

JUSTIFICATION AS EXCUSE PLUS

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Under what conditions are we justified in acting? This paper considers an answer that, to my knowledge at least, goes largely unexplored in the literature. According to the answer in question, D has a justification for performing an act only if two conditions are met. First, there must be an undefeated reason for D to perform the act. Second, it must be the case that, were D to lack this reason, D would have an excuse for performing it. So understood, the conditions of justification incorporate the conditions of excuse—one satisfies the former by satisfying the latter, and by satisfying an additional condition. Justifications, simply put, are excuses plus.

I. INTRODUCTION

Under what conditions are we justified in acting? This paper explores an answer that, to my knowledge at least, goes largely unexplored in the literature. According to the answer in question, D has a justification for performing an action—call it ϕ —only if two conditions are met. First, there must be an undefeated reason for D to ϕ . Second, it must be the case that, were D to lack this reason, D would have an excuse for ϕ ing. So understood, the conditions of justification incorporate the conditions of excuse—one satisfies the former by satisfying the latter, and by satisfying an additional condition. Justifications, simply put, are excuses plus.

Section II clears some ground. Section III clarifies the conception of justification that is our subject—call it *Excuse+* for short. Sections IV and V consider what *Excuse+* implies for the criminal law, and for how we think about justification generally. Section IV considers what we can call:

The question of liability—does it matter, for the purposes of determining whether D is properly convicted of a criminal offence, whether D has a justification rather than an excuse for offending?

I show that, under some plausible assumptions, *Excuse+* implies that our answer should be no.

Section V turns to a second question. Call it:

The question of priority—does justification have priority over excuse?

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John Gardner answered this question in the affirmative. He claimed that justification has both normative and logical priority over excuse. He also claimed, in his later work, that we should endorse *Excuse+*. I offer some reasons to doubt the logical priority of justification. And I suggest that, if *Excuse+* is correct, excuses have logical priority over justifications.

Sections VI and VII turn from implication to evaluation. The former rejects an apparent objection to *Excuse+*. The latter explores an argument in favour of this conception of justification. The argument builds on claims made by Andrew Simester in his *Fundamentals of Criminal Law*.¹ Simester rejects more than one prominent conception of justification on the basis of these claims. He is, I believe, right to do so. Here I show that, if we do reject these conceptions, on the basis on which Simester rejects them, we should endorse *Excuse+* on the same basis.

II. PRELIMINARIES

1. *Senses of Justification*

We can usefully start by distinguishing between two senses of justification. Justification in the broad sense (as I will call it) is synonymous with permissibility. D is justified in ϕ ing if and only if it is not impermissible for D to ϕ .

The broad sense is broad in two respects. First: to establish that an act is permissible, it is sufficient to establish the absence of a negative. If there is no reason against D ϕ ing, it is not impermissible for D to ϕ . So, ϕ ing is necessarily justified in the broad sense. Second: where there *are* reasons for D not to ϕ , it is not necessary to establish the existence of undefeated reasons in favour of ϕ ing. Suppose that my reasons to go to sleep early tonight outweigh my reasons to go for a late drink with a friend. The former thereby defeat the latter. It does not follow that, if I go for the drink, I thereby act impermissibly. To act impermissibly is to act as one is required not to act. Since we are not always required to conform to the weightiest reasons that apply to us, ϕ ing can be justified, in the broad sense, even if the reasons for us to ϕ are defeated reasons.

Justification in the narrow sense—as I will call it—differs in both respects. First: one establishes that ϕ ing is justified, in this latter sense, only if one establishes the existence of a positive case in its favour—only if, that is, one establishes that there is at least some reason for D to ϕ . This is not to say that actions are unjustified when there are neither reasons for nor against performing them. It is only to say that questions of justification, in the narrow sense, do not then arise. Such questions arise only in respect of acts that stand in need of justification, and acts stand in need of justification (as I use this expression here) only if there is reason not to perform those acts.

Second: not just any positive case suffices for justification. One establishes that ϕ ing is justified, in the narrow sense, only if one establishes that (i) there are reasons which count in favour of ϕ ing, and (ii) those reasons are undefeated by the reasons which count against. All else being equal, if my reasons not to meet my friend for

¹ A.P. Simester, *Fundamentals of Criminal Law: Responsibility, Culpability, and Wrongdoing* (Oxford: Oxford University Press, 2021).

a late drink outweigh the reasons in favour, then meeting them is unjustified in the narrow sense.

My central interest here is in the justification of offending acts. I assume that such acts stand in need of justification—that they are acts which there is reason not to perform.² Wherever there is reason not to ϕ , there are facts which make it the case that there is such a reason. I will call these O-facts for short. I further assume that ϕ ing constitutes an offending act only if D is aware that the O-facts obtain. D offends, in other words, only if D chooses to do what she has reason not to do. Finally, I assume that the sense of justification of interest to us is the narrow sense: D is justified in ϕ ing only if there is reason for D to ϕ , and only if that reason is undefeated reason by the reasons against ϕ ing. The facts which make it the case that D has such a reason I will call J-facts.

2. Senses of Excuse

Whether one has a justification for acting depends on whether J-facts obtain. Whether one has an excuse for acting, by contrast, is not dependent on such facts. One does not establish that D has an excuse for ϕ ing by establishing that D conformed to an undefeated reason when she ϕ ed (though she may well have done so). One establishes that D has an excuse for ϕ ing by establishing that D was not at fault for having ϕ ed (despite the existence of what may have been decisive reasons against ϕ ing).³

The question of whether we are at fault for ϕ ing is a question about our practical reasoning. The question is whether, in acting for the reasons for which we acted, we fell short of the expectations others reasonably have of us as responsible agents.⁴ One way to establish that one was not at fault for an action is to establish that one's action was not an exercise of responsible agency at all. Another is to establish that it was perfectly reasonable for a responsible agent—in one's circumstances—to act for the reasons for which one acted. To do the first is to establish an *exemption*—it is to show that the standards which apply to exercises of responsible agency were inapplicable at the time one acted. To do the second is to establish one's *proficiency*—it is to accept that those standards applied; and it to show that they were met.

Excuses in the broad sense include exemptions. Excuses in the narrow sense do not. In what follows, when I refer to excuses *simpliciter*, I have the latter sense in mind. It might be objected that, if D lives up to reasonable expectations in ϕ ing for a reason— r —it must be the case that r is an undefeated reason for D to ϕ . Since I already claimed that the existence of an excuse for acting does not entail the existence of an undefeated reason for action, it may seem to follow—by my own lights—that there are no excuses in the narrow sense. This objection fails because it overlooks the gap between reasons for belief and reasons for action. If V rushes at

² This is true, at least, according to law. Offending acts are legal wrongs, and legal wrongs are things from which, in the eyes of the law, we have reason to refrain.

³ I assume here that questions of excuse, like questions of justification, only arise in respect of actions we have reason not to perform.

⁴ By a responsible agent I mean, roughly, an agent with the ability to respond to (real and apparent) reasons in acting.

D shouting aggressively, while wielding a samurai sword, D may have undefeated reason to believe that she has undefeated reason to kill V. But if V poses no threat to anyone, D has no reason—let alone an undefeated reason—to kill. Now imagine that D believes what she has undefeated reason to believe, because she has undefeated reason to believe it. D lives up to reasonable expectations if she kills V on the strength of this belief. This remains the case even if, as we are assuming, the facts give D no reason to do so. In such a case, D has an excuse for killing V. She does not have a justification.⁵

III. CONDITIONS

J-facts are necessary for justification. Or so I assume here. Some claim that they are also sufficient. For them, D is justified in ϕ ing if and only if D has an undefeated reason to ϕ . Call this *the simple view* for short.

