

The Gist of Excuses

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It is often said that the criminal law judges actions, not character. That is true, but misleading. It is true that, barring certain exceptional and troubling examples, crimes are actions, and being a crime is therefore a property of actions.¹ Nevertheless, the criminality of an action frequently falls to be determined, in part, according to *standards of character* – according to standards of courage, carefulness, honesty, self-discipline, diligence, humanity, good will, and so forth. Nobody can be a thief in English law, for instance, unless she acts dishonestly.² There is, to be sure, a difference between asking whether the accused acted dishonestly, and asking whether she is dishonest. She is dishonest if and only if she tends to act dishonestly. In other words, judging a person dishonest has a diachronic aspect which judging an action dishonest lacks. But apart from this diachronic aspect, the standard by which we judge a person dishonest is exactly the same standard as that by which we judge an action dishonest. It is a standard of character, a standard which bears not only on what is done, but also on the spirit in which and reason for which it is done. The mere fact that I did something that a dishonest person might do – for example, pocketed someone else's cash without asking – does not entail that I am dishonest, and nor, by the same token, does it entail that I acted dishonestly. If I pocketed the cash to save the owner from an

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¹ The exceptional and troubling examples I have in mind are examples of status crimes such as those in *R v Larsonneur* (1933) 24 Cr App Rep 74 and *Robinson v California* 370 US 660, 82 S Ct 1417, 8 L Ed 758 (1966). Crimes of possession are on the borderline between action crimes and status crimes, and present some but not all of the same problems. Michael Moore thinks that crimes of omission are also troubling exceptions: M.S. MOORE, *ACT AND CRIME* (1994), 22–34. I do not share this view and when I speak of actions in the text I always mean to include omissions.

² Theft Act 1968 s1.

embarrassing revelation, or as part of a complex practical joke, or in the belief that the cash was left out for me, or even just absent-mindedly, then pocketing the cash was, other things being equal,³ not a dishonest action any more than it was the action of a dishonest person. It may have been meddlesome, or puerile, or presumptuous, or thoughtless. But those judgments invoke quite different standards of character, depending on quite different configurations of reason and spirit, from the dishonesty standard specified for the identification of a thief in English law.

This example shows that, sometimes, standards of character figure in the criminal law because they are built into the definitions of particular criminal offences, i.e. they are part of what makes an action wrongful in the eyes of the criminal law. They also figure separately, however, in many of the criminal law's *excusatory* doctrines. Now a link between character and excuse has often been forged by those interested in the philosophical foundations of the criminal law. On one familiar view, sometimes called the "Humean" view, we should grant an excuse to somebody in respect of what he did if and only if what he did was no manifestation of his character.⁴ This view proceeds from the sound thought that excuses matter because a person's excused actions do not reflect badly on him – do not show him, personally, in a bad light. That being so, the thinking goes, an excuse must be something that blocks the path from an adverse judgment about an action to a correspondingly adverse judgment about the person whose action it is. The action is cowardly, say, but since this person does not otherwise tend towards cowardly actions, she herself is no coward. Her cowardly action is "out of character". And that, according to the Humean view, is the gist of excuses. But there is a good deal of confusion in this line of

³ I say "other things being equal" only to anticipate the objections (1) that many people have mixed motives and (2) that even without mixed motives pocketing cash to save someone from embarrassment might be dishonest under another description, e.g. as a concealment of the truth.

⁴ Paul Helm, *Hume on Exculpation*, PHILOSOPHY 42 (1967), 268; Michael D. Bayles, *Character, Purpose and Criminal Responsibility*, LAW AND PHILOSOPHY 1 (1982), 5. That Hume is truly committed to this view is doubted by John Bricke in *Hume, Freedom to Act, and Personal Evaluation*, HISTORY OF PHILOSOPHY QUARTERLY 5 (1988), 141.

thought. For there is no such thing as a cowardly action which does not show its agent in a cowardly light. It is true that a cowardly light may be a rather unflattering light; as I accepted already, one cowardly action does not make a coward. But an unflattering light is not the same as a false light. In my cowardly action, by definition, I manifest at least the *beginnings* of a cowardly tendency, the *stirrings* of cowardice. By “manifest” here I do not mean that my cowardly action is mere evidence of some condition called cowardice hidden within me, evidence which may ultimately be discounted for want of corroboration. Cowards are no more and no less than people who tend to perform cowardly actions. Their cowardly actions add up to *constitute*, not to evidence, their cowardice.⁵ Thus even if this cowardly action is my first, and is quite unprecedented, it necessarily counts constitutively and not merely evidentially against me whenever, thereafter, the question arises of whether I am a coward. And that is exactly what it means to say that my cowardly actions show me in a cowardly light. It follows that the Humean view unravels. If my excused actions do not show me in a cowardly light, they cannot, after all, be cowardly actions. That they are excused cannot therefore block the path from the judgment that I did something cowardly to the judgment that I am a coward. The excuse must intervene earlier to forestall the original judgment that this was a cowardly action. Supporters of the Humean view may object that this makes no sense, since if my action was not cowardly after all then I scarcely need to make an excuse for it. What have I left to excuse? But that question betrays another confusion. I need to make an excuse for my action because it is wrongful. As criminal lawyers are usually the first to point out, the wrongfulness of an action is not

