Justification under Authority (2010)

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Justification under Authority[†]

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1. Taking authority for granted

Many legal norms call for the exercise of moral judgment in their application. Which punishments are cruel for the purposes of the Eighth Amendment of the United States Constitution? Which restraints of trade count as unreasonable for the purposes of the common law of contracts? When do dismissals qualify as unfair for the purposes of the United Kingdom's Employment Rights Act 1996, s94? Which takings and conversions are 'fraudulent[ ] and without colour of right' for the purposes of the law of theft under the Canadian Criminal Code, s322? And when is a use of force disproportionate such that it cannot be justified in the *jus ad bellum* or the *jus in bello* of public international law?

There are two main proposals for the interpretation of legal norms that raise moral questions such as these. According to a view known as 'inclusive legal positivism',[1] such legal norms incorporate, at least sometimes, the moral standards that they invoke. Then the illegalities in question are partly constituted by the corresponding immoralities. According to a rival view known as 'exclusive legal positivism' there can be no such incorporation. True, the legal norms as formulated in legislation or in other legal materials often give the impression that there is

† A discussion of and reply to Malcolm Thorburn, 'Justifications, Powers, and Authority', *Yale Law Journal* 117 (2008), 1070. Hereafter simply 'Thorburn'.

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[1] These now-familiar names for the two views were coined by Wil Waluchow in his book *Inclusive Legal Positivism* (Oxford 1994).

an incorporation, but this is only because they are formulated elliptically, in a kind of lawyers' code. When fully spelt out (with the lawyers' code decoded) each norm includes an instruction to some legal official, typically a courtroom official such as a judge or a jury or a judge and jury combined, to settle authoritatively whether the relevant immorality obtains. It is always the official's determination of the immorality, not the immorality itself, that bears on the action's legality. Immorality itself never affects legality; only authoritative determinations of immorality are capable of doing so. Cruel punishments, in other words, do not *per se* violate the Eighth Amendment. What violate the Eighth Amendment are punishments that have been authoritatively determined to be cruel. Or so says the exclusivist.

My own allegiance is to the exclusivist view.[2] Contrary to a common misconception, this view allows that there can be law on the subject of which punishments are cruel and which dismissals are unfair. But there is law on these subjects only inasmuch as there have been authoritative official determinations on these subjects – only inasmuch as, for example, the death penalty has been authoritatively determined to be cruel, or dismissal on ground of pregnancy has been authoritatively determined to be unfair. In these determinations the moral judgment originally called for by the norm is replaced, across a certain range of cases, with a non-moral (and more generally non-evaluative) criterion for its application. Later officials can now look for punitive death as a hallmark of punitive cruelty, and pregnancy among the grounds of dismissal as a hallmark of unfairness in dismissal. Once they do that they are merely applying the law. But the earlier officials who first determined the cruelty of the death penalty or the unfairness of dismissal on ground of pregnancy were not, in so doing, merely applying the

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

law. They were also making it. They were making law that other law empowered and invited them to make, exercising their authority to determine, for legal purposes, the application of certain moral standards to certain types of cases (henceforth to be identified by their non-moral features). The moral standards may, of course, have had a proper application to such case-types quite apart from the law. And the officials may, of course, have got this application wrong. They may, for example, have held an unfairness to be fair, or an uncruelty to be cruel. If and when they did this, the law was unfortunately shaped by the determinations that they did make, not the determinations that, morally speaking, they ought to have made.

For an exclusivist like me, there are two natural ways of reflecting on those parts of the law that call for authoritative moral judgments by officials. Sometimes (a) one reflects on the scope of the authority conferred. Which determinations of which moral questions do the norms authorize which officials to make? But sometimes (b) one reflects, instead, on how the same authority should be exercised. How should officials answer (or go about answering) the moral questions? In the first aspect one is thinking about the legal position, albeit one may also reflect on its moral defensibility or desirability. In the second aspect one is thinking about the moral position, albeit in a way that is inspired, constrained, and made salient by the law. The two aspects may sometimes both be represented in one discussion, and that may make it hard to see the distinction between them.

In my own work on particular areas of law, such as criminal law and the law of torts, I have generally allowed the two aspects to coalesce. True, I have always assumed, in exclusivist vein, that what officials say can be legally authoritative even if morally misguided. But pointing that out has not been among my main goals. My main goals have been (a) to identify some of the moral questions which the law puts to some officials, notably to judges, and in respect of which it asks them to exercise their authority; and (b) to assess the quality of some of the answers given by some

of those officials in exercising their legal authority. By this I mean the moral quality of the answers. The fact that they are answers given in a legal context (i.e. in order to make legally authoritative determinations) is not irrelevant to this inquiry. How could it be, given that legally authoritative determinations always have morally significant consequences?[3] But nor is it the starting-point. It is the frame, the setting in which the moral questions arise, and which sometimes compels some adjustment to the answer. I stress 'adjustment'. *Prima facie* – that is, subject to institutional considerations to be factored in afterwards - a punishment should be officially determined to be cruel if and only if it is cruel. And a dismissal should be officially determined to be unfair if and only if it is unfair. And so on.[4]

One part of the law that I have often reflected upon in this (you may say) conspicuously moralistic[5] way has been the part

[3] See my 'Nearly Natural Law', *American Journal of Jurisprudence* 52 (2007), 1.

[4] The 'only if' may seem too stringent, since there are many actions concerning the cruelty or unfairness of which morality is indeterminate, and yet concerning the cruelty or unfairness of which the law must nevertheless make a ruling. But this too reflects an institutional consideration to be factored in afterwards, and so is already allowed for in my formulation. The best explanation I know is Tony Honoré, 'The Dependence of Morality on Law', *Oxford Journal of Legal Studies* 13 (1993), 1, especially at 16-17.

[5] Of course I would ideally like a different label. 'Moralistic' has pejorative overtones (of small-mindedness, intolerance, self-righteousness, pettiness, etc.). Even if stripped of pejorative overtones, it has illiberal overtones which ought to be regarded as pejorative. Personally I hold unreconstructed 1960s-style permissive views about the proper role of the law (and of parents, teachers, 'communities', etc.). These views are moralistic only in that they are held on moral grounds, i.e. because the superficially appealing intervention to prevent or rectify an immorality is, in my view, often more immoral than the immorality it is supposed to prevent or rectify. The word 'perfectionist' is sometimes used to capture such a view but it too has misleading overtones (of obsessiveness, fussiness, etc.). I have always rather liked Michael Walzer's witty suggestion that such a view should be labeled 'imperfectionist': Walzer, 'The Imperfectionist', *The New Republic*, 7 December 1987, 30.

relating to criminal defences.[6] Here – and this is no coincidence – the law makes particularly pervasive calls for officials to make moral judgments concerning allegedly illegal actions. Resistance must be necessary and proportionate, fear must be well-founded, due care must be taken in assessing the facts, chastisement must be moderate, suspicion must have good cause, and consent must be freely given. Defendants in the dock are held to standards of reasonable fortitude, reasonable self-restraint, reasonable prudence, and reasonable attentiveness. In some of these cases the standards are justificatory. In others they are excusatory. (And some sit on the boundary between the two.)

Malcolm Thorburn takes issue with my handling of the justificatory standards. His primary but not his only complaint is that, in common with several other writers on the subject, I underestimate the importance of authority in conferring justification defences, case by case, on criminal defendants:

> The law does not simply lay out justification defenses as permissions to do what is generally prohibited. Rather, it recognizes that when certain individuals with the requisite legal power validly decide that it is justified to do something that is generally prohibited, that very decision brings about a change in what we are legally permitted to do.[7]

Am I complicit, as Thorburn suggests, in this feature being 'far less well recognized' than are some other features of justification defences in the criminal law, and indeed 'far less well recognized' than it ought to be?[8] Is it true that in my work on justification defences I 'do not consider the importance of decision making'?[9] As an exclusive legal positivist, I am slightly taken aback to be facing the complaint that I do not place

[6] See my *Offences and Defences* (Oxford 2007), chs 4–7.
[7] Thorburn, 1083.
[8] Thorburn, 1085.
[9] Thorburn, 1086.

enough emphasis on the role of authoritative determination in giving content to the law at the point of its application to particular cases. Perhaps my conspicuous moralism about the law, my belief that by default the law should regard something as cruel or cowardly or crass if and only if it is cruel or cowardly or crass – has somehow obscured my exclusivist allegiances? There is some evidence in Thorburn' s text that it has.[10] If so, let me put that right straight away. Inasmuch as they call for moral judgment in their application (and they invariably do) the legal norms that supply justification defences in the criminal law should always be read, like all other legal norms that call for moral judgment in their application, as elliptically investing authority in someone to determine their application by exercising such moral judgment. This is what Thorburn says. It is also what I think.

So I agree with Thorburn' s point, and I regret my failure to hammer it home often enough. Is that the end of our debate? Far from it. In the course of drawing attention to a feature of justification defences that I (for one) took for granted, Thorburn draws attention to a related but additional feature of justification defences that I (for one) failed to register. Where certain justification defences are concerned there is, he points out, a second layer of authority in place. The officials in the courtroom who in the end must make authoritative determinations of who has and who does not have a justification defence may concede the authority of some other person, someone closer to events on the ground, over part of their determination. Here, as Thorburn puts it, the officials in the courtroom ' engage in a …limited review of the prior exercise of discretion by someone else' rather

[10] See the critique that Thorburn borrows, at 1078, from Mitch Berman's, 'Justification and Excuse, Law and Morality', *Duke Law Journal* 53 (2003), 1. In this critique I am associated with the view that crimes are legally justified if and only if they are morally justified. Since this view leaves no room for moral error by the law it is clearly anti-positivist, and *a fortiori* anti-exclusivist. It is in that respect diametrically opposed to my actual view.

than ' evaluating the underlying conduct de novo.' [11] I should stress that when he speaks of this ' someone else' , Thorburn is not thinking of the officials who make the charging and prosecuting decisions that bring the case to court. True, these officials may exercise their authority to prevent the justification defence – as well as all the other issues in the case - from ever being authoritatively ruled upon by the court. In that sense they can make authoritative determinations of who has a justification defence. But Thorburn is not thinking of them. He is thinking of certain exercises of authority that bear *specifically* on the availability of a justification defence (as opposed to the other issues in the case) and that take place even closer to events on the ground (namely at or by the time of the supposedly justified actions). These are the exercises of authority to which, he argues, the criminal court defers in exercising its own authority over the success or failure of at least some justification defences.