It is one thing for J-facts to obtain. It is another for D to be aware that they obtain. It is yet another for those facts to explain why D acts as she does. On the simple view, whether D is justified in ϕ ing depends only on the first of the three. It is independent of D's practical reasoning. D may be entirely unaware of the facts that provide her with undefeated reason to ϕ . She may be aware of those facts but indifferent to them. All that matters, for the purposes of justification, are the J-facts themselves.

Alternatives to the simple view add additional conditions of justification. According to the alternative I explore here, the additional conditions are those that must be met to establish an excuse. On this view, if D is to be justified in ϕ ing, J-facts must obtain. And it must be the case that, had those facts not obtained, D would have had an excuse for having ϕ ed. Since this view makes the conditions of justification the conditions of excuse, plus an additional condition, I call it *Excuse+* for short.

D has an excuse for ϕ ing, in the narrow sense, if and only if D lives up to the expectations we reasonably have of her as a responsible agent. *Excuse+* implies that D has a justification for ϕ ing only if this is so, and only if D also has an undefeated reason to ϕ . I earlier denied that, if D lives up to expectations in ϕ ing for r , this entails that r is an undefeated reason for D to ϕ . It might nonetheless be said that, if r is an undefeated reason to ϕ , D cannot fall short of reasonable expectations in ϕ ing for r . We should reject this second entailment, however, just as we rejected the first. We can see why by distinguishing between (i) the fact that r undefeated; and (ii) those facts which make it the case that r is undefeated. Facts of the latter kind are what I am calling J-facts. They include facts which reinforce r by provide additional reasons to ϕ . And they include facts which unencumber r by negating reasons against ϕ ing. Now suppose that, though J-facts obtain, D is unaware of those facts. Suppose further that the facts of which D is aware do not include facts she reasonably regards as J-facts—that we reasonably expect D to treat r as a defeated reason on the facts as she believes them to be.⁶ *Ex hypothesi*, D falls short of expectations if

⁵ I assume here that the facts which give us reasons for action are facts which confer value on our actions. I also assume that these facts need not be within our epistemic perspective. Both assumptions are admittedly controversial, but they are shared by my principal interlocutors here.

⁶ We are assuming that D is aware of the O-facts.

she ϕ s for r in such circumstances. This is so even though r is an undefeated reason for D to ϕ .

It may help to have an example, so here is one I have discussed before.⁷ D is a doctor who performs laser eye surgery on V. D's reason for performing the procedure is that it will improve V's eyesight. D does not believe that V has consented to the procedure. She regards the optical improvement as sufficient reason to operate. Unbeknownst to D, however, V does consent. Let us now make two assumptions about the case. First: D's consent to the procedure is a J-fact—by giving consent, V removes an objection to D performing laser eye surgery; she thereby makes it the case that improving V's eyesight is an undefeated reason to operate. Second: D is properly expected to treat patient consent as decisive—she is expected to regard reasons to perform laser eye surgery as defeated reasons in the absence of consent to its performance. On these assumptions, D operates for an undefeated reason. But she would have no excuse for operating were there no such reason. If V refused her consent, but D operated regardless, D would fall short of the expectations we reasonably have of her as a doctor. Under these assumptions, the simple view confers a justification upon D. *Excuse+* delivers the opposite verdict.

I turn later to what might persuade one to endorse *Excuse+*. It is worth noting first, however, that John Gardner is one philosopher who should be counted among the persuaded. Admittedly, this is not the view with which Gardner is ordinarily associated. On that view, there are two necessary and sufficient conditions of justification. First: D must have an undefeated reason to ϕ . Second: D must ϕ for such a reason.⁸ Gardner indeed endorsed this bipartite view in his early work.⁹ His considered position, however, was that the two conditions require supplementation.¹⁰ Whether D is justified in acting, Gardner came to believe, is determined not only by *whether* D acts for an undefeated reason, but also by *why* D acts for that reason.¹¹ D's grounds for treating r as an acceptable reason to ϕ must be grounds that would furnish D with an excuse for ϕ ing were r defeated or merely apparent. In Gardner's own words,

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.¹²

⁷ James Edwards, "Justification and Motivation" (2023) CLPH, online: <<https://link.springer.com/article/10.1007/s11572-023-09691-7>>.

⁸ This view is attributed to Gardner by most who discuss his work on justification. For just a few examples, see Hasan Dindjer, "What Makes an Administrative Decision Unreasonable?" (2021) 84(2) Mod L Rev 265 at 274; Michelle Madden Dempsey, "Authority, Obedience, and Justification" (2021) 90(2) U Cin L Rev 408 at 429; Simester, *supra* note 1 at 394ff.

⁹ John Gardner, "Justifications and Reasons" in A.P. Simester & A.T.H. Smith, eds. *Harm and Culpability* (Oxford: Oxford University Press, 1996) at 103, 113; John Gardner, "The Mysterious Case of the Reasonable Person" (2001) 51(3) UTLJ 273.

¹⁰ John Gardner, "Justification under Authority" (2010) 23(1) Can JL & Jur 71 at 82 [Gardner, "Justification under Authority"]; John Gardner, "In Defence of *Offences and Defences*" (2012) 4 Jerusalem Rev. Leg. Stud. 110 at 113 [Gardner, "In Defence of *Offences and Defences*"].

¹¹ Gardner calls this the "in virtue of what" requirement: see Gardner, "Justification under Authority", *supra* note 10 at 82.

¹² *Ibid.* Gardner would add a third necessary condition to the two I have identified. He claims that D is justified in ϕ ing only if (i) D has an undefeated reason to ϕ — r ; (ii) D ϕ s for r ; and (iii) D would have an excuse for ϕ ing if r were defeated. To endorse *Excuse+*, as I understand it here, is to sign up to (i) and (iii). This leaves open the possibility that we should also subscribe to (ii). I discuss this possibility at greater length in Edwards, *supra* note 7.

IV. LIABILITY

Suppose that a statute is enacted making it a criminal offence to ϕ . The enactment, let us assume, is morally legitimate. Making it an offence to ϕ , in other words, is a morally permissible use of legislative power. Now suppose that D is charged with ϕ ing and pleads not guilty. D denies neither that she ϕ ed, nor that she was a responsible agent when she did so. Put differently, she concedes both (i) that the elements of the offence were satisfied, and (ii) that she had the ability to respond to reasons when she acted. D nonetheless argues that she should be acquitted of the crime.¹³

Under what conditions should D's argument be accepted? The answer depends on the norms that should govern the decision-making of criminal courts. I assume in the remainder of this section that (N) is one such norm:

(N) D is properly acquitted of ϕ ing if and only if D has a justification or an excuse for having ϕ ed.

To endorse (N) is to hold that, if D has neither a justification nor an excuse for offending, D is properly convicted of the offence with which she is charged. It is also to hold that, if D has either a justification or an excuse, D should be acquitted of the offence.

What (N) implies for the conditions of criminal liability depends on which understanding of justification is adopted. Let us suppose, first, that the courts adopt the simple view. Two distinct avenues of acquittal then present themselves. First, D should be acquitted if J-facts obtain when she ϕ s. Second, D should be acquitted if she has an excuse for ϕ ing. Either is sufficient to make an acquittal the proper verdict of the court. Neither is necessary for this to be the case.

Now recall what I called at the outset:

The question of liability—does it matter, for the purposes of determining whether D is properly convicted of a criminal offence, whether D has a justification rather than an excuse for offending?

