In Defence of Defences (2002)

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In Defence of Defences

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1. Wrongdoing and justification

According to a view of wrongdoing that I will call the 'closure' view, no action is wrong unless it is wrong *all things considered*, i.e. taking account of both the reasons in favour of performing it (the pros) and the reasons against performing it (the cons). This view was promoted in its simplest and most accessible form by the utilitarians. Yet its appeal was never distinctively utilitarian. It was espoused no less vigorously by Kant. From his anti-utilitarian view that it is always morally wrong to fail do what any moral reason would have one do, Kant concluded that there can be no moral reasons in favour of performing an action if there are moral reasons against performing it.[1] For otherwise, some morally wrong actions would not be morally wrong all things considered, and that would be inconsistent with the closure view of wrongdoing, which Kant treated as axiomatic.

The closure view of wrongdoing obviously takes a lot of philosophical weight off the shoulders of the idea of *justification*. What calls for justification, we can all presumably agree, is that to which there is some rational objection. One might think that the fact that an action is wrong yields a powerful rational objection to its performance, and that wrongdoing therefore calls for justification if anything does. But according to the closure view, wrongdoing can't possibly call for justification, because the reasons in favour of performing the action that would be relied upon to justify it have already been counted in settling whether

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[1] *The Metaphysic of Morals* (trans Mary Gregor, Cambridge 1996), 16–17.

the action was wrong. Talk of 'justified wrongdoing' therefore turns out to be oxymoronic. Naturally one may still say something more circumspect. Even on the closure view, one may say that an action was 'prima facie' wrong, and yet justified. But the words 'prima facie', as used by supporters of the closure view, carry the connotation that the action was not really wrong at all. It only seemed to be wrong, on the strength of incomplete information. When all the pros and cons of performing it were known, it turned out not to be wrong at all.[2]

Opponents of the closure view sometimes also speak of 'prima facie wrongs', but they mean something quite different by the expression. For them prima facie wrongdoing is simply wrongdoing.[3] It is therefore something to which there is a rational objection, and which accordingly calls for justification. The words 'prima facie' are added only as a warning against the tendency to interpret the word 'wrong' in line with the more prevalent closure view. Clearly, the words 'prima facie' are an unhappy choice for this role, since they may just as readily be interpreted as casting doubt on whether the action is really wrong at all, and hence as confirming the preconceptions of subscribers to the closure view.[4] Nevertheless they are intended

[2] David Lyons, *Forms and Limits of Utilitarianism* (Oxford 1965), 19-22; Richard B. Brandt, 'Morality and its Critics', *Am Phil Q* 26 (1989), 89.

[3] See John Searle, '*Prima Facie* Obligations' in J. Raz (ed), *Practical Reasoning* (Oxford 1978), A John Simmons, *Moral Principles and Political Obligation* (Princeton 1979), 24-28. Both Searle and Simmons go on to abandon the 'prima facie' terminology.

[4] The problem started with W.D. Ross, who first coined the terminology. Ross could never decide whether, in calling some wrongs 'prima facie', he meant to commit himself to the closure view of wrongdoing or on the contrary to repudiate that view. Sometimes he said that prima facie wrongs are simply actions of a type that *tend* to be wrong but need not always be: e.g. *The Right and the Good* (Oxford 1930) at 28. But sometimes he said they remained 'morally unsuitable' (i.e. wrong) on all occasions, even when all things considered they ought to be committed: *Foundations of Ethics* (Oxford

to have the opposite effect. Calling an action 'prima facie wrong' is intended to affirm that the action really is wrong, while leaving open the further question of whether the wrongdoing is justified. By the same token, an action that is 'all things considered wrong' is not merely a wrong action. It is a wrong action and also (a quite separate matter) an unjustified one. If it were justified, that would not stop it being wrong. It would merely make it wrong but justified, a conclusion which might be conveyed by saying that it was 'all things considered alright' to perform it. Or so say the opponents of the closure view.

