In Defence of Offences and Defences (2012)

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Jerusalem Review of Legal Studies 4 (2012), 110
doi: 10.1093/jrls/4.1.110

In Defence of *Offences and Defences*

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My title is a more than a little self-parodic. The more my writings on criminal law retreat into the past, the more aware I become of their deficiencies. I should have foreseen this. It is not just a matter of critical distance, or of exposure to new waves of objections. It is also a matter of irreparability. As I have pointed out elsewhere,[1] reasons to which we do not conform stay with us, waiting for whatever conformity we can still belatedly muster. As time passes and circumstances change, our ability to do anything by way of conformity with some reasons may be lost. Then we only have our regrets. Sadly that is the stage I have reached with some passages in *Offences and Defences*.[2] I am no longer in a position to account for some of the strange things I said, never mind to mitigate their strangeness. By attempting to defend what I wrote I will only dig myself into a deeper hole. In such cases I can only concede the case for the prosecution.

Fortunately I have, in Miriam Gur-Arye, Leora Dahan-Katz, and Daniel Statman, merciful prosecutors who make it easier for me to confront the errors of my misspent youth. They soften many of their searching criticisms of my work with superhuman efforts to find redeeming merit in the positions they criticise. They give patient attention to, and seek sensible explanations for, even my most far-fetched ideas. I am honoured by the time and

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1 John Gardner, 'What is Tort Law For? Part 1: The Place of Corrective Justice', *Law and Philosophy* 30 (2011), 1.

2 John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007).

energy that each has invested in making sense of *Offences and Defences*, and by the opportunity provided to me by the editors of the *Jerusalem Review of Legal Studies* to reflect on and reply to their comments in print. In all three contributions I find much to agree with, and much less to disagree with. But it falls to me, nevertheless, to say some final words in my defence, or at least mitigation, before the jury goes out (that means you, dear reader). As my work is now heading in a new direction, I expect that these will also be the final words I will write specifically about criminal law for a while. That being so, it is very agreeable to have been given the opportunity, most explicitly by Gur-Arye, to reflect on some general problems – they might even be thought of as 'methodological' problems, although the word makes me shiver – of philosophising about the criminal law. It is with these problems that I begin.

1. Replies to Gur-Arye

(a) Law and practical reason

Gur-Arye has me slightly worried about what my book is about, or at least what it presents itself as being about. She mentions some issues that I tackle in the middle chapters of *Offences and Defences* – What are criminal defences? How are justificatory ones different from excusatory ones? – and then she announces:

> I will first present Gardner's account of these issues and then discuss these issues from a different perspective – that of the criminal law.[3]

This has me worried because I thought that my account was already from the perspective of the criminal law. The criminal

[3] Miriam Gur-Arye, 'On John Gardner's Justifications and Excuses', *Jerusalem Review of Legal Studies* 4 (2011), 000 at [1].

law was the subject of my book and I tried to remain faithful to its self-understanding. Of course, what I wrote was not a textbook. A student trying to pass Criminal Law 101 using *Offences and Defences* would be in for a nasty shock. Yet the difference was not supposed to be one of perspective. What I aimed to do was to make some of the doctrinal apparatus of the criminal law rationally intelligible. That is also what textbook writers aim to do, and indeed what judges in appellate courts aim to do. True, I occasionally had to reject or ignore some particular fragment of doctrine which was not open to the explanation that I was sketching. But if I was faced with this problem on a larger scale than any other legal author, it was mainly because I was working at a higher level of abstraction. From this height many technical details of the law are hard to discern and interpret. If they can be explained at all, I thought, it would take a different kind of book to do it. But it never occurred to me that one would need to shift perspective in order to write this different kind of book. I thought that one would just make a lower pass, attempting to make sense of some finer points of the law in particular times and particular places. For the perspective I took, as I saw it, was already the criminal lawyer's perspective on the criminal law, merely taken up to a higher altitude at which only the larger features of the landscape can be discerned.

Gur-Arye contrasts the perspective of the criminal law with the 'perspective of practical rationality', which she takes to be my perpective.[4] But to my way of thinking the criminal law is already a province, or at least a parish, of practical rationality. You may wonder how a self-declared legal positivist[5] could think such a thing. A legal positivist surely has to think that the law can fail to create the reasons it purports to create, and fail to reflect the reasons it purports to reflect. And that is what I do think. But

[4] Gur-Arye, supra note 3, at [1].

[5] See John Gardner, 'Legal Positivism: 5½ Myths', *American Journal of Jurisprudence* 46 (2001), 199.

that does not stop me from thinking, and indeed it is precisely what enables me to think, that the law should be assessed as a creator and reflector of reasons. That is how to assess it on its own terms, as what it claims or purports to be.[6]

The first step towards such an assessment, in my view, is to try and make the law rationally intelligible. That means trying to understand it as continuous with, not divorced from, the rest of practical life. And that in turn means investigating its organising categories – in the case of the criminal law, such categories as offence and defence, actus reus and mens rea, justification and excuse, responsibility, harm, wrong, and so on – to see whether they are, so to speak, endogenous or exogenous. Are they the law's own constructs, or are they carried over, at least substantially, from ordinary life? There may be some legal positivists who think that the law can populate its own universe of concepts *ex nihilo*. The law can be Humpty Dumpty from start to finish. Legal duties, some may say, are duties in a special legal sense, legal rights are rights in a special legal sense, legal responsibility is responsibility in a special legal sense, and so on without end. This is not my view. In my view specialised legal concepts always depend for their existence on unspecialised everyday concepts to which the law resorts, and in relation to which (directly or indirectly, by similarity or by contrast) the specialised legal concepts are given their shape. In *Offences and Defences* I tried to show how, at least in the jurisdictions I am familiar with, the criminal law helps itself to the ordinary concepts of justification and excuse, among many others, in constructing its more specialised concepts. Understanding the criminal law as helping itself to those ordinary concepts therefore helps us to gain a wider understanding of the criminal law, as well as of the ordinary concepts themselves.