If the simple view is adopted, an affirmative answer is inevitable. (N) entails that D should be convicted if and only if she has neither a justification nor an excuse for offending. It follows that, if D lacks a justification, D's fate depends on an evaluation of her practical reasoning. D should be acquitted if and only if her reasons for offending do not show her in a bad light. If D has a justification, by contrast, no such evaluation is required. It suffices to show that, since J-facts obtained, D conformed to an undefeated reason when she ϕ ed.

Let us now suppose that the courts instead adopt *Excuse+*. On that view, the conditions of justification incorporate the conditions of excuse. One satisfies the former only if one satisfies the latter. We are assuming—given (N)—that D should be acquitted of ϕ ing if and only if she has a justification or an excuse for having

¹³ I distinguish here and throughout between crimes and criminal offences. One cannot commit a crime without committing a criminal offence. One can commit a criminal offence without committing a crime. One does so when one has a criminal defence.

ϕ ed. It follows that D should be acquitted if and only if the conditions of excuse are met. Establishing that D satisfied these conditions, in other words, is both necessary and sufficient to establish that D should not be convicted of an offence. By contrast, establishing that J-facts obtained when D ϕ ed is neither necessary nor sufficient to establish that D is properly acquitted. It is not necessary because one can have an excuse for ϕ ing even if one has defeated (or no) reason to ϕ . It is not sufficient because one may lack a justification for ϕ ing despite the existence of an undefeated reason to ϕ .

One implication of all this is that, in any legal system that adopts *Excuse+*, the answer to the liability question must be no. In such a legal system, it does not matter, for the purposes of determining whether D is properly convicted of a crime, whether D has a justification rather than an excuse for offending. It does not matter because the sole property which distinguishes justifications from excuses—namely, the existence of J-facts—has no bearing on how cases are properly decided by criminal courts. If J-facts do not obtain, D must rely on an excuse. D should be acquitted if the conditions of excuse are met. She should be convicted otherwise. If J-facts do obtain, nothing changes. D has a justification only if she has an excuse. D should be convicted unless she has a justification or an excuse. Once again, D should be acquitted if and only if the conditions of excuse are met. For these purposes, at least, J-facts make no difference. Neither, we must conclude, does justification.

V. PRIORITY

Let us turn now to the second of the two questions identified at the outset:

The question of priority—does justification have priority over excuse?

This question of priority is often answered in the affirmative by philosophers of criminal law.¹⁴ Obviously enough, however, priority comes in different forms. One form of priority is *evaluative*. For justifications to have evaluative priority over excuses is for the former to be preferable to the latter. Call this *J over E* for short. Suppose D uses force against V to repel what she reasonably believes to be an attack on T. Whether D has a justification or merely an excuse depends on whether the attack is real or merely apparent. If the former, let us assume, D uses force she has undefeated reason to use to repel V's attack. If the latter, D uses force she reasonably but mistakenly believes herself to have undefeated reason to use. To endorse *J over E* is to claim that, all else being equal, anyone in D's situation should prefer the former to the latter.

We can compare evaluative priority with logical priority. For justification to have logical priority over excuse is for the former to come before the latter in the order of explanation. Call this *J before E* for short. Imagine we are trying to understand what it is for D to have an excuse. *J before E* implies that, to fully understand our

¹⁴ For a useful set of references, see Douglas Husak, "On the Supposed Priority of Justification to Excuse" (2005) 24(6) *Law & Phil* 557.

subject, we need to first understand what it is for D to have a justification. It will be clear enough, I hope, that the two forms of priority do not entail one another. We can accept *J over E* while rejecting *J before E*. We can also do the reverse.

In *Offences and Defences*, John Gardner endorses both priority theses. He signs up to *J over E* and *J before E*.¹⁵ Gardner's case for the latter rests on two propositions about excuses. The first is that excuses are properly understood in the narrow sense. One does not establish that D has an excuse by establishing that D was not a responsible agent when D acted. One establishes that D has an excuse by establishing that, in exercising her responsible agency, D lived up to the expectations we reasonably have of such agents.¹⁶

Gardner's second proposition concerns the content of the aforementioned expectations. Grant that the reasons for D to act as she does are defeated reasons. *Ex hypothesi*, D cannot establish a justification for acting. What she can do is establish a justification for the beliefs (attitudes, emotions, etc) on the strength of which she acts. D lives up to reasonable expectations, Gardner claims, if and only if she does just that. Put differently, D has an excuse for acting if and only if she has a justification—not for the action she performed—but for the mental states which explain why she performed it.¹⁷ Simply put, excuses are justifications at one remove. This is why, if one wants to understand what it is to be excused, one first needs to understand what it is to be justified. It is why *J before E* is a sound thesis.

We saw above that, in his later work, Gardner endorsed *Excuse+*. He claimed that it is a necessary condition of justified action that “were one's reason for acting perchance defeated rather than undefeated, one's action would still be excused”.¹⁸ At first sight, this claim sits uneasily alongside the second proposition set out above. *Excuse+* appears to imply that, if we want to understand what it is for D to have a justification for ϕ ing, we need to first understand what it is for D to have an excuse for having ϕ ed. After all, it is only by grasping the conditions under which D has the latter that we grasp the conditions under which D has the former. As we have seen, Gardner's conception of excuse implies that the order of explanation is the other way around. In his own words, it implies that “one needs to understand what a justification is in order to understand what an excuse is”.¹⁹ Hence *J before E*.

It might be said in reply that the tension here is merely apparent. It is one thing to claim both that (i) understanding what it is for acts to be justified requires understanding what it is for them to be excused; and that (ii) understanding what it is for acts to be excused requires understanding what it is for them to be justified. It is quite another to endorse (i) and add that: (iii) understanding what it is for acts to be excused requires understanding what it is for the mental states which explain those acts to be justified. No doubt it would be problematic to combine (i) with (ii). There is nothing problematic, it might be said, about combining (ii) with (iii). And it is the latter, not the former, to which Gardner is committed. His considered view is

¹⁵ John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007) at 269-271 [Gardner, *Offences and Defences*].

¹⁶ *Ibid*, ch 6.

¹⁷ *Ibid* at 110, 161, 271.

¹⁸ See *supra* note 12.

¹⁹ Gardner, *Offences and Defences*, *supra* note 15 at 269.

that we are justified in acting only if we act for undefeated reasons, and only if the beliefs (attitudes, emotions, etc) on the strength of which we act are justified beliefs (attitudes, emotions, etc). It follows that we can understand everything we need to understand about justification without making use of the concept of excuse. We can endorse *J before E* alongside *Excuse+*.

This attempt to put justification back in the logical driving seat is not without difficulty. One problem stems from the thought that the concept of justification is of general application. This is not to deny, of course, that the phenomena which admit of justification are many and varied. Think of actions, beliefs, emotions, attitudes, decisions, practices and rules, to name just a few. What it *takes* to justify each of these objects no doubt differs. What it *means* for each to be justified plausibly does not. Put differently, though the material conditions of justification vary with the object being justified, the conceptual conditions of justification are one and the same. This, at least, is Gardner's position.²⁰ If it is correct, and justifying an *action* requires showing that the actor would otherwise have an excuse for performing her action, then justifying a *belief* must also require showing that the believer would otherwise have an excuse for forming her belief.²¹ It follows that, if justified action is indeed to be understood partly in terms of justified belief, we cannot so easily do away with the conditions of excuse in our attempt to explicate the conditions of justification.

The concept of justification is not, of course, the only one that can be generalised. We can do the same with the concept of excuse. Suppose that we do, and that Gardner is correct about both concepts. A troubling regress looms. One establishes that X satisfies the conditions of justification—*Excuse+* implies—only by establishing that X satisfies the conditions of excuse. One establishes that X satisfies the conditions of excuse—Gardner claims—only by establishing that Y satisfies the conditions of justification (where Y explains X). One establishes that Y satisfies the conditions of justification only by establishing that Y satisfies the conditions of excuse. One establishes that Y satisfies the conditions of excuse only by establishing that Z satisfies the conditions of justification (where Z explains Y). And so on.