So the contrast between the two views could be brought out nicely by saying that on the closure view, one cannot understand what a 'prima facie' wrong is without first understanding what an 'all-things considered' wrong is. A prima facie wrong, on this view, is merely an action that appears to be (all things considered) wrong until the full facts are known. But on the rival view that I have just set out, the reverse is true. One cannot understand what an 'all-things considered' wrong is without first understanding what a 'prima facie' wrong is. A prima facie wrong is just a wrong, while an all things considered wrong is a wrong *with an added feature*, namely absence of justification.

Which view is right? One finds a great deal of ambivalence in contemporary writings, and nowhere more so than in the work of contemporary criminal lawyers. Criminal lawyers retain in their analytical armoury the distinct concepts of 'offence' and 'defence'. For some purposes and on some occasions they present defences, including justificatory defences, as constituting a weapon on the defendant's side that is distinct from, and additional to, a mere denial of the offence. By pleading a justification, the story goes, the defendant does not *deny* but rather *concedes* criminal wrongdoing, which is the very thing that he then tries to justify (e.g. by arguing that he acted in reasonable

1939), 85. His official definition of a 'prima facie duty' on page 20 of the former book tries to walk a non-existent line between the two interpretations.

self-defence). Here the closure view is denied.[5] But for other purposes and on other occasions, the closure view reasserts itself. The distinction between offences and defences is then played down as a technicality, a specialized lawyers' distinction that may bear in some way on evidence or procedure, say, but is of no *substantive* importance. To say that the defendant committed a criminal wrong but was justified comes to the same thing, in the end, as saying that she committed no criminal wrong.[6] Whichever way one expresses it the criminal law has no wish to condemn, deter, or punish such actions. And that is all that ultimately matters. In this vein, many criminal lawyers end up concurring with H.L.A. Hart's conclusion that 'killing in self-defence is an *exception* to the general rule.'[7] That is to say: once the definition of the criminal wrong is fully spelled out, with all of its little nooks and crannies, it already automatically anticipates the so-called 'justificatory' case, and leaves the killer with nothing to justify. The closure view strikes back.

Inverting the conventional textbook wisdom, I tend to think that criminal lawyers are thinking in a more shallow and technical way when they side with Hart and endorse the closure view, and in a deeper way when they rebel against the closure view and assert the substantive importance of their distinction between offences and defences. It is true that this distinction between offences and defences can be difficult to place in particular cases. Regarding some arguments available to criminal defendants it is admittedly unclear, morally as well as legally, whether they are to be regarded as denials of wrongdoing, or rather as concessions of wrongdoing coupled with assertions of justification. That is because, morally as well as legally, some wrongs (notably wrongs defined in terms of negligence) do

[5] See e.g. Glanville Williams, *Textbook of Criminal Law* (2nd ed, London 1983), 50-51.

[6] Ibid., 138 (and especially note 6 on that page).

[7] Hart, 'Prolegomenon to the Principles of Punishment' in his *Punishment and Responsibility* (Oxford 1968), at 13.

admittedly anticipate, in their very definitions, various arguments that would otherwise count as justificatory. But these are special, complicated cases.[8] Denying the closure view does not mean denying that there are cases of this type. It means insisting that cases of this type are complicated variations on cases of a simpler and more basic type in which assertions of justification are distinct – in a morally as well as legally significant way - from denials of the wrong.

That Hart and many other writers on criminal law do not see this distinctness comes, I suspect, of the fact that their account of what counts as moral and legal *significance* in the criminal law is impoverished. They regard distinctions as being of moral and legal significance in the criminal law only if those distinctions make a constitutive difference to the proper incidence of condemnation, deterrence, or punishment. But the criminal law is only secondarily a vehicle for condemnation, deterrence and punishment. It is primarily a vehicle for the public identification of wrongdoing (by certain standards of evidence and procedure) and for responsible agents, whose wrongs have been thus identified, to *answer for* their wrongs by offering justifications and excuses for having committed them. By calling this latter function 'primary' I do not mean to suggest that it is socially more important. I mean that the proper execution of the other functions depends upon it. Criminal law can be a proper vehicle for condemnation, deterrence and punishment only because it is a vehicle for responsible agents to answer for their wrongs.

