

Reflections on Joshua Dressler's *Understanding Criminal Law*

Peter Westen*

Joshua Dressler is without question and without rival America's preeminent criminal law teacher. His casebook and treatise are the principal portals through which American law students, including my own, understand criminal law, and both volumes fully deserve their preeminence.

I first appreciated Josh's influence when I began teaching criminal law in the late 1980s. I was talking with a former student of mine and complimenting him on his final exam when he confided that he had learned from upper-class students that the key to succeeding in my class was to "read Dressler." I was surprised, I confess, because Josh's *Understanding Criminal Law*¹ had only recently appeared and was not yet on my radar. I realized then, however, that I had to join those who "read Dressler," if for no other reason than to keep abreast with what my students—or, at least, the best among them—were learning from him about criminal law.

Understanding Criminal Law was neither the first American treatise on criminal law nor the most comprehensive. But it soon dominated the field, at least among law students, because of its distinctive strengths. Josh speaks to readers in a voice that is personal and humane, confining himself to issues that are of central interest to law students. He expounds existing doctrine in simple, clear, and non-dogmatic terms while also invoking the best of criminal law scholarship to analyze doctrine critically. Where commentators disagree among themselves, he takes pains to present their contending claims impartially, including claims contrary to his own views. He takes positions on some disputed issues of doctrine and theory, and yet reserves judgment on others. Throughout, he imbues his exposition of doctrine and theory with felt compassion for victims and sympathy for alleged offenders.

As my student implied, Josh and I tend to be like-minded about much of criminal law. I shall pass over issues on which Josh and I have differed in the past because I have written about them elsewhere, including the elements of legality,²

* Frank G. Millard Professor of Law, Emeritus, Michigan Law School.

¹ JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* (1st ed. 1987).

² I have argued elsewhere that the principle of legality consists of two existing and well-known moral norms: (1) No person should be punished absent a guilty mind, a norm that explains requirements of notice and prohibitions of retroactive criminal laws; and (2) No person should be punished absent high confidence that the community regards his conduct as punishable, a norm that explains the rule of lenity and prohibitions on desuetude—rules that, together, eliminate any need to void penal laws for vagueness. Compare Peter Westen, *Two Rules of Legality in Criminal Law*, 26 *LAW & PHIL.* 229, 229–30 (2006), with JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 39 (7th

the challenge of individualizing the reasonable person,³ the scope of transferred intent,⁴ impossibility attempts,⁵ and, perhaps most saliently, the reason that duress exculpates.⁶ I will focus on three other issues on which Josh takes positions in *Understanding Criminal Law*: (1) the subject matter of “Criminal Law;” (2) the meaning and usefulness of distinguishing between justification and excuse; and (3) the basic elements of criminal responsibility. I select the three because, although they appear to be unrelated, they are all inflected by Josh’s view of the role in criminal law of *harm*.

I. THE SUBJECT MATTER OF CRIMINAL LAW

Josh introduces *Understanding Criminal Law* and his casebook with what authors ought to address but only rarely do, namely, with the subject matter of criminal law.⁷ Most of the half-dozen casebooks consulted here make no attempt to discuss what distinguishes criminal law from other subjects in the curriculum,⁸ and those that do provide little insight. Thus, one casebook begs the question by

ed. 2015) [hereinafter DRESSLER] (arguing that the principle of legality consists essentially of a single norm against retroactive criminal lawmaking).

³ I have argued elsewhere that the supposedly difficult problem of individualizing the reasonable person is easily resolved: one incorporates into the standard of reasonableness every physical and psychological trait the actor possesses, except his moral values, which one takes instead from what society rightly expects of persons. Compare Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 CRIM. L. & PHIL. 137, 137 (2008), with DRESSLER, *supra* note 2, at 239 (arguing that individualization “pose[s] difficult problems for the law.”).

⁴ I have argued elsewhere that people’s shared intuitions regarding the justice of transferring an actor’s criminal intent from the victim whom he has in mind, say, *A*, to the victim whom he happens to harm, *B*, depend upon how the harm comes about. Compare Peter Westen, *The Significance of Transferred Intent*, 7 CRIM. L. & PHIL. 321, 321 (2013), with DRESSLER, *supra* note 2, at 124–26 (arguing that an actor be held liable for any harm to *B* that an actor intends to inflict on *A* and that, by virtue of his acting on his intent, falls upon *B* rather than *A*).

⁵ I have argued that it can be both feasible and just to punish persons who commit pure legal impossibility attempts. Compare Peter Westen, *Impossibility Attempts: A Speculative Thesis*, 5 OHIO ST. J. CRIM. L. 523 (2008), with DRESSLER, *supra* note 2, at 402–03 (arguing that it is neither feasible nor just to convict persons of attempt in pure legal impossibility cases).

⁶ I have argued that the defense of duress is typically a justification, not an excuse. Compare Peter Westen, *Does Duress Justify or Excuse?*, in MORAL PUZZLES AND LEGAL PERPLEXITIES: ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER (Heidi Hurd & Michael Moore, eds.) (Cambridge University Press, forthcoming), and Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse—And Why It Matters*, 6 BUFF. CRIM. L. REV. 833, 835 (2003), with DRESSLER, *supra* note 2, at 301–04 (arguing that duress is an excuse).

⁷ See DRESSLER, *supra* note 2, at 1, 4; See also JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW 1–6* (4th ed. 2007).

⁸ See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* (7th ed. 2001).

stating that its subject is “the body of law that declares what conduct is *criminal*”⁹ without explaining what distinguishes “criminal” from non-criminal conduct. Another similarly begs the question by stating that the casebook’s “focus is on *crime* definition and the components of *criminal* liability,”¹⁰ also without explaining what distinguishes a crime from a tort. Paul Robinson provides more insight by arguing that what distinguishes criminal law from other areas of law is that criminal law involves “moral condemnation.”¹¹ Yet moral condemnation alone fails to distinguish criminal law from tort law, given that the use of punitive damages in torts also expresses moral condemnation.

Josh improves upon Robinson’s account by imbedding it in a broader framework. Yet Josh’s account raises issues of its own.

A. Dressler’s Improved Definition of Criminal Law

Josh introduces *Understanding Criminal Law* by addressing its subject matter. He states on page one that “[t]he study of the criminal law” is the study of two things: (1) “crimes,” and (2) “the principles of criminal responsibility for those crimes” (the latter, he says, being principles that determine when it is “fair” to blame persons for crimes).¹²

Josh focuses most of his attention on the first component, i.e., “crimes.” But in contrast to the way other casebooks frame criminal law’s subject matter, he also includes the second, i.e., principles of liability. And he is right to do so. For, regardless of what the state constitutes a crime as a matter of positive law, one can always ask of a person who commits a crime, “Is it morally just to blame him for it?” By doing so, Josh is able to encompass something that students soon recognize as central to courses in criminal law, namely, the task of ascertaining whether and when persons who have done what the law declares to be criminal are morally blameworthy for it.

With one minor exception, the “crime” component for Josh is a matter of positive law rather than morals.¹³ A crime, Josh says, consists of two elements, one of which involves the law’s view of an actor’s conduct, the other of which involves the state’s response to such conduct. A person does not commit a crime, he says, unless the person violates what the law defines as a duty of the person to the “public” as a “whole” (as opposed to a duty to private persons alone) and, in thus violating a public duty, causes “social harm.”¹⁴ Even then, however, a person

⁹ WAYNE LAFAVE, MODERN CRIMINAL LAW: CASES, COMMENTS AND QUESTIONS 1 (4th ed. 2006) (emphasis added).

¹⁰ RICHARD J. BONNIE ET AL., CRIMINAL LAW 1 (2d ed. 2004) (emphasis added).

¹¹ PAUL H. ROBINSON, FUNDAMENTALS OF CRIMINAL LAW 25 (2d ed. 1995).

¹² DRESSLER, *supra* note 2, at 1, 4.

¹³ The exception concerns whether it is a crime to possess mere thoughts. See discussion *infra* Section IV.