One way to block the regress in prospect here is to reject *Excuse+*. Another is to revise Gardner's conception of excuses. I turn in due course to whether we have good reason to do the former. The remainder of this section makes a case for the latter.²² That case rests on the thought that, as well as having justifications and excuses for our actions, we can also have justifications and excuses for our beliefs. A belief that *p* is justified only if D has an undefeated reason to believe that *p*. A belief that *p* is blameless if and only if D is not at fault for believing that *p*. If *Excuse+* extends to epistemic justification, justified beliefs are necessarily blameless beliefs.

²⁰ Gardner presents his analysis of justification as an analysis of "the ordinary concept". And he claims that this concept "belongs to the whole of rationality, of which practical rationality is only part". See Gardner, "In Defence of *Offences and Defences*", *supra* note 10 at 123.

²¹ The same goes for attitudes, emotions, etc.

²² It is a case owed to a suggestion made by A.P. Simester. See Simester, *supra* note 1 at 484–485.

Whether or not this is so, however, blameless beliefs are not necessarily justified—some are excused despite being unjustified.²³

Now suppose that D ϕ s on the strength of a mistaken belief in the existence of J-facts. D kills V, say, because D mistakenly believes that V will otherwise culpably kill T. Suppose further that D's belief is a blameless but unjustified belief. Is D at fault for ϕ ing? It is hard to see why. It is hard to see why we should think that, in acting for the reason for which she acted, D fell short of the expectations we reasonably have of her as a responsible agent. After all, D had an undefeated reason to ϕ on the facts as she believed them to be. And D was not at fault for so believing. Let us grant that, under these conditions, D is not at fault for her actions—that she lives up to reasonable expectations in acting as she does. *Ex hypothesi*, this cannot be because she has a justification for acting. Rather, it must be because D has an excuse. She has an excuse because she ϕ s on the strength of a blameless but unjustified belief in the existence of an undefeated reason to ϕ .²⁴

If I am right about all this, we should reject the claim that excuses are justifications at one remove. To establish that D has an excuse for ϕ ing it suffices to establish that the beliefs (attitudes, emotions, etc) on the strength of which D ϕ ed are blameless beliefs (attitudes, emotions, etc). Revising Gardner's conception of excuses in this way has the following three implications. First, the revision offers an escape from the regress that is compatible with *Excuse+*. We can accept that, if we are to show that X satisfies the conditions of justification, we need to show that X satisfies the conditions of excuse. But we can deny that, in order to show that X satisfies the conditions of excuse, we need to show that Y satisfies the conditions of justification.

Second, the revision undermines the case for *J before E* we drew from Gardner. The sole reason that case gave us for regarding justifications as logically prior to excuses was the thought that excuses are justifications at one remove. If, as the revision implies, this thought should be rejected, the case in favour of *J before E* evaporates. Third, and most radically, the revision implies that *J before E* has things backwards. This is the case, at least, if *Excuse+* is correct about justification. Since *Excuse+* holds that the conditions of justification incorporate the conditions of excuse, it implies that we need to understand what it is to be excused in order to understand what it is to be justified. The revised conception of excuses implies that the reverse does not hold true. If this is correct, we not only lack reason to endorse *J before E*; we also have reason to endorse *E before J*—to accept that, in the order of explanation, excuse comes first.

²³ On epistemic excuses generally, see Clayton Littlejohn, "A Plea for Epistemic Excuses" in Julien Dutant & Fabian Dorsch, eds. *The New Evil Demon: New Essays on Knowledge, Justification and Rationality* (Oxford: Oxford University Press, forthcoming); Timothy Williamson, "Justifications, Excuses, and Sceptical Scenarios" in Dutant & Dorsch, *ibid*; Daniel Greco, "Justifications and Excuses in Epistemology" (2021) 55(3) *Nous* 517.

²⁴ It might be said in reply that, though blameless beliefs may themselves be unjustified, they must be beliefs based on other mental states that are justified—on justified emotions, attitudes, etc. I do not see why. Just as we need not show that D's beliefs are justified in order to show that D is not to blame for doing what she does on the strength of those beliefs, so we need not show that D's emotions or attitudes are justified in order to show that D is not to blame for believing what she believes on the strength of those emotions or attitudes.

VI. AGAINST

Everyone agrees that D may have an excuse for ϕ ing without having a justification. Can D also have a justification without having an excuse? If the simple view is correct, she certainly can. If *Excuse+* is sound, this possibility is foreclosed.

In *Fundamentals of Criminal Law*, Andrew Simester explicitly rejects the simple view. His enthusiasm for *Excuse+*, by contrast, is less clear. When discussing criminal defences, Simester claims that “even as an agent may be excused without being justified, she may be justified without being excused”.²⁵ He expands on the point in the following passage:

It is possible for actions to be justified without being excusable at all. That occurred in *Re A (Children)*, in which the Court of Appeal ruled that it would be lawful for surgeons to separate conjoined twins, even though the known consequence was that one twin would die within minutes. Here, the question for the Court turned on whether such an operation would be justified: does the case for protecting one life warrant an intervention that kills the other? Otherwise, however, the surgeons have no possibility of an excuse.²⁶

Does Simester here announce his opposition to *Excuse+*? If so, do his remarks give us reason to reject this understanding of justification?²⁷ I argue that the answer to the first question depends on how we interpret the quoted passage. I distinguish between two different interpretations below. I then argue that, when it comes to the second question, both lead to the same conclusion: we should answer in the negative whichever interpretation we adopt.

We can usefully begin by noting that for Simester—as for the Court of Appeal—J-facts obtain in *Re A (Children)*.²⁸ Both twins will otherwise die. One—Mary—will die regardless. The other—Jodie—may yet be saved. The doctors have an undefeated reason to separate the twins, because doing so is the only means of saving Jodie. Since he rejects the simple view, Simester regards this as necessary but insufficient for justification. For him, the doctors must also operate in order to save Jodie’s life. Assuming they do, Simester holds the operation to be justified. He also claims that the operation is otherwise inexcusable. Let us call this *the inexcusability claim* for short.

Now the inexcusability claim, properly understood, is a claim about a counterfactual. In Simester’s words, it is a claim about what D’s position would *otherwise* be—if, that is, D lacked a justification for her actions. Whether we should accept it therefore depends on how the counterfactual is properly construed—it depends on what we change and what we hold fixed. One option is to

²⁵ Simester, *supra* note 1 at 410.

²⁶ *Ibid* at 413.

²⁷ It is a further question whether Simester *intends* his remarks to constitute a rejection of *Excuse+*. I take no position on this here.

²⁸ *Re A (Children) (conjoined twins: surgical separation)* [2001] Fam 147 (CA, Eng); Simester, *supra* note 1 at 462ff.

remove the J-facts without altering D's practical reasoning. We ask whether, if D's reason for acting proved to be defeated or merely apparent, she could nonetheless establish an excuse. The second option is to retain the J-facts and alter D's practical reasoning. We ask whether, if D had acted for other reasons—reasons other than those provided by the J-facts—D might thereby have established an excuse.

Suppose we plump for the first understanding. Cases in which ϕ ing is justified but otherwise inexcusable are then cases in which D would lack an excuse if her reasons to ϕ were defeated reasons. Obviously enough, the existence of such cases would falsify *Excuse+*. Equally obviously, however, *Re A (Children)* provides no support for the claim that there are such cases. Consider:

*Re A**: As in *Re A (Children)*, except Jodie has an undetectable allergy to an antibiotic that will be used to separate the twins. As a result, the operation will kill both Jodie and Mary.