You may say that this claim begs the question against the closure view. It assumes, rather than argues, that wrongs can be correctly identified and yet that their justification can be left open. True enough. All I meant to do so far was to point out that a rather superficial grasp of what the criminal law is for could lead

[8] To understand these complicated cases one must understand that wrongs are not the only things that call for justification. This opens the logical space for actions which it would be wrong to perform without justification yet not wrong to perform with justification. I will not explore this category here.

criminal lawyers to privilege the closure view too hastily. To see why that would be not only hasty but mistaken, one naturally needs to look beyond the narrow debate over the criminal law's functions to broader debates in moral philosophy. The most important of these debates concerns the role of our rational faculties in our acting successfully, and hence living well. What led Kant and the utilitarians (and many other modern moral philosophers following in their footsteps) to endorse the closure view was a shared but misplaced optimism about the extent to which perfection of our rational faculties would entail perfection of our lives. The problem they had with the idea of an action that was wrong and yet justified was that it seemed to give the seal of full rational approval to that course of action (by agreeing that it was justified) while still insisting that the same course of action left a blemish on one's life (by persisting in identifying it as wrong). A more classical picture of rationality, far from baulking at this possibility, had embraced it as a key defining aspect of the human predicament. According to the classical picture, if one does wrong it is some consolation that one does so with justification (for one thereby exhibits one's competence as a rational being) but it would be better still if one does no wrong in the first place and hence *needs* no justification. Never mind that sometimes (in so-called 'moral dilemma' cases in which failing to take the justified path would *also* be wrong) this leaves one in the unlucky position that one's life will be blemished by wrongdoing whatever one does and hence irrespective of one's competence as a rational being. That's the way the cookie crumbles, according to the classical view. But not so according to the optimistic view of the Enlightenment revisionists. They were prepared to admit that one's life could be damaged *as a consequence* of things that one did that were all-things-considered alright. They admitted that such deeds might be misunderstood or envied, for example, and thus might be held against one by other people (or even by oneself) in such a way that one's life was ruined by misplaced resentment or regret. Yet they refused

to admit that one's life might already have been ruined – or even so much as blemished - by the mere fact that one performed such a deed (and hence they refused to admit that the resentment or regret in question might *not* be entirely misplaced). They refused, in sum, to leave logical space for the classical idea of the tragic, which is the idea of a life unluckily blemished by wrongful actions that were performed without the slightest rational error, and may even have been rationally inescapable.[9]

My own view, you will not be surprised to hear, is that the elimination of this classical category of the tragic, and the concomitant embrace of the closure view of wrongdoing, was a major mistake in the history of moral philosophy.[10] This is obviously not the place to do the detailed work necessary to bear this claim out. So let me instead conclude this brief survey by returning to the more familiar concerns of criminal lawyers.

Lawyers may protest that it is one thing to hold, with Aristotle and Æschylus, that justified wrongdoing still leaves some kind of blemish on the wrongdoer's life, but quite another to endow it with normative consequences of the kind that are commonly administered by the law. But the two cannot be prized apart. I don't mean, of course, that people should be exposed to *punishment* for their justified wrongs. There are, however, many types of normative consequences apart from

[9] The leading study of this idea, tracking it through a great deal of ancient literature and philosophy, is Martha Nussbaum's *The Fragility of Goodness* (Cambridge 1986). Her analysis of Aristotle's examples from myth and history, at 327-342, is particularly choice.

