁷⁸ More significantly, as the foregoing analysis suggests, the law need not find itself confronting the horns of a dilemma, having to make an impossible choice between judgment by reference to an absurdly abstract conception of the ‘reasonable person’, or judgment by reference to the D’s own values and standards, however inadequate, misconceived or debased. There is more than one choice lying between these two extremes; and these choices, such as judgment in accordance with what D him- or herself was reasonably capable of achieving, might—at least, on some views—both satisfy the necessary conditions for an excuse, and pose no serious threat to common goods.⁷⁹

⁷⁶ One can, of course, imagine an argument for saying that the irrelevance of self-induced intoxication is an irrelevance that comes from the need to meet the necessary conditions for excuse. The argument would be that someone whose provoked or fearful reaction is influenced by self-induced intoxication simply fails to show up their reaction in a favourable light. One should resist this line of argument, because the necessary conditions for excuse are not hard to meet, and rarely, if ever, defeated by matters of detail (however important) of this kind. Someone who has been drinking at home, and hence kills when enraged by the persistence of a door-to-door sales representative who has called unexpectedly, can—for the purposes of the necessary conditions of excuse—show up their reaction in a favourable light even if they would never have reacted so disproportionately when sober. However, more generally (so the theory goes), to take the fact the D acts in a drunken rage into account would, *inter alia*, threaten common goods (i) and (ii). So, it is for strategic reasons, for better or worse, that we have the ‘exclusionary’ rule: see *R v Majewski* [1977] AC 443.

⁷⁷ Alan Norrie, ‘From Criminal Law to Legal Theory: The Mysterious Case of the Reasonable Glue-Sniffer’, 546.

⁷⁸ See M. Dubber, review of A. Norrie, ‘Punishment, Responsibility and Justice: A Relational Critique’, (2002) 65 *Modern Law Review* 311.

⁷⁹ For a defence of such a test, in relation to a ‘diminished capacity’ excuse, see chapter 3.6–3.7 and chapter 4.6–4.10 below. Hart himself, of course, gave theoretical prominence to the idea that the ‘reasonable person’ standard need not and should not be a purely abstract standard, through his thesis (considered in section 6 below) that each D should have had a fair opportunity to avoid wrongdoing. See the discussion in A. P. Simester, ‘Can Negligence be Culpable?’, in Jeremy Horder (ed.), *Oxford Essays in Jurisprudence*, 4th Series, chapter 5.

6. OVER-NARROW CONCEPTIONS OF EXCUSE: BEYOND 'CHOICE' THEORY

As we will come to understand more fully in chapters 5 and 6 below, the common law has always worked with a narrow conception of excuses. This conception can be called the 'classical' conception or theory of excuses. The common law or classical conception of excuse (as distinct from its conception of justification, sheer involuntariness or of mental disorder) more or less self-consciously tracks closely Aristotle's account of, first, a distinction between voluntary and involuntary conduct, and, secondly, of what is rationally chosen conduct, both considered below.⁸⁰ Excuses fashioned through common law development have always been largely restricted to claims of mistake, duress, and provocation, regarded by Aristotle (for reasons outlined below) as having an impact either on the absolute voluntariness of conduct, or on whether or not it can be regarded as 'reasoned through' or rationally chosen. Before the emergence of the regulatory state, the narrowness of the classical approach could perhaps be justified as having the effect of confining judicial creativity, in relation to defences that excuse crimes *mala in se*, to legal conceptualization of moral issues arising on 'one-off' occasions or in emergencies.⁸¹ These are moral issues that—whilst controversial—had sufficient clarity and determinacy to make them suitable for resolution through the adversarial process (and through exegesis in the influential work of judge-writers from the seventeenth to the nineteenth centuries). As we will see in chapter 6 below, in the regulatory state, even though Parliament itself has a responsibility for developing excuses, that justification for keeping judicial activity within the confines of such a narrow approach no longer looks adequate.

On Aristotle's (confusingly broad) view, conduct undertaken in ignorance of salient facts is to be regarded as 'involuntary' (*akousion*);⁸² and so

⁸⁰ The account forms part of Aristotle's discussion of the nature of moral goodness, in Aristotle, *Nicomachean Ethics*, Thomson, J. A. K. (trans.) (London: Penguin, 1955). There is some evidence that, perhaps through the benefit of a classical education, judges were directly influenced by the account of involuntariness in Book 3 of Aristotle's *Nicomachean Ethics*: see *Renigger v Fogossa* [1552] 1 Plowd 1. The idea of something decided '*kata ton orthon logon*', according to 'right reason', or as I am putting it 'reasoned through', is notoriously difficult to pin down. For a recent examination of the proposition that the idea of *logos* is linked to the idea of argument, in both moral and political philosophy, see John Gardner, 'The Mark of Responsibility' (2003) 23 *Oxford Journal of Legal Studies* 157, 163–164.

⁸¹ For further discussion of this point, see Jeremy Horder, 'On the Irrelevance of Motive in Criminal Law'.