[6] For how I make sense of the 'claiming' or 'purporting', see John Gardner, 'How Law Claims, What Law Claims' in Matthias Klatt (ed), *Institutional Reason: The Jurisprudence of Robert Alexy* (forthcoming 2011).

If Gur-Arye is right I did a bad job. I did not succeed in making the law rationally intelligible for the simple reason that at least some of what I reported is not the law. It is a kindness on Gur-Arye's part to ascribe such errors to my not having approached the problems from 'the perspective of the criminal law'. A more forthright critic might prefer to ascribe them, more simply, to my being an inexpert criminal lawyer.

(b) Justifications and permissions

No doubt I am an inexpert criminal lawyer. But how inexpert? The first problem that Gur-Arye points out is that my analysis of justificatory defences seems to apply to some criminal-law defences commonly regarded as justificatory, but not to others.[7] I agree with her that there is quite a lot of variety among criminal law defences commonly regarded as justificatory. Consent, for example, is a complex case. In more recent work I have tried to show how nevertheless it conforms to the analysis of justificatory defences that I presented in *Offences and Defences*, calling only for that account to be supplemented, not eroded.[8] I am not sure that the same can be said, however, of self-defence. These days I tend to agree with Gur-Arye (and indeed with Dahan-Katz) that acts of necessary and proportionate self-defence against a guilty attacker do not violate the rights of the attacker. The guilt of the attacker neutralises at least some of the reasons not to kill or injure her in the attack.[9] If it neutralises enough of them (or the right ones) then, as Gur-Arye says, 'the wrong involved in killing the aggressor is negated by self-defence.'[10] And if that is the

[7] Gur-Arye, supra note 3, at [3].
[8] John Gardner, 'Justification Under Authority', *Canadian Journal of Law and Jurisprudence* 23 (2010), 71.
[9] For discussion see John Gardner and François Tanguay-Renaud, 'Desert and Avoidability in Self-Defense', *Ethics* 122 (2011), 111.
[10] Gur-Arye, supra note 3, at [4].

correct conclusion then probably one of my prime examples of a justified offence in *Offences and Defences* – the one in which a terrorist is killed to prevent his imminently detonating a large bomb that will kill many – is a bad choice of example, for it is most naturally read as a case in which at least some objections to killing are neutralised, lessening or eliminating the need for justification. It would have been better if I had provided a different example (Gur-Arye might want to classify it under 'necessity' rather than 'self-defence'[11]) in which the attacker is innocent (e.g. insane or an infant), so as to avoid the special complications introduced by the guilt of guilty attackers.

I am not sure, however, whether my mistake here can be said to have gone beyond my choice of example. Gur-Arye suggests that, if I decide (as I am now minded to do) not to classify self-defence against the guilty as a justification, I am only getting into deeper trouble. If I take this way out, she suggests, I am parting company with the law. For self-defence 'is considered a typical example of a criminal law justification'.[12] I agree that this is how criminal law textbooks often classify it. But I am not so sure that it is how the criminal law itself classifies it. True, courts sometimes *speak* of self-defence as a justification but that may only go to show that lawyers sometimes apply the label 'justification' rather generously to cover both justification defences and those offence-denials in respect of which the defendant has an evidential burden. They do not mean a justification, exactly, but something more like 'a defendant-instigated line of argument that is not excusatory.' It does not follow that they are incapable of distinguishing a (true) justification from an offence-denial. Indeed Gur-Arye herself relies, for a point that she later makes about excuses, on a line of

[11] Gur-Arye, supra note 3, at [3].
[12] Gur-Arye, supra note 3, at [3].

English cases in which self-defence against the guilty was held not to be a justification, but instead to be an offence-denial.[13]

These questions about particular doctrines and how to classify them are less troubling to me than a general point that Gur-Arye makes about my analysis of justification defences. I analysed justification defences as not giving anyone a reason to conform to them, but as merely giving people legal permissions to act on certain reasons that they already have apart from the law. This permissive view, according to Gur-Arye, 'does not leave room for the expressive function of the criminal law, through which the criminal law encourages acting for certain reasons.'[14] This is troubling because it suggests another way in which I failed to convey the nature of my enterprise. I didn't intend to say anything, one way or the other, about the possible social functions of justification defences in the criminal law. Probably they can perform a wide range of social functions, including expressive ones. And it is certainly true – as teenagers everywhere like to demonstrate – that merely being permitted to do something can serve as an encouragement to do it. That is something which teachers and parents and law-makers have to take into account when deciding whether to permit things. And they often do take it into account. The courts in particular are parsimonious in permitting actions under the heading of justification partly because they are cautious about thereby