¹⁴ DRESSLER, *supra* note 2, at 1.

does not commit a crime unless the state responds to his conduct in a distinctive way, namely, by *punishing* him for it.¹⁵

Having defined crime as consisting in part of “punishment,” Josh focuses on defining punishment. Interestingly, however, he defines punishment in two distinct ways that appear to be in tension with one another. Thus, on the one hand, Josh relies on Henry Hart to argue that the essence of punishment is the moral condemnation that a *conviction itself* expresses, not any hardship that the state imposes on an actor as a consequence of conviction:

“[T]he essence of punishment . . . lies in the criminal conviction itself,” rather than in the specific hardship imposed as a result of the conviction. . . . What, then, essentially distinguishes the criminal law from its civil counterpart . . . is the societal condemnation and stigma that accompanies the conviction. When the fact finder . . . determines that a person is guilty of a criminal offense, the resulting conviction is an expression of the community’s moral outrage, directed at the criminal actor, for her act. . . . [A] crime might properly be defined as “an act or omission and its accompanying state of mind which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.”¹⁶

On the other hand, Josh also relies on H.L.A. Hart and Kent Greenawalt to argue that the essence of punishment is *not* the conviction itself but hardship in the form of “pain” or other “suffer[ing]” that the state intentionally imposes on persons pursuant to a conviction:

There is no universally accepted non-arbitrary definition of the term “punishment.” Criminal law scholars have generally concluded, however, that *D* may be said to suffer “punishment” when, *but only*

¹⁵ See DRESSLER, *supra* note 2, at 1 (“A person convicted of a crime is *punished*”) (emphasis added).

¹⁶ DRESSLER, *supra* note 2, at 1–2 (first quoting George K. Gardner, *Bailey v. Richardson and the Constitution of the United States*, 33 B.U. L. REV. 176, 193 (1953); and then quoting Henry Hart, Jr., *The Aims of the Criminal Law*, LAW & CONTEMP. PROBS. 401 (1958)). Having defined what distinguishes criminal conduct from civil conduct, Josh says that the distinction “*should*” be observed even when it isn’t. See *id.* I am not certain what Josh means by that, but I assume that he is referring to instances in which the state morally condemns persons for conduct that is not morally condemnable. If so, Josh is mistaken in thinking that, in doing so, the state is disregarding the distinction between criminal and civil. After all, Josh’s distinction defines “criminal” in terms of what the state *does*, e.g., morally condemn—not in terms of either what the state *should* do (e.g., morally condemn only those who deserve it) or what conduct *deserves* moral condemnation. Consequently, when the state morally condemns persons who do not deserve moral condemnation, the state is not disregarding the distinction between criminal and civil. It is invoking the distinction to characterize as criminal what *is* criminal according to Josh but does not deserve to be so characterized.

when, an agent of the government, pursuant to authority granted to the agent by virtue of *D*'s criminal conviction, intentionally inflicts pain on *D* or otherwise causes *D* to suffer some consequence that is ordinarily considered to be unpleasant.¹⁷

I will return to these two versions of punishment below. It is worth noting, however, that whichever version applies, Josh's definition of crime resolves the problem of punitive damages which Paul Robinson's definition raises. Robinson equates crime with moral condemnation, thereby making it difficult for Robinson to distinguish criminal proceedings from tort actions in which juries express moral disapproval by requiring civil defendants to pay punitive damages for violations of duties to private parties. In contrast, Josh is able to distinguish private suits (including private suits resulting in punitive damages) from criminal proceedings by reserving the term "criminal" for violations of duties to the public as a whole.¹⁸

B. Issues Raised by Dressler's Definition

Josh's definition of crime raises interesting questions, including the role that "social harm" plays. I will reserve discussion of social harm to part IV and focus here on (1) Josh's seemingly inconsistent definitions of punishment, and (2) Josh's assumption that moral condemnation should be confined to conduct that is *mala in se*.

1. Inconsistent Definitions of Punishment

As we have seen, Josh defines the punishment component of crime in inconsistent ways. Thus, he initially writes that the essence of punishment is the moral condemnation that conviction by the state expresses; and yet, he later writes that its essence is the hardship that the state intentionally imposes on a person pursuant to authority granted by virtue of the person's conviction. If pressed, Josh might say that, rather than being viewed as mutually exclusive, the two definitions highlight different aspects of the social practice of punishing—one aspect of which is constitutive of punishment, the other of which is contingent to punishment. If so, Josh could combine the two definitions to say:

¹⁷ DRESSLER, *supra* note 2, at 12 (first quoting H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4–5 (1968); and then quoting Kent Greenawalt, *Punishment*, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1282–83 (Joshua Dressler ed., 2d ed. 2002)).

¹⁸ See generally Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, the Present, and the Future of Punitive Damages*, 118 YALE L.J. 392 (2008).

Punishment

A person is punished if, and only if, the state convicts the person of violating a public duty by subjecting him to moral condemnation for the violation. Moreover, a person is further punished if the state intentionally subjects him to hardship pursuant to authority granted by virtue of his conviction.

The latter definition is an improvement. Nevertheless, it contains two ambiguous terms, both of which originate in Josh's definition of punishment as intentionally imposed hardship. The first ambiguity is the term "intentional" (which Josh uses to describe the state's motivation in subjecting a convicted person to hardship). "Intentional" can be interpreted broadly to mean *either* purposely *or* knowing; or it can be interpreted narrowly to mean purposely *alone*. If interpreted broadly, "intentional" results in a definition of punishment that is over-inclusive. To illustrate, consider *Kansas v. Hendricks*,¹⁹ which raised the question whether, for purposes of the Double Jeopardy and *Ex Post Facto* Clauses of the U.S. Constitution, it was punishment for the state of Kansas to continue to confine convicts who had fully served their sentences for sexual violence based on proof that convicts suffered from mental abnormalities that rendered it likely that, if released, they would commit predatory acts of sexual violence in the future. The U.S. Supreme Court held that such continued confinement does not constitute punishment because, even though Kansas may have *known* that such confinement is hardship, Kansas did not act for that *purpose*. Kansas' purpose was to protect the public, not to cause persons suffering or inflict hardship in the name of desert.²⁰ This suggests that, in the Court's view, hardship does not constitute "punishment" unless the state's purpose is that it be experienced as hardship.

The second ambiguity is the phrase, "*pursuant to authority granted by virtue of his conviction*" (which Josh uses to describe the source of the state's authority to impose hardship). The phrase can be interpreted broadly to refer to hardship that the state imposes on an offender merely as a result of a conviction, and regardless of whether the state expressly deems him to deserve hardship by virtue of his conviction. Alternatively, the phrase can be interpreted narrowly to refer to hardship that the state expressly deems an offender to deserve by virtue of his conviction. Again, if Josh's phrase is interpreted broadly, it produces a definition of punishment that is over-inclusive.

To illustrate, consider by analogy the therapeutic practice of using aversive therapy in the form of administering mild electric shocks to autistic children to

¹⁹ 521 U.S. 346 (1997).

²⁰ *Id.*

disabuse them from engaging in destructive behaviors.²¹ In contrast to *Hendricks*, where hardship was not the state's purpose, aversive therapists explicitly intend autism patients to experience hardship: aversive therapists intend the shocks to be uncomfortable so that autistic patients associate destructive behavior with discomfort and, as a result, eschew it. What aversive therapists do *not* do, however, is clothe the shocks in expressions of moral condemnation. They do not declare to autism patients, "You deserve this shock because you are a bad person who did a bad thing."

With the foregoing analogy to autism in mind, let us assume that a state decides to apply aversive therapy to persons who have been convicted of crimes. The state believes that aversive therapy will help persons who suffer from "Intermittent Explosive Disorder" (IED), a behavioral condition that, according to the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), causes victims to engage in explosive outbursts of violence that are disproportionate to the situation at hand.²² To do so, the state enacts a statute that applies to two classes of persons: persons who have been civilly committed for acts of violence for which they have been held not to be criminally responsible; and persons who have been convicted of acts of violence and whose sentences are about to expire. The statute provides that both classes of persons can be subjected to continued confinement and subjected to aversive therapy if they are diagnosed as suffering from IED, provided that they are told that the shocks are being administered solely as therapy and not because the state believes they deserve shocks for culpable wrongdoing.