I will call this ' the split authority thesis' . I am painting Thorburn in a rather cautious light by stating the thesis as I just did, supported only by brief and selective quotations. In two ways his version of the thesis appears to be more radical. First, Thorburn seems to think that in at least some cases of justification in the criminal law the authority exercised by the ' someone else' that he mentions, the authority operating outside the courtroom, is not so much a delegated part of the court' s plenary authority over the availability of the justification defence as itself a plenary authority over the availability of the justification defence, which the court merely has a limited authority to overrule.[12] Second, and more strikingly, Thorburn seems to think that the exercise of authority by the ' someone else' outside the courtroom is present in all, and not only in some, cases of justification in the criminal law.[13] I like to think,

[11] Thorburn, 1074, emphasis omitted.
[12] Thorburn, e.g. at 1097.
[13] Thorburn, e.g. at 1107.

however, that Thorburn can be persuaded to retreat from these more radical proposals, to the extent that he endorses them. For insisting on either of them would be a mistake that would distract as well as detract from Thorburn' s otherwise important progress in illuminating the logic of the criminal law. Not only are there justification defences in the criminal law which serve as counterexamples to both proposals; there are even, as we will see, justification defences *among Thorburn's own favourite examples* that serve as counterexamples to both proposals.

In what follows I will examine three sample justification defences in the criminal law, focusing on their English common law incarnations, with a view to establishing the extent to which they illustrate the split authority thesis, i.e. ' the prior exercise of discretion by someone else' being recognized as authoritative by the courts. The first of the justification defences I will discuss – consent – is not discussed by Thorburn in these terms. That is because he denies it the status of a justification defence. In the process he deprives himself, I will argue, of one of the best available illustrations of the split authority thesis. The other two defences that I will consider, self-defence and arrest, are both agreed by Thorburn to be justification defences in the criminal law, and are both used repeatedly by him to illustrate the split authority thesis. However, arrest and self-defence, symmetrical though they certainly are in many respects, are not symmetrical in this respect. While arrest nicely exemplifies the split authority thesis, self-defence just as nicely counterexemplifies it, and hence cautions against the temptation to overstate the generality of the thesis and its centrality to what Thorburn calls ' the conceptual structure of justification defenses' .[14] Or so I will argue.

[14] Thorburn, 1074.

2. Three justificatory defences to crime

2.1 Consent

Thorburn thinks that ' consent concerns power over our own affairs.' [15] Not so. To consent is to exercise a normative power to permit (or empower) another to do something that the other has, or would otherwise have, a duty not to do (or no power to do). My disjunctive formulation - ' has, or would otherwise have' - is designed to accommodate two alternative roles for consent in practical thought. Sometimes the fact that a certain action is consented to means that there is now no wrong. There would otherwise be a duty not to do what one does but the consent cancels, or waives, the duty. Sometimes, on the other hand, the fact that a certain action is consented to means only that the wrong is justified, not obliterated. The consent does not cancel the duty, but merely makes available certain reasons, reasons that would otherwise have been excluded by the duty, as acceptable reasons to breach it. In the crime of rape, consent is usually held to have the first role. Consensual sex is not justified rape, for it is not rape at all.[16] Concerning the crime of assault, on the other hand, consent is often held to have the second role.[17] Consensual assaults are still assaults, albeit on occasion justified assaults. I will be focusing here on cases of the second type – in other words, on consent understood as a justification for wrongdoing.

It is sometimes thought that an act of consenting differs from an act of promising (as well as from vowing, undertaking,

[15] Thorburn, 1075.

[16] See e.g. *DPP* v *Morgan* [1976] AC 182 at 206 *per* Lord Hailsham. For a spirited (but in my view failed) moral critique of the received wisdom on this point, see Michelle Dempsey and Jonathan Herring, 'Why Sexual Penetration Requires Justification', *Oxford Journal of Legal Studies* 27 (2007), 467.

[17] See e.g. *R* v *Brown* [1993] 1 AC 212.

agreeing, etc.) in that consent cannot impose a duty on the consentor, but can only grant permission to another.[18] This is oversimplified, and the oversimplification is marked by the parenthetical references to powers included in my characterization of consent above. Among the acts that can be consented to are acts of duty-imposition. Here the consent empowers another to impose a duty, usually a duty already proposed by that other at the time of the consent. Typically, the duty that another is empowered to impose by consent is a duty on the consentor. So, for example, in the law of contract we can acquire new duties not only by promising to perform certain actions but also by consenting to duties that another contracting party proposes to impose upon us (say, in her standard terms and conditions of sale). Sometimes, however, the scope of consent' s force is wider, and empowers another to impose a duty on third parties. The President consents to legislation, and thereby validates the power of the legislature to impose duties on those who are subject to the legislation. In both of these scenarios consent creates new duties and does not merely permit deviations from existing ones. Yet even in these cases in which it creates new duties, there is a sense in which consent still operates in a negative way. It gives rise to new duties by removing a normative impediment to their imposition. Where it does not permit, consent empowers others either to obligate or to permit or to empower. It does not directly obligate.[19]

This marks a difference between giving consent and

[18] Or waive the duty of another. A few among many who associate themselves with this permit-or-waive view: John Plamenatz, *Consent, Freedom and Political Obligation* (2nd ed., Oxford 1968), 9-10; Heidi Hurd, 'The Moral Magic of Consent', *Legal Theory* 2 (1996), 121 at 123-4; David Owens, 'Duress, Deception and the Validity of a Promise', *Mind* 116 (2007), 293 at 303-4.

[19] I am here refining, while preserving in spirit, a point made by A. John Simmonds in his *Moral Principles and Political Obligation* (Princeton 1979), 76.

promising. It also marks a difference between giving consent and what one might regard as the paradigm case of exercising authority. By one' s authority, in the paradigm case, one imposes new duties directly. By one' s consent, however, one does so only indirectly, by validating the imposition of those duties by another. Does it follow that consenting is not a way of exercising authority? No. In this respect it is no different from the exercises of authority that we emphasized in section 1 above, namely those by which judges and juries grant or deny justificatory defences to criminal offenders. These too work negatively in the relevant sense. They either permit the offending action or empower another, such as a consentor, to permit it. If we resist thinking of consent as a kind of authority, it is not because the normative force of consent is less than that of authority but for some other reason. Probably it is because the normal case for recognizing an exercise of authority as valid is different from the normal case for recognizing an act of consent as valid. The normal case for recognizing an act of consent as valid is that it allows people to shape their own relationships and pursuits, or the relationships and pursuits of people that they care for or represent;[20] by contrast, the normal case for recognizing an act of authority as valid is that, by following the authority, people' s actions will be better than they would be if they tried to make up their own minds about how to act.[21] This difference will not much concern us here and I will thus persist in treating consent as a limited (because merely authorizing) type of authority.

When someone gives morally or legally valid consent, the moral or legal position of the person to whom the consent is given is determined (in the relevant respect) by the giving of the consent, never mind whether the action consented to would otherwise be morally or legally justified. So, for example, by my

[20] See J. Raz, *The Morality of Freedom* (Oxford 1986), 86-88.
[21] Ibid, 53-57.

consent I can make it morally or legally permissible for you to punch me, kiss me, throw a ball to me, lead me round the dancefloor, decorate my living room, or borrow my book. Some moral or legal objections to these actions, otherwise sufficient to render them unjustified, are pre-empted by my consent, and no longer bear on its justifiability. My judgment as a consenter is, to that extent, authoritative on the question of justification. Yet there remains some additional authority to be exercised before consent is available as a *legal* justification. For the consentor's authority, *qua* consentor, does not extend to the question of the legal validity of her own consent. Thanks to the truth of the exclusive legal positivist view, some legal official must exercise his or her further authority to decide which consents are to be legally valid. The law may, of course, already set out some conditions thanks to earlier such exercises of official authority. The law may say, for example, that consents to assaults are legally valid only if they are communicated in words, that the under-16s cannot validly consent to certain assaults, that consents to assaults within sports or games are legally valid only if the sports or games in question have regulatory bodies, and so on. But the law may also say that consents to assaults are valid only if not extracted by improper means - for example, only if not extracted by coercion, manipulation, deception, or exploitation. These conditions for the validity of consent are moral conditions, in the sense that they require moral judgments as part of their application.[22]

[22] There is a longstanding debate about the extent to which coercion can be identified non-morally. Much of this debate has focused on whether a coercive proposal by A to B can be identified using a 'non-moral baseline', i.e. without considering the moral acceptability (quite apart from its coercive impact) of what A proposes to do if B does not co-operate. For discussion of possible baselines see Alan Wertheimer, *Coercion* (Princeton 1987), 204-11. However, it is often overlooked that even those who favour non-moral baselines, or who reject the baseline idea altogether, cannot avoid making the identification of coercion depend on moral judgments in other ways. See notably Harry Frankfurt, 'Coercion and Moral Responsibility' in Ted

Where such conditions are concerned the official in the courtroom who is determining the legal validity of a certain act of consent as a justification for an assault needs to make an authoritative determination of his own, on moral grounds, in order to apply the law (except to the extent that some previous official has provided an authoritative non-moral interpretation that can now be used instead). This official authoritative determination together with the non-official authoritative determination of the consenter add up to furnish the assaulter with whatever legal justification he or she has, under the heading of consent, for his or her assault. Although (for reasons we will come to) Thorburn studiously declines to avail himself of it, this is perhaps the simplest and clearest example of his split authority thesis in the furnishing of justificatory defences to crime.