Imagine the doctors operate in *Re A**. Since the operation kills rather than saves Jodie, no J-fact obtains in this case. *Ex hypothesi*, the doctors have no justification. Surely, however, they have an excuse. It is entirely reasonable, given the information available to them, for the doctors to operate in order to try to save Jodie's life. It follows that, on our first interpretation of the inexcusability claim, *Re A (Children)* is not a case of justified action which is otherwise inexcusable. It is a case of justified action which would otherwise be excused.

Let us turn, then, to the second interpretation. Instead of supposing that J-facts do not obtain, we suppose that they do. But we *also* suppose that D's reasons for acting make no reference to those facts—that they are reasons given by other aspects of the situation. Cases in which ϕ ing is justified but otherwise inexcusable are cases in which such reasons cannot furnish D with an excuse.

If this is how the inexcusability claim is best understood, two things follow. First, *Re A (Children)* is plausibly thought of as a supportive example. It is hard to see what other motivation—other than protecting the life of Jodie—could possibly have furnished the doctors with an excuse for causing Mary's death. Second, there is no conflict between the inexcusability claim, so interpreted, and *Excuse+*. To endorse the latter is to claim that

- (i) the doctors have a justification in *Re A (Children)* only if it is reasonable for them to operate regardless of whether Jodie's life is ultimately saved.

To endorse the former is to claim that

- (ii) in the circumstances it would not be reasonable for the doctors to operate for any reason other than to save Jodie's life.

Since there is no conflict between these claims, the truth of the inexcusability claim—on our second interpretation—does nothing to suggest that we should reject *Excuse+*.

VII. FOR

I have argued that, whichever way Simester's remarks are interpreted, they give us no reason to reject *Excuse+*. It does not follow, of course, that we have reason to embrace it. The present section explores one argument in favour of this conception of justification.

We can usefully begin by returning to:

- (N) D is properly acquitted of ϕ ing if and only if D has a justification or an excuse for having ϕ ed.

Earlier, I assumed that (N) properly governs the decision-making of criminal courts. I showed that different interpretations of this norm have different implications for the conditions of criminal liability. The question that follows is which interpretation the courts ought to adopt. The answer depends, as it does generally, on the rationale for the existence of the norm—it depends, that is, on why (N) is a norm that properly governs the courts' decision-making.

Let us consider what I will call the fault-based rationale for (N). It is a rationale comprised of the following two principles:

The negative fault principle (NF)—if D is not at fault for ϕ ing, D should not be convicted of having ϕ ed.²⁹

The positive fault principle (PF)—if D is at fault for ϕ ing, D should be convicted of having ϕ ed.³⁰

Note that these two principles do not entail one another. *NF* implies that there is a case against convicting D of ϕ ing if D is not at fault for having ϕ ed. It does not follow that, if D is at fault, there is anything to be said for convicting D. *PF*, of course, has just this implication—it implies that there is reason to convict offenders who are at fault for their offending acts. This is compatible with denying what *NF* asserts—that there is any reason against convicting ϕ ers who are not at fault for having ϕ ed.

Both principles should be understood defeasibly. *NF* does not entail that there are never reasons to convict offenders who offend faultlessly. Nor does it entail that those reasons are necessarily defeated. *PF* does not imply that courts lack reasons to acquit offenders who are at fault for offending. Nor does it imply that this is never what courts have most reason to do. What both principles *do* imply is that these reasons have something to defeat. They imply that, at least in the case of legitimately enacted criminal offences, both convicting the faultless and acquitting the faulty stand in need of justification. Both are things criminal courts have reason not to do, such that sufficiently powerful reasons must be found to justify doing them.

²⁹ For endorsement, see Simester, *supra* note 1 at 11; John Gardner, "Wrongs and Faults" in A.P. Simester, ed. *Appraising Strict Liability* (Oxford: Oxford University Press, 2005) at 69 [Gardner, "Wrongs and Faults"].

³⁰ Recall our assumption that it is a criminal offence to ϕ , and that the offence was legitimately enacted.

The connection between these principles and (N) is simply stated. *NF* accounts for (N)'s sufficient condition. *PF* accounts for its necessary condition. As to the former, it is because faultless offenders should not be convicted of crimes that those with justifications or excuses for offending are properly acquitted. As to the latter, it is because faulty offenders should not be acquitted of crimes that those with neither justifications nor excuses are properly convicted.³¹ Or so, at least, the fault-based rationale tells us. The key point here is that, if this *is* the rationale for (N), the conditions of justification endorsed by criminal courts should be conditions which confer justifications exclusively upon the faultless. To go further—and confer justificatory defences on faulty offenders—would be unsupported by *NF*. It would be directly contraindicated by *PF*.

In *Fundamentals of Criminal Law*, Andrew Simester argues that this line of thought is fatal to the simple view. His argument runs as follows:

- (1) Criminal courts should hold D to be justified in ϕ ing only if D is not at fault for having ϕ ed;
- (2) The fact that D conformed to an undefeated reason to ϕ does not entail that D is not at fault for having ϕ ed;
- (3) Therefore, criminal courts should not hold D to be justified in ϕ ing merely on the basis that D conformed to an undefeated reason to ϕ .

Premise (1) follows from the fault-based rationale for (N). Whether we should accept premise (2) depends on our conception of fault. I claimed above that the question of whether we are at fault for ϕ ing is a question about our practical reasoning. On this, Simester and I agree.³² We agree, that is, on what we can call:

PR—D is at fault for ϕ ing if and only if D's practical reasoning reflects badly on D.

Whether it reflects badly on us that we ϕ for a reason—*r*—is not determined by whether *r* turns out to be a defeated reason. Nor is it determined by whether *r* proves to be an actual reason to ϕ . It is determined by whether *r* is a consideration we defensibly treat as an undefeated reason for ϕ ing. Whether we do *that* is determined in part by our beliefs at the time of acting, and in part by the evidence we can be expected to consider before we act. By contrast, whether we actually have an

³¹ In Gardner's words, justifications and excuses should be "equally available as defences to any criminal charge" D faces "because both the justification and the excuse equally extinguish [D's] fault" (Gardner, "Wrongs and Faults", *supra* note 29 at 64). For Simester, "both [justifications and excuses] should lead to acquittals because, whether justified or (sufficiently) excused, D's action is not (sufficiently) culpable to warrant conviction" (Simester, *supra* note 1 at 19).

³² James Edwards & Andrew Simester, "Crime, Blameworthiness, and Outcomes" (2019) 39(1) Oxford J Leg Stud 50. See also Simester, *supra* note 1, ch 11, 14. Gardner also appears to take this view. He writes that: "People with different moral faults differ in respect of which reasons they overplay and which reasons they underplay, and hence in respect of which actions they are over- or under-disposed to perform. Cowardly people overplay the importance of their own safety, mean-spirited people underplay the importance of other people's feelings, imprudent people underplay the importance of longer-run consequences, and so on." See Gardner, "Wrongs and Faults", *supra* note 29 at 61.

undefeated reason to ϕ is determined by the facts.³³ This is why, if PR is true, (2) is also true. It is why it is possible to be at fault for ϕ ing even if the reasons in favour of ϕ ing turn out to be undefeated by those against.