The hardship suffered by the second class of persons (i.e., convicts who are subjected to aversive therapy following expiration of their criminal sentences) is objectively identical to the hardship suffered by the first class of persons (i.e., civilly-committed persons who have not been convicted). And both hardships are objectively identical to the hardship that autistic children suffer. To be sure, convicts are subjected to aversive therapy pursuant to their "conviction" (as opposed to pursuant to having been "civilly committed"). However, by the time convicts are subjected to aversive therapy, their convictions for violence have been stripped of all that distinguishes their convictions from civil findings of violence by persons who are adjudged not to be criminally responsible, because both judicial adjudications are invoked as grounds for therapy rather than as hardship deserved by virtue of culpable wrongdoing. It follows, therefore, that, if aversive therapy for civilly-committed persons is not punishment, aversive therapy for convicts who have fully served their sentences is not punishment either.

If the foregoing analysis is correct, a better definition of punishment is:

²¹ See Amy Burkholder, *Controversy over Shocking People with Autism, Behavioral Disorders*, CBS NEWS (Aug. 5, 2014, 5:00 PM), <http://www.cbsnews.com/news/controversy-over-shocking-people-with-autism-behavioral-disorders/> [<https://perma.cc/FZ8S-GU78>].

²² See generally AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-V) (5th ed. 2013).

Punishment-2

A person is punished if, and only if, the state convicts the person of violating a public duty by subjecting him to moral condemnation for the violation. Moreover, a person is further punished if the state purposely subjects him to hardship that it expressly deems him to deserve and imposes pursuant to authority granted by virtue of his conviction.²³

2. Confining Moral Condemnation to *Mala in Se* Conduct

To repeat, Josh defines crime to consist in part of punishment, and he defines punishment to consist in whole or in part of moral condemnation by the state.

Moral condemnation by the state is a public act of blaming by the state. Public blame by the state, in turn, is an expression by the state of the community's moral indignation of an offender, the latter being the reactive emotion that a community feels toward those whom it feels engage in wrongful conduct in selfish disregard for the interests of others.²⁴ Moral condemnation is just when it is directed toward those who deserve it. But moral condemnation is unjust under two conditions: when it is directed toward persons who have not committed alleged wrongs; or when it is directed toward persons who have committed wrongs but who are morally blameless by virtue of not having done so in selfish disregard for the interests of others.

Josh recognizes the injustices of blaming someone for a wrong he did not commit and/or blaming a person who, though he has committed a wrong, has done so blamelessly.²⁵ However, in assessing whether conduct is wrongful, Josh makes an assumption that is questionable: he assumes that conduct is not wrongful—and, hence, not blameworthy—unless the conduct is immoral independently of its being prohibited in law. As Josh puts it, *conduct* “does *not* justify moral condemnation” unless it is itself “morally wrongful behavior.”²⁶

I worry that Josh wrongfully conflates *moral condemnation* with condemnation of *immoral conduct*. It is a fallacy to think that in order for moral condemnation to be just, it must be directed toward *mala in se* conduct, that is, conduct that is immoral prior to it being rendered criminal. Conduct is morally condemnable when it infringes upon the legitimate interests of others. Conduct that would not infringe upon the interests of others in a small, pre-urbanized, pre-industrial society may rightly be deemed to infringe the interests of others in a

²³ See also Westen, *supra* note 2, at 244.

²⁴ See Peter Westen, *An Attitudinal Theory of Excuse*, 25 LAW & PHIL. 289, 353–71 (2006).

²⁵ DRESSLER, *supra* note 2, at 3 (“[I]t is deeply rooted in our moral sense of fitness that punishment entails blame and that, therefore, punishment may not justly be imposed where the person is not blameworthy.”) (quoting Sanford H. Kadish, *Why Substantive Criminal Law—A Dialogue*, 29 CLEV. ST. L. REV. 1, 10 (1980)).

²⁶ DRESSLER, *supra* note 2, at 2 & n.9 (emphasis added).

complex, post-industrialized, regulatory state in which there is no other feasible way to address genuine risks to life and limb. And because a complex, post-industrialized, regulatory state can rightly prohibit such conduct, it can also rightly condemn persons who engage in it in selfish disregard of others.

Consider a criminal statute that prohibits operating a motor vehicle on a public highway with more than a specified level of alcohol in the driver's blood. To wield a life-threatening tool such as a sword or a modern automobile while dangerously impaired is a *mala in se* offense because it subjects persons to unnecessary risks of death. Most automobile drivers who have more than, say, .01% alcohol in their blood are dangerously impaired. But not all such drivers are dangerously impaired. Some possess sufficient tolerance of alcohol that they are not dangers to others and, hence, are not guilty of *mala in se* conduct. Nevertheless, the law categorically prohibits all persons with a certain blood-alcohol content from driving—and the law is right to do so under threat of condemnation—because of the cost, the risk of error, and the potential for police abuse in asking police officers to make individual assessments of dangerous impairment all make it inappropriate for the state to have to rely on such individual assessments of impairment.²⁷ The state can legitimately deem all such driving to be an abridgement of the interests of others, and, because it can, it can morally condemn those who drive in selfish disregard of prohibitions against it.

This is not to say that all *malum prohibitum* offenses are morally legitimate. Commentators differ regarding the conditions necessary for *malum prohibitum* offenses to be morally legitimate.²⁸ The point is that some *malum prohibitum* offenses are morally legitimate, and because they are, it is morally appropriate to condemn persons who violate them.

II. JUSTIFICATION VERSUS EXCUSE

Wayne LaFave and Austin Scott, writing in their 1972 *Handbook on Criminal Law*, draw no conceptual distinction between justification and excuse.²⁹ In contrast Josh distinguished between the two in his earliest writings,³⁰ and he has continued to do so in his treatise.

Josh emphasizes the distinction between justification and excuse because he believes it helps resolve difficult normative issues.³¹ I have questions about (A)

²⁷ R.A. Duff, *Crime, Prohibition, and Punishment*, 19 J. APPLIED PHIL. 97, 102 (2002).

²⁸ Compare *id.*, with Douglas Husak, *Malum Prohibitum and Retributivism*, in *DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW* 65 (R.A. Duff & Stuart P. Green eds. 2005).

²⁹ See WAYNE LAFAVE & AUSTIN W. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* 356–413 (1972).

³⁰ See Joshua Dressler, *New Thoughts About the Concept of Justification in Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. REV. 61 (1984).

³¹ DRESSLER, *supra* note 2, at 218.

the conceptual distinction that Josh draws between justification and excuse, and (B) the purposes that he believes the distinction serves.

A. *The Conceptual Distinction between Justification and Excuse*

Josh starts by asking what the conceptual distinction between justification and excuse consists of. Yet, as discussed below, he appears to define it in inconsistent ways. He begins by saying that justification is a function of the exculpatory nature of *acts*, and that excuse is a function of the exculpatory features of *persons*. Subsequently, however, he sides with commentators who argue that justification is a function of an actor's *mental state* regarding his acts, not the objective nature of the acts themselves.