[10] In his recent book *Punishment, Responsibility and Justice: A Relational Critique* (Oxford 2000), Alan Norrie mounts a many-pronged, and often penetrating, attack what he calls the 'Kantian character' of criminal-law thinking. However when he comes to my critique of the closure view of wrongdoing, he suddenly and without warning changes sides and claims, against me, that 'if [a reason] is defeated then it is indeed undermined, and … cancelled' (at 153). If Norrie is right about this then the power of reason to overcome the adversity of human life is given a massive boost. It is hard to imagine a more Kantian dream, or a more surprising author to be dreaming it.

liability to punishment, including a duty to show regret, to apologize, to make restitution, to provide reparation, and so on. These duties often arise in respect of fully justified wrongs. More to the point, so far as criminal lawyers are concerned, the acquisition of a moral duty to offer some justification for what one did is *itself* a normative consequence of doing it. In the institutional setting of the criminal trial different legal systems naturally handle this duty differently. Not all convert it into a legal duty on the defendant to explain himself personally, and not all put the burden of proof for a justification (as opposed to the burden of adducing preliminary evidence) on the defendant's side. Be that as it may, all presuppose that even fully justified wrongdoing has at least one normative consequence. It makes it the wrongdoer's job to offer up what justification she can, as a responsible agent who answers for her own wrongs.

2. Responsibility and excuse

The closure view of wrongdoing deflates, I think mistakenly, the independent significance of justifications. A closely related view deflates the independent significance of *excuses*. In criminal law scholarship, the view I have in mind is associated most closely with J.L. Austin. According to Austin's view, just as offering a so-called 'justification' is really a matter of denying that one did anything wrong, so offering a so-called 'excuse' is really a matter of denying *responsibility* for one's wrongdoing.[11]

[11] J.L. Austin, ' A Plea for Excuses' in his *Philosophical Papers* (Oxford 1961), at 124. Austin's view on this point may also have influenced Hart's treatment of the same topic in a paper written a few months later, viz. 'Legal Responsibility and Excuses' in his *Punishment and Responsibility*, above note 8.

Admittedly it is not an abuse of language to say that those who are excused are not responsible for their wrongs.[12] Like the words 'wrong' and 'wrongdoing', the word 'responsible', applied to an agent, can mean various subtly different things. It sometimes means no more than 'apt to incur adverse normative consequences in the event of wrongdoing'. If treated as basic, this usage yields what I will call the 'remainder' view of responsibility. This view groups together under the heading of 'factors bearing on responsibility' a ragbag of factors that are still effective, even when wrongdoing has been established, to forestall the wrongdoing's adverse normative consequences (meaning, according to context, a liability to be punished, a duty to make reparations or to apologize, etc.). If one believes as I do that establishing wrongdoing in the relevant sense means leaving the question of justification open, then this remainder view of responsibility turns *both* justifications *and* excuses into factors bearing on responsibility. But if one shares Hart's closure view of wrongdoing, according to which establishing wrongdoing already means establishing absence of justification, then the remainder view of responsibility designates excuses but not justifications as factors bearing on responsibility. Combining the closure view of wrongdoing with the remainder view of responsibility, a simple and appealing framework emerges according to which (a) justifications are denials of wrongdoing (b) excuses are denials of responsibility, and (c) wrongdoing and responsibility combine (jointly exhaustively and mutually exclusively) to yield adverse normative consequences such as a liability to be punished for one's wrongs.

I do not know whether Austin himself endorsed the remainder view of responsibility. But he certainly gave succour to it when he characterized excuses as (full or partial) denials of responsibility, which is a seriously misleading characterization.

[12] This fact doubtless weighed heavy for Austin, who was much moved by the thought that 'our common stock of words embodies all the distinctions men have found worth drawing': 'A Plea for Excuses', previous note, at 130.