[13] Gur-Arye, supra note 2, at [10], citing Fiona Leverick, *Killing in Self-Defence* (2006), 161-3, where the line of cases from *R* v *Williams* [1987] 3 All ER 411 through *Beckford* v *R* [1988] AC 130 is discussed. The cases hold that a mistaken belief that one is under attack need not be a reasonable one in order to support an excusatory defence of mistaken self-defence. The cases strike me as wrongly decided (*per incuriam* and rife with fallacy, as well as morally misguided) but that does not alter the fact that, on the way to their wrong decision about excuses, they deny self-defence the status of a justification. For excellent discussion see Andrew Simester 'Mistakes in Defence', *Oxford Journal of Legal Studies* 12 (1992), 295.

[14] Gur-Arye, supra note 3, at [6].

encouraging resort to self-help, vigilantism, and other threats to the rule of law, as well as various other kinds of irresponsibility. But this presupposes rather than casting doubt on my thesis that what they are doing is permitting. The courts are permitting actions in the knowledge that although they are not thereby giving anyone a reason to perform them, they are drawing attention to reasons that people may already have to perform them, picking out those reasons for special legal recognition, and thereby inviting people to foreground, and perhaps thereby to exaggerate, the desirability of acting for those reasons.

Sometimes these effects may even be sought by the law. Gur-Ayre says that the law sometimes wishes to 'motivate third parties to intervene in order to save legally protected interests of a significant high value.'[15] Maybe she is right. My point is only that when the law does so by providing a justification defence, it does so by permitting people (within limits) to act for reasons they already have (viz. reasons to save the legally-protected interests), and not by giving people new legal reasons to act. If someone is motivated by the existence of the justification defence itself, rather than by the reason to which it draws attention, that is a kind of irrationality, or at any rate a kind of rational failure. 'Why did you do it?' 'Because it was allowed.' That makes no sense at all. Even teenagers know that being allowed to do something is not, in itself, a reason to do the allowed thing.

(c) Excuses and expectations

Like an excuse defence, then, a justification defence gives nobody any reason to do what falls under it. So I argue in chapter 5 of *Offences and Defences*. But that is not the only way in which justifications and excuses are alike, according to the position I maintained in *Offences and Defences*. Like a justification defence, I also argued in chapter 6, an excuse defence reflects and/or sets

[15] Gur-Arye, supra note 3, at [6].

'normative expectations', i.e. expectations of people that may exceed their personal ability to live up to them, and by which their abilities, indeed, may be judged adequate or inadequate.

Gur-Arye rejects the second likening no less than the first. She rehearses (but I am not sure that she finally endorses) the criticism of it advanced by Peter Westen, according to which there is no logical space for actions that live up to normative expectations but are nevertheless unjustified.[16] In work published since *Offences and Defences* I have gone to great lengths to show that there is indeed such logical space, and that it exists thanks to the gap between action out of justified belief and justified emotion on the one hand, and justified action on the other.[17] I will not repeat my labours to establish this here. Instead let me deal with some of Gur-Arye's other objections, I think more committed objections, to my view of the gist of excuses.

Gur-Arye is committed to what, in chapter 4 of *Offences and Defences*, I called the 'residual' view of excuses, according to which excuses are simply defences available to those whom it would be 'unfair to blame'[18] for their unjustified actions. My main reason for rejecting this residual view was its failure to distinguish between two very different grounds on which it may be unfair to blame someone for her unjustified actions. There are cases, I said, in which the ground for not blaming is that the defendant is *not subject* to the relevant normative expectations (insanity, infancy, diminished responsibility). But there are also cases, I said, in which the ground for not blaming is that the defendant has *lived up* to the relevant normative expectations, by coping as well as we should expect anyone to cope with a

[16] Gur-Arye, supra note 3, at [6], citing Westen, 'An Attitudinal Theory of Excuse', *Law and Philosophy* 25 (2006), 289.
[17] Gardner, 'The Logic of Excuses and the Rationality of Emotions', *Journal of Value Inquiry* 43 (2009), 315.
[18] Gur-Arye, supra note 3, at [8].

difficult predicament (duress,[19] provocation, mistake). I have no very profound objection to a wide use of the word 'excuse' to cover both types of case.[20] But I do object, for reasons that I spelled out in chapters 8 and 9 of *Offences and Defences* to the widespread neglect of the distinction between the two types of case, which is what the wide use of the word 'excuse' tends to encourage. To avoid giving any such encouragement I reserved the word 'excuse' for the second class of exculpatory but non-justificatory defences, those in which the defendant lives up to the relevant expectations, and I chose 'denial of responsibility' or 'negation of responsibility' as a replacement name for the first class, in which the relevant expectations do not apply.