Since this is all fairly abstract, let us consider two examples. Suppose first that the facts as D believes them to be do not include J-facts. Nor do they include facts it is reasonable for D to regard as such. It reflects badly on D if ϕ s on the strength of her belief in these facts. This is so even if, unbeknownst to D, J-facts do obtain, such that D conforms to an undefeated reason when she ϕ s. It reflects badly on D, for example, if D kills V because she believes she will otherwise lose out on a lucrative inheritance. This is so even if, as it happens, D thereby saves many lives, because her actions prevent V setting off explosives of which D knew nothing.

Now suppose that the facts as D believes them to be do include J-facts. The available evidence nonetheless gives D decisive reason to believe that these facts do not obtain, and D has no excuse for ignoring that evidence. Once again, it reflects badly on D if she ϕ s on the strength of her belief. This is so even if, unbeknownst to D, there turns out to be an undefeated reason in favour of ϕ ing. Suppose that D is a doctor who performs surgery on her patient, V, because she believes that doing so is necessary to cure V of a debilitating ailment. Though surgery was once regarded as a suitable treatment for patients like V, the medical consensus has long been that less invasive options are superior for such patients. It reflects badly on D if she ignores this evidence and operates on the strength of her belief. This is so even if, because of an undetectable abnormality, no other treatment could have successfully cured V.

PR implies that, in cases of both types, D is at fault for ϕ ing. She is at fault even though she conforms to an undefeated reason when she ϕ s. It follows that, if PR is correct, (2) is also. We already saw that the fault-based rationale implies the truth of (1). Combining that rationale with PR entails that we should accept (3). This, of course, is to reject the simple view.

If this argument is sound, additional conditions of justification are required. Those conditions must make the availability of justification dependent on our practical reasoning. One of the lessons of *Fundamentals* is that not just any such conditions will do. We can see this by returning to the bipartite view commonly attributed to John Gardner. On that view, what is necessary and sufficient for justification is not conformity but *compliance*—D is justified in ϕ ing if and only if D has *and acts for* an undefeated reason to ϕ .

What we should make of this view depends on what it is for a reason to be undefeated. Gardner writes that,

If the reasons in favour of some action defeat the reasons against, then in the ordinary case it is only the reasons against which end up defeated. The reasons in favour are all of them undefeated, i.e. they are undefeated *in gross*. [The requirement that] one always act for some undefeated reason is therefore compatible, in the ordinary situation with more pros than cons, with our acting on any one of the various reasons in favour of the action.³⁴

³³ Or so we are assuming here.

³⁴ Gardner, *Offences and Defences*, *supra* note 15 at 102.

To see that this implies, let us suppose that R1 is the sole reason against D ϕ ing. R2 and R3 are reasons in favour. The weight of R1 is 99. The weights of R2 and R3 are 100 and 1 respectively. R1 and R2 are reasons given by the interests of others. R3 is a reason given by D's own interests. *Ceteris paribus*, both R2 and R3 are undefeated reasons. On the bipartite view we are considering, D is justified in ϕ ing if D ϕ s for either reason. Now suppose that D is aware of R1 and R3 but unaware of R2. On the facts as D believes them to be, there is a weighty reason not to ϕ given by the interests of another, and a comparatively trivial reason in favour of ϕ ing given by the interests of D. It reflects badly on D if, despite this, she chooses to ϕ for R3. To do so is for D to dramatically overestimate the relative importance of her own interests or to radically underestimate the relative importance of the interests of others. If *PR* is right, it follows that D is at fault for ϕ ing. She is at fault despite having complied with an undefeated reason to ϕ .

One response to this line of thought invokes the *ceteris paribus* clause I inserted at the beginning of the last paragraph. Some believe that, as well as being defeated by weight, reasons can also be defeated by kind. Reasons that are defeated in this second way are what Joseph Raz calls excluded reasons.³⁵ They are reasons of a kind for which we should not act. Some deny that exclusionary defeat is a genuine phenomenon. For those who think otherwise, we can stipulate that R2 and R3 are unexcluded reasons. Suppose, to take an example of Simester's, that T is standing behind D. V rushes towards them, intending to push D out of the way so she can stab T. Before she can do so, however, D uses lethal force against V to thwart the attack.³⁶ On these facts, R1 is a reason not to use lethal force against V. R2 is the fact that T will otherwise be killed by V, while R3 is the fact that D will otherwise suffer a minor injury. Since R2 is surely not an excluded reason, it is plausible to think R3 is not excluded either. After all, both are reasons to use defensive force to repel V's attack. Given the weights assigned to them earlier, if both reasons are indeed unexcluded, they are also undefeated. It follows that D is justified in killing V, on the bipartite view we are considering, even if D is oblivious to the fact that her actions will save T's life. She is justified merely because she uses lethal force to prevent herself suffering a minor injury.

If all this is correct, we can draw the following conclusions. If we were right to reject the simple view, on the grounds on which we rejected it above, we must also reject the bipartite view initially endorsed by Gardner. More formally:

- (1) Criminal courts should hold D to be justified in ϕ ing only if D is not at fault for having ϕ ed;
- (2') The fact that D complied with an undefeated reason to ϕ does not entail that D is not at fault for having ϕ ed.
- (3') Therefore, criminal courts should not hold D to be justified in ϕ ing merely on the basis that D complied with an undefeated reason to ϕ .

³⁵ The *locus classicus* is Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1975).

³⁶ Simester, *supra* note 1 at 397.

If this argument is sound, the bipartite view we have been discussing is too lax. As Simester points out, it does not follow that *no* bipartite view of justification is defensible. We can provide a stricter view by toughening the two conditions. This is Simester's own preferred alternative. He claims that D is justified in ϕ ing if and only if D complies with a *sufficient* reason to ϕ .³⁷ A reason is sufficient if and only if it is an undefeated reason that is itself no less weighty than the reasons not to ϕ .³⁸ It follows that D has no justification if D kills V for R3. The counterexample we considered above therefore fails to bite.

Other examples nonetheless prove less tractable. Suppose that R4 is a reason in favour of ϕ ing. R5 and R6 are apparent reasons not to ϕ . The weight of R4 is 11. The weight of R5 and R6 are 100 and 10 respectively. R4 is a reason given by D's own interests. R5 and R6 are reasons given by the interests of others. No other reason bears on whether D should ϕ . Now suppose that D believes that the appearances are accurate: that R4, R5 and R6 all obtain. Suppose also that D is partly right and partly wrong: R5 is merely apparent, while R4 and R6 are not. Under these assumptions, R4 is a sufficient reason for D to ϕ . It is itself weightier than the only countervailing reason. On the facts as D believes them to be, however, this is not so. There is a weighty reason not to ϕ , given by the interests of another, which substantially outweighs the reason in favour of ϕ ing given by the interests of D. It reflects badly on D if, despite this, she chooses to ϕ for R4. Since Simester endorses *PR*, he must conclude that D is at fault for ϕ ing. D is at fault despite having complied with a sufficient reason to ϕ . If this is correct, we can replace (2') and (3') with:

- (2*) The fact that D complied with a sufficient reason to ϕ does not entail that D is not at fault for having ϕ ed.
- (3*) Therefore, criminal courts should not hold D to be justified in ϕ ing merely on the basis that D complied with a sufficient reason to ϕ .

We saw above that Simester's grounds for rejecting competing conceptions of justification include both *PR* and the fault-based rationale for (N). If I am right, these grounds not only impugn the conceptions rejected by Simester; they also cast doubt on his own favoured conception of justification. Those same grounds, I now want to claim, are supportive of *Excuse+*. Consider the following three propositions:

- (A) If D's reasons to ϕ are defeated, or merely apparent, D is at fault for choosing to ϕ unless D has an excuse for having ϕ ed.
- (B) If D's reasons to ϕ are undefeated, D lacks a justification for ϕ ing if D is at fault for having ϕ ed.
- (C) The conditions under which D is at fault for ϕ ing are independent of whether D has an undefeated reason to ϕ .