⁵ Michael Moore rejects this “dispositional” conception of character on the ground that it “doesn’t say much about the person whose character it is”: Moore, *Choice, Character, and Excuse*, SOCIAL PHILOSOPHY AND POLICY 7 (1990), 29 at 42. But that is no objection. By definition, whatever view of character is sound says as much about the person, in the dimension of character, as there is to be said. Moore’s worry cannot be that the dispositional conception doesn’t say enough about the person, but rather that it portrays the person to be, in at least one dimension, a less substantial entity than he imagined it to be. And that is not surprising, since the person is a less substantial entity than most people imagine it to be.

comprehensively or invariably dictated by character standards. That point holds both in the law and outside the law. Even morally speaking, it is perfectly possible for actions to be admirable at the same time as wrongful, i.e. to be things that should not have been done, whether prima-facie or all-things-considered, but which cast the person who did them in a favourable light.⁶ *A fortiori* there can be things that should not have been done, whether prima-facie or all-things-considered, but which do not cast the person who did them in an *unfavourable* light, but at worst an indifferent light. And that is precisely the equilibrium which a valid excuse, whether inside or outside the law, establishes.

So the gist of an excuse is not that the action was “out of character”, in the sense of being a departure from what we have come to expect from the person whose action it is.⁷ Quite the contrary, in fact. The gist of an excuse, as I will try to explain, is precisely that the person with the excuse lived up to our expectations. On first encounter, this claim may give the misleading impression that people’s wrongful actions are excused so long as they continue to live up to the character standards that they have always lived up to, however appalling. One may have an image of someone excusing themselves by saying: “I’ve always been spiteful and malicious, so how did you expect me to behave?” Being spiteful and malicious is, of course, no excuse for anything. Pointing to the spite and malice in one’s wrongful actions is asserting, not denying, that these actions cast one in a bad light. So the question, for excusatory purposes, is obviously not whether the person claiming the excuse lived up to expectations in the predictive sense of being true to form or true to type or

⁶ For argument, see MICHAEL SLOTE, *GOODS AND VIRTUES* (1983), 77–107; DEREK PARFIT, *REASONS AND PERSONS* (1984), 31–35; MICHAEL STOCKER, *PLURAL AND CONFLICTING VALUES* (1990), 37–50.

⁷ That a person acted “out of character” may, if accompanied by the appropriate sense of guilt or remorse, be a reason for forgiving her or showing her mercy, things which criminal courts often do at the sentencing stage of the criminal trial. But those whose actions are excused do not need any forgiveness or mercy, so this issue need not be explored here. For exploration of this and several related issues, see JEFFRIE G MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY*, (1988).

even true to our disappointing experience of human beings in general. The question is whether that person lived up to expectations in the *normative* sense. Did she manifest as much resilience, or loyalty, or thoroughness, or presence of mind as a person in her situation should have manifested? In the face of terrible threats, for example, did this person show as much fortitude as someone in his situation could properly be asked to show? In the face of constant taunts, did this person exhibit as much self-restraint as we have a right to demand of someone in her situation? The character standards which are relevant to these and other excuses are not the standards of our own characters, nor even the standards of most people's characters, but rather the standards to which our characters should, minimally, conform.

This word "minimally" here may lead one to suppose that we are talking of uniform normative expectations – that the same basic standard of self-restraint or fortitude is the excusatory standard for all of us. But that is not so. Different people are subject to different normative expectations when their excuses are assessed. Imagine, for example, a young and inexperienced soldier operating a checkpoint in some troubled frontier zone, who has been warned that the intelligence services expect such a checkpoint to come under terrorist attack today. Already on edge, he misinterprets some motorist's actions – he thinks she was going for a gun, say, when she was only reaching for her car documents – and kills her with one panic-stricken shot.⁸ There are various aspects of this situation which may attract our attention when we think about the soldier's possible excuses for this (as we will assume) wrongful killing. One is that he is young and inexperienced. There is a view of excuses, sometimes (mistakenly) labelled "Kantian", according to which the standards of character applicable to an excuse are relativised to the *capacities* of the person claiming the

⁸ The scenario is loosely based on that in *R v Clegg* [1995] 1 All ER 334, where the legal issue was the availability of an excusatory defence to murder for those, particularly soldiers, who kill in mistaken or excessive self-defence. In that case the victim of the shooting was complicitous in venal wrongdoing. This together with the political context (the sectarian conflict in Northern Ireland) created distractions which I have stripped out of my own example.

excuse.⁹ The soldier in our example does not react with the kind of level-headedness which some soldiers might have exhibited. But being young and inexperienced, the thinking goes, he may not have been *capable* of that more mature degree of level-headedness. One has to imagine how working in this troubled frontier zone, under constant tension and at constant risk, might have affected one so young and new to the job, and how his capacity for keeping a level head might have been affected by this. This is not the same, adherents of the “Kantian” view would stress, as relying on mere predictions of how our soldier will stand up under pressure. Our soldier’s excuse is not validated by the standards of level-headedness which he tends to live up to, so that he can excuse himself by saying: I’ve always been a bit of a panicker, so what did you expect? Rather, the assumption in the so-called “Kantian” view is that people may have in principle the capacity – the inner resources, if you like – to live up to standards of character higher than those which they do live up to. It is that capacity, thought to vary from person to person and indeed possibly within one person from one phase of her life to the next, which places a cap on our normative expectations of people when we come to consider their excuses. Thus whether the terrorist threat which was imagined to be posed by the motorist in our example excuses what our soldier did depends, among other things, on whether, in shooting her dead, he showed as much level-headedness as he was capable of showing in the circumstances.