Thus, Josh begins by defining the distinction as follows:

Justified conduct is conduct that is “a good thing, or the right or sensible thing, or a permissible thing to do.” That is, a justified act is an act that is right or, at least, not wrong . . . [in contrast], [w]hereas a justification claim generally focuses upon an *act* (*i.e.*, *D*'s conduct), and seeks to show that the result of the act was not wrongful, an excuse centers upon the *actor* (*i.e.*, *D*), and tries to show that the actor is not morally culpable for his wrongful conduct. Thus, an excuse defense “is in the nature of a claim that although the actor has harmed society, [he] should not be blamed or punished for causing that harm.”³²

This distinction between acts and persons is a familiar one because it is the distinction between *bad acts* (or “wrongdoing”) and *guilty minds* (or “culpability”).³³ An actor does not commit the bad act of murder unless, as an objective matter and independently of his mental state, he actually causes the death of a human being. And an actor does not have the guilty mind of murder unless, independently of the objective consequences of his actions, he concurrently has a certain subjective state of mind, e.g., malice aforethought. This would suggest that, in Josh's view, a justified act is an act that, as an objective matter, causes results that are permissible, all things considered, while an excused act is one that, though it causes objectively undesirable results, is committed by a person who, by virtue of his subjectivity, cannot justly be blamed for his actions.³⁴

That, however, is not Josh's position. On the contrary, Josh makes his position clear in the course of assessing a dispute over two contrasting views of justification. One view reflects the aforementioned distinction between acts and

³² *Id.* at 204–05 (citations omitted).

³³ Indeed, that is why it has been said that justification and excuse are nothing but the negations of bad acts and guilty minds, all things considered. See Heidi M. Hurd, *Justification and Excuse, Wrongdoing and Culpability*, 75 NOTRE DAME L. REV. 1551, 1561, 1563–65, 1572 (1999).

³⁴ See Westen, *supra* note 24, at 309–10.

persons: it is the view that, like bad acts, justification is measured *ex post* by the objective “deeds” that an actor actually commits (hereinafter the “deeds” view), regardless of what is in his mind.³⁵ The other view, however, is quite different. It is the view that justification is measured *ex ante* by an actor’s subjective “reasons” for acting based, reasons that are function of the information that is epistemically available to him (hereinafter the “reasons” view).³⁶ The difference between the two views becomes significant in instances of reasonable mistake: an actor, *A*, makes a reasonable mistake, for example, when, based upon information available to him *ex ante*, he reasonably believes that *B* is about to wrongfully kill him, and, accordingly, he shoots and kills *B*—only to discover *ex post* that he was mistaken and that *B* was harmless. Deeds- and reasons-theorists take contrasting positions on such reasonable mistake cases. Both would both acquit *A* of murder, but they would do so for different reasons. Reasons theorists would acquit *A* on the ground that, even though *A* actually killed a harmless person, he was *justified* because he acted reasonably based upon what he knew at the time. In contrast, deeds theorists would acquit *A* on the ground that, although his deed of shooting a non-threatening person was objectively *unjustified*, *A* should be excused because he reasonably believed he was under threat.

In the end, Josh appears to side with reasons theorists.³⁷ Contrary to his earlier claim that the justification/excuse distinction tracks that between *acts* and *persons*, he concludes that justification is a function not of objective acts but of something peculiar to the person at issue, namely, what a person subjectively believes he is doing at the time he acts. To support that conclusion, Josh asks readers to imagine a police officer who commits what would otherwise be a bad act (i.e., subjecting a person to involuntary confinement based upon his probable cause to believe that the person committed a crime—only to learn afterwards that the person was innocent all along). Josh believes the police officer must be regarded as justified because the officer did what he was “legally entitled” to do. To take the deeds view, Josh says, is to take the untenable position that the officer “act[ed] outside the law,” where in reality the officer, being all too human, was merely mistaken.³⁸

Ultimately, this much remains clear: Justification can be determined *ex ante*. Or justification can be determined *ex post*. But justification cannot be determined from *both* simultaneously. One must choose between the two time-frames based

³⁵ For the “deeds” view, see PAUL H. ROBINSON, *STRUCTURE AND FUNCTION IN CRIMINAL LAW* 100–24 (1997) (distinguishing *ex ante* from *ex post* views of justification as being the difference between “reasons” and “deeds,” and opting to embrace a “deed” view).

³⁶ For the “reasons” view, see Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1903 (1984). For Josh’s summary of the contrasting views, see DRESSLER, *supra* note 2, at 215–16.

³⁷ DRESSLER, *supra* note 2, at 217.

³⁸ *Id.*

upon one's position regarding of the relative advantages and disadvantages of the two views, including as they arise in instances of "unwitting justification."³⁹

The two time-frames each have advantages and disadvantages. Determining justification *ex ante* has the advantage of using "justification" as an honorific term for persons who do their best based on such information as they possess *ex ante*. At the same time, however, the *ex ante* view has the disadvantage of not being able to account for whether harms have occurred that society wished to prevent, all things considered. Consider two police officers, *A* and *B*, each of whom makes an arrest based upon probable cause, the difference being that *A* arrests a person who is guilty while *B* arrests a person who is innocent. The law has reason to distinguish between *A*'s act and *B*'s act because *B* inflicts a harm that society wishes had not occurred: *B* inflicts a harm about which society—and, indeed, *B* himself—should feel what Bernard Williams calls "agent regret," that is, regret not about *B*'s motivation in acting but about the grievous consequences of *B*'s action, even if the action was blameless.⁴⁰ In contrast, neither society nor *A* should feel agent-relative regret about *A*'s act because the arrest he made was highly desirable. Yet the *ex ante* view has no way to distinguish between the respective consequences of *A*'s and *B*'s acts. The *ex ante* view can do nothing but say to *A* and *B* alike, "Your actions were both justified."

The *ex post* view, too, has advantages and disadvantages. It has the disadvantage of not being able to honor well-motivated behavior. The *ex post* view cannot honor well-motivated behavior because it does not use "justification" to refer to motivations. It uses "justification" in the same objective sense as the criminal law uses "bad act," namely, to refer to objective harms, regardless of motivation: it uses "justification" to refer to harms that are *not* bad acts, all things considered, that is, they are not harms that society seeks to prevent or regrets, all things considered. By the same token, however, the *ex post* view has the advantage of being able to distinguish between *A* and *B* by saying, "*A*'s action was justified, while *B*'s was not."

Josh and I have different preferences. Josh prefers the *ex ante* view because it uses justification as an honorific, while I prefer the *ex post* view because it tracks the distinction between acts and persons. I would be happy to leave it at that were

³⁹ An unwittingly justified actor is one who makes a reasonable mistake of the opposite kind: he maliciously harms a third person in the reasonable but mistaken belief that the latter is *no* wrongful threat to himself, only to discover afterwards that harming the latter was necessary to protect himself from imminent and wrongful harm at the latter's hands. *Ex ante* and *ex post* theorists agree that unwittingly justified actors are culpable but differ regarding what they should be punished for. For penetrating discussion of the different ways that *ex ante* and *ex post* views treat unwittingly-justified actors and those who resist them, see Robinson, *supra* note 35, at 108–15. Although Josh does not address the issue, *ex ante* theorists generally argue that unwittingly-justified actors should be punished for completed crimes rather than attempt. For the argument that they should be punished for attempt, see Peter Westen, *Unwitting Justification*, SAN DIEGO L. REV. (forthcoming).

⁴⁰ BERNARD WILLIAMS, MORAL LUCK, in MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980, at 20, 27 (1981).

it not for Josh's arguments in support of the *ex ante* view. Josh makes basically two arguments in support of his view. He begins by saying that the law cannot expect persons to do more than make conscientious efforts to ascertain the facts, and that, when people do so, law should declare them justified, even if their actions produce unintended and undesirable harms:

All that the law can fairly expect of a person is that she make a conscientious effort to determine the true state of affairs before acting. If she does this, . . . her conduct is justifiable, although the result of her conduct . . . may be tragic.⁴¹

With due respect, while the first sentence of Josh's argument is incontestable, the second sentence begs the question. Everyone agrees that the law cannot expect a person to do more than make a reasonable judgment based on the information he possesses *ex ante*. Everyone also agrees that when a person does so and later turn out to be mistaken, he should be exculpated, despite committing a regrettable harm. The question at issue, however, is how to *characterize* his rightful exculpation. Advocates of the reasons view, who regard justification as an honorific, focus on the person's *ex ante* motivation and, hence, characterize his conduct as justified. Advocates of the deeds view, who focus on regrettable harms all things considered, characterize the person's conduct as unjustified. Each view has its advantages and disadvantages. But it is not an argument in favor of the reasons view to say, as Josh does, that if an actor is well-motivated, her conduct is justified. Saying so is simply a restatement of the reasons view.