The most basic problem of the remainder view is apparent on its face. It threatens the role that the concept of responsibility is normally presumed to play in moral and legal argument. The fact that someone is responsible is normally held to play some role in *explaining why* her wrongdoing carries or would carry certain adverse normative consequences for her. But the remainder view of responsibility transparently disables it from doing any more than *asserting that* her wrongdoing carries certain adverse normative consequences for her, never mind why. It is mere placeholder for a residual ragbag of factors and does nothing to explain why those factors are relevant to punishment, reparation, apology, etc. It does not point to anything interesting that these factors have in common apart from the fact that they are all conditions for adverse normative consequences to attach to wrongdoing. This leads one to the suspicion that the use of the word 'responsible' simply to mean 'apt to incur adverse normative consequences in the event of wrongdoing' is a shadow or derivative use. The more basic use must be to designate some independently significant property or set of properties that *make* someone apt to incur such adverse normative consequences.

I have already made one suggestion, in the previous section, for understanding the notion of responsibility compatibly with this constraint. I suggested that responsible agents are those who are in a position to *answer for* their wrongs, or in other words to venture justifications and excuses for what they did. You may object that while this suggestion technically meets the objections to the remainder view, it does so in a supremely unhelpful way. In the first place, it isn't transparent why being in a position to answer for one's wrongs should be thought relevant to anyone's exposure to adverse normative consequences of the kind we are considering. In the second place, it isn't revealed what is supposed to be 'independently significant' about being in this position, i.e. why it matters apart from the fact that it opens the way to adverse normative consequences.

Do these objections bite? I think not. I indicated already what is independently significant about being able and willing to justify what one does. This is none other than being able and willing to explain one's action as a manifestation of one's rational competence. One made no rational error in performing the action - and one cares to explain why.[13] One reveals thereby one's participation in the most basic human goods of reason and speech.[14] Isn't this fact independently significant by any plausible standards? And it is not hard to see how the possession of this distinctively human capacity – or should I say conjunction of capacities - might come to bear on one's exposure to certain adverse normative consequences. For the consequences we have in mind here are all of them of a distinctive kind that *symbolize* one's participation in the basic human goods of reason and speech. It is not as if, because one did wrong, the way is open to just any form of retaliation, preventive detention, quarantine, etc. Rather, the way is open to punishing one, extracting compensation or apology from one, and similar (partly) symbolic transactions, which all address one as a being who grasps and listens to reason rather than a mere object to be manipulated for some other being's good. The latter point naturally needs to have lot of details filled in. Writers on punishment, especially, vary in the extent to which they expect the speech-and-reason-affirming aspect of the practice to dominate it and drive it as opposed to

[13] The fact that being responsible means being in a position both to *have* and to *make* a relevant explanation leads to English criminal law's doctrine of 'unfitness to plead', which grants an acquittal to those who cannot answer for themselves at trial even if they were fully in command of their faculties when the crime was committed. I agree with Antony Duff's view that the acquittal of such people is justified by the fact that - just like those who are acquitted because of mental illness at the time of their crimes - they are not responsible for their crimes: Duff, *Trials and Punishments* (Cambridge 1986), 119ff.

[14] On which see a paper I wrote with Timothy Macklem called 'Reasons, Reasoning, Reasonableness' in J. Coleman and S. Shapiro (eds), *The Oxford Handbook of Jursiprudence and Philosophy of Law* (Oxford 2001).

merely setting constraints on it.[15] That is a subject for a different paper. But the general point is clear.

In two closely connected ways, these observations turn the remainder view of responsibility on its head. According to the remainder view, one's responsibility is something to be regretted and (if possible) avoided. For it is none other than a vulnerability to adverse normative consequences in the event of wrongdoing. Since the consequences are adverse, they are (analytically) to be avoided. But according to the rival view just presented (which is obviously not the *only* rival to the remainder view) one's responsibility is something to be proud of and (if possible) to defend. One's responsibility is closely bound up with the one's humanity, and to have it called into question is, with the best will in the world, degrading.[16] Naturally one may still regret, and seek to avoid, the adverse normative consequences that one's responsibility sometimes brings with it. But the self-respecting way to avoid these is not by denying one's responsibility. Rather it is by offering a justification or an excuse. And this brings us to the second inversion of the remainder view. On the view I sketched, unlike the remainder view, offering an excuse is not a way of denying, but rather a way of *asserting*, one's responsibility. For having an excuse, like having a justification, is by its nature an affirmation of one's rational competence. Both justifications and excuses are rational explanations for wrongdoing. They