The supposed relationship between a virtue and the capacity for it needs a good deal of explanation if this view is to make sense. True, just because we are human beings, every one of us has the capacity to *develop* new virtues by learning to recognise different rationally-

⁹ Bayles, *Character, Purpose, and Criminal Responsibility*, *supra* note 4; NICOLA LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES (1988), at 63. That Kant did not and could not have subscribed to any such view is apparent from the following passage in THE DOCTRINE OF VIRTUE (ed. Gregor 1964) at 66: “We must not determine ethical duties according to our estimate of man’s power to fulfil the [moral] law; on the contrary we must estimate man’s power by the standard of the law, which commands categorically. Hence we must appraise this power on the basis of our rational knowledge of what men should be in keeping with the Idea of Humanity, not on the basis of our empirical knowledge of men as they are.”

significant features of situations and respond to them in our actions by acting, in a suitably positive spirit, on the reasons they give. But that is not the capacity that the so-called “Kantian” view is concerned with. It is not concerned with a capacity I might have at time t to develop virtues by time $t+1$, but with a capacity I might have at time t to act more virtuously at time t than I do in fact act at time t . Could there be any such capacity? That people *do* act “out of character”, and sometimes for better rather than for worse, cannot be doubted. Someone who never showed any heroic tendency in her life may, in some extreme situation, perform an act of great courage. And if she does do so, then necessarily she *can*. The real question is what sense it makes to think of this “can” as the “can” of capacity rather than merely the “can” of possibility. Given the march of technology, I may one day enjoy the possibility of flying to the moon. But I will never enjoy the *capacity* to fly to the moon, because the fact that I can fly to the moon will never be owed to anything *about me*. Instead my flying to the moon will exploit the capacities of others, e.g. engineers and spaceship commanders. They are the ones with the array of qualities – in this case, skills as well as virtues – that will get me to the moon.¹⁰ Now courage is undoubtedly one of those qualities. Being courageous means that one has capacities that one would not otherwise have, such as the capacity to be a spaceship commander. That is because courage gives one the capacity to act courageously, and spaceship commanders, among others, need that capacity to be fit for their job. The question we are facing here is whether someone who is *not* courageous may nonetheless have that same capacity to act courageously. I must admit to finding the whole idea baffling. The reason is that I cannot see how someone with that capacity could fail to have the corresponding tendency. Someone may say that he understands the world just as the courageous person understands it, and yet somehow does not manage, by and large, to put this understanding into practice. His inclination towards

¹⁰ This is perhaps a suitable place to make clear, for the sake of completeness, that some excuses invoke technical standards rather than standards of character. Although these excuses differ in certain ways from those under discussion here, their gist mirrors that of the excuses under discussion here: that the person who has them lived up to expectations in respect of her skill.

self-preservation often gets the better of him. To which my reply would be that in that case he is kidding himself if he thinks he understands the world just as the courageous person understands it. For a person who sees the world through genuinely courageous eyes, there is nothing to “manage”, no question of putting anything “into practice”, no room for any motivational obstruction between understanding why a situation calls for courage and acting courageously. If one sees the world through genuinely courageous eyes one does not see danger to oneself the way that more cowardly people see it, as a threat, but rather as a challenge, something which, up to a point, one inclines towards rather than away from. Up to that point, one therefore has no inclination to overcome, no will-power to exercise. One looks with bewilderment upon those who hold back and say they’re too scared to act. How, one asks oneself, can they so comprehensively miss the point? And how, to return our question, can such people ever be thought to have a *capacity* for courage when, in their actions, they manifest nothing at all of the courageous mentality – when they admittedly do not share in the spirit of the courageous person, and therefore cannot be seeing the world as the courageous person sees it? Perhaps, like most people, they have the capacity to learn to be more courageous by being faced with fearful situations which put the trivial fears of their lives to date in perspective. Or perhaps one day they will simply act courageously, quite out of character – we human beings have an unpredictable side to us. But the idea that right now, as they shrink back, some of these people might already have the capacity for courage – that idea makes no sense. Right now, these people have no relationship to courage except a palpable lack of it. It follows that the standard of courage which they must show if they are to benefit from an excuse cannot be the standard of their own extant capacity for it. Because, in spite of what adherents of the so-called “Kantian” view say, that standard does reduce straightforwardly to the standard of purely predictive expectation, the standard of character which those making the excuse already meet. That is because the extent of someone’s capacity for courageous action at time t is no more and no less than the extent of her courage at time t . Apart from that courage, there is no further something about her, at time t , which can intelligibly be described as a capacity for acting courageously

at that time. There is, in respect of truly courageous action, no further variety of “inner resources” anyone could ever intelligibly be said to have.