Josh also argues that the *ex post* view is unfair to persons who do their best based on the information they possess *ex ante*. Consider, he says, the previously-mentioned police officer who makes an arrest based on probable cause only to discover afterwards that the arrestee was innocent. To adopt the *ex post* view, Josh says, is to say that the police officer "act[s] outside the law."⁴² I beg to differ. To act "outside the law" is to exclude oneself from the protections of the law. The *ex post* view does not exclude the police officer from the protections of the law. It does precisely the opposite: it declares that, although the police officer committed an act that produced regrettable results (and, hence, was unjustified), he is entitled to the protection of the law in that by virtue of his appropriate motivation, he has a right to be adjudged to have been blameless.

To be sure, the *ex post* view conceptualizes the officer's impunity in terms of excuse. But excuse under the *ex post* view has none of the pejorative connotations that it possesses under the *ex ante* view. Indeed, if anything, excuse has positively laudatory connotations under the *ex post* view. Of course, under *ex ante* and *ex post* views alike, a person is excused only if he is first determined or assumed to

⁴¹ DRESSLER, *supra* note 2, at 217.

⁴² *Id.*

have acted unjustifiably.⁴³ However, lack of “justification” has different meanings under the two views and, hence, “excuse” has different meanings as well. Under the *ex ante* view, to act justifiably is to act with proper motivation, and to act unjustifiably is to act with motivation that is flawed in some way (e.g., because of insanity, immaturity, or involuntary intoxication). Consequently, to be excused under the *ex ante* view is to be exculpated, *despite* a certain deficit in cognition or volition. In contrast, to act unjustifiably under the *ex post* view is to do nothing but produce undesirable results, regardless of one’s motivation. Accordingly, under the *ex post* view, to be excused is to be exculpated on *any* ground that renders one blameless, including acting with the kind of reasonable, good-faith motivation that renders a person justified under the *ex ante* view. Thus, to excuse a police officer under the *ex post* view is not to begrudgingly exculpate him despite a cognitive or volitional deficit. It is to exculpate him on the ground that, though he brought about a harm that everyone including himself regrets, his motivation was entirely virtuous.

B. *The Purposes Served By the Justification/Excuse Distinction*

Josh argues that the justification/excuse distinction serves six distinct purposes. Two of the alleged purposes are, indeed, valid, and they are valid regardless of whether one embraces an *ex ante* or *ex post* view of justification. Three of the alleged purposes are questionable, however, and one is superfluous.

1. Valid Purposes for the Distinction

Josh rightly argues that the justification/excuse distinction serves two valid purposes: (a) the distinction identifies conduct that is and is not justified, and, in doing so, it instructs people regarding how they should and should not act; and (b) the distinction also identifies conduct that is and is not excused, and because persons who engage in unjustified conduct in the expectation of being excused have no moral right to be exculpated, the distinction identifies defenses (i.e., excuses) that can be repealed retroactively without thereby abridging anyone’s moral rights.⁴⁴

Significantly, the distinction serves those two purposes, regardless of whether it is based upon *ex ante* or *ex post* views. Thus, with respect to instructing people regarding what they may and may not do, the *ex post* view of justification tells people which harms are objectively non-regrettable, all things considered, and, hence, it tells people what results to aim toward, even though they cannot know until afterwards if they have succeeded. Similarly, the *ex ante* view tells people they may act on the reasonable belief that they are not committing regrettable

⁴³ See Marcia Baron, *Is Justification (Somehow) Prior to Excuse? A Reply to Douglas Husak*, 24 LAW & PHIL. 595, 602 (2005).

⁴⁴ DRESSLER, *supra* note 2, at 218, 220.

harms, all things considered, and, hence, it tells them what beliefs to act on, though they cannot know until afterwards if their beliefs were accurate.

With respect to retroactive repeals, *ex post* and *ex ante* views define what results and beliefs are permitted, all things considered, and they both establish residual categories of exculpatory defenses that have nothing to do with permissible conduct, i.e., excuses. Because excuses under both have nothing to do with permissible conduct, repeals of excuses under both may be made retroactive without abridging anyone's moral rights (provided, of course, that such repeals could also be made prospective without abridging their moral rights). To be sure, the *ex post* view of justification treats as an excuse something that the *ex ante* view treats as a justification, namely, an actor's reasonable but mistaken belief that force is necessary to avert imminent and proportional harm. And the latter defense is one that it would, indeed, be morally unjust to repeal retroactively. Notice, however, *why* it would be unjust to repeal the defense retroactively. Retroactive repeal would be unjust not because it is *retroactive* but because it is a *repeal*. Repeal of *any* kind would be morally unjust, even if it were made prospective. Repeal would itself be morally unjust because, regardless of whether reasonable belief in the necessity of proportional force to avert imminent harm is characterized as a justification or an excuse, no one should be punished who reasonably believes that force is necessary and proportional to avert imminent harm.

2. Dubiously Valid Purposes for the Distinction

Josh argues that the justification/excuse distinction serves three additional purposes: (a) identifying when third parties may intervene on behalf of putative victims, (b) helping legislatures avoid the inconsistency of combining partial justifications and partial excuses, and (c) identifying when defendants may be made to bear burdens of persuasion. I do not believe that either the *ex ante* or *ex post* views of justification support the first two purposes, and doubt that the *ex ante* view supports the third.

i. Identifying When Third Persons May Intervene on Behalf of Putative Victims

Josh argues that the justification/excuse distinction is useful because, if a person, *A*, is justified in using force against another, *B*, it means that a third person, *C*, would also be justified in using force against *B* as well.⁴⁵

I am skeptical that the justifiability of *C*'s conduct invariably derives from the justifiability of *A*'s or *B*'s conduct. Consider two persons, *A* and *B*, each of whom is justified in using lethal force against the other under Josh's *ex ante* view: *A* reasonably but mistakenly believes that *B* is about to wrongfully shoot him and,

⁴⁵ *Id.* at 219–20.

hence, prepares to use lethal force to protect himself; *B* observes *A*'s threatening behavior and reasonably and accurately believes that *A* is about to shoot him. If Josh is right that justification is defined *ex ante*, and if he is right that a third person is entitled to use whatever force another person is justified in using, it means that a third person, *C*, who has no personal relationship to either *A* or *B* and who is fully aware of the facts, is justified in shooting *B*. But is that true? Is *C* justified in killing *B* whom *C* knows was no threat at all to *A* until *A* erroneously mistook him for a threat and prepared to kill him?⁴⁶

In rejoinder, *ex post* advocates would say that, rather than supporting Josh's assumption that third parties are justified in doing what others are justified in doing, the foregoing hypothetical does something else: it vindicates the *ex post* view over the *ex ante* view because under the *ex post* view, *A* is not justified in using force, thereby explaining widely-held intuitions that *C* would not be justified in aiding him. To eliminate that rejoinder, therefore, consider instead a case that *ex ante* and *ex post* views treat identically. Consider Robert Nozick's 'falling fat man' hypothetical.⁴⁷ In Nozick's hypothetical, a malicious villain pushes a fat man, *A*, into a well, intending to kill him; *A*, who will otherwise die from the fall, happens to find himself falling toward *B* who is lying at the bottom of the well and whose body will save *A* by acting as a cushion, albeit at the cost of *B*'s life; *B* has a ray-gun and can protect himself from being fatally crushed by *A*'s falling body but only if he vaporizes *A*. Nozick argued that *B* is justified in killing *A* to prevent *A* from lethally crushing him.⁴⁸ (Otherwise, the law's message to *B* is, "Despite your innocence, you should let yourself be fallen upon and killed"). Now assume that *A* also has a ray-gun and can vaporize *B* before *B* succeeds in vaporizing him. If Nozick is right that *B* is justified in killing *A* to prevent *A* from killing him, isn't *A* also justified in killing *B* in order to prevent *B* from killing him? Do *A* and *B* not each have agent-relative interests in favoring himself over the other, given that both are innocent and each must kill or be killed?⁴⁹ (Otherwise, the law's message to *A* is, "We would rather *B* kill you than you kill *B*, despite your both being innocent").