³⁷ Simester characterises his preferred conception of justification as a "dual requirement theory". The requirements are that: "D's own reasons must themselves be valid, and sufficient, for D's action of ϕ ing to be justified." See Simester, *supra* note 1 at 392, 405.

³⁸ If exclusionary defeat is real, it is therefore an unexcluded reason.

Proposition (B) is an implication of the fault-based rationale for (N). As we saw above, criminal courts which endorse that rationale should deny that offenders who are at fault for offending have a justification for their offences. Proposition (C) is an implication of *PR*. Whether we have an undefeated reason to ϕ , we have assumed throughout, is determined by the facts. Whether our practical reasoning reflects badly on us, I have claimed, is determined by our beliefs about those facts, and by the evidence we can be expected to bring to bear upon our beliefs. Proposition (A) follows from the thought that excuses are fault-negating, combined with the thought that the fault of responsible agents who choose to ϕ without justification cannot be negated on other grounds.

Let $c1, c2, c3 \dots$ be the conditions that must be satisfied if D is to have an excuse for ϕ ing when her reasons to ϕ are defeated. (A) implies that D is at fault if $c1, c2, c3 \dots$ are not met. (C) implies that the same is true if D has an undefeated reason for ϕ ing: D is also at fault if $c1, c2, c3 \dots$ are not met. (B) implies that, unless $c1, c2, c3 \dots$ are met, D is not justified in ϕ ing. Grant that all this is correct. It follows that D has a justification for ϕ ing only if, were D to lack an undefeated reason to ϕ , D would have an excuse for having ϕ ed. This, of course, is just what *Excuse+* tells us.

This argument for *Excuse+* can be challenged on various grounds. The remainder of this section considers two of them. Though constraints of space prevent me saying everything I would in a fuller discussion, I hope to say enough to explain why—in my view—neither is convincing.

Some would reject the argument I offered because they deny *PR*. It might be claimed that:

- (i) D is at fault for ϕ ing only if it is wrongful for D to ϕ .

What (D) implies depends, of course, on how we understand wrongfulness. On one view:

- (ii) It is wrongful for D to ϕ if and only if D has most reason not to ϕ .

If (ii) is sound, the wrongfulness of an action depends on the reasons that apply to the actor. It does not depend on the reasons for which they act. On a different view:

- (iii) It is wrongful for D to ϕ if and only if D ϕ s for a defeated or insufficient reason.

Combining (i) with (ii) give us:

- (iv) D is not at fault for ϕ ing if D has an undefeated reason to ϕ .

If we instead add (iii) to (i) we get:

- (v) D is not at fault for ϕ ing if D ϕ s for an undefeated or sufficient reason.

We have been assuming that, since the rationale for (N) is fault-based, criminal courts should endorse:

NF—if D is not at fault for ϕ ing, D should not be convicted of having ϕ ed.

NF and (iv) entail that the courts should adopt the simple view: they should grant justificatory defences to all offenders whose offending acts conform to undefeated reasons for action. *NF* and (v) entail that criminal courts should subscribe to one of the bipartite views considered above. They entail that D should benefit from a justificatory defence if D offends for an undefeated or sufficient reason.

We should, I believe, reject these views. We should do so because both (iv) and (v) imply that whether D is at fault for ϕ ing can be entirely a matter of luck. We can see this by returning to our example involving R4, R5 and R6. D, recall, believes that all three reasons obtain. The available evidence supports the truth of D's beliefs.³⁹ Since R4 is the sole reason to ϕ , and R5 is a much weightier countervailing reason, D would have decisive reason not to ϕ if her beliefs about the facts were true. As it happens, however, D gets lucky: despite the evidence to the contrary, R5 does not obtain. Since R4 is weightier than R6, and D ϕ s for R4, D ϕ s for a sufficient reason. Both (iv) and (v) imply that D is not at fault for ϕ ing. From D's perspective, however, this is a fluke: the fact that R4 proves not to be defeated is sheer luck. Whether we are at fault for performing an action cannot, I believe, be determined by sheer luck.⁴⁰ If I am right, both (iv) and (v) must be rejected.

The argument I sketched for *Excuse+* relies on the truth of *PR*. It also relies on the truth of the fault-based rationale for (N). A second way to challenge the argument is to accept the former but to deny the latter. The most popular version of this response holds that the rationale for (N) is bifurcated: while both the excused and the justified are properly acquitted of crimes, they are properly acquitted for different reasons. The excused are properly acquitted because *NF* is a sound principle, and because those with excuses for offending are not at fault for their offending acts. By contrast, the justified are properly acquitted because justified acts are not wrongful, and because the following principle is sound:

The negative wrongfulness principle (NW)—if it is not wrongful for D to ϕ , D should not be convicted of ϕ ing.⁴¹

³⁹ This is what I meant when I described the three reasons involved in the example as the *apparent* reasons.

⁴⁰ Whether our actions are justified, by contrast, can be a matter of sheer luck. This is true on each of the views considered here. On each view, D is justified in ϕ ing only if D conforms to an undefeated reason when she ϕ s. Suppose that, if D's beliefs about the facts were true, D would have such a reason. Suppose further that the available evidence decisively supports the truth of D's beliefs. The reasons for D to ϕ may nonetheless be defeated. If they are, D lacks a justification for ϕ ing. It is this thesis—that justification depends on luck—that Bernard Williams sought to defend in his famous exchange with Thomas Nagel. While Nagel focused on the relationship between luck and blameworthiness, Williams was concerned with the relationship between luck and justification. He argued that luck matters because it matters whether our actions are justified, and because luck helps determine whether this is the case. I explicitly confront the question of whether justification *does* matter in the following section.

⁴¹ If we endorse both negative principles, our positive principle requires revision. It should instead state that, if D is at fault for ϕ ing, *and it is wrongful for D to ϕ* , D should be convicted of having ϕ ed.

I have argued that D can be at fault for ϕ ing even though D has an undefeated reason to ϕ , and even though D ϕ s for a sufficient reason. It follows that, if either (ii) or (iii) is correct, D can be at fault for ϕ ing even though it is not wrongful for D to ϕ . *Excuse+* implies that, where this is so, neither a justificatory nor an excusatory defence should be available to D. In short, D should be convicted. *NW* entails that the opposite is true.

To endorse *NW* is to claim that, even if D is at fault for committing an offence, and even if the offence is legitimately enacted, there are cases in which D should nonetheless be acquitted. These are the cases in which D's offending act was not wrongful. The question is why this should be the case. There are, of course, various answers on offer. Here, I have space to consider just one. The answer I have in mind is one which appeals to the preventive dimension of the criminal law. To see it, let us suppose that (ii) is correct: wrongful acts are acts we have most reason not to perform. Now consider the following two propositions:

- (D) If it is a crime for D to ϕ , it is legally permissible to use reasonable force to prevent D ϕ ing.⁴²
- (E) If it is not wrongful for D to ϕ —because D has an undefeated reason to ϕ —it should not be legally permissible to use force to prevent D ϕ ing.

(D) is a legal claim. (E) is a moral claim. Let us assume, for present purposes, that both are correct. It might be thought that, once this assumption is in place, *Excuse+* must be rejected. After all, criminal courts which endorse *Excuse+* will deny criminal defences to any offender who is at fault for offending. They will do so even if the offender had an undefeated reason to offend.⁴³ Criminal courts which deny criminal defences to such offenders thereby make it a crime to faultily offend in conformity with an undefeated reason. Now let us imagine that D is about to do just that. (D) seems to imply that force can permissibly be used to prevent D's offending act. But if (E) is correct, this should not be. It should not be legally permissible to use force to prevent offending acts if those acts conform to undefeated reasons. To ensure that this is not permissible, criminal courts should endorse the simple view: they should hold it to be a sufficient condition of justification that offenders have undefeated reasons to act as they do. For short, let us call this *the argument from prevention*.