Now it may be said that level-headedness, the virtue which is at stake in the case of our young soldier, differs from courage in precisely this respect. It may be said that it belongs, alongside self-discipline and self-restraint, to a family of virtues characterised by motivational conflict. On this view the spirit of level-headedness is not the positive I-can-cope-with-this, I-just-look-danger-in-the-eye spirit of the courageous, but an unstable teeth-gritted, whatever-I-do-I-must-stay-calm sense of apprehension and self-doubt. The level-headed person has a strong inclination to act in a panicky way, the story goes, which he controls only by sheer will-power. Therefore apart from the question of whether our soldier is sufficiently level-headed there is also the question of whether he has sufficient will-power, i.e. a sufficient capacity, to be any more level-headed than he is in such a situation. Personally, I doubt whether the virtue of level-headedness belongs to any such family of virtues or comprises any of these features, which strike me as the features of someone who is very far from level-headed. In fact, I think this is the non-level-headed person’s stilted view of what life as a level-headed person might be like. But even if level-headedness were like this, those who rely on this fact when defending the so-called “Kantian” view of excuses merely expose that view to deeper doubts in the process. They may rely on the fact that our soldier had limited will-power to suggest that our expectations of him in the dimension of level-headedness should be limited. But then they instantly face the question of why our expectations of him *in the dimension of will-power itself* should not exceed the standards which he currently meets in that dimension. Why, having been denied the excuse “I’ve always been a bit of a panicker, so what did you expect?” should he nevertheless be granted the excuse “I’ve always had a bit of a problem with will-power, so what did you expect?” Is there something about lack of will-power such that it doesn’t show people in a bad light in the way that lack of courage or lack of level-headedness does?

Not for the real Kant, and not for the rest of us. If it makes any sense to say that our soldier was as level-headed as he was capable of being, as distinct from merely being as

level-headed as he was, then it is always a possible answer to his purported excuse that *he simply should have had a greater capacity for level-headedness*. And when we ask “by what standards should his capacity have been greater?” our excusatory focus naturally switches from the fact that he was young and inexperienced to the fact that he was a soldier in a troubled frontier zone. Why, of course – he should have had the capacity that a soldier in a troubled frontier zone should have had. His excuse, when he wrongly shoots the motorist, should be structured by normative expectations which are in turn structured by his role as a soldier. A soldier should be more level-headed than most (and therefore, if that really is something different, needs a greater capacity for level-headedness than most), because coping with tension and threats and emergencies is the soldier’s stock-in-trade. A soldier who tends to panic is unfit to be a soldier. It is true, of course, that a junior soldier may not properly be expected to meet quite the same standards of level-headedness as, say, his platoon sergeant, and a rookie junior soldier perhaps *a fortiori*. But this has nothing to do with any capacity or incapacity the rookie soldier may have, at this early stage, to meet the higher standards of level-headedness which will later be expected of him. It has to do with the fact that the role of a soldier changes with rank and with training. The process of learning to be a soldier is partly the process of learning to be more level-headed than one might otherwise have been, of learning to see how the world looks without the clouding presence of panic. Thus not even all soldiers, let alone all people, are subject to exactly the same normative expectations so far as their level-headedness is concerned. But nevertheless for each soldier and for each person the relevant normative expectations, *including expectations of capacity itself*, vary not according to capacity but according to role. Someone who tries to excuse her betrayals of her friends in the face of threats or other pressures to betray has his excuses judged by the standards of loyalty applicable to friendship, and if she is incapable of such loyalty (or, in my plainer terms, if she is not loyal enough) then that only goes to show that she is unfit for friendship, unfit to call herself a friend. A mountaineer who tries to excuse his cutting of the ropes between himself and his colleague when the link puts him in danger, even though the cutting of it may put his colleague in comparable danger, has his excuses judged

by the standards of dependability befitting mountaineers, and if there is something about him which means that he cannot be that dependable (or, in my plainer terms, if he is not dependable enough) then that confirms, rather than denies, that he is unfit to join a mountaineering expedition.

Those still in the thrall of the supposedly “Kantian” view of excuses are bound to balk at the implication, in this alternative and broadly Aristotelian view of mine, of an automatic correlation between being unfit for the role one occupies and being shown in a bad light. Doesn’t this depend, they are sure to ask, on the soundness of the earlier claim that we all have the capacity to *develop* virtues and skills which would make us fit for the lives we lead, so that those who do not are being caught by some fallback doctrine of prior fault?¹¹ If it turned out that somebody could *never have become* fit to be a soldier, or a friend, or a mountaineer, then would it still be true that her unfitness to be one reflects badly upon her now that she is one? These questions comprehensively – I would say almost wilfully – miss the point. That our actions exhibit our unfitness for the role we are occupying, or more broadly the life we are leading, is just what it *means* for our actions to reflect badly on us. As I have just been trying to convey, there is no further question of whether our unfitness, in turn, reflects badly on us. There are, fundamentally, two closely related things that matter about our relationship with the life we lead, and the roles which go to make it up. The first is that we do not fail in those roles, that we do not do things which people in those roles should not do – that we do not betray our friends, trip up our fellow-athletes, misdiagnose our patients’ ailments. The second is that we are fit for those roles, that we