With that mind, consider a third-party stranger, *C*, who has no personal relationship to either *A* or *B* but has a ray-gun of his own. Regardless of whether

⁴⁶ The MPC, which otherwise adopts the *ex ante* view of justification, avoids ruling that *C* is justified, but the MPC does so only by engaging in "gyrations" that enable it to mimic the results of the *ex post* view. See Robinson, *supra* note 35, at 107.

⁴⁷ ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 34–35 (1974).

⁴⁸ *Id.*; accord SUSAN UNIACKE, PERMISSIBLE KILLING: THE SELF-DEFENCE JUSTIFICATION OF HOMICIDE 177 (1994); Helen Frowe, *Equating Innocent Threats and Bystanders*, 25 J. APPLIED PHIL. 277, 277–78 (2008); Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283, 286 (1991). But see Kimberly Kessler Ferzan, *Justifying Self-Defense*, 24 LAW & PHIL. 711, 734 (2005).

⁴⁹ See authorities cited in *supra* note 48. For the claim that agents have agent-relative interests to inflict harm that agent-neutral persons do not, see THOMAS NAGEL, THE VIEW FROM NOWHERE 164–66 (1986); DEREK PARFIT, REASONS AND PERSONS 27 (1984); SAMUEL SCHEFFLER, THE REJECTION OF CONSEQUENTIALISM 41–114 (1982).

one adopts an *ex ante* or *ex post* view of justification, one who believes that the justifiability of *C*'s conduct is derivative of *A*'s or *B*'s would have to maintain that, because *A* and *B* are each justified in vaporizing the other, *C* is justified in vaporizing either *A* or *B*, whichever he chooses. But is that true? Is it true that *C*, who has no stake in the outcome, is justified in vaporizing whichever of the two he chooses merely because *A* and *B* (who *do* have personal stakes in the outcome) are each justified in vaporizing the other?⁵⁰

ii. Helping Legislatures Avoid Combining Partial Justifications and Partial Excuses

Josh argues that the justification/excuse distinction also helps prevent legislatures from creating “inconsistent,” even “contradictory” defenses by inadvertently combining partial justifications with partial excuses within a single defense.⁵¹

To illustrate, Josh points to the partial defense of reasonable heat-of-passion, a defense which reduces the grade of criminal homicide from murder to voluntary manslaughter. Josh argues that the partial defense of reasonable heat-of-passion “suffers from a lack of proper attention to the justification/excuse distinction” because some of its elements “are best explained in justificatory terms, while others seem excused-based.”⁵²

I might say in passing that I differ with Josh's description of the reasonable heat-of-passion defense. I do not believe that *any* elements of the defense are best explained in terms of justification. As Josh himself explains later in his treatise,⁵³

⁵⁰ See Jonathan Quong, *Agent-Relative Prerogatives to Do Harm*, 10 CRIM. L. & PHIL. 815, 817 (2016) (arguing that the answer is no).

To be sure, Josh might argue that *A* and *B* do, indeed, have a defense that *C* lacks, but that it is a defense of excuse, not justification. Specifically, Josh might argue that *A* and *B* have a defense of duress under MPC § 2.09(1)—a defense that Josh regards as an excuse—because persons of “reasonable firmness” in *A* and *B*'s situation in contrast to persons in *C*'s situation would have been “unable to resist” the threats they faced. See DRESSLER, *supra* note 2, at 301–04. This claim raises two problems. First, MPC § 2.09(1) confines the defense of duress to persons who are victims of “coerci[ve]” threats, and neither the threat to *A* nor the threat to *B* is coercive. Second, and more importantly, the “reasonableness” of an actor's firmness is measured not by that of an *average* person but by that of a *right-minded* person. See R.A. Duff, *Rethinking Justifications*, 39 TULSA L. REV. 829, 840 & n.32 (2004); R.A. Duff, *Rule-Violations and Wrongdoings*, in CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 47, 64–66 (Stephen Shute and A.P. Simester eds. 2002); John Gardner, *The Gist of Excuses*, 1 BUFF. CRIM. L. REV. 575, 579 (1998). Consequently, if reasonable persons in *A* and *B*'s situation in contrast to *C*'s situations would have been unable to resist, it is precisely because *A* and *B* had legitimate agent-relative interests that *C* lacked, interests that go to justification, not excuse. See Gary Watson, *Excusing Addiction*, 18 LAW & PHIL. 589, 608–10 (1999) (agent-relative interests go to justification, not excuse).

⁵¹ DRESSLER, *supra* note 2, at 218.

⁵² *Id.* at 218.

⁵³ *Id.* at 539–40.

the defense can be wholly accounted for without assuming that provoked persons are even partially justified in killing: the defense exists not because reasonably provoked persons are even partially justified in *killing*, but because they are justified in being very *angry*, and because the emotion of anger makes it difficult (though not impossible) for persons to act in accord with their settled values.⁵⁴

Nevertheless, even if Josh were right that some elements of reasonable heat-of-passion sound in justification and others in excuse, it does not follow that it is wrong to combine them. A partial justification, when valid, reduces the degree of an actor's culpability. A partial excuse, when valid, also reduces the degree of an actor's culpability. An actor's possession of both defenses is cumulative and reduces culpability more than either standing alone. To illustrate, consider the Model Penal Code's provision on death-penalty sentencing. The MPC specifies certain mitigating circumstances that reduce a capital defendant's punishment from death to imprisonment unless the trier of fact finds that none of the enumerated or other mitigating circumstances is "sufficiently substantial" to call for leniency.⁵⁵ Significantly, at least two of the enumerated mitigating circumstances consist of partial justifications, and another three consist of partial excuses (as marked below in brackets):

MPC section 210.6(4) Mitigating Circumstances

* * *

(b) [Partial excuse] The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) [Partial justification] The victim ... consented to the homicidal act.

(d) [Partial justification] The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

* * *

(g) [Partial excuse] At the time of the murder, the capacity of the defendant to appreciate the criminality... of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect or intoxication.

⁵⁴ See Peter Westen, *How Not to Argue that Reasonable Provocation Is an Excuse*, 43 U. MICH. J. L. REFORM 175 (2009).

⁵⁵ MODEL PENAL CODE § 210.6(2) (repealed 2009).

(h) [Partial excuse] The youth of the defendant at the time of crime.⁵⁶

Now suppose an actor murders someone while possessing multiple mitigating factors, some of which sound in partial justification and others of which sound in partial excuse. Thus, imagine an actor who, at the request of a loved one who suffers from a terminable and painful disease, and upon feeling extremely emotional as a result, administers the loved one lethal drugs with the latter's consent. Or imagine that a seventeen year-old actor shoots and kills a robber who is fleeing in his stolen car, believing that he is justified in doing so to recapture his car. And imagine that both actors are charged with capital murder. Is it really "inconsistent" or "contradictory," as Josh suggests it is,⁵⁷ for jurors—or for legislatures, for that matter—to conclude that such partial defenses can be combined and that, when they are combined, they possess greater mitigating force than any one standing alone?

iii. Identifying Defenses on Which Defendants May Be Made to Bear Burdens of Persuasion

Josh further argues that the justification/excuse distinction helps identify defenses on which the state must bear burdens of persuasion, i.e., justifications, and defenses on which defendants may be made to bear burdens of persuasion, i.e., excuses.⁵⁸

I have doubts, at least under the *ex ante* view of justification that Josh embraces. People disagree regarding which factors rightly bear on burdens of persuasion. However, if Josh is right that the state ought to bear the burden of persuasion regarding *ex ante* justification, it is hard to see why the state should not do the same regarding some defenses that are excuses under the *ex ante* view. To illustrate, contrast two actors, *A* and *B*, each of whom is charged with murder for shooting and killing a housemate; each claims in his defense that he shot his respective housemate in the actual and, *for him* reasonable belief that doing so was necessary to prevent the respective housemate from imminently and wrongly killing him first; and each realizes by the time of trial that he was mistaken in thinking his life was in danger. The difference is that actor *A* is a sane person, while actor *B* is a certifiably paranoid/schizophrenic.