⁸² As far as ignorance is concerned, Aristotle equates involuntariness with a mere lack of intention to act under the salient description. So, for him, sexual intercourse without consent, where the perpetrator was unaware that V was not consenting, would be 'involuntary'. By this usage, Aristotle seems to have in mind what is sometimes known as 'moral' involuntariness. For further discussion, see W. F. R. Hardie, *Aristotle's Ethical Theory*, 2nd edn. (Oxford: Clarendon Press, 1980), 156–157; C. Finkelstein, 'Duress: A Philosophical Account of the Defence in Law' (1995) 37 *Arizona Law Review* 251, 275–278. The very early common law is

are some kinds of conduct intentionally engaged in under coercion. As far as the relationship between coercion and involuntariness is concerned, Aristotle draws a distinction between two kinds of coerced conduct. First, conduct can be involuntary when for the agent it is ‘compulsory without qualification [namely] when the cause is external and the agent contributes nothing to it’.⁸³ Secondly, pieces of conduct can be involuntary ‘in themselves’ or ‘absolutely’, but nonetheless voluntary ‘at the given time and cost’ (actions *intentionally* engaged in under coercion).⁸⁴ Confusing though it can be, the framework for discussion he sets up has been highly influential. So, it is worth briefly trying to reconstruct his argument even though the argument is not really directed at providing a ‘theory of excuses’ as such.⁸⁵ In rather too brief a discussion, Aristotle’s observations on what would now be called the theory of excuses are to be found at the start of book (iii) of the *Nichomachean Ethics*. He begins by claiming that actions are involuntary when performed under compulsion or through ignorance, because then the originating cause of the action ‘has an external origin of such a kind that the agent or patient contributes nothing to it’.⁸⁶ As far as compulsion is concerned, this claim very obviously requires immediate qualification, as Aristotle recognizes, because action taken under compulsion can involve a decision to do something to avoid a threat (and can hence involve something contributed by the agent ‘from the inside’), and is not the same as when ‘a voyager [is] conveyed somewhere [unexpected?] by the wind’.⁸⁷ So, his claim that actions intentionally undertaken to avoid dire consequences are involuntary must immediately be modified, becoming a claim that such actions are only ‘presumably’ involuntary, and only then when considered ‘absolutely’, on the grounds that ‘nobody would *choose* to do anything of this sort in itself’.⁸⁸ I shall come back to this point about choice in a moment. Having apparently thus nailed his flag to the mast, making absence of choice the key to ‘involuntariness’ through compulsion, Aristotle then modifies this claim straightaway as well.

What matters, it seems, when D intentionally acts to avoid certain consequences, is not so much the subjective *experience* of lack of choice, but

uncertain on the point: see Samuel E. Thorne, and J. H. Baker (eds.), *Readings and Moots at the Inns of Court in the Fifteenth Century* (London: Selden Society, 1990), ii, 74 and 274. Hale, however, employs the Aristotelian understanding: see Sir M. Hale, *Pleas of the Crown*, I, 42: ‘*Ignorantia facti* . . . in many cases makes the act morally involuntary’.

⁸³ *Nichomachean Ethics*, iii, 1110a17-b7.

⁸⁴ *Ibid.* Some modern courts and commentators have picked up this way of looking at action under coercion or conditions of necessity, describing it as ‘normatively’ involuntary: see e.g. *Perka v R* (1984) 13 DLR (4th) 1, drawing on George P. Fletcher, *Rethinking Criminal Law* (Boston, Mass.: Little, Brown, 1978), 803.

⁸⁵ It is one small aspect of Aristotle’s theory of moral goodness.

⁸⁶ *Nichomachean Ethics*, iii, 1109b30-1110a16.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, 1110a17-b7 (my emphasis).

how well or badly, ethically speaking, D can be said to have done in so acting:

Sometimes people are actually praised for such actions [under duress] when they endure some disgrace or suffering as the price of great and splendid results; but if the case is the other way round, they are blamed, because to endure the utmost humiliation to serve no fine or even respectable end is the mark of a depraved nature. In some cases, however, the action, though not commended, is pardoned: *viz* when a man acts wrongly because the alternative is too much for human nature, and nobody could endure it.⁸⁹

This passage endorses a more familiar three-fold distinction between justified conduct, conduct that is both unjustified and inexcusable, and excused conduct. In that regard, in the final words of the passage, Aristotle hints that what matters to excuse is not simply whether D him- or herself found the threat too much to endure (and hence, subjectively, experienced an absence of choice), but how well D's choice to do wrong stands up, ethically, against a standard of what we can expect a mentally well-equipped adult to endure before making such a choice. I shall have more to say about this—'standards'—view of excusing conditions in due course.⁹⁰

A somewhat clearer basis for regarding actions as excusable, as distinct from conditions that render conduct involuntary, emerges from Aristotle's discussion of action in anger. As indicated above, for him, an act is voluntary when its originating cause is internal to the agent him- or herself;⁹¹ but a voluntary act is, for Aristotle, only truly chosen when it is has been reasoned through, and is hence based on something like (the balance of) rational principle.⁹² Now, Aristotle tells us that actions due to temper are voluntary, but not rationally chosen. In his view, such actions are voluntary, because 'irrational feelings are considered to be no less part of human nature than our considered judgements';⁹³ but such acts are not chosen, because 'still less is choice to be identified with temper; for acts due to temper are thought to involve choice less than any others'.⁹⁴ Not for the first time, thus, the concept

⁸⁹ *Nicomachean Ethics*, iii, 1110a17-b7.