[15] Antony Duff's recent book *Punishment, Communication and Community* (New York 2001) is the most sustained and dramatic available rendition of the 'dominate and drive' view. Personally, however, I lean towards the less exciting 'constraint' view. See my 'Bemerkungen zu den Functionen und Rechtfertigungen von Strafrecht und Strafe', in Nils Jareborg, Andrew von Hirsch and Bernard Schünemann (eds), *Positive Generalprävention als letzte Auskunft oder letzte Verlegenheit det Straftheorie* (Heidelberg 1998).

[16] I say 'with the best will in the world' because people often degrade each other through misplaced attempts to be humane, to make concessions to weakness, etc. See J. Gardner and T Macklem, 'Compassion without Respect? Nine Fallacies in *R* v *Smith*', [2001] *Crim LR* 000.

explain why the agent acted as she did by pointing to reasons that she had at the time of her action.

So what is the difference between them? Writers sometimes lose sight of the distinction between excuses and factors negating responsibility because they are worried about losing sight, otherwise, of the distinction between excuses and justifications. Justifications are rational explanations for wrongdoing. Surely excuses must be non-rational ones? This neglects the fact that there are two kinds of rational explanations for wrongdoing. A rational explanation is a justificatory one to the extent that it cites reasons that the agent had *for doing whatever she did*. It points to features of her situation that militated in favour of the action she took. An excusatory explanation falls short of this. It relies on reasons the agent had *for thinking* that she had reasons to do as she did, or reasons she had *for being inclined or inspired or driven* (etc.) to do as she did. Excuses point to features of one's situation that do not militate in favour of the action one took, but nevertheless *do* militate in favour of the beliefs or emotions or attitudes (etc.) on the strength of which one took that action.[17] The defendant did not have reason to kill her husband, for instance, but she certainly had reason to be so terrified by his obnoxious behaviour that night that she was driven to kill him. The action is excused thanks to the fact that it was performed on the strength of justified terror. The element of justification is still there, notice, but at one remove from the action. In that respect the explanation remains rational, and the agent who offers it claims rational competence. And this, in turn, is where an excuse differs fundamentally from a denial of responsibility. One can imagine a terror that is not explained by any features of one's situation. One's terror is in no way lessened when one has less to be terrified of and one knows it. If one kills in the grip of this terror then one has left the realm of excuses behind, let alone the realm

[17] Strictly speaking this covers only character-based excuses and not skill-based excuses, which focus on the way in which the action was approached.

of justifications. For not only the killing but even the terror itself is no longer apt to be rationally explained. One can only explain it pathologically, as an affliction. In the process one casts doubt – most regrettably - on one's responsibility for one's actions.

The same Enlightenment turn of thought that I mentioned earlier as lending credence to the closure view of wrongdoing also tends to obscure the basic difference in point of rationality on which the distinction between justifications and excuses turns. Recall that Kant and the utilitarians shared a misplaced optimism about the extent to which perfection of our rational faculties would entail perfection of our lives. This has given rise in many quarters to a related optimism about the extent to which perfection of our theoretical rationality entails perfection of our practical rationality. If there could be cases in which it would be perfectly rational to ϕ and yet perfectly rational to conclude that it would not be rational to ϕ, that would raise the spectre of our lives being blemished by wrongdoing without our being able to prevent its being so blemished by even the most impeccable conceivable exercise of our rational faculties. Our practical rationality is, after all, epistemically bounded. We can only act on reasons that we are aware of and (*qua* rational) we can only be aware of reasons that we have reason to be aware of. To bring the blemishing of our lives by wrongdoing back under our rational control what is needed, the story goes, is some epistemic tweak built into the very fabric of practical rationality, such that those who act on what they rationally hold to be the balance of reasons should be regarded as acting on the balance of reasons (and as doing no wrong). Or something like that. Again you will not be surprised to learn that I regard this tweaking as a serious mistake. It is one thing to have a reason to defend oneself and quite another to have every reason to believe one has a reason to defend oneself that in reality one does not have (e.g. because one has strayed accidentally and without any warning onto the set of an action movie). The first opens the way to justifying one's act of self-defence. The second opens the way to excusing it. Thus,