Does my own explanation of justificatory defences to crime accommodate such examples? Thorburn thinks not. This is how he summarises my explanation before challenging it:

> [C]onduct is justified [according to Gardner] so long as, first, the reasons in favour of the conduct outweigh the reasons against it, and, second, the actor did it for the right reasons.[23]

I will return below to the second limb of this summary, which gestures towards the condition that (in my view) converts a merely justifiable action into a justified one. But allow me to start here by discussing the first limb, which is supposed to represent my criterion of justifiability. The basic problem that consent presents for this criterion of justifiability is obvious. Consent is

Honderich (ed), *Essays on Freedom of Action* (London 1973), 65. My own view is that one identifies A's coercion of B only by identifying (i) a *prima facie* wrong by A against B which is also (ii) a justification or excuse for B's co-operation with or submission to the will of A. To identify manipulation, deception or exploitation one needs to apply the first of these criteria although not the second.

[23] Thorburn, 1078.

not a reason for anyone to do anything. This follows from the fact that consent may be permission-granting or power-conferring, but is never directly duty-imposing. Unlike a duty, neither a permission nor a power is a reason (or entails or even suggests the existence of a reason) to act as one is permitted or empowered by it to do.[24] Is one to get married just because one's marriage would be legally valid? Is one to become a vegetarian just because it is morally unexceptionable to be one? Of course not. As they stand these are not intelligible explanations of one's actions. Something else – a reason for the action – is still needed. By the same token, the fact that someone consented to one's doing something cannot stand, in its own right, as an intelligible explanation of one's doing it. It is no reason to do anything. Since it is no reason to do anything, consent cannot be a reason that outweighs any other reason, and so cannot, by this criterion, render anything done by anyone justifiable.

This criterion of justifiability with which I am associated by Thorburn is not, however, my criterion of justifiability. It differs in three respects from what I proposed in earlier writings.[25] First, and for present purposes least importantly, where there is a bare conflict of weight between reasons for action, it is in my view justifiable to do whatever is supported by a reason that is not outweighed, whether or not it also outweighs. This is important because there are many conflicts involving incommensurables where one reason does not outweigh its rival, but is also not outweighed by it. In these cases, all else being equal, multiple justifiable courses of action are available. (There are also special cases where, owing to incommensurability, *no* justifiable courses of action are available, but these need not detain us here.)

Second, and more importantly, as well as being outweighed,

[24] Raz, *Practical Reason and Norms* (London 1972), 106.

[25] For the most detailed statement of my position, see *Offences and Defences*, above n6, ch 5.

reasons may be excluded from consideration by their rivals.[26] A duty to ϕ (or more exactly, the fact that one has a duty to ϕ) is a reason to ϕ coupled with a reason not to act for at least one possible reason not to ϕ. That possible reason not to ϕ is then said to be excluded from consideration, and all else being equal it is then unjustifiable to do what it is a reason to do. If I break my promise to meet you for lunch because I am busy saving a drowning child, my action has to overcome not one but two hurdles in order to be justifiable. First, it has to be the case that there are reasons for what I did that were not outweighed by any of the reasons I had to keep my promise. Second, at least one of those non-outweighed reasons for what I did must be absent from the list of reasons excluded from consideration by my promise. The inconvenience to me of keeping our lunch date is so excluded, even when considerable. But is a child' s urgent need for help? Probably not. Be that as it may, the general lesson is clear. A justifiable action is one supported by a reason that it is not only not outweighed, but is also not excluded. It is (in the summary language I adopted) an *undefeated* reason.

But this still doesn' t help to explain the justifying power of consent. Since consent is not a reason to do anything, it is not an undefeated reason to do anything any more than it is an outweighing reason to do anything. To understand the justificatory power of consent, therefore, a third idea has to be introduced. Having been excluded from consideration, a reason may sometimes be unexcluded by someone' s exercise of a normative power to unexclude it. In earlier work I gave this as my general explanation of how justificatory defences in the criminal law work.[27] By default, in the eyes of the law, a criminal prohibition excludes from consideration all competing reasons. It constitutes an absolute duty. The provision by the law of a

[26] The terminology is Raz's: *Practical Reason and Norms*, above note 24, 39-40.
[27] *Offences and Defences*, above note 6, 106-7.

justificatory defence unexcludes a certain reason or a certain range of reasons in favour of the prohibited action and returns the reason or reasons so unexcluded to the pool of reasons that engage in a simple conflict of weight with the duty, and are capable of either outweighing or being outweighed by it. In my fancy lingo, justificatory defences in law are *cancelling permissions*. They legally permit one to commit an offence by cancelling, not the legal reasons not to commit it, but the legal reasons not to act for (certain) reasons in favour of committing it.

How does this help with consent? Since consent is not a reason to do anything, how is the law's recognition of it as a justificatory defence to be explained as the unexcluding of a reason to do something? The answer is that it is not, or not exactly. Rather it is to be understood as the delegation – to the consentor – of the legal power to determine, within limits, the scope of the applicable cancelling permission. The 'within limits' qualification matters. The question often arises, in the law, not only of whether consent was validly given, but also of whether the defendant's (D's) action was covered by the consent. The word 'covered' here anticipates two possible objections to D's reliance upon the consent. One is that D did something different from what was consented to. He γd when the consent was only to his ϕing. He punched or groped P in the rugby scrum rather than just pushing P backwards with his shoulders. The second is that D did not act on the consented-to ground. He ϕd and had consent to do so, but he did so for a reason that the consent did not unexclude. He tackled P to the ground in order to get back at P for an injury inflicted on him by P in an earlier game. In the common law tradition, for most purposes and on most occasions, the law adopts what we might call a 'coarse-grained' approach to consent. The coverage of consent is determined at the level of the actions consented to and without regard to the reasons for which they are performed, except in the special case in which an action performed for a certain reason is thereby transformed into a different action. This,

at any rate, is the common law' s default rule for interpreting acts of consent.[28] To express it another way, the law regards it as an aspect of the consentor' s delegated authority that he or she, not the law, is the one to investigate, and to be satisfied about, D' s reasons, and to do so before consenting to D' s actions. But even if the law will sometimes[29] investigate D' s reasons to see if they were covered by the consent, it will not assess whether they were otherwise sufficient reasons for D to act as he did. To go that far would be to obliterate entirely the significance of the consent and the role of the consentor in determining the justifiability of D' s action.

These features of consent make it strikingly different from some other legally-recognized justification defences, in a way that brings us to the second criterion of justification, the criterion by which a merely justifiable action becomes a justified one. As Thorburn expresses this criterion in the second limb of his summary, justified actions must be performed ' for the right reasons' . Once again, I have a quibble with his formulation, which may be taken to suggest that, in my view, justified actions are always nobly or admirably motivated. Not so. My view is that an action is justified only if performed for an undefeated reason, which need not be a noble or admirable one.[30] Thus, in my view, one and the same feature of reasons, namely their undefeatedness, plays two roles in justification. For ϕing to be justified, first, there must be one or more undefeated reasons in

[28] *R* v *Flattery* (1877) 2 QBD 410; *R* v *Williams* [1923] 1 KB 340. As the court explained these cases in *R* v *Linekar* [1995] 2 Cr App Rep 49, 'it is the non-consent to sexual intercourse rather than the fraud of the doctor or choir master that makes the offence rape.' For a Canadian implementation see *R* v *Cuerrier* [1998] 2 SCR 371 *per* Gonthier and McLachlin JJ.

[29] For example, in a departure from English common law, the Sexual Offences Act 2003 s76(2)(a) makes the 'purpose' of an act, and not only its nature, relevant to whether it is covered by the consentor's consent.

[30] *Offences and Defences*, above note 6, 103-4.

favour of ϕing, and second, the agent must have ϕd *for* one or more of these undefeated reasons. Of course, strictly speaking the second criterion entails the first, but it is still worth spelling the two out separately. For the second criterion is more contentious than the first. Many think that the reasons why an agent ϕs are generally irrelevant to whether ϕing is justified.[31] One might think that consent provides a good illustration of the point.[32] For in cases where the defence to ϕing offered by D is consent, the reasons why D ϕd are, with rare exceptions, treated by the law as irrelevant to the success of the defence. And this strikes most people, me included, as a sound legal doctrine. D' s reasons for ϕing *should* be largely irrelevant to the success of consent as a defence. Doesn' t it follow that where consent is the supposed justification for ϕing it does not matter – contrary to my declared view – whether D ϕd for an undefeated reason?

No, it does not follow. In saying that an agent, to be justified in ϕing, must have ϕd for an undefeated reason, I left open the possibility that in some types of cases, all the possible reasons for ϕing are undefeated reasons for ϕing, and thus are rightly so treated by the law. I did not say that every justification needs to pick out just one reason for ϕing, or just a small range of reasons for ϕing, as undefeated. Any undefeated reason will do, and there may be any number of undefeated reasons. In a case where every

[31] Thorburn, at 1070, associates this view with Paul Robinson's 'utilitarian account of justification'. However enthusiasm for the same view in moral philosophy is more closely associated with anti-utilitarians, such as Judith Thomson, Frances Kamm, and Thomas Scanlon. For a good survey and defence, see John Oberdiek, 'Culpability and the Definition of Deontological Constraints', *Law and Philosophy* 27 (2008), 105. (I admit to some hesitation in associating these writers with the Robinson view. They claim to be discussing the conditions of 'permissibility'. I find it hard to work out how, for them, ϕing's being permissible is supposed to relate to ϕing's being permitted, never mind how it is supposed to relate to ϕing's being justifiable or justified.)