⁹⁰ See chapter 3.6 below. There is also a good deal in Aristotle's discussion of conduct made involuntary through ignorance, however, to give succour to those who would like to claim Aristotle's theory of excuses was based on a '(good) character' theory of excuses, rather than on a 'capacity' or 'standards' theory. He claims, for example, that if it turns out that you are indifferent to the hurt you caused by accident, the accident should not be regarded as truly involuntary: *Nicomachean Ethics*, iii, 1110b7-31, because (*ex ante*) you obviously cared too little about causing such accidents. See the interpretation of the relevant passages in J. O. Urmson, *Aristotle's Ethics* (Oxford: Basil Blackwell, 1988), 46, and for a modern version of the argument, see Jean Hampton, 'Mens Rea' (1990) 7 *Social Policy and Philosophy* 1, 27, '[I]gnorance is a function of faulty character . . . so we locate the defiance not at the time of the [unintentional] act, but earlier, during the process of character formation . . .'

⁹¹ *Nicomachean Ethics*, iii, 1110a17-b7; 1111a18-b5.

⁹² *Ibid.*, 1111b31-1112a17.

⁹³ *Ibid.*, 1111a18-b5. The point being that if 'irrational' feelings are a part of ordinary human nature, then, considered as originating causes of conduct, they are internal, and hence issue in voluntary forms of conduct.

⁹⁴ *Ibid.*, 1111b5-31. The point being that the unpremeditated and spontaneous overwhelming of reason by anger, whilst sometimes praiseworthy (and, more generally, open to evaluation), cannot be said to issue in conduct motivated by rational principle.

of voluntariness employed by Aristotle threatens to cloud the analysis. However naturally 'human' it may be, provoked anger has at least some part of its originating cause lying outside the agent, in the provoking conduct of the person who generated the anger.⁹⁵ So, on the view of involuntariness he outlined when discussing coercion, there is something to be said for regarding provoked anger as involuntary; but that looks counter-intuitive, and inconsistent with what he is now saying, which is that angry actions are voluntary because they are all-too-human. It is, then, best to put the 'external cause' element in Aristotle's account of voluntariness on one side, and agree with him that in mentally well-equipped people, angry actions are rightly regarded as voluntary; but they are not truly chosen, because they are not reasoned through.⁹⁶ In such cases, what Aristotle calls the 'desiderative' or 'appetitive' part of the soul (passion) gets the better of reason, short-circuiting the process of reasoning through, in practical deliberation. Although he does not make the point explicitly, we can further assume that—by way of analogy with his discussion of coercion—Aristotle would not regard as excusable action in anger that is too disproportionate to provocation received. For, it is not, or not only, the subjective experience of lack of choice in one's actions that is crucial for excusatory purposes, when anger overwhelms us, but the objective judgment that the provocation might have made almost anyone give in to his or her feelings and commit the wrong.⁹⁷ In retrospect, this is also the best explanation of Aristotle's analysis of conduct intentionally engaged in under coercion that falls to be excused (as opposed to justified).⁹⁸ Putting aside the issue of 'external cause', such conduct ought to be regarded as voluntary, fearful action being only too human in nature. One would not have done as one did, however, if one had had a proper chance to guide one's actions by reasoning them through, rather than being led by one's fear of an imminent threat. One's fear just more or less understandably dictated one's conduct in committing the wrong.⁹⁹

This Aristotelian theme, as a basis for explaining the theoretical foundations of the traditional excuses, is pursued further in due course. It would not be right, however, to regard the foregoing discussion as an attempt to

⁹⁵ A point perhaps most famously made by J. L. Austin, 'A Plea for Excuses'. For further discussion, see Andrew Ashworth, 'The Doctrine of Provocation' (1976) 35 *Cambridge Law Journal* 292.

⁹⁶ For further philosophical analysis of both these ideas, see chapter 2.10 and 2.11 below.

⁹⁷ For more detailed discussion, see Jeremy Horder, *Provocation and Responsibility*, chapter 8.

⁹⁸ It may be that Aristotle did not explain intentional action under coercion in this way, as compared with angry action, because it seems obvious that one chooses between evils in a case of coercion, whereas one seems to act more spontaneously and without choosing between alternatives in cases in which one is provoked into a response in anger; but if this is the reason, then that just shows Aristotle did not think hard enough about the range of responses there can be to fear and anger: see chapter 2.10–2.12 below.

⁹⁹ For more detailed philosophical discussion, see chapter 2.10–2.12 below.

elaborate on Aristotle's 'theory' of excuses, because he did not really have such a theory. Although he says that his observations may be 'useful also for legislators with a view to prescribing honours and punishments',¹⁰⁰ his discussion of involuntariness, coercion and action in anger are really intended merely as a prelude to a broader investigation of moral goodness, in the guise of authentic and informed reasoning towards, and choice of, what is truly good (the mark of the person of good character).¹⁰¹ Even so, some of the structure (re)constructed above has become highly influential in shaping some judges' understanding, as well as the understanding of some theorists, of the nature and limits of excuses, and the Aristotelian character of this influence explains why I term it the 'classical' conception of excuses. As regards the development of excuses at common law, for example, Hart says that the excuses of 'Mistake, Accident, Provocation, Duress and Insanity',¹⁰² were rightly developed and applied by courts to what he regards as the most serious crimes (murder is his favourite example) because, even where serious crimes are in issue:

[E]xcusing conditions . . . are regarded as of moral importance because they provide for all individuals alike the satisfactions of a choosing system. Recognition of excusing conditions is therefore seen as a matter of protection of the individual against the claims of society for the highest measure of protection from crime that can be obtained from a system of threats. In this way the criminal law respects the claims of the individual as such, or at least as a *choosing being* . . .¹⁰³

In this passage, Hart himself appears to share with common lawyers the view that the narrow, classical Aristotelian framework for understanding the

¹⁰⁰ *Nicomachean Ethics*, iii, 1109b30. See also *ibid.*, 1113b21-1114a8, '[Legislators] impose punishments and penalties upon malefactors (except where the offence is committed under duress or in unavoidable ignorance) . . .'