Gur-Arye takes the uninformative route that I was trying to guard against. She reasserts the residual view without saying very much about what makes it unfair to blame the various people who benefit from excuses according to that view. What she does say echoes the explanatory gesture that judges sometimes make: excuses are a 'concession to human frailty'.[21] Yes, we may agree, but which human frailty? The human frailty of those, like Orestes, to whom the standards do not apply? Or the human frailty of those who, like Oedipus, meet the standards but do not thereby avoid unjustified actions? Maybe Gur-Arye thinks that I am oversimplifying by insisting on this bifurcation. Maybe she thinks that excuses are miscellaneous, in which case the residual account is probably the best that can be hoped for.[22] Some of her remarks certainly suggest that she sees much more irreducible variety among what the criminal law treats as excuses, placing the

[19] I am referring, obviously, to excusatory duress. As Gur-Arye notes, (supra note 3, at [9]) I think that duress is sometimes a justification rather than an excuse. She thinks the same (supra note 3, at [11]).

[20] Gardner, supra note 2, 83.

[21] Gur-Arye, supra note 3, at [10].

[22] In *Offences and Defences* I spoke, not of a miscellany, but of a 'ragbag'. Gardner, supra note 2, at 84.

law at odds not only with what I say about excuses in my strict sense, but also with what I say about excuses in the broader sense in which they also include denials of responsibility.

I tend to think, however, that Gur-Arye must accept something like my 'normative expectations' account of at least some excuses. She reminds us of her view, set out elsewhere, that 'state officials should be required to overcome pressure and fear, as part of the requirement that they meet the criminal law's normative expectations.'[23] It follows, she says, that 'a soldier in his role as a soldier will not be granted an excuse.'[24] For some reason that I do not quite understand,[25] Gur-Arye regards this line of thought as militating against my view of excuses. But the only difference I can see between what she says and what I said on the same subject is one of degree. As she notes, I argued that that we should expect soldiers and police officers to exhibit more courage, self-control, patience, and resilience than could reasonably be expected of ordinary folk. If soldiers or police officers are only ordinarily courageous, self-controlled, patient, or resilient then they are not fit to be soldiers or police officers as the case may be.[26] Gur-Arye goes further than I did, seemingly expecting soldiers and police officers to have *endless* reserves of courage, self-control, patience, and resilience. Maybe she is right to expect that. Maybe I underestimated the relevant normative expectations and so was too ready to excuse official actions. Be that as it may, normative expectations are clearly what matter, for Gur-Arye and I seem to agree that they are what dictate the

[23] Gur-Arye, supra note 3, at [11].
[24] Gur-Arye, supra note 3, at [11].
[25] Those in search of further explanation are referred to Gur-Arye's 'Can the War against Terror Justify the Use of Force in Interrogations? Reflections in Light of the Israeli Experience', in Sanford Levinson (ed), *Torture: a Collection* (2004). However the wording there (at 188) is very similar.
[26] Gardner, supra note 2, at 128-9.

availability, or non-availability, of at least some excuses (duress and provocation, for a start) to state officials.

2. Replies to Dahan-Katz

(a) Justified wrongdoing

Dahan-Katz joins Gur-Arye in focusing on the middle chapters of *Offences and Defences*. She is right to detect some flux in what I said there about the effect of justifications on the rational position of those who have them.[27] In chapter 4 I contrasted the 'closure' view of wrongdoing (according to which 'justified wrong' is another way of saying 'no wrong at all') with a rival view according to which a justified wrong is what it sounds like, viz. still a wrong, but with the added feature that it is justified. I pointed to aspects of our experience as rational beings that the rival view, but not the closure view, seemed equipped to explain. However in the following chapters I neither defended nor relied upon the rival view. I defended a less radical view, a *tertium quid*, according to which the effect of a justification is to leave intact the reasons for not committing the wrong apart from the mere fact that it is a wrong. I understood a wrong to be a breach of duty; I understood a breach of duty to be a failure to conform to a protected reason for action; I understood a protected reason for action (following Raz[28]) to be a reason for doing something that is also a reason not to act for at least some countervailing reasons; and I understood the effect of a justification defence to be the removal of the protection from the protected reason, i.e. the removal of the ban on acting for one or more of the normally

[27] Leora Dahan-Katz, 'Justification, Rationality and Morality in John Gardner's Offences and Defences', *Jerusalem Review of Legal Studies* 4 (2011), 000 at [1].

[28] Joseph Raz, *The Authority of Law* (1979), 17-19.

banned countervailing reasons. On this model, a justification defence in the criminal law serves as what I called a 'cancelling permission'.[29] The justification defence does not cancel the reasons not to do what the criminal law would have one not do. On the other hand it does cancel the reason that the criminal law would otherwise give one not to act on certain specified countervailing reasons. When those countervailing reasons are weighty enough, the law grants one a defence.

Dahan-Katz would have preferred me to stick with the more robust resistance to the closure view that was foreshadowed in chapter 4.[30] Outside the law, she thinks, there are justified wrongs in the plain-speaking sense I originally articulated. The justification does not come of what I called a cancelling permission. Sometimes it comes of what is known as a strong, or exclusionary, permission.[31] Sometimes, it comes of a conflicting duty. Either way, it comes of a conflicting norm. This opens up the possibility that one does wrong even when one's act is justified. Indeed it opens up the possibility that one may be doomed to do wrong whatever one does. Given these possibilities my *tertium quid* will not suffice. The closure view must be ditched, thinks Dahan-Katz, and only the rival view that I sketched in chapter 4 can explain what is going on.