[32] See Lawrence Crocker, 'Justification and Bad Motives', *Ohio State Journal of Criminal Law* 6 (2008), 277 at 278.

possible reason for ϕing is undefeated, it is true, one may wonder whether we are still dealing with a justification. For one may wonder whether ϕing can still be thought of as a wrong – a breach of duty – once none of the reasons against doing it are any longer excluded or outweighed. What is left of the duty? And so what is there to justify? One may be tempted to think that here the distinction breaks down between consent as a justification for wrongdoing and consent as a negation or cancellation of wrongdoing. But it does not. For it remains the case that, to avail oneself of consent as a justification for ϕing one must have *relied on* the consent when one ϕd.[33] Whereas where consent negates the wrong of ϕing it is irrelevant whether one relied upon the consent in ϕing. Thus one is no rapist if one has sex with consent, never mind whether one was aware of the consent.[34] Whereas one may still be guilty of assault if, as a doctor, one performs a procedure that one had consent to perform while unaware of the consent, and hence not relying on it.[35] The requirement that a justified action be an action for an undefeated reason is preserved here in a requirement that an action justified by consent must be an action taken in reliance on the consent, consent which, even though not itself a reason for acting, was what made the reason for which one acted an undefeated reason. One must still make a case for ϕing which explains *in virtue of what* one' s reason for ϕing was undefeated and was taken to be undefeated, such that one was justified in breaching one' s duty.

This ' in virtue of what' requirement is not an *ad hoc* addition grafted on to my analysis of justification in order to cope

[33] Antony Dillof calls this the 'regard' element in his 'Unraveling Unknowing Justification' *Notre Dame Law Review* 77 (2002), 1547. However, he mistakenly regards it as a replacement for, rather than a supplement to, the undefeated reason requirement.

[34] A variation on the facts in *R* v *Deller* (1952) Cr App Rep 184. One might still be an attempted rapist under the rule in *R* v*Shivpuri* [1987] AC 1.

[35] A variation on the facts in *Dadson* v *R* (1850) 4 Cox CC 358.

with the case of consent. It is a subsidiary requirement for other justifications as well. One's action is not justified unless, were one's reason for acting perchance defeated rather than undefeated, one's action would still be excused. Or to put it another way, it must be for an undefeated reason that one regards or treats one's undefeated reason for acting as undefeated. This refinement to my second criterion of justification is needed to cope with the well-known problem of 'deviant causal chains' in practical thought.[36] One is under attack. One believes that one is under attack. And one defends oneself accordingly. That one is under attack is an undefeated reason for one to defend oneself. And one acts for that undefeated reason. Yet one is not justified if one's belief that one is under attack is purely coincidental with the fact that one is under attack: if one does not detect the actual attack, for example, but only a distraction that one bizarrely – without any reason - imagines to be an attack. One might simplify what is going on in such cases by saying that the reason 'I was under attack' was not undefeated; but more precisely one should say that it was correctly held to be undefeated but not on undefeated grounds. It did not meet the 'in virtue of what' requirement for justification. And this is the same requirement that comes to the fore in cases of supposedly justificatory consent, where it is necessary to plead one's awareness of the fact of the consent to explain how it came to be that one regarded or treated the undefeated reason for doing as one did as undefeated. (One could add that the requirement also applies a second time to the fact of the consent itself: one must also have regarded the action as consensual for an undefeated reason.)

Thorburn could have relied upon these aspects of consent in defending his views, and in particular in illustrating his split authority thesis. As already mentioned, however, he declines to

[36] For a general treatment see Christopher Peacocke, 'Deviant Causal Chains', *Midwest Studies in Philosophy* 4 (1979), 123.

do so. Instead he denies that consent should be classified as a justification defence at all, or indeed as a defence of any kind. When successfully argued it should, he says, always be regarded as a negation of the wrong, such that no justification is needed.[37] Thorburn's official explanation of why it is a negation, not a justification, is connected with what I said above about the normal case for recognizing an act of consent as valid. He thinks, roughly, that what justifies recognizing an act of consent as valid is the value of the consentor's being able to determine which acts by another are wrongs against her. And he seems to think that an act that is not a wrong against someone is not a wrong at all, and hence does not call for justification.[38]

I have elsewhere challenged the penultimate step in this argument (i.e. the inference from 'not a wrong against someone' to 'not a wrong at all').[39] As it happens, I have many doubts about the rest of the argument too. But be that as it may, Thorburn has another, and for present purposes more interesting, reason to deny that consent is a justification, one that he only mentions in passing. It reflects my second criterion for justification, which he calls the 'reasons requirement'. He interprets this requirement to mean that justification defences regulate 'ends' rather than 'means'.[40] The legal doctrine of consent, as he notes, does not regulate ends.[41] It generally allows people, under the protection of another's consent, to pursue any ends, so long as those ends can be pursued by performing the consented-to action. In other words, the law of consent generally

[37] Thorburn, 1114.
[38] Thorburn, 1115.
[39] In *Offences and Defences*, above note 6, ch 1 (cowritten with Stephen Shute). Thorburn cites the piece (1115n118) for its resistance to a 'consequentialist' account of consent but fails to note that it also challenges his own rival view.
[40] Thorburn, 1080–1.
[41] Thorburn, 1080, invoking the example of a rule against 'taking someone's property without her consent'.

regulates means. Yet it does not follow, as we just saw, that it does not regulate reasons for acting. For in order to have consent as a justificatory defence one must have relied on the consent in one's reasoning in committing the offence. One's undefeated reasons for acting, whatever they may be, must be regarded or treated by one as undefeated reasons by reason of the consent. This is enough to satisfy the 'reasons requirement', and hence to allow consent to be admitted as a justificatory defence to wrongdoing. Thorburn is wrong to beef up the 'reasons requirement' to an 'ends-not-means requirement', so that the consent defence is no longer capable of meeting it.

2.2 Self-defence

Whereas I would nominate the defence of consent, Thorburn singles out the defence of self-defence as the 'perhaps most important' illustration of his split authority thesis.[42] He writes:

> [W]hen a citizen uses force in self-defense, she both determines whether or not it is justified to use force in self-defense and then actually uses that force to defend herself.[43]

There are, as Thorburn notes, fewer links in the normative chain here than there are in the case of consent. In the case of consent there is (i) the consenter, (ii) the defendant who relies on the consent in acting as he does, and (iii) the officials in the courtroom who determine the validity of the consenter's consent and decide whether the defendant acted within the scope of it. In the case of self-defence, however, there is only (i-ii) the self-defender and (iii) the court, with the former both (i) determining, within limits, whether this is a good occasion for acting in self-defence, and (ii) acting in self-defence if she

[42] Thorburn, 1074.
[43] Thorburn, 1074.

determines that it is a good occasion to do so. As between (i) and (ii), says Thorburn, there is here only a ' notional' rather than an ' actual' division of labour. Nevertheless:

> The important point to focus on … is not whether there is an actual or merely notional division of labor between those who have the power to decide what conduct is justified and those carrying it out; rather, the critical point is that *all* justifications involve the exercise of a legal power - an authoritative decision by the appropriate person that a certain course of action is justified under the circumstances.[44]

In a case of self-defence, thinks Thorburn, there are still two authorities, two exercisers of legal powers. As always there is the court with the legal power to determine whether D' s action falls within the scope of self-defence as legally defined; and then, says Thorburn, there is D herself, to whom part of that legal power is hived off, such that D' s decision, within limits, binds the court.

What are those limits? Thorburn quickly concedes that they are relatively narrow. They are nowhere near as broad as, for example, those applicable to the consenter:

> In the case of self-defense … the law gives the decision maker [i.e. the self-defender] quite detailed criteria to apply to the facts at hand: she must decide not only whether it is necessary, under the circumstances, for her to use force to defend herself, but if so, what force would be proportionate to the nature of the threat she faces.[45]

But is the self-defender' s discretion even *this* broad? Not in any legal system known to me. At English common law, the self-defender is permitted to use no more than necessary and proportionate force. But the determination of how much force is necessary and proportionate is a matter for the court. It is not even partly a matter for the self-defender. If she uses more than

[44] Thorburn, 1074.
[45] Thorburn, 1074.

(what the court holds to be) proportionate means of self-defence, or uses (what the court holds to be) proportionate means but does so before it is (as the court judges) necessary for her to do so, her doing so is at her own legal peril; the court, representing the law, will not be bound by the self-defender' s determinations of the permissible limits of self-defence but will determine these limits for itself from scratch.[46] In these respects the court' s intervention is nothing like Thorburn' s description of it. It is nothing like ' a limited review of the prior exercise of discretion' by the self-defender.[47] On the contrary: the self-defender' s own assessments of the necessity and proportionality of her actions are irrelevant to the law. It is not even necessary, let alone sufficient, that she regarded her own self-defensive actions as necessary and proportionate (although it remains necessary, of course, that she regarded them as self-defensive, for that is an implication of her having acted *in* – for reasons of - self-defence).[48]

Yet the law does defer to the self-defender on another point. It does defer to the self-defender in the determination of whether to defend herself, and to what extent, so long as she always stays within the legally-determined limits of necessity and

[46] See *R* v *Clegg* [1995] AC 482. The court's determination of necessity and proportionality makes allowances for the fact that the defendant is not in ideal deliberative conditions, to the extent that this is the case: *Palmer* v *R* [1971] 1 All ER 1077. As Jeremy Horder points out, this introduces a degree of excusatory latitude into the otherwise justificatory plea of self-defence: Horder, *Excusing Crime* (Oxford 2006), 57. It does not, however, alter the fact that it is for the court, not the defendant, to determine what qualifies as a necessary and proportionate reaction in the circumstances. *R* v *Scarlett* [1993] 4 All ER 629 and *Zecevic* v *Director of Public Prosecutions, Victoria* (1987) 162 CLR 645 may seem to have granted more evaluative latitude to the defendant. However *R* v *Owino* (1996) 2 Cr App Rep 128 and *Osland* v *The Queen* (1998) 197 CLR 316 reaffirm the common law position as stated in *Clegg*.