¹⁰¹ *Ibid.*, 1113a12-34.
¹⁰² H. L. A. Hart, *Punishment and Responsibility*, 31. Mistakenly, Hart includes insanity amongst the excusing conditions, when—as Aristotle himself recognized—insanity is a threshold condition of responsibility, and not a case in which D is genuinely claiming excuse on the grounds (say) that, ordinary human nature being what it is, no one could reasonably have been expected to do better: see e.g. *Nicomachean Ethics*, iii, 1148b20-1149a11. A modern defence of the Aristotelian view is to be found in John Gardner, 'The Gist of Excuses'. It should be noted, though, that some see the inclusion of insanity amongst excusing conditions as a positive theoretical virtue: see K. J. M. Smith and William Wilson, 'Impaired Voluntariness and Criminal Responsibility: Reworking Hart's Theory of Excuses—The English Judicial Response' (1993) 13 *Oxford Journal of Legal Studies* 69.

¹⁰³ H. L. A. Hart, *Punishment and Responsibility*, 49 (Hart's emphasis). The theory, touched on in this passage, that excuses are rightly regarded as individual claims 'against' the claims of society was criticized in section 3 above. Hart makes the claim in a more unconditional way, in H. L. A. Hart, *Punishment and Responsibility*, 44, 'it is clear that we look on excusing conditions as something that *protects* the individual against the claims of the rest of society' (Hart's emphasis). To be fair to Hart, it might be perhaps that a defence of excuses would take on that appearance if it were proposed to abolish them in pursuit of 'the highest measure of protection' against crime; but in practice, states worldwide have found plenty of means by which to pursue (or to give the impression of pursuing) such a measure of protection without abolishing all trace of excusing conditions.

necessary conditions for excuse, in terms of an absence of choice, is the right framework when crimes *mala in se* are in issue. In that regard, it is not only the common law that has been shaped by its Aristotelian inheritance. Given a more modern-looking, neo-Kantian gloss, the ‘choice’ theory of excuses continues to be influential in academic thinking about excuses today.¹⁰⁴

Hart was also, however, perhaps one of the first to see that a theory of excuses does not have to relate to conditions that interfere with a *choice* to do wrong. The necessary conditions for excuse do not have to be restricted in that way. At common law, Hart suggests, it is on responsibility for ‘serious’ crimes (crimes to conviction for which stigma attaches) that excuses have historically had a morally significant bearing, in virtue of what he calls ‘the doctrine that a “subjective element”, or “*mens rea*”, is required for criminal responsibility’.¹⁰⁵ The bearing the one is supposed to have on the other is moral, in that if liability for serious crimes depends on the subjective element of free ‘choice’ (understood to include subjective recklessness alongside intention), then what makes excuses such as mistake, provocation, and duress relevant to such crimes is that, as Aristotle suggested, they put in question whether or not the wrongdoing was freely chosen. As far as crimes of strict liability are concerned, where the doctrine of subjective *mens rea* is not applied at common law, Hart goes on to say that the theory (to which he is not wholly unsympathetic) is that, ‘the law, like every other human institution, has to compromise with other values besides whatever values are incorporated in the recognition of some conditions as excusing’.¹⁰⁶ In that regard, he thought, it might be considered to be the triumph of the value of a concern for ‘social welfare’ that has precluded the application of excusing conditions to crimes of strict liability in the courts.¹⁰⁷ Hart points out, though, that how ‘strict’ liability turns out to be rests, in any individual case, on the attitude the courts take towards the interpretation of the crime in question,¹⁰⁸ and it may be that duress and insanity can through creative interpretation be given some application to crimes of so-called strict liability.¹⁰⁹

Building on these observations, in spite of his obvious sympathy with the ‘choice’ account of excuses as they apply to crimes that are *mala in se*,

¹⁰⁴ See e.g. Andrew Ashworth, *Principles of Criminal Law*, 3rd edn., 99; Michael S. Moore, ‘Choice, Character and Excuse’ (1990) 7 *Social Policy and Philosophy* 29.

¹⁰⁵ H. L. A. Hart, *Punishment and Responsibility*, 31.

¹⁰⁶ Hart adds at this point that it may not always be clear what values are to be regarded as triumphing over the values that makes excusing conditions important. To be fair, Hart does make it clear at this point (as at several others) that crimes of strict liability have not escaped criticism, as ‘an odious and useless departure from proper principles of liability’.

¹⁰⁷ H. L. A. Hart, *Punishment and Responsibility*, 33–34. In that regard, Hart suggests, ‘the utilitarian argument that [strict liability] prevents evasion of the law by those who would be prepared to fabricate pleas of mistake or accident has some plausibility’ (ibid., 179). This claim obviously combines elements of what I outlined as strategic concerns (iii) and (v) in section 2 above.

¹⁰⁸ H. L. A. Hart, *Punishment and Responsibility*, 112.

¹⁰⁹ Ibid., 242. See the discussion in A. P. Simester and G. R. Sullivan, *Criminal Law: Theory and Doctrine*, 1st edn., 167–168.