I agree completely. I did not mean to dispute it. And indeed in other work, outside *Offences and Defences*, I have made these very claims. I have emphasised the role of justified wrongs in non-institutional morality,[32] and in private law.[33] In these

[29] Gardner, supra note 2, 106-7.
[30] Dahan-Katz, supra note 27, at [4].
[31] GH von Wright, *Norm and Action* (1963), 85–89; Joseph Raz, 'Permissions and Supererogation' *American Philosophical Quarterly* 12 (1975), 161.
[32] Gardner and Tanguay-Renaud, supra note 9; Gardner, 'Criminals in Uniform' in R.A. Duff, L. Farmer, S. Marshall and V. Tadros (eds) *The Constitution of Criminal Law* (forthcoming 2012).
[33] Gardner, supra note 1, 42-4.

settings, I have rejected the closure view without compromise. Nevertheless, as I tried to show in *Offences and Defences*, the criminal law does not reject it without compromise. Indeed one would be 'half-right' (I said in chapter 7)[34] to regard criminal law justifications as exceptions to the prohibitory norm, which is exactly how the closure view regards them. Perhaps Dahan-Katz overlooks this rapprochement with the closure view because, unlike Gur-Arye and me, Dahan-Katz is not particularly interested in preserving the perspective of the criminal law. She is interested in morality, and in morality beyond the law she finds, as I do, that the closure view is a non-starter.

(b) Morality and rationality

In spite of our agreement on the inadequacy of the closure view as an account of what goes on in morality beyond the law, Dahan-Katz finds my discussion of justification in *Offences and Defences* insufficiently focused on morality. I find this criticism surprising, and in way gratifying, since the book, and in particular its account of justification defences, has been described by another critic as a work of 'new-fangled legal moralism'.[35] This only goes to show, it seems to me, how many different uses of the word 'moral' there are, and hence how treacherous it can be. For some people, my work is moralistic simply because it speaks up for the continuity of the law with ordinary life, which is the same continuity that I stressed in my first reply to Gur-Arye above. For Dahan-Katz, on the other hand, there is a further important distinction to be drawn within ordinary life

[34] Gardner, supra note 2, 148.

[35] Malcolm Thorburn, 'Criminal Law as Public Law' in R.A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (2011), 21 at 23.

outside the law, between morality and (the rest of?)[36] practical rationality, including 'prudential, aesthetic [and] other non-moral reasons.' Dahan-Katz objects to my account of justification, even the straight anti-closure-view version that she finds and admires in chapter 4, on the ground that it does not place enough emphasis on this divide, and does not bring out, in particular, that the only possible justifications for wrongdoing are specifically moral justifications, built of moral reasons.

I find this objection quite difficult to meet because I do not know what is supposed to be the hallmark of a moral reason in the sense that Dahan-Katz has in mind, or why I should care. I do not share with her the sense that reasons for action inhabit different 'realms'. To me they are all just reasons for action and they each have whatever force they each have in reasoning, never mind whether we classify them as 'moral' or 'prudential' or whatever. Such classifications should therefore be regarded mainly as matters of convenience without much philosophical work to do. So all I can say to Dahan-Katz is that I do not find it particularly convenient to classify several familiar justifications known to morality outside the law as moral justifications.

Take self-defence and duress. They sometimes serve as justifications for violating what are conveniently classified as moral norms, notably norms governing the intentional killing and injuring of others. But to enjoy these justifications, at least in the textbook examples, one must act for what are usually classified as non-moral reasons. One must act to save one's skin. It is true that doing so is morally permitted. But as we already know from our engagement with Gur-Arye above, a permission is not a reason. That morality gives one permission to act for a certain reason does not entail that the reason in question is a

[36] To see the significance of the question mark, jump straight to the final paragraph of this subsection, in which we find Dahan-Katz hinting that, for her, morality does not form part of rationality, practical or otherwise.

moral one.[37] Indeed one might well ask why, if the reason were a moral one, morality would need to give one permission to act for it. But since that question already concedes too much, for my tastes, to the view of morality as a 'realm', it is better just to say: No doubt some justifications for wrongdoing can conveniently be thought of as moral justifications – but surely not all?

I think that this is a version of the first path that Dahan-Katz holds open for me in responding to her criticisms. In other words, I think that what I am doing is 'bit[ing] the bullet' and holding that 'actions that are [morally] wrong may be justified by ... non-moral reasons.'[38] But I do not see why this commits me, or even disposes me, to say what Dahan-Katz thinks I must say about the famous 'Gauguin' case that she borrows from Bernard Williams.[39] She thinks that, if I 'bite the bullet', I must also say that Williams' Gauguin is justified in abandoning his family in Europe (a serious moral wrong) to paint paintings in Polynesia that will be vastly superior to anything he would otherwise have painted (a huge aesthetic gain). I must say this, says Dahan-Katz, because leaving for the South Pacific is 'the rational thing to do' and justification, for me, turns purely on rationality.[40]

Must I really say this? Here is what I would actually say. Gauguin's duty to his family, being a duty, is a protected reason. A protected reason is one that excludes some or all of the countervailing reasons from consideration, and thereby leaves them defeated, even when they would be weighty enough to

[37] Note 29 of Dahan-Katz's paper, supra note 27, may be designed to anticipate this challenge by claiming that some prudential reasons are also, for certain purposes, to be regarded as moral ones. I tend to think that this confirms my point that there is nothing much of philosophical importance in the distinction between moral and non-moral reasons.