As we have seen, Josh takes the position that reasonable belief by a sane person in the necessity of self-defense is a justification, even when the belief is mistaken. Josh further argues that because such belief is a justification, the state has the burden of disproving two things: (i) that *A* actually believed that lethal self-defense was necessary to protect him from imminent, wrongful and grievous harm; and (ii) that it was reasonable for *A* to have that belief. At the same time, however,

⁵⁶ *Id.* at § 210.6(4) (repealed 2009).

⁵⁷ See DRESSLER, *supra* note 2, at 218.

⁵⁸ See *id.* at 220–21.

Josh takes the position that a mistaken belief by an insane that he must kill to protect himself from wrongful attack is an excuse and, hence, something on which the defendant bears the burden of persuasion at trial. One must wonder, however, whether the state should not also bear the burden of disproving *B*'s defense. After all, the issues in dispute at *A* and *B*'s trials are the same: did the defendant actually believe that he had to kill to prevent himself from being imminently and wrongly killed? And (ii) if so, was the defendant blameless for possessing and acting on that belief?

3. A Superfluous Purpose for the Distinction

Josh argues that the justification/excuse distinction also identifies when third-persons may act as accomplices in assisting actors in using force against others, namely, when those whom the third persons would assist are themselves justified in using force.⁵⁹

I have previously expressed doubts about whether Josh is right to claim that the right of third persons to intervene on behalf of putative victims is a function of justification.⁶⁰ Even if Josh is right about that, however, his argument regarding accomplices seems superfluous because the right of third parties to intervene *in place of* putative victims surely includes the lesser right to *assist* them.

III. BASIC ELEMENTS OF CRIMINAL RESPONSIBILITY

A major strength of Josh as a treatise writer is his intuitive affinity for conventional understandings of criminal law. He generally avoids fanciful or unorthodox theories by keeping his authorial finger on the pulse of mainstream thinking.

Josh's discussion of basic elements of criminal responsibility is illustrative. Treatise writers customarily conceptualize criminal responsibility as consisting of bad acts and guilty minds, and they define bad acts as consisting of actions or omissions that are harmful, offensive or dangerous. Following in that path, Josh argues that *actus reus* is the "physical or external part" of a crime and consists of a voluntary act or an omission that causes "social harm"⁶¹—social harm being something that violates or endangers the legitimate interests of persons or the state.⁶² The scope of an actor's debt to society—and, hence, of the punishment an

⁵⁹ *Id.* at 219.

⁶⁰ *See supra* section II.B.2.i.

⁶¹ DRESSLER, *supra* note 2, at 85 & n.4, 114, 181, 203.

⁶² *Id.* at 113–14. *Mens rea*, in turn, according to Josh, is the "internal portion" of crime, involving an actor's "moral blameworthiness" and consisting of an actor's "culpable state of mind." *Id.* at 52–53, 114.

actor deserves—is directly a function of the social harm he causes, whether it consists of an injury he causes or a danger he creates.⁶³

I sympathize with Josh's instinct to adhere to convention. However, I believe his view is mistaken in two respects: the actus reus component of crime need not itself cause social harm; and punishment that a wrongdoer deserves is not a function of the social harm he causes.

A. *The Relation between Actus Reus and Social Harm*

Josh is right that actus reus components often consist of acts or omissions that cause harm in the form of injury or danger. Thus, the actus reus of homicide consists of causing the death of a human being, and the actus reus of reckless endangerment consists of endangering another's life or physical well-being. However, it is not true that actus reus components always consist of acts or omissions that cause harm. Some actus reus components are entirely innocuous.

To illustrate, suppose that an actor, *A*, is charged with attempted sale of a controlled substance based on evidence that he sold powdered sugar to a DEA agent in the mistaken belief that it was cocaine. Or suppose that an actor, *B*, is charged with possessing tools that could be used to commit burglary with intent to commit a non-consensual entry. The “physical or external” acts that *A* and *B* are alleged to have committed—that is, the actus reus of their respective crimes—are innocuous: *A*'s alleged act consists of his selling powdered sugar; *B*'s alleged act consists of possessing tools that lend themselves to consensual and nonconsensual entries alike. Neither act is injurious or dangerous in itself: grocery stores everywhere sell powdered sugar; and locksmiths everywhere possess tools that can be used for non-consensual entry.

This is not to deny that *A* and *B* have revealed themselves to be dangerous. They did present dangers. But the dangers they presented—the social harms they caused—did not consist of their “physical or external” acts alone. The dangers they presented arose not from the actus reus that each committed, but from the combination of actus reus that each committed and the mens rea with which they committed them.

B. *The Relation between Harm and Deserved Punishment*

Commentators disagree about the relationship between the harms that culpable actors cause and the punishments they deserve. Some commentators, whom Josh calls “culpability-retributivists,” argue that deserved punishment is a function of the wrongful harms that actors manifest themselves *willing* to inflict, not harms that may subsequently transpire after actors have performed all that is within their control.⁶⁴ Others, whom Josh calls “harm-retributivists,” argue that

⁶³ *Id.* at 52–53.

⁶⁴ *Id.* at 384.

deserved punishment is a function in part of the wrongful harms that culpable actors actually bring about, even where such resulting harms are not wholly within their control.⁶⁵

Josh ultimately sides with harm-retributivists. He believes that the amount of harm that proximately results from an actor's culpable conduct—regardless of whether the harm is “physical, psychological, moral, [or] economic, etc., to the immediate victim, the victim's family, and the broader community”—determines the actor's retributive desert.⁶⁶

The principle of causation is the instrument society employs to ensure that criminal responsibility is personal. . . . “[C]ausation” serves as the mechanism for determining how much the wrongdoer owes society and ought to repay it, *i.e.*, causation principles help quantify his just deserts.⁶⁷

To illustrate, assume that actors, *A* and *B*, both shoot persons in the head with intent to kill with differing results: *A*'s victim dies, while *B*'s victim miraculously survives. Josh argues that, while *A* and *B* both produce social harm, *A* produces the greater harm—*A* actually brings about the death of his intended victim—and, hence, *A* owes greater debt to society repayable through greater punishment:

[T]he criminally successful actor and the unsuccessful one “have done different things” Since the harm caused by a failed attempt is less than that caused by the successful commission of the targeted crime, the debt owed by the attempter is less than that of the successful wrongdoer.”⁶⁸

Josh's view has the advantage of conforming to the common practice of generally punishing completed offenses more severely than otherwise identical impossibility attempts. Nevertheless, Josh's view presents at least two problems. First, it decouples desert from blameworthiness. According to Josh, blameworthiness is a function of an actor's mental state and willingness to act on it.⁶⁹ By that measure, murderer *A* and attempted murderer *B* are equally blameworthy because they possess identical criminal intent and identical willingness to act on it. Yet, even though *A* and *B* are equal in blameworthiness, Josh deems them unequal in desert.

Second, Josh's view makes it difficult to justify the common practice of punishing some inchoate crimes equally with otherwise identical crimes of harm. Consider the MPC, which punishes most impossibility attempts equally with

⁶⁵ *Id.*

⁶⁶ *Id.* at 52–53.

⁶⁷ *Id.* at 183.

⁶⁸ *Id.* at 386 (citation omitted).

⁶⁹ *See id.* at 386 (distinguishing “culpability” and “fault” from “harm”).

otherwise identical completed crimes.⁷⁰ Or consider jurisdictions that punish larcenies equally, regardless of whether deprivations of property are temporary or permanent.⁷¹ For harm-retributivists, there is no deontological justification for punishing such offenses equally. Either some offenders are punished more severely than they deserve or others are punished less severely than they deserve.