Hart himself advocates discarding the classical conception of excuses, with its narrow Aristotelian framework. He shifts his theory of excuses on to a different theoretical foundation to that unquestioningly employed by the common law. As a result, in Hart's theory, crimes of strict liability become as significant as any other crimes to a theory of excuses:

[A] primary vindication of the principle of responsibility could rest on the simple idea that unless a man has the capacity and a fair opportunity or chance to adjust his behaviour to the law its penalties ought not to be applied to him . . . Such a doctrine of fair opportunity would not only provide a rationale for most of the existing excuses which the law admits in its doctrine of mens rea but it could also function as a critical principle . . . That is, in its light we might . . . press further objections to strict liability.¹¹⁰

It has never been altogether clear how much of an improvement this theoretical move has turned out to be. Some have regarded a 'lack of capacity' as irrelevant to excuses, seeing it as having a bearing only on denials of responsibility,¹¹¹ an issue tackled (so far as the putative partial excuse of 'diminished capacity' is concerned) in chapter 4 below. Moreover, the idea of a lack of 'fair opportunity' has always been too loose or abstract to give much theoretical illumination. Too much hinges on the concrete theory of 'fairness' that must fill it out, for the idea to be capable of doing useful work in itself.¹¹² Even so, perhaps surprisingly, although there has been plenty of theoretical discussion of whether the traditional excuses (mistake; provocation; duress) can be explained by seeing them in terms of a lack of 'capacity' and/or of a lack of 'fair opportunity',¹¹³ the suggestion that a lack of 'fair opportunity' doctrine might be developed in a more sophisticated way to provide a defence to crimes of strict liability has received significantly less attention. An effort to remedy this is made in chapter 6 below, although, when it comes to excusing the commission of regulatory offences, we will see the 'fair opportunity' doctrine does not escape the limitations of a common law perspective on excuses as well as does the alternative 'due diligence' defence. In essence, Hart sees a lack of 'fair opportunity' in terms of the unreasonableness of cognitive or emotional demands placed on D (along with the effects of mental disorder), the kinds of factors central to Aristotle's classical account of excusing conditions. By way of contrast, I will argue that the (extent of the) effort made by those subject to regulation to avoid committing offences has a special, 'liberal' excusatory significance, beyond that inherent in the idea that D lacked a 'fair opportunity'—understood in cognitive or emotional terms—to avoid committing the offence. It is thus necessary to break free from the confines of the traditional account of excuses, if one is to appreciate the true theoretical significance of a 'due diligence', as opposed to a 'no fair opportunity' excuse.

¹¹⁰ H. L. A. Hart, *Punishment and Responsibility*, 181.

¹¹¹ See e.g. John Gardner, 'The Gist of Excuses'.

¹¹² In chapter 2 below, a much more elaborate set of theoretical foundations for the excuses is laid out.

¹¹³ See e.g. Andrew Ashworth, *Principles of Criminal Law*, 3rd edn., 254.

7. WHOSE RESPONSIBILITY IS IT TO DEVELOP EXCUSES?

Few would dissent from the proposition that the courts should not create new criminal offences, even if it must also be accepted that the courts will inevitably—and perhaps should—on some occasions extend or restrict the reach of existing offences through the exercise of their power and duty to interpret the law, as well as simply to apply it.¹¹⁴ Is the position the same where defences, and excuses in particular, are concerned? The answer is likely to vary from jurisdiction to jurisdiction, depending on how active a role remains for judges in making law. In England and Wales, where judges retain not insignificant powers of law creation, in discharging their role within the adversarial process, the traditional excuses and exemptions—duress, mistake, provocation, and insanity—have been, of course, wholly or mainly the product of the use of such powers of law creation.¹¹⁵ Much doctrine now constituting and governing them, including rules concerned with whether excuses are to apply to particular offences, still remains legally binding in virtue of its status as common law, rather than through statutory embodiment. That inevitably means that the courts must take some responsibility for the restriction or expansion of these excuses, because it is they who are charged with maintenance of a common law that commands moral as well as legal authority.¹¹⁶ What, though, of the creation of new excuses?

It seems hard to deny that there remains an inherent common law power to create new excuses, and to decide whether or not to apply them to particular crimes. Such a power has arguably been reinforced, under section 3 of the Human Rights Act 1998, by the modern duty on courts to ‘give effect’ to legislation, including criminal legislation, in a way that is compatible with the rights created under the European Convention on Human Rights.¹¹⁷ To exercise such a power to create excuses would be to exercise precisely the same power that has been authoritatively (if sometimes controversially) used in relatively recent times, for example, to develop a broad-ranging excuse of

¹¹⁴ For general discussion, see A. T. H. Smith, ‘Judicial Law-Making in the Criminal Law’; Andrew Ashworth, ‘Interpreting Criminal Statutes: A Crisis of Legality?’ (1991) 107 *Law Quarterly Review* 419; Andrew Ashworth, *Principles of Criminal Law*, 3rd edn., chapter 3; Jeremy Horder, ‘Criminal Law and Legal Positivism’ (2002) 8 *Legal Theory* 221, 237–241.

¹¹⁵ Historically, it may well be that an understanding that crimes *mala in se* are subject to such excuses stems from arguments to that effect emerging from medieval debates and moots in the Inns: see Samuel E. Thorne, and J. H. Baker, *Reading and Moots at the Inns of Court*, ii, introduction.