This argument, though superficially appealing, is ultimately unsuccessful. We can begin to see why by noting what (D) does *not* say. It does not say that force can be used to prevent crime under any circumstances. It says that force can be used to prevent crime when it is reasonable to use it. It is reasonable to use force to prevent crime when one has a justification for using it. One has a justification for using force to prevent crime, we have assumed, only if one has an undefeated reason to do so.

Now consider an example in which two things are true. First, there is an undefeated reason for D to ϕ . Second, since D is at fault for offending, *Excuse+* denies a defence to D. Suppose again that the reasons to offend—R2 and R3—weigh 100

⁴² The relevant provision in English law is Criminal Law Act 1967 (c 58) 1967 (UK) s 3.

⁴³ We are assuming that this is possible, because we are assuming the truth of PR.

and 1 respectively. The sole reason against offending—R1—weighs 99. If all three reasons are unexcluded, D has an undefeated reason to ϕ . If D is unaware of R2, I earlier claimed, D is nonetheless at fault for ϕ ing. *Excuse+* therefore implies that D is criminally liable. She commits a criminal offence to which she has no defence.

Now suppose that B is a bystander who is aware of all the facts. She could forcibly intervene to prevent D ϕ ing. Does (D) imply that B would be legally permitted to do so? The argument from prevention goes through only if we answer ‘yes’. If we do, the implications of *Excuse+* conflict with (E). In truth, however, the answer is ‘no’. As I already pointed out, B is legally permitted to forcibly prevent D’s offending act only if B has an undefeated reason to prevent it. The reasons which count in favour of D committing the offence are reasons which count against B preventing its commission. The reasons which count against D committing the offence are reasons which count in favour of B preventing the offence. Since the reasons for D to commit the offence defeat the reasons against, the reasons against preventing its commission defeat the reasons in favour. It follows that using force to prevent D from ϕ ing would be unjustified. Since unjustified force is not reasonable force, D is not legally permitted to use it. The argument from prevention, we should conclude, fails to bite.

It is worth adding two further points at this juncture. The first concerns the justification for the principle I have called (E). If it should not be legally permissible to forcibly prevent others conforming to undefeated reasons, this is presumably because there is a reason not to use force to prevent them doing so. We can leave open exactly what makes it the case that there is such a reason. The point here is simply that, if the reason does exist, its existence strengthens the case against forcible intervention in cases like the above. It adds an additional reason for B not to forcibly prevent D from ϕ ing. It also helps explain why, if D’s reasons for and against offending were equally weighty—or otherwise on a par—forcibly preventing D from ϕ ing would nonetheless be unjustified.

The second point concerns the interpretation I have given to the term “reasonable force”. It might be said that using force is reasonable if one has either a justification or an excuse for using it. Let us assume, for a moment, that this broader interpretation is correct. Two things can now usefully be said. The first is that, even on the broader interpretation, it remains unreasonable for B to forcibly intervene in the above example. B, recall, is aware of all the facts. Those facts make it wrongful for B to forcibly prevent D ϕ ing. All else being equal, it would reflect badly on B if she nonetheless forcibly intervened. Given *PR*, B would have no excuse for doing so.

The second thing to say is that, if the broader interpretation is correct, conflict between (D) and (E) is inevitable. To see this, suppose that (i) D has an undefeated reason to ϕ , and that (ii) B blamelessly believes that she has an undefeated reason to forcibly prevent D ϕ ing. Given (ii), B has an excuse for using preventive force against D. On the broader interpretation, (D) implies that B is legally permitted to use such force. Since D has an undefeated reason to ϕ , however, this implication is incompatible with (E). The upshot is that, if we do endorse the broader interpretation of reasonableness, (D) will inevitably license uses of force which are opposed

by (E). This is so whichever conception of justification we adopt. It follows that the truth of (D) and (E) lends no support to any particular conception.

No doubt there are other arguments that might be offered in defence of *NW*—and in turn, of the bifurcated rationale for (N). My principal aim has not been to show that these arguments all fail. It has not been to show, in other words, that the fault-based rationale should be preferred to the bifurcated alternative. My principal aim in this section has been rather more modest. It has been to establish that those who subscribe to the fault-based rationale—and who reject the simple view on that basis—should adopt *Excuse+* as their conception of justification.

VIII. CONCLUSION

Does justification matter? My argument has been that, if we endorse *Excuse+*, some purposes for which justification is often thought to matter are purposes for which it does not. We need not determine whether offenders are justified in committing criminal offences in order to determine whether they are properly convicted of those offences. Nor do we need to understand what it is for an action to be justified in order to understand what it is to for an action to be excused.

Should we infer from this that justification does not matter? Of course not. Justification matters because we are responsible agents, and because there are standards that apply to exercises of that agency to which we conform by performing justified acts. Some of these are standards of competence. Others are standards of success. When our actions are excused but not justified, we conform to the former but not the latter. We use our responsible agency in ways that live up to reasonable expectations. We are nonetheless unlucky: our competence does not result in our successfully doing what we have undefeated reason to do. When our actions are justifiable but not justified, the reverse is true. Though we fall short of reasonable expectations in exercising our responsible agency, we get lucky in how things turn out: we successfully conform to undefeated reasons despite our shortcomings.

These remarks point to the truth in what I earlier called *J over E*—in the claim that justification has evaluative priority over excuse. We should prefer to be justified rather than excused because, though the justified conform to standards of responsible agency conformed to by the excused, the excused fall short of standards of responsible agency conformed to by the justified. Put differently, we should want our actions to be justified, and not merely excused, because we should not be indifferent between competent success in exercising our responsible agency and competent failure.⁴⁴ We should want our actions to be justified, rather than merely justifiable, because we should not be indifferent between successful competence,

⁴⁴ Such failure, I hasten to add, in no way reflects badly on us. It may be entirely a matter of luck. Given this, some will wonder *why* we should care about success (as I use the term in the text) and not merely about competence. Here, I think, Bernard Williams was on the right track. We should care because whether we use our rational capacities successfully determines how well our lives go for us. For Williams' discussion,

in making use of our rational capacities, and successful incompetence. This, at least, is the explanation on offer if we endorse *Excuse+*.⁴⁵ There is no doubt much more to say about whether endorsement is ultimately warranted. I hope to have said enough here to show that this conception of justification is worthy of further exploration.

see Bernard Williams, *Moral Luck: Philosophical Papers 1973-1980* (Cambridge: Cambridge University Press, 1981), ch 3. I say more about all this in Edwards, *supra* note 7.

⁴⁵ It is a further question whether, if this *is* the explanation of *J over E*, the evaluative priority of justification should be of any interest to criminal lawyers. John Gardner claimed that it should be. He claimed that criminal defendants have an interest not only in avoiding being convicted of the crimes of which they are accused, but also in presenting themselves in the best available rational light to their accusers (and to others). This interest, Gardner thought, counts in favour of giving defendants the opportunity not only to assert that they exercised their rational capacities competently in committing offences, but also that they exercised those capacities successfully. It therefore counts in favour of distinguishing justificatory from excusatory defences in the criminal law. I discuss Gardner's arguments on this score in James Edwards, "Explaining Ourselves in Court" in Michelle Madden Dempsey & François Tanguay-Renaud, eds. *From Morality to Law and Back Again: A Liber Amicorum for John Gardner* (Oxford: Oxford University Press, 2023).