¹¹ Many people describe the Aristotelian view as depending on this, which shows only that they have preoccupations quite different from Aristotle’s own. See, e.g., Edmund L. Pincoffs, *Legal Responsibility and Moral Character*, WAYNE LAW REVIEW 19 (1973), 905; Michael Moore, *Choice, Character and Excuse*, *supra* note 5, at 45–6. Aristotle did hold that all people have the capacity to develop virtues and skills, but the importance of the point was not, in his mind, that if it were the case that they never had this capacity they would be excused, or in some other way exonerated, in respect of their later vicious actions. That these are vicious actions is enough *automatically* to preempt any such excuse, however the viciousness may have arisen: NICOMACHEAN ETHICS, 1113^b3-22.

have the qualities (the virtues, skills, and tastes, as well as the physical and mental constitution) which people in those roles should have – that we are loyal friends, fair-minded (as well as powerful) athletes, thorough (as well as expert) doctors. As my list of examples brings out, our fitness regulates, up to a point, our prospect of failure. That we have the right qualities for our role contributes to our not doing the wrong thing, either constitutively (where the wrong thing is partly defined in terms of standards of character, skill, etc.) or at any rate instrumentally (where meeting a relevant standard of character, skill etc. makes our doing the wrong thing less likely). Nevertheless, fitness and the avoidance of failure do not inevitably go hand-in-hand. I already mentioned the possibility of admirable wrongdoing – of actions which should not have been done but which reflect favourably on the person who did them. Such actions – the thoughtful act which back-fires and causes offence, the act of solicitousness for one’s children which only brings out the worst in them – yield examples of failure in spite of fitness. Conversely, there are examples of unfitness without failure – police officers who treat suspects properly but are grudging about it, athletes who never cheat but only because they fear disqualification. But in all this the question of whether and how one’s actions reflect upon one *just is* the question of whether they point to one’s fitness or unfitness for whatever role one is occupying, for whatever life one is leading. So valid excuses, which prevent one’s wrong actions from reflecting badly upon one, cannot conceivably invoke standards of character (or for that matter standards of skill or taste or physical or intellectual fitness) which fall short of the standards of fitness for the role in which, by doing the wrong thing, one failed. In particular, those standards cannot be capped according to the capacities (be they past, present, or even future) of the person to whom the excuse is supposed to apply. For such incapacity, far from militating against unfitness, is a mode of unfitness in its own right.

Now of course there are some people whose incapacity goes very deep – taking them, in some or all of what they do, beyond the realm in which talk of the occupation of roles and the application of the standards of fitness for those roles makes any sense. Of these people we say that they are not responsible for their actions. One of the biggest sources of

confusion in the study of excuses lies in the thought that those who make excuses are thereby denying their responsibility for their actions.¹² This thought is nourished by one of the many ambiguities of the word “responsible”.¹³ In one sense, being responsible for what was done means bearing the adverse normative consequences of its having been done. Many people who make excuses, for example those who make them in a criminal court, are denying that they should bear responsibility in this sense. But they are not denying their responsibility in a second sense, which is normally, and certainly in any legitimate criminal court, a precondition of responsibility in the first sense. By making excuses people are, on the contrary, *asserting* their responsibility in this second sense. For being responsible in this sense – being responsible for our actions – is none other than being in that condition in which our actions are amenable, in principle, to justification and excuse.¹⁴ Justifications and excuses are available only to those whose actions have intelligible rational explanations, i.e. whose actions properly reflected reasons for action that they took themselves to have, and this is the basic condition of our responsibility for our actions.¹⁵ It is met by our young

¹² Among many examples: J.L. Austin, *A Plea for Excuses*, in AUSTIN, PHILOSOPHICAL PAPERS (1961), 123 at 124; ERIC D’ARCY, HUMAN ACTS (1965), 85; GEORGE FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT (1996), 104–5.

¹³ The classic taxonomy of different senses of this word is H.L.A. Hart, *Varieties of Responsibility*, LAW QUARTERLY REVIEW 83 (1967), 346. The two senses I am about to distinguish correspond, respectively, to Hart’s “liability responsibility” and his “capacity responsibility”, although his definitions depart from mine at certain points.

¹⁴ And in which, I should add for the sake of completeness, we are also in a fit state to *offer* justification or excuse. When the question arises of whether we are responsible for our actions, attention must be paid to our condition at two separate stages – first at the time of the action which is under scrutiny, and secondly at the time of its evaluation, e.g. when the case comes to court. The basic idea of responsibility (also known as accountability) is the etymologically undemanding one of an ability to respond to accusations, being in a position to account for one’s actions: J.R. LUCAS, RESPONSIBILITY (1993), 5–12.