[38] Dahan-Katz, supra note 27, at [11].

[39] From Williams, 'Moral Luck', *Proceedings of the Aristotelian Society, Supplementary Volume* 50 (1976), 115.

[40] Dahan-Katz, supra note 27, at [10].

defeat the protected reason if only it were unprotected. Quite possibly Gauguin's career prospects as an artist and his gift to artistic posterity, if he leaves for the South Pacific, are among the reasons for leaving that are excluded from consideration in this way by his duty, and thereby defeated in spite of their weight. If this is the whole story (i.e. if there are no other permissions or duties at work that we haven't been told about) then Gauguin's leaving his family for the South Pacific is not 'the rational thing to do'. It is not rational to act for a defeated reason. So I do not have to say that Gauguin is justified in abandoning his family merely because justification, for me, turns purely on rationality.

Why would Dahan-Katz so quickly jump to the conclusion, not just on my behalf but also speaking for herself, that Gauguin's abandoning his family is 'the rational thing to do'? It may be that the word 'rational' has connotations for Dahan-Katz that differ from those it carries in my work. I use the word 'rational' to mean the same as 'reasonable'. Rationality is reasonableness, and morality is part of it.[41] Maybe Dahan-Katz thinks, by contrast, that it is possible to be rationally unreasonable? Here is some evidence that this is what she thinks. 'The rational element [of justification] may be there,' she writes, but as compared with the moral element it 'seems to be of peripheral significance'.[42] To my way of thinking this remark makes no sense. Morality is part of rationality, and the whole obviously cannot be of more peripheral significance than the part. We seem therefore to be driven to the conclusion that Dahan-Katz does not see morality as part of rationality. In which case the rational thing to do can still be an unreasonable thing to do, its unreasonableness coming to light once moral reasons are brought to bear. I am not sure

[41] See Gardner, 'The Mysterious Case of the Reasonable Person', *University of Toronto Law Journal* 51 (2001), 273. I should add that sometimes, in contexts that are not relevant here, I use the word 'rational' to mean only 'capable of rationality', where this in turn means 'capable of reasonableness'.

[42] Dahan-Katz, supra note 27, at [8].

whether this is really Dahan-Katz's view, but it is a possible way to explain the claim she makes, and tries to land me with at the same time, that Gauguin's departure is rational – and the further claim she makes that this is some kind of problem for my analysis of justification that could best be remedied by my accepting her view that justifications for wrongdoing must be moral ones.

(c) The very concept of justification

Even if all justifications for wrongdoing must be moral ones, in whatever sense Dahan-Katz gives to the designation 'moral', I am not sure why she feels the need to present this as a challenge to my understanding of the very *concept* of a justification.[43] Surely it is a success condition for any analysis of the concept of justification that it is possible for beliefs and emotions, and not only actions, to be justified or unjustified according to that analysis? If so it seems highly unlikely that justification is essentially moral, or moral by its nature. My belief that this paper is now overdue for submission is amply justified, and it happens to be a belief about the moral position, but it hardly follows – and indeed it makes no sense to say – that it is a morally justified belief. Moral reasons, whatever else they are, are reasons for action, not reasons for belief. They belong to practical rationality. The concept of justification, by contrast, belongs to the whole of rationality, of which practical rationality is only part, morality in turn being part (never mind exactly which part) of practical rationality. So if moral reasons do a particularly good job of justifying, that is not because of some conceptual truth about justification. This matters especially to a legal positivist like me because I want to say that the law can help itself to the ordinary concept of justification while having its own (perhaps very eccentric) views of which actions are justified.

[43] Dahan-Katz, supra note 27, at [7].

3. Replies to Statman

(a) Emotions and their rationality

The idea that beliefs and emotions too answer to reason and call for justification is central to the arguments of chapters 6 and 8 of *Offences and Defences*, which draw attention to the excusatory role of justified belief and emotion. But the answerability of emotion to reason is in a way even more central to chapter 1 (which I originally authored jointly with Stephen Shute). It is on the use of this idea in chapter 1 that Statman focuses his attention.

Shute and I argued that the negative emotional reactions of those who have been raped – feelings of shame, grief, fear, disillusionment, bitterness, embarrassment, regret, and so on[44] – cannot be what make rape wrong. Rape *warrants* those negative emotional reactions, so it must be wrong independently of them. Admittedly, we should have emphasized more than we did that the negative reactions in question can count towards the wrongness of rape. Our point was only that they cannot be all there is to the wrongness of rape. There must also be something about rape that makes such negative reactions appropriate. Statman denies this. He thinks that 'the psychological harm caused to rape victims is an independent basis for [rape's] wrongness, not one that depends on some other argument.'[45] This is not to deny, he emphasises, the general truth that emotions answer to reason. But it is to deny that this general truth can do much to help us with the subject of rape. The search for an explanation of what is humiliating about rape is (Statman

[44] I don't mean all of these emotions in all cases. On the contrary, the list is designed to make room for 'the diverse voices of rape victims', as Clare McGinn puts it in 'Feminism, Rape, and the Search for Justice', Oxford Journal of legal Studies 31 (2011), 825 at 842.