¹¹⁶ Obviously, there are some large issues here that cannot be addressed in the present context. There is a wide-ranging and sensitive discussion in Andrew Ashworth, ‘Interpreting Criminal Statutes: A Crisis of Legality?’, 438–447. The passing of the Human Rights Act 1998 may also give fresh impetus to debates about the range of defences, given that judges are now under an obligation to take account of human rights jurisprudence in reaching judgment under adversarial process: see further, Ben Emmerson and Andrew Ashworth, *Human Rights and Criminal Justice* (London: Sweet & Maxwell, 2001), chapter 8.

¹¹⁷ See, in particular, the discussion of the importance of the good of ‘reciprocity’ (strategic consideration (iv), in section 2 above) to a fair trial, in chapter 6.4 below.

mistake.¹¹⁸ Parliament, however, has now begun to take more interest in carving out excuses to crimes it creates by statute, often tailoring those excuses in a very precise way to fit the particular context.¹¹⁹ Should that entail that the courts leave the development of new excuses, and the question whether they are applicable to particular crimes, to Parliament? This seems unlikely. There can be little doubt that Parliament is well-placed, from an expert point of view, to develop very context-specific defences, when it creates new crimes (usually, but not solely, in a regulatory context). That is in itself a reason for the courts to refuse to seek to fashion such defences themselves, even if in theory they have the power to do so.¹²⁰ Nonetheless, so long as the issues at stake neither turn on expert knowledge and opinion the courts do not possess, nor involve highly open-ended, wide-ranging and controversial moral issues much better addressed through the legislative rather than through the more haphazard adversarial process,¹²¹ the courts are legally and politically competent to create new general defences to statutory (or common law) crimes. This is significant, in that (as we will see in chapter 6 below) the fact that a crime has some context-specific defences that apply to it cannot rule out the possibility that, in all the circumstances, it may turn out to be right to apply to those crimes a more general excuse that it is within the courts' competence to create, such as the 'due diligence' excuse, even if such a defence found no place in the original statutory scheme. In summary, as Lord Simon has put it, speaking of the judicial development of excuses in the light of what I have called the strategic concerns at the heart of the sufficient conditions for excusing:

I am all for recognising frankly that judges do make law. And I am all for judges exercising this responsibility boldly at the proper time and place—that is, where they feel confident of having in mind, and correctly weighed, all the implications of their

¹¹⁸ The development of a distinctive excuse of mistake in the modern era is traced in the excellent discussion to be found in Glanville Williams, *Criminal Law: The General Part* (London: Stevens, 1961), Chapter 5. For the debate about Sir James Stephen's influential views on judicial creativity, in this regard, see A. T. H. Smith, 'Judicial Rule-Making in the Criminal Law', 63, and the references cited at n. 90. I speak of the 'modern era' because whilst it has been clear enough since medieval times that some kinds of mistake or ignorance would prevent the infliction of harm being regarded as felonious, this was probably simply because a claim of mistake was just one amongst a number of ways of rebutting the presumption of malice, and not because 'mistake' was regarded as a distinct excuse to some crimes but not to others.

¹¹⁹ See e.g. the Education Act 1996, where a number of more or less context-specific excuses and justifications are set out that can be pleaded in response to a charge that a parent has criminally failed to ensure that their child attends regularly at school, an offence contrary to s.444(1) of that Act. See also the Food Safety Act 1990. For further discussion of this point, see the end of chapter 6.3 below.

¹²⁰ Further, even where the development or extension of a more general, common law defence is in issue, it could be right to leave the matter to Parliament if the moral issues at stake are especially wide-ranging and controversial in character. For such an argument, where the application of the excuse of duress to murder was in issue, see the speech of Lord Kilbrandon in *DPP v Lynch* [1975] AC 653, 700. For a closely related discussion, see George P. Fletcher, *Rethinking Criminal Law*, 792–798.

¹²¹ In other words, so long as the considerations set out in strategic concern (viii), in section 2 above, are met. For discussion of this point, in relation to justifications, see Jeremy Horder, 'On the Irrelevance of Motive in Criminal Law', 189.

decision, and where matters of social policy are not involved which the collective wisdom of Parliament is better suited to resolve.¹²²

The matter could be left there, but it is worth seeking to give the discussion a slightly deeper theoretical perspective, since both judges and theorists continue to express concern about judicial activism (as well as, sometimes, about judicial ‘passivity’),¹²³ in relation to the development of excuses.¹²⁴ For legal positivists, a legal system is comprised (a) of binding standards (such as rules and principles) for, *inter alia*, guiding or judging behaviour as well as for determining how disputes are to be resolved, and (b) of more or less limited and structured discretionary powers to develop such standards and to resolve disputes ungoverned by existing standards.¹²⁵ Where (b) are concerned (the discretionary powers), whilst Parliament has a well settled power to change or develop *inter alia* the standards for guiding and judging behaviour, by rule-of-law convention, it does not employ that power to resolve individual disputes, leaving this—as appropriate—to the executive and to the judiciary.¹²⁶ In resolving individual disputes arising in a statutory context, judges are bound by whatever existing legal standards have a bearing on the case. In the absence of such standards (or where those standards do not make a decisive difference), however, judges may still be bound—politically, *qua* public officials—to resolve the dispute in accordance with moral or other evaluative standards, or at least to have regard to a sub-set of such standards, if the relevant interpretive convention so dictates.¹²⁷ In that regard, as Raz puts it:

Given that the courts are manned by people who will act only in ways they perceive to be valuable, principles of adjudication will not be viable, will not be followed by

¹²² *DPP v Lynch* [1975] AC 653, 695, cited by A. T. H. Smith, ‘Judicial Law-Making in the Criminal Law’, 63 n. 81.