Significantly, there is a deontological account of desert that equates it with culpability and, yet, is also consistent *both* with jurisdictions that punish completed offenses more severely than inchoate offenses *and* with jurisdictions that punish completed and inchoate offenses equally. It is Plato's account of the relationship between resulting harms and criminal desert.⁷² Plato was a culpability-retributivist who believed that criminal desert is a function of the wrongful harms that an actor manifests himself willing to bring about and not harms that may thereafter occur. Thus, with respect to two malefactors who both throw spears intending to kill their respective enemies, Plato argues that the two are equally guilty and equally deserving of punishment, even though one malefactor's spear finds its intended victim and the other fortuitously misses.

Nevertheless, Plato says, it does not follow that desert-minded societies are obliged to punish the two malefactors equally. It does not follow because punishments also have an expressive function, including the backward-looking function of expressing how societies feel about what actors have done. Societies may rightly feel relieved when, because of sheer luck on society's part (rather than lack of effort on a malefactor's part), a malefactor fails to inflict a harm that he does all he can to inflict. And societies can rightly express that relief by punishing failed impossibility attempts less severely than successful attempts, not because they feel failed attempters deserve less punishment, but because, being relieved at their good fortune, they can rightly acknowledge feeling less distressed than if the attempts had succeeded. In contrast, societies that use punishment to express desert alone rather than relief when attempts fail can do so by punishing successful and failed attempts equally.

IV. SOCIAL HARM

The three subjects that I have discussed thus far—Josh's definition of crime, his view of justification and excuse, and his view of criminal desert—share something in common: they are all inflected by Josh's position on social harm. Thus, Josh defines crime to consist of acts or omissions that cause social harm; Josh argues that the punishment an actor deserves is a function of the harm he causes; and Josh's preference for *ex ante* justification over *ex post* justification

⁷⁰ See MODEL PENAL CODE § 5.05(1) (AM. LAW INS. 1985).

⁷¹ Larceny, like attempt, is an inchoate crime because it does not depend upon deprivations of property being permanent. See DRESSLER, *supra* note 2, at 380.

⁷² See PLATO, LAWS 9.876- .877b. See also Peter Westen, *Why Criminal Harms Matter: Plato's Abiding Insight in the Laws*, 1 CRIM. L. & PHIL. 307 (2007).

may be a preference for the possible presence of social harm when justification is viewed *ex ante* over the absence of actual harm when justification is viewed *ex post*.

These commonalities raise several questions: Is Josh's notion of social harm merely a reformulation of John Stuart Mill's venerable "Harm Principle"? Or is Josh's notion of social harm a watering down of Mill's "Harm Principle"? If it is the latter, what, if anything, would Josh lose by defining crime without reference to social harm?

John Stuart Mill argued in *On Liberty* that, in order to maximize personal freedom, the state ought to confine itself to preventing people from harming others.⁷³ Mill's disciple, Joel Feinberg, famously applied Mill's harm principle to criminal law, arguing that, with some exceptions, the state ought not to punish persons unless they harm or immediately offend others.⁷⁴ In both cases, the Harm Principle is a moral limitation on state regulation. Its purpose is to restrain the state from regulating what the state might otherwise wish to regulate, by declaring it to be morally illegitimate for the state to punish persons for certain kinds of conduct that states may be tempted to punish, namely, self-regarding conduct and harmless conduct they may deem to be immoral.

Josh devotes the first page of his treatise to defining crime, later stating it to be "essential" that crimes cause social harm.⁷⁵ Moreover, in clarifying what he means by social harm, Josh quotes Joel Feinberg as saying that "[a]cts of *harming* . . . are the direct objects of the criminal law."⁷⁶ Josh's reference to Feinberg might suggest that Josh means to adopt Mill's and Feinberg's moral limits on what the state may legitimately punish by incorporating those limits into his definition of crime. If anything, however, the reality is the opposite. With the exception of one behavior that, to my knowledge, no state punishes and neither Mill nor Feinberg even mentions, Josh imposes no moral limits on what states are tempted to punish through positive law.

The key lies in Josh's understanding of social harm. Josh argues that, if social harm is to be an "essential element" (as he clearly means it to be), it must be "*carefully—and broadly—defined.*"⁷⁷ To define social harm broadly, however, is the opposite of what Mill and Feinberg undertake because their purpose is the opposite of Josh's. Mill and Feinberg define harm narrowly because they want to *constrain* state authority in order to enlarge areas in which people may act free from criminal regulation. Josh defines social harm broadly because, rather than constraining state authority, he wants to *encompass* state authority. Josh is a treatise writer whose mission is to describe positive penal laws as they presently exist in the United States. As such, Josh defines crime not to exclude such conduct

⁷³ See JOHN STUART MILL, *ON LIBERTY* 68 (Penguin Classics 1985) (1859).

⁷⁴ See JOEL FEINBERG, *HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW* (1984).

⁷⁵ See *infra* note 78.

⁷⁶ DRESSLER, *supra* note 2, at 112 (quoting FEINBERG, *supra* note 74, at 31).

⁷⁷ *Id.* at 113 (emphasis added).

as Mill and Feinberg argue ought not be punished but to incorporate whatever conduct states choose to punish through positive law. Josh defines social harm to encompass “*any . . . interest*” that a society “deems socially valuable” and, hence, worthy of criminal protection:

Society values and has an interest in protecting people and things. The “things” that society values and has an interest in protecting may be tangible (*e.g.*, an automobile or an animal) or intangible (*e.g.*, emotional security, reputation, personal autonomy). Society is wronged when an actor invades *any* socially recognized interest and diminishes its value. Specifically, “social harm” may be defined as the “negation, endangering, or destruction of an individual, group or state interest which was deemed socially valuable.”⁷⁸

Josh nevertheless recognizes an exception to this blanket incorporation. Yet it is an exception for something that is so rarely, if ever, punished that it escapes Mill’s and Feinberg’s notice altogether—namely, the possession of mere thoughts. The sole moral constraint that Josh imposes on criminal law is that the state not punish persons for mere thoughts.⁷⁹

The result is that Josh could just as well define crime without any reference to the causing of social harm or injury. Thus, consider Josh’s definition of crime:

A crime [is an act or omission that] causes “social harm,” in that the injury suffered involves “a breach and violation of the public rights and duties” . . . “[that], if duly shown to have taken place, will incur a formal and solemn pronouncement of moral condemnation of the community.”⁸⁰

Apart from excluding punishment for mere thoughts, the reference to “caus[ing] social harm” does not add anything that does not exist without it. It adds nothing because Josh defines “social harm” to encompass anything that society regards as violating “public rights or duties.” Given that social harm plays no moral role except to bar punishing persons for mere thoughts, Josh could just as well define crime by omitting any reference to it, as follows:

A crime is an act or omission [other than mere thoughts] that involves “a breach and violation of public rights and duties . . . [that], if duly shown to have taken place, will incur a formal and solemn pronouncement of moral condemnation of the community.”

⁷⁸ *Id.* at 113–14 (citations omitted).

⁷⁹ *Id.* at 86–87.

⁸⁰ *Id.* at 1–2 (citations omitted).

V. CONCLUSION

Those of us who teach criminal law have at most 50 to 100 students per year. We like to believe that we leave our students with better understandings of criminal law than they would possess without us. Yet, deep down, most of us realize that we are dispensable and that our students would do just fine with someone else in our place at the podium.

The opposite is the case with the tens of thousands of students—including my own—who look each year to Joshua Dressler's *Understanding Criminal Law* for instruction. If it were not for Josh, they would struggle to make sense of the myriad puzzles and questions which U.S. casebooks foist on students of criminal law. They would struggle because they would have nowhere else to turn for help. Wayne LaFave's encyclopedic *Criminal Law* is no substitute because it is not tailored to the way criminal law is taught in U.S. schools. And no other treatise comes close to *Understanding Criminal Law* in combining criminal law doctrine with the best of criminal law scholarship and in presenting it in a clear, succinct, and personal voice.

Josh is not only America's preeminent criminal law teacher. He has made himself America's indispensable criminal law teacher.