¹⁵ I have tried to explain justifications, and their relationship to excuses, in Gardner, *Justifications and Reasons*, in A.T.H. SMITH AND A.P. SIMESTER (eds.), HARM AND CULPABILITY (1996).

soldier, who, even in his panic, took himself to be facing a terrorist who was going for a gun, and who shot her in what he incorrectly took to be an act of self-defence. It is similarly met by those who commit wrongs under duress or provocation. They believe the threats or taunts they are facing to be reasons for them to do as they do, and they intelligibly, even if quite mistakenly, do what they do for those reasons. It is sometimes hinted that this element of rational intelligibility is all that it takes to ground an excuse. If only we can *make sense of* what someone did in the light of the reasons she took herself to have for doing it, then can't we by that token excuse her for doing it? The answer is that, of course, we can't, because even when we have made sense of the reasons on which someone acted, on any credible view we still have to *assess* her reasons, as well as the spirit in which she acted, according to the applicable standards of character. But the focus on making sense of people's actions in the light of their reasons rightly brings to the surface the important point that those whose reasoning *can't* be made sense of in this way, whether because of profound mental illness or infancy or sleepwalking or (on some interpretations of it) post-hypnotic suggestion, are not responsible for their actions and therefore need no excuses for what they do. And of course this means that there is a sense in which one very specific and deep-seated incapacity – namely, the incapacity to reason intelligibly through to action – can place a cap on the standards of character by which one is judged when one makes an excuse. It places that cap by extinguishing the need for one to rely on excuses altogether. But it does not follow that when one does need to rely on excuses, one can enjoy an analogous cap based on one's *other* incapacities. For the analogy is false, since now one is not denying one's responsibility for one's actions, but asserting it instead.

Even once one has understood this contrast between denials of responsibility and excuses, it is easy to underestimate its importance. Criminal lawyers, in particular, tend to be fixated with responsibility in the first sense I mentioned, and tend to take it for granted that any doctrine that serves to acquit the accused, and therefore to avert the adverse normative consequences of her action, is as good as any other so far as the accused is concerned. I have always found this an astonishing assumption, which implies that nobody

who is tried in the criminal courts has, or even deserves to have, any self-respect. Self-respect is an attitude which everyone ought to have if they deserve it, and which, moreover, everyone ought to deserve. The self-respecting person aspires to live up to the proper standards for success in and fitness for the life she leads, and holds herself out to be judged by those standards. It follows that it is part of the nature of self-respect that a self-respecting person wants to be able to give an intelligible rational account of herself, to be able to show that her actions were the actions of someone who aspired to live up to the proper standards for success in her life and fitness to lead it.¹⁶ She wants it to be the case that her actions were not truly wrongful, or if they were wrongful, that they were at any rate justified, or if they were not justified, that they were at any rate excused. A denial of responsibility rules all of this out, and that is, accordingly, the line of defence which counts as an admission of defeat for any self-respecting person.

The point can be nicely illustrated by comparing the defences of provocation and diminished responsibility which are found side-by-side in the modern English legislation on homicide, and both of which, if successfully pleaded, have the effect of substituting a manslaughter conviction for a murder conviction.¹⁷ To those who have complained of deficiencies in the provocation defence, which is quite tightly circumscribed, it is sometimes said that they could always rely on the more loosely drawn diminished responsibility defence instead. If your long history as a victim of domestic violence was not allowed to affect the assessment of how gravely you had been provoked by your violent partner when you killed him, well why not say instead that your “battered woman syndrome” left you with diminished responsibility for your actions?¹⁸ After all, it surely

¹⁶ In this explanation I have been influenced by Stephen Darwall, *Two Kinds of Respect*, ETHICS 88 (1977), 36 and Joseph Raz, *Liberating Duties*, LAW AND PHILOSOPHY 8 (1989), 3.

¹⁷ Homicide Act 1957, ss 2 and 3.

¹⁸ See e.g. R v Thornton [1992] 1 All ER 306 at 315–6, per Beldam LJ. The label “battered woman syndrome” was coined in LENORE WALKER, THE BATTERED WOMAN SYNDROME (1984) and is now frequently used in English-speaking courts.

comes to the same thing in the end. But it does not come to the same thing at all.¹⁹ The whole point of the diminished responsibility defence is that it depends on the *unreasonableness* of the defendant's reactions, i.e. their unamenability to intelligible rational explanation. "Why would anyone have done that? It makes no sense. It must be some pathological condition, some kind of 'battered woman syndrome'." The whole point of the provocation defence, on the other hand, is that it depends on the *reasonableness* of the provoked person's reaction to the provocation. "I can see why she did it; she did it because she could see no other escape." "I can see why she did it; she did it because she needed to save some vestige of her dignity before he destroyed it utterly." "I can see why she did it; she did it for the sake of the children, whom she thought would be the next target." Of course intelligible rational explanations like this will not automatically be *sufficient* to make the provocation plea successful – that depends on whether they also meet the relevant normative expectations – but they are certainly *necessary*. Nobody can have a provocation defence without them, but, equally, they cannot have a diminished responsibility defence with them. Faced with the choice, any self-respecting defendant would rather be able to give an intelligible account of herself in rational terms. She would also rather be judged, in the light of that account, by the proper standards of character, skill, taste etc. for the life she leads, not by some standard manipulated to take account of some claimed weakness in her, which only brands her constitutionally unfit for the life she leads, an incapable and pathetic specimen. Any self-respecting person would rather have a provocation defence, in other words, that properly takes account of the scale of the provocation she was subjected to but judges her reactions to that provocation by the proper standards of character applicable to all, as opposed to falling back on a diminished responsibility defence and conceding that those standards of character do not apply to her in the first place.

¹⁹ The following point has been made many times before although its broader implications for the relationship between excuses and responsibility have rarely been appreciated. See, e.g., Phyllis Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, HARVARD WOMEN'S LAW JOURNAL 8 (1985), 121 or ALAN NORRIE, CRIME REASON AND HISTORY (1993), 254.