[47] Thorburn, 1074.

[48] *R* v *Thain* [1985] NI 457, tightening the rule in *Dadson*, above note 35.

proportionality. The self-defender does not forfeit her self-defence plea merely because she defends herself too little, say by giving up on self-defensive efforts while the attack is still going on.[49] Indeed she is not required to defend herself at all; so far as the law of self-defence is concerned she is perfectly at liberty to turn the other cheek. Her decision whether to defend herself, and how much, could therefore be thought of as an ' exercise of discretion' that is reserved for her. This is exactly what I tried to capture in my proposal that self-defence, like other justification defences, operates as a cancelling permission. Like all other justification defences it permits, but does not require, the defendant to act for reasons that would otherwise be excluded from consideration by the law. In being permissive, the defence necessarily leaves latitude to the self-defender to determine whether or not to make use of it. It leaves it to her, as I put it before, to determine whether this is a good occasion for acting in self-defence. The limits are that she must not exceed what is necessary and proportionate to repel the attack, where these limits are to be set not by her but by the court.

So I agree with Thorburn that the self-defender has a discretion, even though we disagree about which aspects of the defence her discretion extends to. More important for present purposes, however, is our disagreement about whether the self-defender' s exercise of her discretion is also the exercise of a normative power. Thorburn needs the self-defender to enjoy not just discretion, but discretion under a power-conferring law, if the doctrine of self-defence is to involve split authority as his thesis requires. For authority is a type of normative power and a law that confers authority must be a power-conferring law. More specifically, authority is a power of one person to alter the

[49] So long as her self-defence remains necessary to repel the attack, bearing in mind that the criterion of necessity builds in an element of efficacy. A futile attempt at repulsion cannot be necessary. See Daniel Statman, 'On the Success Condition for Legitimate Self-Defense', *Ethics* 118 (2008), 659.

normative position of another (by imposing a duty, granting a permission, or conferring another power). I am not clear what leads Thorburn to think of the self-defender as having such a normative power, or indeed any normative power at all. After all, he frequently, and in line with my own view, speaks of the self-defender's action as a permitted or permissible one. Indeed he agrees right from the outset that it is the hallmark, or one hallmark, of justification defences that under them we are 'we are legally permitted to do what the criminal law generally prohibits'.[50] So his criticism of my view cannot be that there is a power *instead of* a permission. It must be that there is a power *as well as* a permission. Where exactly does this power fit in? What is it a power to do and to whom?

One possible interpretation of Thorburn's view is that inasmuch as the self-defender has a normative power, it is only an ability to change her own normative position. She has the ability to grant herself a permission to act in self-defence. But not only is this not an exercise of authority (for authority must be exercised over another); there is also the less nitpicking objection that there is no act of granting this permission that is distinct from the act of doing what is supposedly permitted under it. The only thing that the self-defender needs to do in order to benefit from the law of self-defence is to defend herself within the limits of (what the law earlier or later determines to be) necessity and proportionality. She need not first declare or otherwise assert her intention to do so, or perform any other action that could be construed as granting a permission to herself to act within those limits. She need not even make a prior decision to act. There is no more an exercise of normative power by the self-defender here than there is in the case where a robber makes it the case that he breaks the law on robbery by committing his robbery. The legal duty not to rob is imposed directly by law, and applies to each of us

[50] Thorburn, 1072.

irrespective of whether we conform to it or breach it; that is how we are supposed to be able to rely on it in deciding *whether* to conform to it or breach it. The same is true with the permission to defend ourselves. If the existence of the permission is to be capable of informing our decision whether or not to help ourselves to it – and Thorburn and I agree that it must be so capable[51] - it cannot be the case that we grant the permission to ourselves only by helping ourselves to it.

So much, then, for the idea that the self-defender exercises a normative power over herself. A more promising and natural interpretation of Thorburn's view is that the self-defender is supposed to be exercising a normative power over the officials with whom she is joined in her Thorburnian split of authority. As I put the point a few paragraphs back, the self-defender's decision to act in self-defence is supposed to 'bind the court'. It is tempting to say, in response, that there is no binding of the court to do. Once the self-defender's self-defence is (admittedly) legally permitted, surely all that binds the court is the general legal norm according to which the court has a duty not to convict anyone of a crime whom it judges not to be guilty of that crime, including anyone whom the law permits to commit it? Since this duty on the court exists quite independently of the self-defender's self-defensive actions, surely she does not, by those very actions, change the normative position of the court? This move, although tempting, is too quick. For one may

[51] Thorburn, 1092; Gardner, *Offences and Defences*, above n6, 115-6. Thorburn approaches this issue, I think unhelpfully, by asking whether we should think of norms conferring justifications as 'conduct rules' or as 'decision rules'. He criticizes me for equivocating on this point. But I did not equivocate. Rather, I rejected the distinction: *Offences and Defences*, 116-7. Indeed I anticipated the point ultimately made by Thorburn himself when he concludes at 1097: 'It might be best to avoid this language [of 'decision rules' and 'conduct rules'] altogether and to keep in mind that things are rather more complicated.' I am not sure why Thorburn licenses himself to reject the distinction while he insists on holding me to it against my will!

exercise a normative power not only by changing a norm but also by changing the world in some other respect so that there is a new instance, a new case, to which the norm applies. For example, one exercises a normative power not only by altering the norms of marriage but also by officiating at a marriage. The norms remain the same but now, by one's actions, they apply to two extra people. Could it not likewise be the case that, when one acts within the limits of legally justified self-defence, one leaves the law intact but changes its application so that one's own case is brought under it? In which case, the fact that the court merely applies the general law against convicting the innocent to D's case does not show that, in deciding whether to defend herself or not, D did not exercise a normative power.

In the relevant sense of 'normative position', then, D does have an ability to change the court's normative position by her self-defensive actions. She has the ability, depending on whether and how she defends herself against her attacker, to change the court's duty from 'convict' to 'acquit' or *vice versa*. Up to a point (e.g. by limiting herself to the two options of submitting meekly to the attack and making an early pre-emptive strike on her would-be attacker) she even has the ability to make this normative change knowingly and intentionally. The problem, however, is that not all abilities to change someone's normative position, even abilities to do so knowingly or intentionally, are normative powers. Here is Joseph Raz's explanation of why:

> An actor's awareness of the normative consequences of his action can play two roles in justifying those consequences. It may function positively as part of the reason for those consequences, or it may function negatively by removing an objection to them. Compare a duty to pay customs duties on an imported television set with the duty to keep a promise. In both cases, the behavior incurring the duty (importing the television set, making the promise) is avoidable. Promisors always know what they are doing (that follows from the notion of a promise), and importers either know or can easily find out about customs duties. I assume that customs duties are unjust and therefore unjustified unless known to the importers or at least unless

> the importers can easily find out about them. … But that knowledge fulfills a negative justificatory role. It provides no reason for imposing a duty. The positive reason for the duty is, let us say, the need to protect local industries or local wages. The state of mind of those who incur the duties is relevant only to remove a reason against the existence of the duties. Promissory obligations, on the other hand, are positively justified by reference to the state of mind of the promisor.[52]

Here Raz is drawing a distinction between voluntary obligations, such as those created by promises and agreements, and other duties that one incurs by one' s own actions. But his observations can and should be generalized, to distinguish exercises of normative powers from other actions that have normative consequences. They apply equally to the case at hand. Subject to some caveats to be introduced in 2.3 below, it is true that – by the principles of the rule of law – D should be able to know, more or less, when her actions will have which types of adverse legal consequences, such as a criminal conviction. If this information is concealed from her by the law, the law should not be attaching the adverse consequences in question. However the adverse consequences do not attach because she is aware of them. They attach because she is guilty of a crime. Her being aware of them is necessary for them to arise only because otherwise their arising would be objectionable under the principles of the rule of law. That means that the legal norm under which she brings the consequences about – by which she affects the verdict that the court is legally required to return - is not a power-conferring norm. Rather it is a duty-imposing norm. It is the norm that she violates when she commits the crime, which is in turn subject to cancelling permissions such as the one by which necessary and proportionate actions in self-defence are justified.

Let me put the point another way, showing H.L.A. Hart' s

[52] Raz, 'Promises in Morality and Law', *Harvard Law Review* 95 (1982), 916.

influence.[53] While there is a question of whether D' s act of self-defence is *lawful*, there is no distinct question of the same act' s *validity*, meaning its success in changing the court' s normative position. A question of validity arises not in respect of the act of self-defence but only in respect of the plea of self-defence which D later advances in court. A positive reason for letting D advance the plea is to enable her, with awareness of what she is doing and the intention to do it, to change the normative positions of the prosecution and the court. So at this later time there is a genuine exercise of normative power by D. At the earlier time when she defends herself, the time at which Thorburn sees an exercise of a normative power by D, she is merely helping herself to a permission, upon which she later relies in advancing her plea.