[45] Statman, 'Gardner on the Wrongness of Rape', *Jerusalem Review of Legal Studies* 4 (2011), 000 at [4].

echoes Avishai Margalit in saying) 'absurd'. That rape is humiliating is self-evident. Anyone who can't see it just doesn't know what humiliation is.

This summary of his critique gives the impression that, for Statman, humiliation is one of the emotions that a rape victim might experience, and so one of the things that Shute and I were hoping (Statman would say vainly and absurdly) to rationalise. And Statman does sometimes present humiliation this way, as a negative emotion that a victim might suffer. He speaks of 'the rationality of emotions in general, and of humiliation in particular.'[46] In the same vein, he says that 'there is nothing irrational in humiliation, at least not in the sense relevant to moral and legal judgment.'[47] But Statman is not consistent about this portrayal of humiliation. In other remarks he conveys that being raped is neither a cause of nor a reason for the humiliation of the rape victim; rather, being raped *is* the humiliation of the rape victim. That is what is conveyed when he asks, rhetorically: 'if rape is not humiliation, then what is?'[48] In the same vein he speaks of humiliation as a 'ground for harm' (i.e. a ground for emotional or more broadly psychic trauma). To judge by these latter remarks (and to judge by the passage he approvingly quotes from Margalit) Statman does not regard humiliation as a negative emotion, but rather as a reason for negative emotions.[49]

[46] Statman, supra note 45, at [3].

[47] Statman, supra note 45, at [4].

[48] Statman, supra note 45, at [3].

[49] Of course, one may think that the word 'humiliation' names *both* a distinctive emotion *and* the distinctive reason for having that emotion: see e.g. Gabriele Taylor, *Pride, Shame, and Guilt: Emotions of Self-Assessment* (1985), 8–13. I tend to think that this is a misinterpretation. Saying that one 'feels humiliated' is akin to saying that one 'feels manipulated'. Nobody would conclude from this locution that manipulation is an emotion. But even if 'humiliation' names a distinctive emotion as well as the distinctive reason for having it, Statman still faces the charge of equivocation between the two

If that is so, then Statman is not after all refusing to join Shute and me in our efforts to rationalise the negative feelings of rape victims. He does not after all think that such efforts are vain and absurd. He is eagerly joining us in those efforts, and offering a rationalisation of his own. Victims of rape have been humiliated, and that's one reason why they tend to have the assorted negative emotional reactions that they have. That rationalisation seems right to me. But notice that at this point the debate between Statman and us is no longer about whether the rape victim has a reason to feel as bad as she does. It is common ground that she does. Now the debate is about something else. It is about rape itself, about the properties it has such that the familiar negative reactions to it are appropriate ones. And this is exactly where Shute and I said the debate must be taken. That was exactly our point. It cannot be, we said, that rape is wrong merely because of how it feels to have been victim of it. It must be because of something about rape which explains such feelings.

Once we see that Statman's resistance to rational explanation in the neighbourhood of rape is not a resistance to the rational explanation of the negative emotions experienced by those who have been raped, but rather a resistance to the rational explanation of the very features of rape at which those negative emotions are directed, we should feel a lot less tempted to follow him. Surely there are facts about being raped, and equally facts about being forced to scrub pavements (Statman's other example), in virtue of which such things are the humiliations that they are? And surely insisting on knowing what these facts are is entirely consistent with agreeing that being raped and being forced to scrub pavements are self-evidently humiliations, with

referents, which leaves facing both ways simultaneously on the question of whether the emotions of rape victims are open to rationalisation.

the Statmanian implication that anyone who can't see that they are humiliations doesn't know what humiliation is?[50]

It would not be much of a stretch to say that this is the very point from which Shute and I launched our discussion. We already agreed with the implicit stance of Statman's rhetorical question: 'if rape is not humiliation, what is?'[51] But far from shutting down all further rational inquiry on our part, that stance only served to fortify our interest in finding out what it is about rape that makes it such a terrible humiliation, such that those who are raped are right to have negative feelings about it.

(b) Actions and their social meanings

What is so humiliating about rape, we went on to claim, is that rape is the sheer use of a person. Statman says that this proposal cannot do the work that Shute and I wanted it to do, namely to establish 'what is wrong with rape in particular',[52] or in other words what is distinctively wrong with rape so as to warrant its being picked out for special opprobrium and separate criminalisation. Under the heading of 'sheer use', rape can readily be assimilated to an extensive list of other wrongs, some of which are not so special, and not so serious, as all that. So even when armed with the 'sheer use proposal we are still left wondering: what's so special about rape? This is what Statman calls 'the missing part of [our] argument.'[53]

[50] For powerful criticism of the idea that self-evident truths do not need to be explained, see Joseph Raz, 'Value: A Menu of Questions' in John Keown and Robert George (eds), *Reason, Morality, and the Law: The Jurisprudence of John Finnis* (forthcoming 2012).
[51] Statman, supra note 45, at [4].
[52] Gardner, supra note 2, at 3.
[53] Statman, supra note 45, at [6].