¹²³ See e.g. A. P. Simester and G. R. Sullivan, *Criminal Law: Theory and Doctrine*, 1st edn., chapter 6; Jeremy Horder, ‘Strict Liability, Statutory Construction and the Spirit of Liberty’ (2002) 118 *Law Quarterly Review* 458.

¹²⁴ See e.g. Paul H. Robinson, M. Cahill, and U. Mohammed, ‘The Five Worst (and Five Best) American Criminal Codes’ (2000) 94 *Northwestern University Law Review* 17, ‘It is imperative . . . that a code include all appropriate defences and leave nothing to the whim of the judiciary’. And, for as strong a statement from a Law Lord, see Lord Kilbrandon’s comments on the suggestion that the House of Lords should have a role in reforming the defence of duress, in *DPP v Lynch* [1975] AC 653, 700, ‘It will not do to claim that judges have the duty—call it the privilege—of seeing to it that the common law expands and contracts to meet what judges conceive to be the requirements of modern society. Modern society rightly prefers to exercise that function for itself, and this it conveniently does through those who represent it in Parliament.’

¹²⁵ The classic modern statement of this view is to be found in Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979), chapters 3 and 9, but Raz’s view is in a way a development and elaboration of Hart’s concept of a legal system.

¹²⁶ One ingenious way to get around the rule-of-law convention is for the government to persuade Parliament to empower one of the government’s own ministers to develop standards and resolve individual disputes, as he or she goes along, in the name of upholding the aims of the statute in question: see e.g. the powers of the relevant minister under the Race Relations (Amendment) Act 2000. The rule-of-law propriety of such measures must be open to serious question.

¹²⁷ Joseph Raz, *The Authority of Law*, 96–97; Joseph Raz, *Ethics in the Public Domain*, chapter 14. When interpreting statutes, judges may also be bound to take account of, if not necessarily to follow, rules and standards developed at common law.

the courts, unless they can reasonably be thought to be morally acceptable, even though the thought may be misguided . . . quite commonly courts have the discretion to modify legal rules, or to make exceptions to their applications, and where they have such discretion they ought to moral reasoning to decide whether to use it and how. It follows that legal expertise and moral understanding and sensitivity are thoroughly intermeshed in legal reasoning . . .¹²⁸

One of the ways in which, as Raz puts it, legal expertise and moral understanding become ‘intermeshed’, is through the development of over-arching doctrines to guide judges in the exercise of their discretion to resolve disputes that turn on matters of interpretation under a great variety of statutes. One such doctrine is the so-called presumption that *mens rea* (which, broadly construed, may take the form of recognition of an excusatory plea) will be required before someone may be convicted of a criminal offence.¹²⁹ Doctrines of this kind, part of whose moral significance comes from the understanding that they are of general application, enable the courts to give substance to the claim that they are, in Lord Simon’s words, ‘a mediating influence between the executive and the legislature on the one hand, and the citizen on the other’.¹³⁰ So, in contexts as diverse as food safety,¹³¹ licensing law,¹³² anti-drug legislation,¹³³ and sexual or morals offences,¹³⁴ judges have sometimes been willing to ‘read in’ requirements of substantive *mens rea*, or defences of reasonable or of honest mistake, to the criminal offences created by the legislation.¹³⁵ The courts have on occasions been prepared to do this, in spite of what would undoubtedly in each case have been special pleading by prosecutors or experts called to give evidence that, in the particular context, strict criminal liability was more helpful and appropriate in promoting the aims of the legislation.¹³⁶

Naturally enough, the duty to act—as one perceives it—morally (or in accordance with other binding non-legal standards, as appropriate) binds legislators and members of the executive as much as it binds judges. So, when creating criminal offences, the legislature is under a duty to give consideration to whether it would be morally appropriate to create excuses, even though the creation of such excuses might be perceived by some as detracting from the likelihood that the legislation in question will achieve

¹²⁸ Joseph Raz, *Ethics in the Public Domain*, 333–334 and 335.

¹²⁹ See e.g. the speech of Lord Reid, in *Sweet v Parsley* [1970] AC 132, 148, in which he claims (perhaps with a degree of hyperbole) that, ‘there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did.’ For further discussion, see chapter 6.5 below.

¹³⁰ *Stock v Frank Jones (Tipton) Ltd.* [1978] ICR 347, 353.

¹³¹ *Core v James* (1871) LR 7 QB 135. ¹³² *Sherras v De Rutzen* [1895] 1 QB 918.

¹³³ *Sweet v Parsley* [1970] AC 132. For further discussion of this case, see chapter 6.1 below.

¹³⁴ *B (a minor) v DPP* [2000] 2 AC 438; *R v K* [2001] 3 WLR 471; *R v Tolson* (1889) 23 QB 168.

¹³⁵ It is, of course, no part of my argument that judges have taken this approach with any degree of consistency, or with the courage of true conviction: see Jeremy Horder, ‘Strict Liability, Statutory Construction and the Spirit of Liberty’.