Even if you think, *pace* Raz, that there is an exercise of normative power at the earlier time, you should still think there is something amiss about Thorburn' s suggestion that it is a *discretionary* power. Recall that if D is held by the court to have defended herself proportionately and necessarily, she is not guilty under the law of self-defence. But equally she is not guilty under the law of self-defence if the court determines that she did not defend herself at all. Either way – and across the whole space in between - the court has the same duty, the duty to acquit D under the law of self-defence. So the discretion enjoyed by D under the law of self-defence is not a discretion bearing on the incidence of the court' s duty to acquit, which remains the court' s duty irrespective of how D exercises her discretion under the law of self-defence. It is only if D *exceeds* her discretion under the law of self-defence – only if she does what is not covered by the permission - that the court loses its duty to acquit on grounds of self-defence. So if D does have a normative power here it is patently not exercised by her exercising the permissive discretion that the law of self-defence grants to her. This in itself is not a

[53] Hart, *The Concept of Law* (Oxford 1961), ch 3.

reason to deny that D has a normative power. It is not a necessary condition of anyone's having a legal or moral power that its valid exercise is also legally or morally permissible.[54] However it is misleading to label the power 'discretionary' in a case where that condition is not met, for the label suggests that the law permits, as well as attaching legal consequences to, the power-holder's decision.[55] This makes one wonder whether there is some confusion or sleight-of-hand in Thorburn's talk of 'discretion'. At some points he appears to use 'discretion' and 'power' interchangeably, as if (which is false) every discretion were normatively empowering, and every normative power were discretionary.[56] Sometimes, in consequence, he appears illicitly to rely on the fact that the self-defender enjoys permissive discretion under the criminal law to lend spurious support to the quite different proposition that she has a discretionary power, a measure of authority over the court, a measure of authority which she exercises simply by defending herself.

2.3 Arrest

In thinking of an act of self-defence as the exercise of a

[54] A well-known illustration is *Edwards* v *Ddin* [1976] 3 All ER 705. Compare G.H. von Wright, *Norm and Action* (London 1963), 192, where an attempt was made to explain powers as higher-order permissions. For decisive criticisms consonant with those rehearsed here see e.g. Eugenio Bulygin, 'On Norms of Competence', *Law and Philosophy* 11 (1992), 201 at 205-6.

[55] It further suggests that there is more than one permissible way to exercise the power. Contrast 'mandatory powers', free of permissive latitude, such as the power of executors to transfer assets to beneficiaries under a will. See H.L.A. Hart, 'Bentham on Legal Rights', in A.W.B. Simpson (ed), *Oxford Essays in Jurisprudence: Second Series* (Oxford 1973), 171 at 196n93.

[56] Thorburn, 1074. The proposition that justification defences 'involve the exercise of a legal power' mutates into the proposition that such defences 'require at least some case-by-case discretion.' On the same page 'discretion' is used apparently interchangeably with 'authority': 'the police officer exercised his decision-making authority—his discretion—reasonably.'

normative power – an authority over the court - Thorburn may be influenced by what I regard as an orthogonal disagreement between us. It concerns the case where D reasonably but mistakenly believes himself to be under an attack that, if only it were as he believes it to be, would justify D' s acts of self-defence against his supposed attacker. We both think that the common law is right in its treatment of this case, but this agreement is predicated on two disagreements. While we disagree about how the case should be treated by the law, we also have a parallel disagreement about how the case is treated by the law. Thorburn thinks that D' s case is treated and should be treated by the law as a case of justified self-defence. My view is that D' s case is treated and should be treated by the law as falling under an excusatory doctrine of mistaken self-defence, parasitic on but distinct from the ordinary justificatory doctrine of self-defence.

This disagreement about self-defence is regarded by Thorburn as having large implications for how we would respectively analyze the law relating to arrest by a police officer. He is certainly right to connect self-defence with arrest. Strictly speaking, the arrest defence is one of ' reasonable force to effect an arrest' , and it is a variation on the same theme as the self-defence defence.[57] First, the force must be used in order to effect the arrest. Second, to qualify as reasonable it must be both necessary and proportionate force. Third, the necessity and proportionality of the force are both to be determined by the court, not by the arresting officer. In one way, the degree of permissive latitude given by the law of arrest is narrower than that given by the law of self-defence. That is because a police officer at least sometimes has a legal duty to arrest, whereas nobody has a legal duty to defend himself. However the police officer' s duty to arrest does not come of its being a criminal offence for him not to do so, but rather of professional duties for

[57] *R* v *Clegg*, above note 46, at 496 per Lord Lloyd.

breach of which he is subject to disciplinary sanctions (and possibly to judicial review in administrative law). On a *criminal* charge – our only concern here – an arresting officer enjoys the same permissive latitude that a self-defender enjoys, namely a latitude to use anything from no force at all up to and including all necessary and proportionate force. The difference between the officer's situation and that of a self-defender is essentially a difference in what the force must be necessary *for* and proportionate *to*. In self-defence the force must be necessary for the purpose of defending oneself and proportionate to the gravity (=violence? danger? intended outcome?) of the attack. In arrest it must be necessary in order to effect the arrest and proportionate to the arrest's importance[58] as well as the gravity (=violence? danger? intended outcome?) of the arrestee's resistance.

It is in these requirements that Thorburn sees the scope for his additional and orthogonal challenge to my views. He points out that in the case of arrest, the arresting officer is permitted to use necessary and proportionate force on the strength of his reasonable suspicion that an offence has been (or is being, or is about to be) committed, because it is on the strength of such reasonable suspicions that he is empowered to make the arrest in the first place. The officer need not be correct in his suspicions. Yet – as Thorburn says - we do not regard this fact alone as demoting the officer's defence from a justificatory to an excusatory one.[59] The officer's use of force to effect the arrest is not rendered unjustified by the mere fact that the suspect against whom the force was used, although validly arrested, turned out to be innocent of the suspected crime, or even if no such crime had in fact been committed.[60] So why – asks Thorburn, directing the question partly at me – should we regard a self-defender's plea as demoted from justificatory to excusatory in the analogous

[58] *Lynch* v *Fitzgerald* [1938] IR 382.
[59] Thorburn, 1092.
[60] *Wright* v *Sharp* [1947] 176 LT 308.

case where she reasonably but mistakenly took herself to be under attack, or under graver attack than she really was?[61]

The short answer is that two cases are not analogous. In the arrest case, unlike the self-defence case, there is a Thorburnian authority split. The ability to arrest, unlike the ability to defend oneself, is a true normative power. The police officer's awareness of the normative consequences of what he does plays a positive role in justifying those consequences. The consequences include changes in the duties and permissions and powers of himself and other police officers (such as the permission to detain and some permissions to search), as well as changes in the duties and permissions and powers of the arrestee (such as the duty not to resist) and of third parties (such as the duty not to obstruct). The primary role of reasonable suspicion in the law of arrest is to determine, in combination with various other criteria, the validity of the exercise of this normative power, so that the action of the arresting officer has these various normative consequences. The plea of reasonable force in effecting an arrest piggybacks on all of this. The officer's action must qualify as a valid arrest before the question arises of whether force in effecting it was reasonable, i.e. proportionate and necessary. Thus the standard for the availability of a justificatory defence in arrest cases remains a correctness standard. All that changes is what one needs to be correct *about*. It is not correctness in identifying one's situation as a self-defensive situation, and reacting necessarily and proportionately to that, but correctness in identifying one's situation as a valid arrest situation, and reacting necessarily and proportionately to *that*. If one is incorrect about this identification, including incorrect about any of the facts that bear on the validity of the arrest, then the most one can hope for is an excuse, the excuse of mistaken arrest. The twist in the tale of which Thorburn makes so much is merely that one of the facts

[61] Thorburn, 1092–3.

that bears on the validity of the arrest – a fact which has no counterpart in the law of self-defence, where there is no normative power at stake – is whether the arrest was made on the strength of reasonable suspicion. This admittedly gives the officer a discretion to determine whom to arrest and when, a determination which, within limits, will be treated by the court as binding on it in a later criminal trial of the officer.[62] The court determining the validity of the arrest will, for example, allow the officer a wide margin of error[63] in determining the necessity and proportionality of the arrest itself (as opposed to the necessity and proportionality of the force used to effect it).[64]

This analysis may seem perplexing because one may think, as Thorburn apparently thinks, that there are no extra reasonable mistakes of fact that an officer could possibly make beyond those that were already waved through in determining that the officer had the reasonable suspicion required to make the arrest valid. I doubt whether this is true. Consider the example of mistaken identity. Arguably, in English law, a valid arrest of X must be based on a reasonable suspicion about X, not a reasonable suspicion about Y, such that a case of reasonably mistaken identity (where the officer knows he is after Y but reasonably thinks that Y is X) is not a case of a valid arrest but of an invalid arrest, for the use of necessary and proportionate force in which there is no justification but at most an excuse.[65] Thus X, arrested

[62] *Hussein* v *Chong Fook Kam* [1970] AC 942; *O'Hara* v *Chief Constable of Royal Ulster Constabulary* [1997] AC 286.

[63] Up to the point at which the arrest is so disproportionate or so unnecessary as to qualify as irrational according to the criteria set out in *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 KB 223. See *Mohammed-Holgate* v *Duke* [1984] AC 437 per Lord Diplock on the application of the *Wednesbury* principles in determining the validity of an arrest.

[64] Thus excessive force used in effecting an arrest does not invalidate the arrest: *Simpson* v *Chief Constable of South Yorkshire*, *The Times*, 7 March 1991.

[65] The argument proceeds from *Hoye* v *Bush* (1840) 1 Man & G 775, admittedly a case about mistaken identity in the issue of an arrest warrant, and

in place of Y, has *ceteris paribus* a good case against the officers involved for the tort of unlawful imprisonment, even if the officers involved should not be convicted of any crime (such as kidnapping or assault). The excuse is valid in criminal law but not in tort, which makes no room for excuses. But even if this is not the law' s stance on mistaken identity, the most one could conclude is that there are no excusatory cases parasitic on the justificatory doctrine of reasonable force in effecting an arrest, because they are all anticipated in the criteria for the valid exercise of the power of arrest itself, and hence all subsumed into the justification. It does not follow that there are no excusatory cases of mistaken self-defence parasitic on the justificatory doctrine of self-defence, which is (in this respect) different.