I said “applicable to all”; but surely, if I am true to my own Aristotelian account of excuses, I must mean “applicable to people in her role”? And what, for these purposes, *is* her role? By exactly which standards of character should the law of provocation, through its reasonableness test, be judging her? Certainly not by the standards of character which determine fitness for being a victim of domestic violence. Since nobody should be a victim of domestic violence, there is no self-respect in living up to any standards of fitness for this role. Nor in living up to standards of fitness for being a killer, by the same token. The standards of fitness for being a parent? A partner? An airline pilot or gas installer (if that is what she also happens to be)? A citizen? The problem seems to be that the broadly Aristotelian view of excuses is role-based, but the modern criminal law is not. Surely we come before the modern criminal law, or if we take all this talk of “equality before the law” seriously we are at any rate supposed to come before it, stripped of our roles, and so subject to the same rules and principles irrespective of the particular kind of life we lead?²⁰ Actually that is far from true when we look at the criminal law as a whole. A large and ever growing body of criminal law today is what academic commentators call “regulatory” criminal law, criminal law that applies to us only in our roles as shopkeepers, householders, social security claimants, witnesses, motorists, parents, waste-disposal contractors, and so forth, and purports to judge our actions, *inter alia*, by standards of character specifically befitting these roles.²¹ But the law of homicide is not part of the regulatory criminal law in this sense. Like the law of theft and the law of assault, it applies to us all, whatever furrows we may plough in life. So shouldn’t the standards of character applicable to it, including those which govern the availability of excuses in it, be uniform? And if so, the question remains, what exactly should they be? My own view is that there is no fundamental

²⁰ See e.g. Michael Sandel, *The Political Theory of the Procedural Republic* in ALLAN C. HUTCHINSON AND PATRICK MONAHAN (eds.), *THE RULE OF LAW: IDEAL OR IDEOLOGY?* (1987), 85.

²¹ Some textbook-writers confuse “regulatory” crime in this sense with *less serious* crime. For a welcome corrective, see NICOLA LACEY, CELIA WELLS AND DIRK MEURE, *RECONSTRUCTING CRIMINAL LAW* (1990), especially at 233–256.

objection to making excusatory standards vary, even in the law of homicide, according to the standards applicable to roles which the defendant occupies when he kills. If he kills while on duty and armed as a police officer, then there is no fundamental objection to judging him by the standards of courage, level-headedness and self-restraint applicable specifically to police officers. But I agree that the problem is more difficult when we are dealing with people who kill while occupying a role (such as that of robber or slave) the internal standards of which should not be supported by law because the role should not exist, or a role (such as that of lover or friend) the internal standards of which should be supported by law but do not include any relevant standards (e.g. have nothing specifically to say about level-headedness or courage). The criminal law then seems to have only two options. One is the *lowest common denominator* option. It holds people only to the minimum standards of character needed to lead *any* kind of worthwhile life. The other is the *overarching role* option. It holds that, whatever other roles we may have in life, we also have the distinct role of being human beings, which itself sets basic standards of character. The former option, however, turns out to be a non-starter as soon as one realises that there can be no common denominator across the various roles we occupy, except to the extent that there is an overarching role of being a human being. Every virtue, every skill, every taste is such that some roles make no specific demand for it, unless, as it turns out, they must incidentally make that demand just by virtue of being human roles. It follows that the lowest common denominator option collapses into the overarching role option. And that leaves the criminal law with the problem of setting distinctive standards of character (and other standards of fitness) for that overarching role, reopening that age-old intractable question of what it means to be human.

Of course this is not the place to tackle this question. Suffice it to say that it need not remain quite as intractable for the criminal law as it does for moral philosophers. For the law has a function not only in supporting, but also in *establishing*, the proper standards of character (as well as the other standards) for the roles it governs. That the regulatory criminal law does this is neither open to doubt nor, in general, a source of much moral

anxiety. The measure of attentiveness required of drivers, the measure of probity required of company directors, the measure of truthfulness required of witnesses; these and many other standards of character are settled directly by doctrines of the regulatory criminal law. In some cases the roles themselves are creations of law, so that the law has no alternative but to set the applicable standards until the roles start to take on a life of their own. But even when roles do acquire a life of their own, and also when they are not creations of law in the first place, the law often has a role in settling which of various competing applicable standards will be the appropriate standard for the role. There comes a point at which, as between these competing standards, it matters less which of them becomes the standard for the role than that the standard for the role is authoritatively settled to allow us to have uniform expectations of each other when we are in that role. This is, of course, the classic “co-ordination” argument for legal regulation.²² It applies no less to standards of character than to other standards supported and enforced by law. And, if it is true that the non-regulatory criminal law is concerned with us in our overarching role as human beings, it applies no less to the non-regulatory criminal law than to the regulatory criminal law. There is no reason to assume that the standards for this overarching role of ours are more determinately settled in advance of the law’s intervention than they are for the less overarching roles of electrician or spouse or lawyer. Again, there may be a variety of competing defensible standards for failure and fitness as a human being *simpliciter*, and at a certain point in the competition it may be less important which one of them wins than that we have a clear winner to rely upon in forging our expectations of each other. The basic standard of honesty which people should show is not merely captured but *set* by the law of fraud and theft, and the setting of that basic standard by law rather than by, say, the person whose honesty is at issue is justified by the co-ordinating power of the law. Likewise the law on duress and provocation, which settles which of a variety of possible and otherwise defensible minimum standards for courage and self-control we have a right to expect of each other, making that the true applicable minimum standard thanks to the extra value