sometimes, even though we are epistemically faultless, we cannot be aware of what we would need to be aware of in order to perform a justified action. In that case the most we can hope for is an excuse. That takes us down a peg, morally speaking, because although it testifies to our rational competence, it also points to a rational error. We acted for a non-existent reason, albeit one that we were justified in holding to exist.

3. Jareborg's ladder

According to the picture I have sketched – which I believe applies as much in the criminal law context as in other contexts of moral thinking - it is best of all if we commit no wrongs. If we cannot but commit wrongs, it is best if we commit them with justification. Failing justification, it is best if we have an excuse. The worst case is the one in which we must cast doubt on our own responsibility. When I say 'best' and 'worst' here I mean best and worst for us: for the course of our own lives and for our integrity as people. So far as avoiding liability to punishment is concerned, denials of wrongdoing, justifications, excuses and denials of responsibility may all in principle be as good as each other. Lawyers sometimes say that this makes them all as good as each other 'in practice'. But the lawyer's idea of 'practice' here is distorted. We should care not only about limiting our liabilities but also about the kind of argument that we rely upon to avoid those liabilities. That has been my main thesis.

This thesis owes much to Nils Jareborg, whose typically modest and unpretentious essay 'Justification and Excuse in Swedish Criminal Law' influenced me greatly when I first read it some years ago.[18] Although he quotes without dissent (or indeed comment) a passage from Hart in which the closure view of wrongdoing is espoused and a passage from Austin encouraging

[18] In Jareborg, *Essays in Criminal Law* (Uppsala 1993).

the remainder view of responsibility, Jareborg himself does not seem to endorse either view. On the contrary, he writes:

> If it is important to distinguish between
>
> > (a) a deed is criminalized, but not unlawful (because it is justified); and
> >
> > (b) a deed is unlawful, but not a crime (because the actor is excused)
>
> it is even more important to distinguish between
>
> > (1) an unlawful deed is not a crime (because the actor is excused); and
> >
> > (2) an unlawful deed is a crime, but the actor cannot legally be punished.[19]

I do not agree with the way that Jareborg allocates certain specific criminal defences to these various categories. For instance, he promptly allocates mental incapacity to the 'excuse' category, when (to my way of thinking) it belongs to the 'cannot legally be punished' category. But Jareborg's general structure strikes me, all the same, as absolutely correct. Excising the specialized criminal lawyer's terminology: it is important to distinguish between actions that are not wrong at all, and actions that are wrong but justified; between actions that are wrong but justified and those that are wrong and unjustified but excused; and between unjustified but excused wrongs and those which are neither justified not excused but are nevertheless not punishable. The last category includes, but is broader than, the category of wrongs which are committed without responsibility. It also includes some specifically *legal* or *institutional* defences such as diplomatic immunity, abuse of process, etc. Thus one could

[19] Ibid, at 13.

usefully subdivide Jareborg's final contrast (2) into two parts: (2a) an unlawful deed is a crime but the actor is not responsible; and (2b) an unlawful deed is a crime, and the actor is responsible, yet he or she enjoys protection against prosecution or conviction. I have not said anything here about the (2b) defences, which raise fascinating problems of their own. However I have said a few things, I hope usefully, about all of Jareborg's other classes of defences. In particular, I have tried to explain why, as Jareborg says, it is important to distinguish between them - even when the distinctions do not make a 'practical' difference according to the impoverished lawyer's perception of practicality.