To reduce the distracting aura of the ' reasonable suspicion' standard in the law relating to arrest by a police officer, one need only shift one' s attention to the law of arrest by a non-police-officer, colloquially known as citizen' s arrest. Ordinary members of the public, in many common law jurisdictions, may validly arrest for a past offence only when that offence has actually been committed. Where there is no offence, but only a reasonable suspicion of one, this invalidates the arrest and opens up the arrester to a potential tort action by the arrestee.[66] Still, so long the arrester used only the force necessary and proportionate to the arrest that she reasonably imagined herself to be effecting – assuming it would have been valid had the facts been as she reasonably supposed them to be - a criminal charge against her (e.g. a kidnapping or battery charge) should fail, not because the arrest is justified but because it is excused. This mirrors, I believe, the position in self-defence.

Thorburn does not acknowledge the existence of such arrangements in the law, but he lets it be known that he would

perhaps not extendable to mistakes in warrantless arrests.

[66] *Walters* v *WH Smith & Sons* [1914] 1 KB 595; *R* v *Self* [1992] 1 WLR 657.

find them problematic, maybe even incoherent, if he did:

> It is only possible for the decision maker to determine whether conduct is justified in the circumstances based on the evidence available to him at the time. So long as there are reasonable and probable grounds to find that the conduct is justified, he should so find—and once this decision has been validly made, this renders the conduct justified for the purposes of criminal law.[67]

This argument contains at least two mistakes. First, it cannot be true – of the person whose conduct is under scrutiny - that ' so long as there are reasonable and probable grounds to find that [his] conduct is justified, he should so find' . On the contrary, he should find his conduct justified only if it is justified. If it were the case that he should find his conduct justified whenever there are reasonable and probable grounds to find it justified, then it would also be true that he should find his conduct justified whenever there are reasonable and probable grounds to find that there are reasonable and probable grounds to find it justified, and whenever there are reasonable and probable grounds to find that there are reasonable and probable grounds to find that there are reasonable and probable grounds .. and so on. We are thrust into an infinite regress in which the rational requirements for justified action tend inexorably towards zero. Secondly, and more decisively, it is not true that, in the circumstances described by Thorburn (which are exactly those found in the law of citizen' s arrest) ' it would be impossible to make ...decisions' regarding the justifiability of one' s action. It is not impossible but merely risky to do so. Thorburn repeats a familiar *nonsequitur* in concluding, from the fact that I cannot guarantee my conformity to a reason by relying on it in my reasoning, that I cannot conform to that reason by relying on it in my reasoning. It is a long way from the claim that one cannot guarantee conformity

[67] Thorburn, 1092.

to the claim that one cannot conform. Correspondingly it is a long way from the claim that one cannot be sure in advance that one' s decisions are right (are covered by permissions, are valid exercises of a power, are among one' s duties) to the claim that ' it would be impossible to make such decisions' .

As already mentioned, Thorburn and I agree that it is part of the nature of a justification defence that its existence can be relevant to one' s decision whether or not to act.[68] In other words, one may help oneself to a justification defence intentionally. Thorburn seems to think that I am somehow casting doubt on this same idea when I contend ' that it is up to courts to determine what conduct is justified, ex post facto, based on a standard of correctness' .[69] But there is no tension here. It does not follow from the fact that the law' s permissions have to be such that we can intentionally help ourselves to them that we also have to enjoy some kind of assurance that we will fall under them when we do intentionally help ourselves to them.[70] In assuming otherwise, Thorburn is exaggerating the demands of the rule of law as they apply to criminal defences. In the past I have followed George Fletcher in arguing that the demands of the rule of law apply with greater stringency to the definition of criminal offences than to the definition of criminal defences, including justification defences.[71] I gave a complex argument, emphasizing the point that justification defences do not provide legal reasons to do what is, according to them, justified, but merely permit one to act for – by uncancelling - certain other

[68] See text at note 51 above.

[69] Thorburn, 1096.

[70] In other words, 'intentionally' does not entail 'knowingly'. I can intend to ϕ even though, as I know, I have very little prospect of ϕing: R.A. Duff, *Intention, Agency and Criminal Liability* (Oxford 1991), 55-57.

[71] Fletcher's argument is in 'The Nature of Justification' in Stephen Shute, John Gardner and Jeremy Horder (eds), *Action and Value in Criminal Law* (Oxford 1993); mine is in *Offences and Defences*, above note 6, 114-8.

reasons, reasons from outside the law or from other parts of the law, which cannot be expected to meet the same rule of law standards as reasons given by the criminal law itself. But concealed in this complex argument there was always a simpler point. Given the tough demands that the rule of law places on criminal offence definitions we should expect the criminal law to keep various countervailing moral considerations in a relatively naked form at the defence stage, mitigating what would otherwise be the excessive rigidity, and hence moral insensitivity, of the criminal law as a whole. So as I said in section 1, it is 'no coincidence' that we find pervasive calls for moral judgment by courtroom officials in determining the application of criminal defences. Even where some of the relevant moral judgments can be made *ex ante* by legal officials on the ground, as in the case of arrest by the police officer, there are also invariably some other moral judgments about the behaviour of those officials reserved for the court, which allow for what Thorburn calls the court's 'limited review of the prior exercise of discretion'.[72]

3. Criminal law as public law?

Here, as in some earlier passages, I am granting Thorburn his analogy to administrative law, his talk of the criminal court in at least some justification cases as 'reviewing' a prior exercise of normative powers by officials closer to the ground. Perhaps it was a mistake to grant even this much. Perhaps I thereby gave succour to Thorburn's more radical but misguided view according to which, in cases like the arrest case, there has already been an exercise of plenary authority on the question of justification by officials on the ground even before the case comes to trial, such that a court making a contrary ruling is thereby overruling those officials. I am not sure whether granting

[72] Thorburn, 1074.

the analogy to administrative law gives succour to this misguided view because, in most common law jurisdictions, administrative law is still in its intellectual infancy. It lacks a mature conceptual apparatus. Illegality and invalidity are frequently run together, unenforceability is equated to nullity, legal powers are confused with discretions, and the distinction between justification and excuse appears to be all but unknown.[73] In this climate it is hard to know what judicial review of official action is, and hence hard to know whether the Thorburnian analogy to it is apt.

In one respect, however, the Thorburnian analogy is clearly overambitious. Thorburn concludes that what is reviewed by the court, when self-defence or citizen's arrest is pleaded in a criminal trial, is not merely a prior exercise of authority but a prior exercise of *public* authority, i.e. a prior exercise of authority by a 'public official'. True, he admits, the self-defender and the citizen's arrester need not be public officials on any standing basis. They need not be card-carrying, let alone badge-wearing, public officials. Yet they are, says Thorburn, 'public officials *pro tempore*' just in virtue of the fact that they act under the auspices of the law on citizen's arrest or the law on self-defence as the case may be.[74] Thorburn concedes that the self-defence example is 'somewhat murkier' than the arrest example.[75] He delves into English legal history, via a modern decision of the Alberta Court of Appeal, in at attempt to clarify it. His verdict is that not only citizen's arrest, but also self-defence, involves its agent in an exercise of distinctively public powers.

Since – as we saw - acting in self-defence involves no exercise of any powers at all, it obviously cannot involve an exercise of public powers. However it is worth a small digression to challenge the odd interpretation of the common law conjured

[73] See, for example, *R (on the application of Corner House Research)* v *Director of the Serious Fraud Office* [2008] 4 All ER 927.
[74] Thorburn, 1076.
[75] Thorburn 1075.

up by the Alberta Court of Appeal, and borrowed by Thorburn. This is how the court sums up its interpretation:

> The power exercised by a citizen who arrests another is in direct descent over nearly a thousand years of the powers and duties of citizens in the age of Henry II in relation to the 'King's Peace.' Derived from the Sovereign it is the exercise of a state function.[76]

And this is how Thorburn extends the point beyond arrest:

> [T]he source of ordinary citizens' legal power to decide when it is permissible to violate criminal prohibitions in order to defend themselves, to effect an arrest, to prevent a breach of the peace, or to prevent the greater evil seems quite clearly to derive from the power of front-line state officials such as police constables to make such decisions, as well.[77]

There is something comically anachronistic about referring to a 14th-century parish constable as a 'front line state official'. But the anachronism betrays an equivocation on Thorburn's part, inherited from an equivocation on the part of the Alberta court, and displayed in Thorburn's use of the words 'derive' and 'source'. Perhaps – although I am sceptical - there was a time in which people were held by the law to be permitted to resist each other's aggressions or permitted to react to each other's crimes only as (or only on the fiction of their being) agents or representatives of the Crown engaged in the keeping of the peace. Perhaps one can tell a story, as Thorburn tries to do, according to which the modern law has its 'source' in, and is 'derived' from this earlier arrangement. However the historical sources of the law, the causal antecedents of interest to historians, are not the sources of the law that matter to lawyers.[78] The law of

[76] *R* v *Lerke* [1986] 67 AR 390 at 394-95.
[77] Thorburn, 1127-8.
[78] Hans Kelsen warns of this pitfall of the use of the word 'source' in *General*

self-defence has its legal source, its legal derivation, in whatever case law and statute law is currently authoritative in the legal system under scrutiny. *Lex posterior derogat priori* is a rule of the common law (and of legal systems in most other traditions) applicable not only to statute law but also to case law.