²² See John Finnis, *Law as Co-ordination*, *RATIO JURIS* 2 (1989), 97.

which comes of co-ordinating our expectations of each other to a uniform standard. To the extent that there is any real force in demands for “equality before the law”, that force comes of this consideration coupled with the consideration I adduced in the previous paragraph.²³ It comes of the instrumental value of uniform standards in resolving coordination problems coupled with the intrinsic value of granting self-respecting people what, as self-respecting people, they want – namely to be judged by the proper standards which apply to their role, be that their role as golfers or parents or guests or engineers or merely as people. And both of these considerations militate strongly against placing a capacity-based cap on the level at which the standards of character applicable to particular defendant’s excuses are set.

It may be objected that the fact that this is the authoritative voice of the law speaking also introduces a major countervailing consideration. Surely, under the doctrine of the Rule of Law, it is crucial that people who are subject to the law’s authority can be guided by the law, so that they can deliberately steer their lives round it and avoid the disruption of the law’s adverse normative consequences? Doesn’t it follow that a law which sets standards to which self-respecting people may well aspire but which they have no capacity to reach is in violation of the Rule of Law?²⁴ Yes and no. The consideration is a powerful one so far as the definitions of criminal offences are concerned. These should be such that everyone can be guided by them, and therefore should be such that everyone has the capacity to avoid

²³ I should say that I find the label “equality” misleading in this setting, as in so many others. I find it more perspicuous to frame the demand as a demand that courts be faithful to their role as administrators of justice. I have explored some of the other implications of this role in Gardner, *The Purity and Priority of Private Law*, UNIVERSITY OF TORONTO LAW JOURNAL 46 (1996), 459 and in Gardner, *Crime – in Proportion and in Perspective*, forthcoming.

²⁴ This was the essence of H.L.A. Hart’s famous defence of a capacity-capped doctrine of excuse in the criminal law: Hart, *Legal Responsibility and Excuses* in HART, PUNISHMENT AND RESPONSIBILITY (1968), 28 at 46–47. It is unclear whether Hart had a view about the gist of excuses outside the criminal law context, and if so how that view was related to his Rule-of-Law argument for the recognition of capacity-capped excuses in that context.

violating them.²⁵ Although it can often be achieved in other ways, it is possible that this can sometimes be achieved only by individuating the standards of the offence definition, including its character standards, to the reduced capacities of the accused. If my Aristotelian understanding of character is correct, this solution comes to much the same thing as eliminating character standards from that offence definition altogether. So this Rule of Law argument may help to explain the Anglo-American criminal lawyer's traditional reluctance to employ character standards in the definitions of criminal offences.²⁶ But the same consideration does not apply to the definitions of criminal *excuses*, which are not supposed to provide any guidance to those whose actions may fall foul of the criminal law.²⁷ To attempt to benefit from a legal excuse by being guided by it is to forfeit that excuse. One is under duress, from the legal point of view, only if one's fear of the threats one is subject to was rationally adequate, in one's own eyes as well as according to the applicable standards of character, for one to commit the wrong one committed. Accordingly, if in evaluating those threats one also takes account of the likelihood that one will benefit from the legal excuse of duress when one gives into them, one's excuse is thereby lost. It is thus no objection to the law's definition of the excuse of duress that there are some people, their capacity for courage lacking, who cannot be guided by that definition. The same is necessarily true for everyone, irrespective of their capacity for courage; those with the lower capacity labour under no special disadvantage so far as the

²⁵ I have considered some aspects of this requirement in more detail in Gardner, *Rationality and the Rule of Law in Offences Against the Person*, CAMBRIDGE LAW JOURNAL 53 (1994), 502.

²⁶ Consider the furore among the major academic textbook-writers in England after the decision in *R v Caldwell* [1981] 1 All ER 961, which held an accused to capacity-independent standards in respect of recklessness. J.C. SMITH AND BRIAN HOGAN, *CRIMINAL LAW* (5th ed., 1983), 52–58; Glanville Williams, *Recklessness Redefined*, CAMBRIDGE LAW JOURNAL 40 (1981), 252.

²⁷ This distinction provides the key to answering Alan Norrie's important question: "If doing justice to individuals involves recognising their motives in acting in the duress situation, why does the law not recognise their motives in all those other contexts in which crimes are committed?" NORRIE, *CRIME REASON AND HISTORY*, *supra* note 19, 166.

guiding power of the law is concerned. It follows that a capacity-based cap on the standards of character used in legal excuses cannot be justified along Rule of Law lines, any more than it can be justified along any of the other lines we have been considering. Contrary to popular myth the gist of an excuse, even in the criminal law, is not that one had no capacity to conform, in one's actions, to the standards of character which were demanded of one. On the contrary, as I have tried to explain, the gist of an excuse is that one lived up to those standards.