¹³⁶ For a modern example in which expert evidence was given on this point, see *Barnfather v London Borough of Islington Education Authority* [2003] EWHC 418.

its aims. It may be, of course, that legislatures commonly neglect this duty. As Paul Robinson puts it, ‘The very immediacy and import of criminal law render it all the more susceptible to mere politicking rather than deliberate craftsmanship’,¹³⁷ a gloomy view of the way legislatures behave shared (on this side of the Atlantic) by Glanville Williams, for whom, ‘Statutes, which are generally drafted by Government officials, often neglect juristic principles’.¹³⁸ Indeed, Lord Devlin has gone so far as to say that:

The fact is that Parliament has no intention whatever of troubling itself about *mens rea*. If it had, the thing would have been settled long ago . . . One is driven to the conclusion that the reason why Parliament has never done that is that it prefers to leave the point to judges and does not want to legislate about it.¹³⁹

This passage misleads, however, in a number of respects.

First, historically, there was always at least some legislative interest in fault requirements during the years in which the establishment of a regulatory state in Britain gathered significant momentum.¹⁴⁰ Secondly, there is now far less evidence that legislatures still prefer to leave matters of fault and excuses solely for the courts to decide on, especially where specialized excuses tailored to the regulatory context are in issue.¹⁴¹ Finally, even if legislatures always turned their attention to fault and the excuses at the time of enactment, that ought not to be regarded as settling the issue once and for all time. If D’s claim is that justice demands that an excuse, such as ‘due diligence’, be applied to a statute to avoid a wholly wrongful conviction, it would be irresponsible for the courts to reason that, since Parliament was under an obligation to consider whether or not to introduce this excuse, and did so consider, D’s claim can be dismissed on the grounds that the courts have been relieved of any obligation themselves to consider whether or not to introduce such an excuse, however long ago and however cursorily Parliament may have considered the matter. The question for the courts in relation to any individual D, just as much as for the legislature more generally,

¹³⁷ Paul Robinson, M. Cahill, and U. Mohammed, ‘The Five Worst (and Five Best) American Criminal Codes’, 64.

¹³⁸ Glanville Williams, *Textbook of Criminal Law*, 2nd edn. (London, Stevens, 1983), 18. I have criticized the notion that there might be an apolitical realm of ‘juristic principles’ and ‘deliberate [legal] craftsmanship’: see Jeremy Horder, ‘Criminal Law’, in Peter Cane and Mark Tushnet (eds.), *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2003), 228–229.

¹³⁹ Patrick Devlin, *Samples of Lawmaking* (Oxford, Oxford University Press, 1962), 71.

¹⁴⁰ See chapter 6.2 below for fuller discussion. Under section 5 of the Sale of Food and Drugs Act 1875, D was not liable for a range of offences concerned with selling or preparing food unfit for consumption, ‘if he shows to the satisfaction of the Justice of the court . . . that he did not know . . . and that he could not with reasonable diligence have obtained that knowledge [that the food might be injurious to health].’ See also section 29 of the Public Health Act 1875, and Vaccination (Amendment) Act 1867, which says, ‘Every parent . . . who shall neglect to take such child . . . to be vaccinated . . . and shall not render a reasonable excuse for his neglect shall be guilty of an offence’.

¹⁴¹ See the discussion at the end of chapter 6.3 below; but see also Andrew Ashworth, ‘Is the Criminal Law a Lost Cause?’ (2000) 116 *Law Quarterly Review* 225.

is always, 'given that someone's claim fulfils the necessary conditions for excuse, does justice demand that (with whatever limitations are appropriate) such a claim be regarded as meeting the sufficient conditions for excuse as well?'.¹⁴²

This point returns us to the 'common good' considerations we encountered in section 2 above. Just as people's respect for legal obligations, and for the moral integrity of the excuses applied to them, can be undermined if those excuses are too generous, so, *mutatis mutandis*, people's respect for legal obligations can be undermined if conduct deemed criminal is regarded as wholly inexcusable however much D may have done to avoid transgression (strategic consideration (iv) in section 2 above). As we will see in chapter 6.4 below, the maintenance of such respect for legal obligations, and more broadly for trial processes triggered by breach of these obligations, through an openness to excusatory arguments, is an aspect of the common good of 'reciprocity' within the criminal justice system, alongside procedural due process. This brings us back to the relevance to excuse-creation of what I have been calling strategic concerns.¹⁴³ It may be that it is well within the competence of a higher court to decide, whether the possible undermining of respect for legal obligations amongst citizens is a more real and weighty danger than the countervailing danger that creating a given excuse will encourage too many unmeritorious claims, thus undermining the prospects for successful prosecution of cases against offenders by an under-staffed and under-resourced regulatory agency. So, there should, on the part of the courts, be no shirking the responsibility for deciding whether or not justice demands the creation of an excuse, on the grounds that it is beyond the courts' competence to tackle such a question.

¹⁴² This is, in effect, acknowledged by Lord Millett in *R v K* [2002] 1 AC 462, 480, where he claims that the courts may have the power to create a defence (in this case, of honest mistake) to a crime even when it is clear that Parliament has passed up the opportunity to create the defence itself, if, 'Parliament has signally failed to discharge its responsibility for keeping the criminal law in touch with the needs of society,' and there has been a 'persistent failure of Parliament to rationalise this branch of the law even to the extent of removing absurdities which the courts have identified'.

¹⁴³ A relevance acknowledged by Lord Simon in *DPP v Lynch* [1975] AC 653, 695, cited in the text at n. 122 above.