On closer inspection we did provide much of this 'missing part', admittedly hidden away in our discussion of the scope or limits of the wrong of rape. Here is the relevant passage:

> Which actions count as paradigms of sheer-use-and-abuse of human beings varies, even though the Kantian argument against the sheer-use-and-abuse of human beings has enduring force. Often the special symbolism of a particular act or class of acts is tied to the particular symbolism of acts which are regarded as their moral opposites. The special symbolism of penetrative violation is closely associated, in our culture, with the special symbolism of penetrative sexual activity. That latter symbolism may be over-romanticised. It may come of an aspiration to an impossible perfect union of two selves through two bodies, by making the two bodies, in a sense, just one (recall Shakespeare's 'beast with two backs'). Be that as it may, the fact that penetrative sex is regarded as having that significance actually endows it with that significance by changing its social meaning. The social meaning of the subversion of penetrative sex – its subversion in rape – tends to mirror the social meaning of penetrative sex. If the latter is thought of as a perfection of subject-subject relations – through the most complete and literal intertwining of selves – then the former may well come to represent a paradigm of subject-object relations. This is relevant to explaining and justifying the reactions even of those who do not share the aspiration to intertwine selves in this literal way (eg those who eschew or avoid penetrative sexual relationships, or those who see them as purely functional). The use of penetration can be a special weapon even against these people, perhaps *especially* against these people. It can become a peculiarly dramatic way of objectifying them, of turning them into mere things to be used, mere means to another's ends. That being so, there is reason for all those who suffer such violations to feel humiliated, whether or not they see particular value, or any value, in consensual penetrative sexual activity. The social meaning of consensual sexual penetration is not necessarily the meaning it has for them, and it is the social meaning of consensual sexual penetration which the rapist exploits by subverting it.[54]

[54] Gardner, supra note 2, 23.

In this passage Shute and I give our answer to Statman on the question of why rape is not to be assimilated to all the other cases of sheer use of another person. Rape is 'a paradigm' of sheer use, a 'special weapon' of humiliation, a 'peculiarly dramatic way of objectifying [people], of turning them into mere things to be used.' Moreover, this is exactly the kind of answer that Statman says is needed, emphasising 'the meaning of our body for us, or, more precisely, the meaning for us of being sexual objects,'[55] and thereby trying to explain why 'using a person becomes so much worse ... when the use has sexual connotations.'[56] It is a little unfair to say that we ignore 'the elephant in the room.'[57]

It would not be unfair, however, to say that Shute's and my argumentative strategy – relying on the social meaning of sexual activity – is risky. Some actions (doffing one's cap, flashing one's headlights, sticking up a certain finger at someone, etc.) have social meanings every bit as arbitrary as the meaning of ordinary words in a natural language. Depending on accidents of history these actions could have ended up with, and sometimes have ended up with,[58] different meanings, including utterly opposite meanings, at different times and different places. Is the same true of sex, and hence of rape? While it is self-evident to people in our time and place (including rapists[59]) that rape is an arch-

[55] Statman, supra note 45, at [6].
[56] Statman, supra note 45, at [6].
[57] Statman, supra note 45, at [6].
[58] The flashing of headlights is a good example. In UK driving culture a single flash of headlights is an invitation to proceed ahead of the headlight-flasher. In many other driving cultures (and also according to a comically impotent provision of the UK Highway Code) any flash of headlights is a warning, and often in particular a warning to give way to the headlight-flasher.
[59] That's why they do it, as we are rightly reminded by those who say that rape is primarily about power, not about sex. The 'primarily' here is important as one should not overlook the fact that the kind of power being used is a power to force someone into sexual contact, which has a special meaning. See Gardner, supra note 2, at 23-4.

humiliation, could it be that only an arational process of meaning-acquisition stands in the way of a world in which rape does the very opposite of humiliate, in being regarded as, *and hence in being*, an honour all round, both to the rapist and to the person raped? Wouldn't this be a straight application of our principle according to which 'the fact that [an action] is regarded as having [a certain] significance actually endows it with that significance by changing its social meaning'?

Statman runs this risk more than we do. He claims (a) that rape's wrongness lies in the fact that it is a humiliation; (b) that it is absurd to ask for a further reason why it is a humiliation; and (c) that its humiliatingness is a function of the meaning for us of our sexuality. His claim (b) seems to stand in the way of his placing any rational limits on the possible meanings of sexual acts. But we are not in quite the same position. As already indicated, we reject claim (b) and so we can deny that the meaning of rape could be just anything. We insist that rape is humiliating because it is sheer use of a person. That means that rape cannot be made honourable (or even made not humiliating) by the rise of a social understanding that it is honourable (or not humiliating). 'The enduring force of the Kantian argument', as Shute and I said, stands in the way of any such exception or qualification to the wrongness of rape. Social meaning, for us, effects change of value, and thus rational change, only within the limits of reason, meaning here the reasons that apply independently of it.

That is but another application, I think, of the same view that I took concerning the contribution to practical rationality of emotion and belief, viz. that they contribute only when they meet some independent rational standards. It is a view that pervades *Offences and Defences*. The book, I repeat, leaves me with many regrets. However, that I stood up for the primacy of reasonableness in life and law is not one of them. If doing so is

what it takes to be a 'rationalist',[60] I plead guilty and ask for numerous like offences to be taken into consideration.

[60] The charge was laid by Ngaire Naffine in *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (2009), 74-5. (However I draw the line at Naffine's baseless and inflammatory charge that I'm an *English* rationalist!)