Set against the rest of the modern law of the common law systems, the reported position of the Alberta Court of Appeal is *outré*. The modern common law position is that the permission to defend oneself against an aggressor is the basic legal doctrine, to which the duty to submit oneself to a valid arrester is an exception,[79] and of which the legal permission to use force in effecting a valid arrest is an extension.[80] Moreover, within the 'valid arrest' category the legal power of ordinary members of the public to effect an arrest is the basic power, and the extra arrest powers of police officers, including the power to arrest on reasonable suspicion of the commission of an offence, are special extensions of that.[81] This reflects the more general common-law doctrine, of which Dicey made so much,[82] that public officials are regulated first by the ordinary law of the land applicable to private persons, to which ordinary law of the land all specifically public powers, duties and permissions must be read as either extensions or exceptions.[83] This now established (but once

Theory of Law and State (trans. Wedberg, Cambridge, Mass 1945), 131-2.

[79] *Rice* v *Connolly* [1966] 2 QB 414.

[80] *R* v *Chief Constable of the Devon and Cornwall Constabulary* ex parte *Central Electricity Generating Board* [1982] QB 458, per Templeman LJ at 479-80.

[81] Usually known as the 'citizens in uniform' doctrine, this is often traced back to remarks of Lord Mansfield CJ in *R* v *Kennett* (1781) 5 Car & P 282. A more recent leading case is *Albert* v *Lavin* [1982] AC 546, see esp. per Lord Diplock at 565, presenting the special police arrest powers as supplementary.

[82] No doubt too much, although he was less rabid a zealot for the doctrine than is sometimes remembered. See A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed., London 1920), ch 4 for the zealotry. See ch 12 for more conciliatory remarks about the *Conseil d'État*.

[83] *Entick* v *Carrington* (1765) 19 St Tr 1029; *Bowles* v *Bank of England* [1913] 1

newfangled?) doctrine is flatly incompatible with the view advanced by Thorburn, according to which the powers of arrest enjoyed by ordinary people are legally derived from those enjoyed by police officers, and according to which the permission to self-defend enjoyed by all is in turn a variation on this official-centred apparatus of arrest, such that all of us are rendered, just in virtue of our defending ourselves, never mind conducting an arrest, as public officials *pro tempore*.

There is something ironic about Thorburn's endorsement of this 'public officials *pro tempore*' doctrine, given the other important lessons that he teaches us along the way. Of course he is right that criminal law functions, in the common law tradition, as a powerful weapon against the abuse of public powers. It is a weapon that goes back a long way before modern administrative law. We might benefit from dusting it down and using it a bit more against the more egregious errors of politicians and police officers.[84] In the common law tradition it is a fine and perilous line between arresting someone and assaulting her, between

Ch 57. This doctrine cuts both ways. Just as public officials are burdened by a need to show special legal authority for everything they do that goes beyond what anyone else may lawfully do, so they are legally permitted, unless some law specifically restricts them, to do whatever anyone else may lawfully do: *Malone* v *Metropolitan Police Commissioner* [1979] Ch 344 at 357.

[84] I am thinking, for example, of the decision of the Independent Police Complaints Commission not to recommend murder charges against individual police officers involved in the death of Jean Charles de Menezes at Stockwell underground station in London on 22 July 2005. See the IPCC's report *Stockwell One* at http://www.ipcc.gov.uk/stockwell_one.pdf. Although there is high judicial authority for the proposition that mistakes of fact in self-defence need not be reasonable ones in order to furnish an excuse – for police officers or others - this authority (*Beckford* v *R* [1988] AC 130, cited by the IPCC at para 19.4 of *Stockwell One*) strikes many as both morally misguided and *per incuriam*, and it might helpfully have been re-examined in the courts by the launch of a murder prosecution in this particularly shocking case. Alas the *Beckford* error has since been put on a statutory footing thanks to s76(4) of the Criminal Justice and Immigration Act 2008.

granting an export license for military aircraft and abetting murder, between discontinuing a prosecution and conspiring to pervert the course of justice, between seizing evidence and stealing, and so on. Thorburn does much, and much that is welcome, to focus our attention on this fact. His whole argument builds on the fact that public officials do not escape the clutches of the ordinary criminal courts, nor of the ordinary criminal law, merely because they are public officials purporting to exercise their public powers. Nor do the rest of us escape those same clutches by kowtowing to public officials and following their perhaps misguided directions. This is, of course, Dicey' s point, and Thorburn bears it out repeatedly and brilliantly. So it is a surprise, at the end, to have Thorburn turn against the Diceyean interpretation of the common law and embrace its broadly Napoleonic rival. His official reasons for doing so seem weak, verging on nonexistent. He writes:

> The modern phenomenon of privatization … raises perhaps the deepest and most difficult problems for defenders of a neat public-private divide. For decades, American and Canadian constitutional scholars have tried to set out a workable distinction between state action that is subject to constitutional review and private action that is not, but to no avail. The present discussion of justifications and the manner in which the authority of private citizens to decide when conduct is justified seems to be derivable from their position as public officials pro tempore might provide a sort of new beginning to this deeply unsatisfying debate.[85]

I agree about the unsatisfyingness of the debate, and in particular the failure of those who set out to defend a ' neat public-private divide' for the purposes of judicial review. This is part of the larger problem that I alluded to, namely the immature conceptual apparatus of our modern administrative law. What I do not understand is why it cuts in favour of a revisionist

[85] Thorburn, 1128-9.

interpretation of our modern (and much more mature) criminal law, an interpretation according to which all self-defenders and arresters should be regarded as public officials *pro tempore*. Why is it not equally consistent with the opposite, well-established view according to which every defendant comes before the criminal court simply as an ordinary person, unencumbered and unenhanced by any robes or seals or badges of office? Of course it is true, as we saw, that occasionally the criminal law must recognize people' s legal powers (e.g. their power to arrest) as part of the process of determining whether their *prima facie* crimes were justified. And it is equally true that occasionally people have additional legal powers by virtue of being public officials, such as police officers. But although these additional powers are the powers of public officials, nothing turns, for the criminal law, on the fact that they are the powers of public officials. All that matters to the criminal law is whether the defendant, the person in the dock, held them at the time of the alleged crime and so can rely on them in mounting her defence. In the criminal court, unlike the administrative court dispensing judicial review, their public character is neither here nor there.

This being so, I am not sure what Thorburn is getting at when he claims that ' the distinction between public officials and private citizens was not always as neat as contemporary criminal law theorists often assume.' [86] It does not seem to me that theorists of the Anglophone criminal law are particularly prone to rely on this distinction, or even to mention it, in carving up justification defences.[87] I hope that I have never relied upon it

[86] Thorburn, 1128.

[87] An arguable exception is Andrew Ashworth, who travels part of the same road as Thorburn in arguing that certain kinds of official involvement in crime should be available as defences, albeit not for the official herself but for others who rely on her advice or assurance. Why I say 'arguable' is that in such cases Ashworth would favour a *nolle prosequi* (or similar waiver) over a justification defence, given the choice. Ashworth, 'Testing Fidelity to Legal Values:

myself for this purpose or for any neighbouring purpose. Thorburn himself is the one who introduces it, thereby luring criminal lawyers into the same muddy waters as their administrative law colleagues. Why does he do so?

The question takes us far into Thorburn' s broader moral and political ideals, of which we have frequent glimpses throughout his paper. His various remarks suggest that he and I have many sharp differences of moral and political opinion. But this is not the occasion to explore these differences. My main concern here, rather, was to document some conceptual and doctrinal misunderstandings which allow Thorburn to present some parts of the criminal law, in my view falsely, as exemplifications of his moral and political ideals, and which sometimes allow him to attribute mistakes to me that I never made. On the conceptual side, I emphasized

- the core doctrine of exclusive legal positivism, according to which the law poses morality' s questions but does not thereby incorporate morality' s answers;

- the falsity, or at least exaggeration, of Thorburn' s contrast between acts of consent and exercises of authority;

- the disconnect, which Thorburn neglects, between having a normative power and having permissive latitude;

- the difference between one' s reasons for acting (important on my own view of justification defences) and one' s ends in acting (important on Thorburn' s view); and

- the distinction between a reason' s being defeated by outweighing and a reason' s being defeated by exclusion, a distinction crucial to my view, ignored by Thorburn.

Official Involvement and Criminal Justice' in S. Shute and A.P. Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (Oxford 2002).

Meanwhile, on the doctrinal side, I emphasized

- the occasions on which consent is indeed, *pace* Thorburn, a justification defence in the common law of crimes;
- on such occasions, the importance of reliance upon consent as an essential element of the defence;
- the limits of the discretion conferred upon the self-defender at common law, which does not extend, as Thorburn seems to think it does, to determining either the proportionality or the necessity of her response;
- the merely threshold role of the valid exercise of powers of arrest in grounding the criminal-law defence of reasonable force in effecting an arrest;
- the logical space for excuse in cases of mistaken arrest; and
- the centrality to the common law tradition of the doctrine, almost inverted by Thorburn, that every defendant comes before the criminal court as an ordinary person subject to the ordinary law of the land, and hence unencumbered by public office except inasmuch as particular duties or powers or permissions may happen to be attached to that office.

Should we conclude from these criticisms and caveats that Thorburn' s project fails? Far from it. We should doubt its success as an attempt, if that is what it is, to isolate a distinctive and hitherto unidentified feature shared by all justification defences. But we should not doubt the importance, in certain justification defences, of the feature to which Thorburn draws attention. There are crime-scene normative powers at work in both the arrest and the consent defence, and probably in others. Not, on the other hand, in the self-defence defence. In this respect justification defences vary. It has taken Thorburn' s detailed and fascinating study to make this as apparent as it now is. Conceived

as an attempt to expose the diversity of justification defences, then, Thorburn' s project qualifies as a resounding success.